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ADVIES INZAKE

De identificatie van internationaal gewoonterecht

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Gebruikte afkortingen

AVVN	Algemene Vergadering van de Verenigde Naties
CAVV	Commissie van advies inzake volkenrechtelijke vraagstukken
ILC	International Law Commission
NGO's	Non-gouvernementele organisaties
UN	United Nations
VN	Verenigde Naties

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Inhoudsopgave

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1. Inleiding

In zijn brief van 27 maart 2017 heeft de Minister van Buitenlandse Zaken de Commissie van advies inzake volkenrechtelijke vraagstukken (hierna CAVV) verzocht advies uit te brengen inzake de door de International Law Commission (hierna ILC) [1] van de Verenigde Naties opgestelde Ontwerpconclusies met betrekking tot de identificatie van internationaal gewoonterecht, zoals aangenomen na eerste lezing.
De CAVV heeft de eer de Minister hierover als volgt te adviseren en hoopt dat de bevindingen van waarde zijn voor de inbreng van Nederland in het vervolgdebat over de Ontwerpconclusies.[2]

2. Algemene opmerkingen

De CAVV is in het algemeen positief over de Ontwerpconclusies en spreekt dan ook waardering uit voor het werk dat de ILC tot nu toe heeft verricht.

2.1 De status van posities ingenomen door de International Law Commission

In Part Five 'Significance of certain materials for the identification of customary international law' van het ILC rapport (pp. 101-102) bespreekt de International Law Commission kort de rol en betekenis van het eigen werk zonder zelf “at this stage” “to include (..) a separate conclusion on the output of the International Law Commission”.[3] Dit doet de vraag rijzen welk gewicht dient te worden toegekend aan de Ontwerpconclusies en hun toelichting voor de vaststelling van de regels inzake de identificatie van internationaal gewoonterecht.

Een veelvoud van factoren speelt een rol bij beantwoording van de vraag welke betekenis aan het werk van de ILC mag worden toegekend:

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[1] De International Law Commission (in het Nederlands wel aangeduid als Commissie voor Internationaal Recht) is een commissie die in 1948 in het leven is geroepen door de Verenigde Naties en is formeel een subsidiair orgaan van de Algemene Vergadering van de Verenigde Naties (AVVN). De Commissie zetelt in Genève en heeft momenteel 34 leden. De ILC assisteert de Algemene Vergadering bij het gevolg geven aan artikel 13 van het Handvest van de VN, op basis waarvan de AVVN aanbevelingen doet over de ontwikkeling van het internationaal recht en de codificatie daarvan.

[2] In Bijlage II bij dit advies zijn de Ontwerpconclusies van de ILC opgenomen, zoals aangenomen na eerste lezing. Tenzij anders vermeld, hebben alle verwijzingen naar pagina’s en paragrafen in dit advies betrekking op UN doc. A/71/10 waarin de Ontwerpconclusies en de toelichting zijn opgenomen op pp. 76 t/m 117.

[3] In voetnoot 319 van het rapport wordt gesteld “[o]nce the General Assembly has taken action in relation to a final draft of the Commission, such as by commending and annexing it to a resolution, the output of the Commission may also fall to be considered under draft conclusion 12”, hetgeen betrekking heeft op de betekenis van resoluties van internationale organisaties en intergouvernementele conferenties. Ontwerpconclusie 12 noemt daarbij verschillende mogelijkheden, die ook door de CAVV worden onderschreven (p. 106). Een dergelijke resolutie inderdaad “cannot, of itself, create a rule of customary international law”. Een dergelijke resolutie echter “may provide evidence for establishing [such a rule], or contribute to its development” en kan daarnaast ook “reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*)”.

- Als subsidiair orgaan van de Algemene Vergadering draagt de ILC bij aan de uitvoering van de taak van de Algemene Vergadering, conform artikel 13(a) van het Handvest van de Verenigde Naties, om de progressieve ontwikkeling en codificatie van het internationaal recht te bevorderen.

- De samenstelling van de ILC, de positie van de leden van de ILC die als onafhankelijke experts functioneren, de positie van de speciale rapporteur en de reactie van de leden van de ILC op het werk van de rapporteur.

- Het stadium waarin het werk van de ILC zich bevindt. Het spreekt vanzelf dat aan de slotconclusies van de ILC als geheel meer waarde moet worden toegekend dan aan individuele rapporten van de speciale rapporteurs.

- De commentaren van staten op het werk van de ILC in de verschillende stadia van het werk en de wijze waarop door de ILC met die commentaren rekening is gehouden.

- De mate waarin naar het oordeel van de ILC sprake is van codificatie dan wel van progressieve ontwikkeling van het internationaal recht. De taak van de ILC is immers niet louter een codificering van het bestaande internationaal recht; een tekst kan ook elementen *de lege ferenda* bevatten.

Gezien het voorgaande lijkt de conclusie gerechtvaardigd dat– rekening houdende met het stadium van de studie en de geïncorporeerde reacties van staten wat betreft de vaststelling van het bestaan van een regel van internationaal gewoonterecht – aan het werk van de ILC betekenis kan worden toegekend als een bijzondere vorm van "subsidiary means for the determination of rules of law" in de zin van artikel 38(1)(d) van het Statuut van het Internationaal Gerechtshof. Het voorgaande brengt mee dat aan het werk van de ILC in het algemeen meer gewicht moet worden toegekend dan aan het werk van het Institut de Droit International, de International Law Association of aan het werk van individuele schrijvers.

2.2 Het onderscheid tussen het bestaan en de inhoud van een regel

In de Ontwerpconclusies en de bijbehorende commentaren wordt met regelmaat gesproken over de identificatie of vaststelling van ´het bestaan en de inhoud van internationaal gewoonterecht´ (Ontwerpconclusies 1, 2, 12, 13 en 16; rapport p. 79 § 1 en voetnoot 246, pp. 81-82 § 3, 4 en 5 en voetnoot 253, p. 84 § 6, p. 98 voetnoot 309, p. 100 § 6, p. 102 § 2, p. 111 § 2). De ILC geeft aan dat soms wel het bestaan van een regel van internationaal gewoonterecht wordt geaccepteerd, maar dat het bereik daarvan wordt betwist of dat het omstreden is of er uitzonderingen bestaan op de regel (p. 81 § 3). Onduidelijk blijft of het proces waarmee het bestaan van een regel wordt vastgesteld gelijk is aan het proces waarmee de inhoud van die regel wordt bepaald.

In de literatuur wordt wel de vraag opgeworpen of regels van internationaal gewoonterecht onderwerp kunnen zijn van interpretatie (recent Merkouris, Interpreting the Customary Rules of Interpretation, 19 ICLR 2017, pp. 126-155). Zo zou men zich dan ook kunnen afvragen of de eenheid en coherentie van het systeem van internationaal recht, waarnaar de ILC verwijst (p. 84 § 6), niet vereist dat regels van internationaal gewoonterecht in hun onderling verband dienen te worden geïnterpreteerd. Als voorbeeld daarvan zou men kunnen verwijzen naar de overwegingen van het Internationaal Gerechtshof in de *Asylum case*, inhoudende dat de mogelijkheid om diplomatiek asiel te verlenen zou derogeren aan de soevereiniteit en territoriale jurisdictie van

een staat (I.C.J. Reports 1950, 274-275), en die van de *Jurisdictional Immunities of the State case*, waar de immuniteitsregels werden geconstrueerd in samenhang met de achterliggende regel van territoriale jurisdictie (I.C.J. Reports, 123-124, § 57; zie ook rapport p. 98 voetnoot 309). Kortom, het lijkt de CAVV wenselijk dit onderscheid expliciet te maken of ten minste in gedachten te houden: er zijn verschillende processen die van toepassing (kunnen) zijn op het vaststellen van enerzijds het bestaan en anderzijds de inhoud van een regel van internationaal gewoonterecht.

2.3 De rol van internationale organisaties

In de Ontwerpconclusies komen internationale organisaties op twee manieren aan de orde: in hun rol van platform voor de (rechts)handelingen van staten en in hun rol van zelfstandige internationaal-juridische actor. Ontwerpconclusie 4 (*Requirement of practice*), lid 2, verwijst naar de praktijk van internationale organisaties *zelf* als een mogelijke bijdrage aan "the formation, or expression" van regels van internationaal gewoonterecht. Ontwerpconclusies 6 (*Forms of practice*), lid 2, 10 (*Forms of evidence of acceptance as law* (*opinio juris)),* lid 2, en 12 (*Resolutions of international organizations and intergovernmental conferences*) bespreken de praktijk en *opinio iuris* van staten in de context van internationale organisaties.[4]

Terwijl aldus de rol van internationale organisaties als kader voor handelingen van staten wordt uitgediept, zijn de Ontwerpconclusies kort over de zelfstandige rol van internationale organisaties bij de vorming en vaststelling van gewoonterecht. De praktijk van internationale organisaties wordt, zoals gezegd, genoemd in Ontwerpconclusie 4, lid 2. De *opinio iuris* van internationale organisaties wordt in Ontwerpconclusie 10 niet genoemd; de toelichting bevestigt dat Ontwerpconclusie 10 is gericht op handelingen van staten (p. 107 § 3).

De beperkte aandacht voor internationale organisaties als zelfstandige juridische actoren is begrijpelijk bij een codificatie-project dat, ook gezien zijn praktijkgerichtheid, in de eerste plaats *bestaand* internationaal recht beoogt vast te leggen. Tegelijkertijd geven de Ontwerpconclusies aan dat in beginsel internationale organisaties als zodanig er zowel relevante praktijk als *opinio iuris* op na kunnen houden (vgl. de toelichting bij Ontwerpconclusie 4 (pp. 88-89 § 4): "Their practice in international relations (..), when accompanied by acceptance as law *(opinio juris*), gives rise or attests to rules of customary international law (…)". Dat uitgangspunt krijgt extra reliëf nu Ontwerpconclusie 4, lid 3, uitdrukkelijk stelt dat overige niet-statelijke actoren dat vermogen niet hebben.

Vragen over de nadere invulling van de zelfstandige rol van internationale organisaties bij gewoonterechtsvorming zullen dan ook steeds naar voren blijven komen, temeer daar de rol van internationale organisaties op het internationale toneel alleen maar groter wordt. Eén vraag is hoe wij kunnen vaststellen dat er sprake is van praktijk van een organisatie als zodanig (zoals genoemd in Ontwerpconclusie 4, lid 2), en niet van praktijk van lidstaten in het kader van een internationale organisatie. Een andere vraag is hoe de *opinio iuris* van een internationale organisatie als zodanig kan worden vastgesteld.

De CAVV steunt, in hun algemeenheid, de Ontwerpconclusies voor zover deze betrekking hebben op internationale organisaties, maar is van mening dat de toelichting meer aandacht zou kunnen besteden aan de hiervóór opgeworpen vragen.

[4] Zie ook kort onder de betreffende Ontwerpconclusies.

3. Opmerkingen per Ontwerpconclusie

3.1 Ontwerpconclusie 2 inzake de twee constituerende elementen

Conclusion 2 Two constituent elements To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).

De ILC benadrukt dat het bestaan van een regel van internationaal gewoonterecht slechts mag worden aangenomen wanneer het bestaan van "[a] general practice and acceptance of that practice as law (*opinio juris*)" (p. 82) (de zgn. *two-elements approach*) kan worden aangetoond. Deze inductieve vorm van rechtsvinding verdient ook volgens de CAVV duidelijk voorop te staan. Volgens de ILC laat de *two-elements approach* evenwel "a measure of deduction" toe, "in particular when considering possible rules of customary international law that operate against the backdrop of rules framed in more general terms that themselves derive from and reflect a general practice as law (accompanied by *opinio juris*), or when concluding that possible rules of international law form part of an 'indivisible regime'" (p. 84).

In dat geval wordt het ontbreken van een specifieke praktijk en een specifieke rechtsovertuiging als het ware gecompenseerd door een bredere en meer algemene norm ondersteund door andere of meer algemene praktijk dan de specifieke praktijk en door een ruimere en meer algemene *opinio iuris* dan aanwezig voor het aannemen van het bestaan van de meer specifieke norm van internationaal gewoonterecht. De ruimte voor de toepassing van rechtsvinding via deductie behoort volgens de CAVV slechts aanvullend te zijn op de strikte *two-elements approach*. De deductieve benadering dient daarin haar grens te vinden wanneer de via deductie verkregen rechtsvinding zou afwijken van het resultaat dat redelijkerwijs via de strikte toepassing van de *two-elements approach* via inductieve weg kan worden bereikt.

3.2 Ontwerpconclusie 3 inzake de beoordeling van bewijs

Conclusion 3 Assessment of evidence for the two constituent elements 1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found. 2. Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element.

In de toelichting bij Ontwerpconclusie 3 wordt door de ILC aangegeven (p. 86 § 4) dat “where prohibitive rules are concerned (such as the prohibition of torture)” het moeilijk zou kunnen zijn om “positive State practice (as opposed to inaction)” te vinden. De CAVV meent dat het ongelukkig is om in de context van verbodsnormen te spreken van “positive State practice”. Het kenmerk van verbodsnormen is nu eenmaal dat onthouding is geboden en de praktijk dus in eerste instantie moet worden beoordeeld in termen van ´inaction´. De “positive State practice” waarover de ILC spreekt zal natuurlijk zeker relevant kunnen zijn, maar voornamelijk voor de mogelijke vorming van de verbodsnorm en niet zozeer voor de inhoud van een reeds bestaande regel. In dat laatste geval is een tweetal hypotheses mogelijk, zoals inzichtelijk gemaakt in de Nicaragua zaak (I.C.J. Reports 1986, 98, § 186). Allereerst is het mogelijk dat ´State practice´ een schending van de regel oplevert. Ten tweede is het mogelijk dat een staat beroep doet op een (nieuwe) uitzondering of rechtvaardiging. In dat laatste geval zou mogelijk kunnen worden gesproken van ´positive State practice´, maar dan in verband met de uitzondering of rechtvaardiging en niet ten aanzien van de verbodsnorm. Vandaar dat de CAVV van mening is dat voor zover sprake is van reeds bestaande verbodsnormen beter kan worden gesproken van ‘affirmative State practice’.[5]

3.3 Ontwerpconclusie 4 inzake het vereiste van praktijk

Conclusion 4 Requirement of practice 1. The requirement, as a constituent element of customary international law, of a general practice means that it is primarily the practice of States that contributes to the formation, or expression, of rules of customary international law. 2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law. 3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.

De CAVV is het eens met de stelling in Ontwerpconclusie 4, lid 3, dat de praktijk van niet-statelijke eenheden, niet zijnde internationale organisaties, zoals NGO’s, niet-statelijke gewapende groepen, transnationale ondernemingen of privé personen, geen relevante praktijk oplevert voor de vorming van internationaal gewoonterecht noch een bijdrage levert aan de vorming van een daarop betrekking hebbende rechtsovertuiging. Desalniettemin is het zeer wel denkbaar dat die niet-statelijke eenheden, zoals het Internationale Comité van het Rode Kruis, de praktijk en de rechtsovertuiging van staten (en in bepaalde gevallen van internationale organisaties, zoals genoemd in lid 2 – zie ook hiervóór onder 2.3 ‘Algemene opmerkingen’ “De rol van internationale organisaties”) beïnvloeden en aldus op indirecte wijze een bijdrage leveren

[5] Zie ook voetnoot 34 in *The first report on formation and evidence in customary international law* by Michael Wood, special rapporteur (A/CN.4/663).

aan de totstandkoming van internationaal gewoonterecht. De CAVV verwelkomt dan ook de overwegingen en nuances die worden vermeld in de toelichting (pp. 89-90 § 9 en 10).

3.4 Ontwerpconclusie 6 inzake de vormen van praktijk

Conclusion 6
Forms of practice
1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.
2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.
3. There is no predetermined hierarchy among the various forms of practice.

In Ontwerpconclusie 6 met betrekking tot de vormen van praktijk wordt in lid 1 gesteld: "Practice may take a wide range of forms. It includes both physical *and verbal acts*. It may, under certain circumstances, include inaction" (cursivering door CAVV).

In § 2 (p. 91) van de bijbehorende toelichting wordt nog eens gesteld: "[I]t is now generally accepted that verbal conduct (whether written or oral) may count as practice; action may at times consist solely in statements, for example a protest by one State addressed to another".

De gelijkstelling van "verbal conduct (whether written or oral)" met de werkelijke praktijk van staten is niet zonder problemen. Verklaringen van staten hoeven niet met de werkelijke praktijk van staten overeen te komen. Wetten van staten kunnen in feite slechts dode letters zijn. Aan uitspraken van rechterlijke instanties wordt in werkelijkheid niet altijd uitvoering gegeven. Er is dus een gevaar verbale uitingen van staten te beschouwen als een bewijs zowel van de werkelijke praktijk van staten als van hun *opinio iuris*. In dit verband moge nog eens worden verwezen naar voetnoot 25 in het Derde Rapport van de Special Rapporteur (UN doc. A/CN.4/695):

> 25 … See also M.H. Mendelson, "The Formation of Customary International Law", 272 Recueil des cours (1998), pp. 155, 206-207 ("What must, however, be avoided is counting the same act as an instance of both the subjective and the objective element. If one adheres to the 'mainstream' view that it is necessary for both elements to be present, and in particular for the subjective element to be accompanied by 'real' practice, this must necessarily preclude treating a statement as both an act and a manifestation of belief (or will)"); … At the same time, "[q]uite often, both elements coincide; even in the cases where it has proclaimed the validity of the theoretical distinction between practice and *opinio juris*, the [International] Court mixes them up" (Pellet, supra note 20) [A. Pellet, "Article 38", in A. Zimmerman et al. (eds), The Statute of the International Court of Justice: A Commentary, 2nd edition (Oxford University Press, 2012), at p. 827].

De CAVV meent dat aan verbale uitingen als praktijk slechts gewicht kan worden toegekend indien de feitelijke praktijk van de betreffende staat meer algemeen bezien correspondeert met de positie zoals verbaal verwoord.

De CAVV acht voorts een verheldering van lid 3 van Ontwerpconclusie 6 wenselijk, nu niet geheel duidelijk is welke "hierarchy" hier wordt bedoeld. Volgens de toelichting (p. 92 § 7) gaat het om het ontbreken van een vooraf bestaande hiërarchie in de bewijswaarde ("probative value") van vormen van praktijk onderling. Dat lijkt echter een tamelijk willekeurige ('pick-and-choose') benadering toe te staan welke de rechtszekerheid mogelijk niet ten goede komt, terwijl bijvoorbeeld algemeen gesproken een officiële regeringsverklaring wel degelijk zwaarder weegt in de internationale betrekkingen dan een beslissing van een parlement of een (lage) nationale rechter. De toelichting wijst op de nuance van de contextuele benadering die blijkt uit Ontwerpconclusie 3 (met daarin nadruk op het algemene beeld dat oprijst uit de praktijk) en Ontwerpconclusie 7 (met daarin nadruk op hiërarchie binnen een bepaalde vorm van praktijk, zoals hogere en lagere rechtspraak), maar ook die benadering sluit algemene, context-onafhankelijke, uitgangspunten ter zake van een hiërarchie in praktijkvormen niet (noodzakelijk) uit. Zo zou in beginsel aan meer specifieke – toegespitste – vormen van praktijk relatief sterkere (bewijs)waarde kunnen toekomen, evenals aan recente (ten opzichte van oudere) praktijk, en aan de praktijk van staatsorganen die de interne, binnen-statelijke, hiërarchie volgt (bijvoorbeeld de regering die de uitvoerbaarheid van een nationale rechterlijke beslissing blokkeert vanwege de volkenrechtelijke verplichtingen van de staat).

3.5 Ontwerpconclusie 10 inzake bewijs voor opinio iuris

Conclusion 10 Forms of evidence of acceptance as law (*opinio juris*) 1. Evidence of acceptance as law (*opinio juris*) may take a wide range of forms. 2. Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference. 3. Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.

De Ontwerpconclusies kennen aan uitspraken van nationale rechters ("decisions of national courts") de (mogelijke) betekenis toe van statenpraktijk, bewijs van *opinio iuris*, en, indien toepasselijk, subsidiair middel voor de vaststelling van internationaal gewoonterecht (respectievelijk Ontwerpconclusies 6, 10, en 13 lid 2). In theorie, zo lijkt het, kan aldus een bepaalde regel van internationaal gewoonterecht uit (louter) nationaal rechtersrecht bestaan c.q. worden afgeleid. Het komt de CAVV voor dat moet worden gewaakt voor al te veel nadruk op de nationale rechtspraak van staten als kenbron of bewijsmiddel; het internationaal

gewoonterecht zal toch voornamelijk (moeten) worden gevonden in de praktijk van staten in hun internationale betrekkingen. Te veel nadruk op nationale rechtspraak roept ook vragen op die het, toch al moeilijke, proces van de identificatie van het bestaan en de inhoud van regels van internationaal gewoonterecht verder kunnen vertroebelen – zoals, wanneer is er sprake van een algemene en consistente nationale rechtspraak, komt aan de nationale rechtspraak van bepaalde (bijvoorbeeld democratische) staten meer gewicht toe dan aan die van andere staten, kan nationale rechtspraak ook wijzen op een 'persistent objector', et cetera.

De ILC heeft niettemin terecht aangenomen dat het bewijs voor de rechtsovertuiging van staten vele vormen kan aannemen. De CAVV kan zich dan ook in algemene zin vinden in de verschillende vormen die in lid 2 worden benoemd, evenals in de formulering die aangeeft dat geen sprake is van een uitputtende lijst. Wel heeft zij enige bedenkingen bij het opnemen van rechterlijke uitspraken als uiting van *opinio iuris*. Toegegeven moet worden dat in de toelichting (p. 100 § 5) enigszins ambigue wordt gesteld dat "[d]ecisions of national courts may also contain such statements when pronouncing upon questions of international law". De zin die hieraan vooraf gaat geeft ook aan dat nationale wetgeving, alhoewel het gevolg van politieke keuzes, waardevol kan zijn als bewijs voor de rechtsovertuiging indien wordt aangegeven dat die uitvoering geeft aan internationaal gewoonterecht. Toch blijft onduidelijk in hoeverre rechterlijke uitspraken zelfstandig kunnen bijdragen aan de vorming van de rechtsovertuiging door staten. Natuurlijk kan niet worden ontkend dat rechters organen van de staat zijn en derhalve kunnen bijdragen aan schendingen van internationaal recht (artt. 2 en 4 ILC Articles on Responsibility of States for Internationally Wrongful Acts), maar de rechter heeft als zodanig geen zelfstandige taak bij het vaststellen van de juridische posities die staten innemen in de internationale betrekkingen. In zijn algemeenheid is het aan de regeringen van staten om de juridische posities vast te stellen in de internationale betrekkingen en het mag dan ook geen verbazing wekken dat de vormen die in Ontwerpconclusie 10 worden genoemd als bewijs voor de vaststelling van de rechtsovertuiging, primair afkomstig zijn van de regeringen *of* vertegenwoordigers van de staat handelend onder verantwoordelijkheid van regeringen.

Daar komt nog bij dat zowel nationale als internationale rechters, mogelijk met uitzondering van rechters die de ´common law´ toepassen, geen rechtsvormende taak hebben. Zij zijn dus gehouden het recht te interpreteren en toe te passen zoals zij dit vinden, niet om bij te dragen aan de vorming van nieuwe regels. Zo stelde het Internationaal Gerechtshof (Legality of the Threat or Use of Nuclear Weapons, § 18), reagerend op het verwijt dat indien het een advies zou geven het de rechterlijke taak te buiten zou gaan en zich een wetgevende capaciteit zou aanmatigen, dat "[i]t is clear that the Court cannot legislate, … it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend". Al met al meent de CAVV dat deze overwegingen bijzondere aandacht verdienen in de toelichting bij Ontwerpconclusie 10.

In lid 3 van Ontwerpconclusie 10 wordt gesteld dat het nalaten te reageren op een (bepaalde) praktijk onder voorwaarden kan bijdragen aan de vorming van een rechtsovertuiging. Daarbij wordt aangegeven dat een staat in de positie moest verkeren om te reageren en dat een reactie was geboden gezien de omstandigheden. In de toelichting (pp. 100-101 § 7) wordt daarbij opgemerkt "Toleration of a certain practice may indeed serve as evidence of acceptance as law (*opinio juris*) when it represents concurrence in that practice. For such a lack of open objection or protest to have this probative value, however, two requirements must be satisfied in order to ensure that it does not derive from causes unrelated to the legality of the practice in question.

First, it is essential that a reaction to the practice in question would have been called for: this may be the case, for example, where the practice is one that (directly or indirectly) affects – usually unfavourably – the interests or rights of the State failing or refusing to act." In dit verband spreekt de toelichting bij Ontwerpconclusie 3 (p. 86 § 5) over de rol van de afwezigheid van een protest in gevallen waarin een staat op de hoogte is van bepaalde concrete acties en die een "immediate negative impact on its interests" hebben.

De CAVV kan zich in zijn algemeenheid vinden in deze positie en ondersteunt de genoemde voorwaarden en argumenten hiervoor. Niettemin hecht zij eraan op te merken dat het ontbreken van een reactie door een betrokken staat zich mogelijk laat verklaren uit een veelvoud van factoren. Per slot van rekening kan het stilzwijgen van een staat mogelijk worden verklaard uit het politieke, economische of zelfs militaire gewicht van een andere betrokken staat, het bestaan van een politieke alliantie, of de waarde die wordt gehecht aan het onderhouden van vriendschappelijke betrekkingen. Of de twee genoemde voorwaarden voldoende zijn om uit te sluiten dat het stilzwijgen voortkomt uit "causes unrelated to the legality of the practice in question" (p. 100) mag dan ook worden betwijfeld.

Sterker nog, de posities die staten innemen in de internationale betrekkingen worden niet in eerste instantie ingegeven door juridische overwegingen. Een voorbeeld hiervan kan worden gevonden in de al eerder genoemde Nicaragua zaak, waarin het Internationaal Gerechtshof opmerkte (108-109, § 207) dat gronden die de Verenigde Staten soms aanvoerde voor inmenging in de aangelegenheden van andere staten moesten worden beschouwd als "statements of international policy, and not an assertion of rules of existing international law". En het Hof borduurde hierop voort (109, § 208) door te stellen dat de Verenigde Staten voor bepaalde handelingen tegenover Nicaragua geen juridische rechtvaardiging aanvoerde, maar dat sprake was van "justified in this way on the political level".

Het lijkt de CAVV dan ook wenselijk uitgebreider stil te staan bij de verklaringen die staten achteraf (desgevraagd) zelf geven voor bepaalde posities en voor hun mogelijke stilzwijgen. Daarbij zou de uitgangspositie niet dienen te zijn dat aan die verklaringen of het stilzwijgen per definitie een bepaald juridisch gewicht toekomt, maar dat dit afhangt van een veelheid van factoren waarbij de juridische specificiteit van de verklaringen en de achterliggende politieke of andere reden(en) voor het stilzwijgen worden meegewogen. Wat betreft juridische specificiteit verwijst het rapport (p. 99 § 4) slechts in zeer algemene bewoordingen naar verklaringen dat een bepaalde praktijk is toegestaan, verboden of gemandateerd onder internationaal gewoonterecht. Wat betreft mogelijke verklaringen voor het stilzwijgen van staten in bepaalde situaties geeft het rapport geen nadere indicaties dan hierboven al aangehaald (pp. 100-101 § 7, p. 86 § 5).

Ontwerpconclusie 10 maakt geen gewag van de *opinio iuris* van internationale organisaties (zie ook hiervóór onder 2.3 'Algemene opmerkingen' "De rol van internationale organisaties"). De CAVV meent dat de toelichting zou kunnen noemen dat *opinio iuris* van internationale organisaties althans een mogelijkheid is (zoals geïmpliceerd in § 4 van de toelichting bij Ontwerpconclusie 4), waartegen theorie en doctrine zich niet verzetten. In dit opzicht kunnen in de rechtspraktijk van de afgelopen 15 jaar de nadrukkelijke stellingnames van de VN (meer dan van de lidstaten) inzake "Responsibility to Protect" of "The Rule of Law" als relevant worden beschouwd.

3.6 Ontwerpconclusie 11 inzake de rol van verdragen

Conclusion 11 Treaties 1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule: (a) codified a rule of customary international law existing at the time when the treaty was concluded; (b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or (c) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law. 2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.

In deze Ontwerpconclusie wordt de mogelijke betekenis van verdragen voor reeds bestaand, zich ontwikkelend of toekomstig internationaal gewoonterecht adequaat beschreven. De verhouding tussen verdragen en internationaal gewoonterecht blijft evenwel zeer gecompliceerd. Enerzijds kan een verdrag internationaal gewoonterecht bevestigen of de totstandkoming ervan bevorderen, anderzijds kan het ook de *bewijsvoering* dat een verdrag een overeenkomstige regel van internationaal gewoonterecht belichaamt aanmerkelijk bemoeilijken. Een verdrag kan immers door de partijen worden gesloten juist om af te wijken van bestaand of omstreden internationaal gewoonterecht. Ook kan altijd het argument worden gebruikt dat de partijen bij een verdrag een bepaalde regel naleven uitsluitend omdat zij daar door een verdragsverplichting toe zijn gehouden. Tenzij er andere duidelijke indicaties zijn over de belichaming van een regel van internationaal gewoonterecht in een verdrag, zal de lakmoesproef daarvoor moeten bestaan in het aantonen van de voor internationaal gewoonterecht vereiste praktijk en rechtsovertuiging tussen staten die niet partij zijn bij het verdrag, of in de gevolgde praktijk tussen staten die partij zijn bij het verdrag en staten die daarbij niet partij zijn.[6] Het lijkt de CAVV dan ook wenselijk meer aandacht aan deze aspecten te besteden in de toelichting.

3.7 Ontwerpconclusie 12 inzake de rol van resoluties van internationale organisaties en van intergouvernementele conferenties

Conclusion 12 Resolutions of international organizations and intergovernmental conferences 1. A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.

[6] Zie in dit verband ICJ, North Sea Continental Shelf, Judgment, ICJ Reports 1969, p. 3, 43, § 76.

2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for establishing the existence and content of a rule of customary international law, or contribute to its development.

3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).

De CAVV kan zich vinden in Ontwerpconclusie 12 maar is van mening dat de toelichting de reikwijdte van Ontwerpconclusie 12 onnodig beperkt (§ 3: "(..) in the context of the present draft conclusion what matters is that they may reflect the collective expression of the views of States members (..)"). Nu is gesteld (zie hiervóór) dat ook internationale organisaties in beginsel zelfstandig relevante praktijk en *opinio iuris* kunnen 'hebben', hoeft de conclusie over – specifiek – resoluties van internationale organisaties als bron van gewoonterecht zich niet te beperken tot staten.

3.8 Ontwerpconclusie 16 inzake 'particular customary international law'

Conclusion 16

Particular customary international law

1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.

2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*).

De CAVV vraagt zich af of de betiteling "particular" customary international law tevens is bedoeld als juridische definitie. Als dat zo is, zou het een nieuwe naam met weinig onderscheidend vermogen inluiden voor internationaal gewoonterecht dat geografisch dan wel thematisch niet-algemeen toepasselijk is. Een alternatieve betiteling zoals bijvoorbeeld 'customary international law that binds a limited number of States' is weliswaar omslachtiger, maar tegelijk meer consequent. Het zou duidelijker dan nu het geval is, aangeven dat als hoofdregel het internationaal gewoonterecht algemeen en overal geldt, en dat een algemene praktijk (vgl. Ontwerpconclusie 8) ook is vereist voor niet-algemeen bindend internationaal gewoonterecht, en dan, zoals blijkt uit Ontwerpconclusie 16, ziet op de algemene praktijk binnen de daarvoor in aanmerking komende (beperkte) kring van staten. Als laatste mag worden opgemerkt dat de ILC in Ontwerpconclusie 16 spreekt van een regel van internationaal gewoonterecht "that applies only among a limited number of States". De mogelijke verwarring rondom het gebruik van de term 'apply' kan wellicht worden opgelost door te spreken van een regel van internationaal gewoonterecht 'that binds only a limited number of States'.

BIJLAGEN

Adviesaanvraag van 27 maart 2017 inzake de door de International Law Commission aangenomen ontwerpconclusies over de identificatie van internationaal gewoonterecht

Ontwerpconclusies van de International Law Commission over de identificatie van internationaal gewoonterecht, zoals aangenomen na eerste lezing (hoofdstuk V van het ILC-rapport van 2016, doc.nr. A/71/10)

Leden van de Commissie van advies inzake volkenrechtelijke vraagstukken

Bijlage I

Adviesaanvraag van 27 maart 2017 inzake de door de International Law Commission aangenomen ontwerpconclusies over de identificatie van internationaal gewoonterecht

Ministerie van Buitenlandse Zaken

Prof. dr. R.A. Wessel
Voorzitter
Commissie van advies inzake volkenrechtelijke vraagstukken

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Datum 27 maart 2017
Betreft Adviesaanvraag ILC-conclusies

Geachte voorzitter,

Gaarne verzoek ik de Commissie van advies inzake volkenrechtelijke vraagstukken twee separate adviezen uit te brengen inzake de door de International Law Commission tijdens haar achtenzestigste zitting aangenomen ontwerpconclusies over de identificatie van internationaal gewoonterecht (hoofdstuk V van het ILC-rapport van 2016, doc.nr. A/71/10), en haar tijdens dezelfde zitting aangenomen ontwerpconclusies over latere overeenstemming of gebruik met betrekking tot de interpretatie van verdragen (hoofdstuk VI van het ILC-rapport van 2016, doc. nr. A/71/10). Voor de ontwerpconclusies verwijs ik naar de bijlagen bij deze brief.

Ik verwacht dat de twee adviezen van uw Commissie een aanzienlijke toegevoegde waarde zullen kunnen geven aan een Nederlands commentaar met betrekking tot de ontwerpconclusies.

Ik acht het wenselijk dat bij uw advies over de identificatie van internationaal gewoonterecht ook de rol van de Nederlandse rechter wordt betrokken.

Ik zou het op prijs stellen de twee adviezen van uw Commissie uiterlijk 1 november 2017 tegemoet te mogen zien.

Hoogachtend,

Bert Koenders
Minister van Buitenlandse Zaken

Bijlage II

Ontwerpconclusies van de International Law Commission over de identificatie van internationaal gewoonterecht, zoals aangenomen na eerste lezing (hoofdstuk V van het ILC-rapport van 2016, doc.nr. A/71/10)

Chapter V
Identification of customary international law

A. Introduction

50. 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.[237] At the same session, the Commission had before it a note by the Special Rapporteur (A/CN.4/653).[238] 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.[239]

51. At its sixty-fifth session (2013), the Commission considered the first report of the Special Rapporteur (A/CN.4/663), as well as a memorandum by the Secretariat on the topic (A/CN.4/659).[240] At the same session, the Commission decided to change the title of the topic to "Identification of customary international law".

52. At its sixty-sixth session (2014), the Commission considered the second report of the Special Rapporteur (A/CN.4/672)[241] and decided to refer draft conclusions 1 to 11, as contained in the second report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently considered 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.

53. At its sixty-seventh session (2015), the Commission considered the third report of the Special Rapporteur (A/CN.4/682) and decided to refer to the Drafting Committee the draft conclusions contained in that report. The Commission subsequently took note of draft conclusions 1 to 16 as provisionally adopted by the Drafting Committee at the sixty-sixth and sixty-seventh sessions (A/CN.4/L.869).[242] The Commission also requested the Secretariat to prepare a memorandum concerning 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.[243]

B. Consideration of the topic at the present session

54. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/695), and an addendum to that report (A/CN.4/695/Add.1) providing a bibliography on the topic. The fourth report addressed the suggestions made by States and

[237] At its 3132nd meeting, on 22 May 2012 (*Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), 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 A to the report of the Commission (*ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), pp. 305-314).

[238] *Ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 157-202.

[239] *Ibid.*, para. 159.

[240] *Ibid., Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 64.

[241] *Ibid., Sixty-ninth Session, Supplement No. 10* (A/69/10), para. 135.

[242] *Ibid., Seventieth Session, Supplement No. 10* (A/70/10), para. 60.

[243] *Ibid.*, para. 61.

others on the draft conclusions provisionally adopted and contained suggestions for the amendment of several draft conclusions in light of the comments received. It also addressed ways and means to make the evidence of customary international law more readily available, recalling the background of the prior work of the Commission on that matter as a basis for further consideration by the Commission in the context of the topic. In addition, the Commission had before it a memorandum by the Secretariat concerning 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).

55. The Commission considered the fourth report of the Special Rapporteur, as well as the memorandum by the Secretariat, at its 3301st to 3303rd meetings, from 19 to 24 May 2016. At its 3303rd meeting, on 24 May 2016, the Commission referred to the Drafting Committee the proposed amendments to the draft conclusions contained in the fourth report of the Special Rapporteur.[244]

56. At its 3303rd meeting, on 24 May 2016, the Commission also requested the Secretariat to prepare a memorandum on ways and means for making the evidence of customary international law more readily available, which would survey the present state of the evidence of customary international law and make suggestions for its improvement.

57. The Commission considered and adopted the report of the Drafting Committee on draft conclusions 1 to 16 (A/CN.4/L.872) at its 3309th meeting, on 2 June 2016. It accordingly adopted a set of 16 draft conclusions on identification of customary international law on first reading (sect. C.1 below).

58. At its 3291th meeting, on 2 May 2016, the Commission decided to establish an open-ended working group, under the Chairmanship of Mr. Marcelo Vázquez-Bermúdez, to assist the Special Rapporteur in the preparation of the draft commentaries to the draft conclusions to be adopted by the Commission. The working group held five meetings between 3 and 11 May 2016.

59. At its 3338th to 3340th meetings, on 5 and 8 August 2016, the Commission adopted the commentaries to the draft conclusions on identification of customary international law (see sect. C.2 below).

60. At its 3340th meetings on 8 August 2016, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft conclusions (sect. C below), through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2018.

61. At its 3340th meeting, on 8 August 2016, the Commission expressed its deep appreciation for the outstanding contribution of the Special Rapporteur, Sir Michael Wood, which had enabled the Commission to bring to a successful conclusion its first reading of the draft conclusions on identification of customary international law.

[244] See fourth report on identification of customary international law (A/CN.4/695), annex (Proposed amendments to draft conclusion 3 (Assessment of evidence for the two elements), draft conclusion 4 (Requirement of practice), draft conclusion 6 (Forms of practice), draft conclusion 9 (Requirement of acceptance as law (*opinio juris*)) and draft conclusion 12 (Resolutions of international organizations and intergovernmental conferences)).

C. Text of the draft conclusions on identification of customary international law adopted by the Commission

1. Text of the draft conclusions

62. The text of the draft conclusions adopted by the Commission on first reading is reproduced below.

Identification of customary international law

Part One
Introduction

Conclusion 1
Scope

The present draft conclusions concern the way in which the existence and content of rules of customary international law are to be determined.

Part Two
Basic approach

Conclusion 2
Two constituent elements

To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).

Conclusion 3
Assessment of evidence for the two constituent elements

1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.

2. Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element.

Part Three
A general practice

Conclusion 4
Requirement of practice

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

2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.

3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.

Conclusion 5
Conduct of the State as State practice

State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.

Conclusion 6
Forms of practice

1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.

2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.

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

Conclusion 7
Assessing a State's practice

1. Account is to be taken of all available practice of a particular State, which is to be assessed as a whole.

2. Where the practice of a particular State varies, the weight to be given to that practice may be reduced.

Conclusion 8
The practice must be general

1. The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.

2. Provided that the practice is general, no particular duration is required.

Part Four
Accepted as law (*opinio juris*)

Conclusion 9
Requirement of acceptance as law (*opinio juris*)

1. The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation.

2. A general practice that is accepted as law (*opinio juris*) is to be distinguished from mere usage or habit.

Conclusion 10
Forms of evidence of acceptance as law (*opinio juris*)

1. Evidence of acceptance as law (*opinio juris*) may take a wide range of forms.

2. Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.

3. Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.

Part Five
Significance of certain materials for the identification of customary international law

Conclusion 11
Treaties

1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:

(a) codified a rule of customary international law existing at the time when the treaty was concluded;

(b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or

(c) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law.

2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.

Conclusion 12
Resolutions of international organizations and intergovernmental conferences

1. A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.

2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for establishing the existence and content of a rule of customary international law, or contribute to its development.

3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).

Conclusion 13
Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.

2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules.

Conclusion 14
Teachings

Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law.

Part Six
Persistent objector

Conclusion 15
Persistent objector

1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.

2. The objection must be clearly expressed, made known to other States, and maintained persistently.

Part Seven
Particular customary international law

Conclusion 16
Particular customary international law

1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.

2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*).

2. Text of the draft conclusions and commentaries thereto

63. The text of the draft conclusions and commentaries thereto adopted by the Commission on first reading at its sixty-eighth session is reproduced below.

Identification of customary international law

General commentary

(1) The present draft conclusions concern the methodology for identifying rules of customary international law.[245] They seek to offer practical guidance on how the existence (or non-existence) of rules of customary international law, and their content, are to be determined. This matter is not only of concern to specialists in public international law; others, including those involved with national courts, are increasingly called upon to apply or advise on customary international law. Whenever doing so, a structured and careful process of legal analysis and evaluation is required to ensure that a rule of customary international law is properly identified, thus promoting the credibility of the particular determination.

(2) Customary international law remains an important source of public international law.[246] In the international legal system, such unwritten law, deriving from practice

[245] As is always the case with the Commission's output, the draft conclusions are to be read together with the commentaries.

[246] Some important fields of international law are still governed essentially by customary international law, with few if any applicable treaties. Even where there is a treaty in force, the rules of customary international law continue to govern questions not regulated by the treaty and continue to apply in relations with and among non-parties to the treaty. In addition, treaties may refer to rules of customary international law; and such rules may be taken into account in treaty interpretation in accordance with article 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties (United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331 (hereinafter "1969 Vienna Convention")). It may

accepted as law, can be an effective means for subjects of international law to regulate their behaviour and it is indeed often invoked by States and others. Customary international law is, moreover, among the sources of international law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice, which refers, in subparagraph (b), to "international custom, as evidence of a general practice accepted as law".[247] This wording reflects the two constituent elements of customary international law: a general practice and its acceptance as law (also referred to as *opinio juris*).

(3) The identification of customary international law is a matter on which there is a wealth of material, including case law and scholarly writings.[248] The draft conclusions reflect the approach adopted by States, as well as by international courts and tribunals and within international organizations. Recognizing that the process for the identification of customary international law is not always susceptible to exact formulations, they aim to offer clear guidance without being overly prescriptive.

(4) The 16 draft conclusions that follow are divided into seven parts. Part One deals with scope and purpose. Part Two sets out the basic approach to the identification of customary international law, the "two element" approach. Parts Three and Four provide further guidance on the two constituent elements of customary international law, which also serve as the criteria for its identification, "a general practice" and "acceptance as law" (*opinio juris*). Part Five addresses certain categories of materials that are frequently invoked in the identification of rules of customary international law. Parts Six and Seven deal with two exceptional cases: the persistent objector; and particular customary international law (being rules of customary international law that apply only among a limited number of States).

Part One
Introduction

Part One, comprising a single draft conclusion, defines the scope of the draft conclusions, outlining their function and purpose.

Conclusion 1
Scope

The present draft conclusions concern the way in which the existence and content of rules of customary international law are to be determined.

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sometimes be necessary, moreover, to determine the law applicable at the time when certain acts occurred ("the intertemporal law"), which may be customary international law even if a treaty is now in force. A rule of customary international law may continue to exist and be applicable, separately from a treaty, even where the two have the same content and even among parties to the treaty (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at pp. 93-96, paras. 174-179; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of the International Court of Justice, 3 February 2015, para. 88).

[247] This wording was proposed by the Advisory Committee of Jurists, established by the League of Nations in 1920 to prepare a draft Statute for the Permanent Court of International Justice; it was retained, without change, in the Statute of the International Court of Justice in 1945. While the drafting has been criticized as imprecise, the formula is nevertheless widely considered as capturing the essence of customary international law.

[248] For a bibliography on customary international law, including sections that correspond to issues covered by some of the draft conclusions, as well as sections addressing the operation of customary international law in various fields, see the fourth report of the Special Rapporteur (A/CN.4/695/Add.1), annex II.

Commentary

(1) Draft conclusion 1 is introductory in nature. It provides that the draft conclusions concern the way in which rules of customary international law are to be identified, that is, the legal methodology for undertaking that exercise.

(2) The term "customary international law" is used throughout the draft conclusions, being in common use and most clearly reflecting the nature of this source of international law. Other terms that are sometimes found in legal instruments (including constitutions), in case law and in scholarly writings include "custom", "international custom", and "international customary law" as well as "the law of nations" and "general international law".[249] The reference to "rules" of customary international law includes rules that are sometimes referred to as "principles" (of law) because they have a more general and fundamental character.[250]

(3) The terms "identify" and "determine" are used interchangeably in the draft conclusions and commentaries. The reference to determining the "existence and content" of rules of customary international law reflects the fact that while often the need is to identify both the existence and the content of a rule, in some cases it is accepted that the rule exists but its precise scope is disputed. This may be the case, for example, where there is disagreement as to whether a particular formulation (usually set out in texts such as treaties or resolutions) does in fact equate to an existing rule of customary international law, or where the question arises whether there are exceptions to a recognized rule of customary international law.

(4) Dealing as they do with the identification of rules of customary international law, the draft conclusions do not address, directly, the processes by which customary international law develops over time. Yet in practice identification cannot always be considered in isolation from formation; the identification of the existence and content of a rule of customary international law may well involve consideration of the processes by which it has developed. The draft conclusions thus inevitably refer in places to the formation of rules; they do not, however, deal systematically with how rules emerge, or how they change or terminate.

(5) A number of other matters fall outside the scope of the draft conclusions. First, they do not address the content of customary international law; they are concerned only with the

[249] Some of these terms may be used in other senses; in particular, "general international law" is used in various ways (not always clearly specified) including to refer to rules of international law of general application, whether treaty law or customary international law or general principles of law. For a judicial discussion of the term "general international law" see *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment of the International Court of Justice (16 December 2015), Separate Opinion of Judge Donoghue (para. 2), Separate Opinion of Judge *ad hoc* Dugard (paras. 12-17).

[250] See *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at pp. 288-290, para. 79 ("The association of the terms "rules" and "principles" is no more than the use of a dual expression to convey one and the same idea, since in this context [of defining the applicable international law] "principles" clearly means principles of law, that is, it also includes rules of international law in whose case the use of the term "principles" may be justified because of their more general and more fundamental character"); *The Case of the S.S. "Lotus", P.C.I.J., Series A*, No. 10 (1927), p. 16 ("the Court considers that the words "principles of international law", as ordinarily used, can only mean international law as it is applied between all nations belonging to the community of States").

methodological issue of how rules of customary international law are to be identified.[251] Second, no attempt is made to explain the relationship between customary international law and other sources of international law; the draft conclusions touch on this only in so far as is necessary to explain how rules of customary international law are to be identified, for example the relevance of treaties for such purpose. Third, the draft conclusions are 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. Finally, the draft conclusions do not address the position of customary international law within national legal systems.

Part Two
Basic approach

Part Two sets out the basic approach to the identification of customary international law. Comprising two draft conclusions, it specifies that determining a rule of customary international law requires establishing the existence of the two constituent elements: a general practice, and acceptance of that practice as law (*opinio juris*). This requires a careful analysis of the evidence for each element.

Conclusion 2
Two constituent elements

To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).

Commentary

(1) Draft conclusion 2 sets out the basic approach, according to which the identification of a rule of customary international law requires an inquiry into two distinct, yet related, questions: whether there is a general practice and whether such general practice is accepted as law (that is, accompanied by *opinio juris*[252]). In other words, one must look at what States actually do and seek to understand whether they recognize an obligation or a right to act in that way. This methodology, the "two element approach", underlies the draft conclusions and is widely supported by States, in case law, and in scholarly writings. It serves to ensure that the exercise of identifying rules of customary international law results in determining only such rules as actually exist.[253]

(2) A general practice and acceptance of that practice as law (*opinio juris*) are the two constituent elements of customary international law; together they are the essential conditions for the existence of a rule of customary international law. The identification of such a rule thus involves a close examination of available evidence to establish their presence in any given case. This has been confirmed, *inter alia*, in the case law of the

[251] In this connection it is important to note that reference is made in these commentaries to particular decisions of courts and tribunals in order to illustrate the methodology, not for the substance of the decisions.

[252] The Latin term has been retained alongside "acceptance as law" not only because of its prevalence in legal discourse, including the synonymous use of the term in the jurisprudence of the International Court of Justice, but also because it may capture better the particular nature of this subjective element of customary international law as referring to legal conviction and not to formal consent.

[253] The shared view of parties to a case as to the existence and content of what they regard to be a rule of customary international law is not sufficient; it must be ascertained that a general practice that is accepted as law indeed exists: *Military and Paramilitary Activities in and against Nicaragua* (see footnote 246 above), at pp. 97-98, para. 184.

International Court of Justice, which refers to "two conditions [that] must be fulfilled"[254] and has repeatedly laid down that "the existence of a rule of customary international law requires that there be "a settled practice" together with *opinio juris*".[255] To establish that a claim concerning the existence and/or the content of a rule of customary international law is well founded thus entails a search for a practice that has gained such acceptance among States that it may be considered to be the expression of a legal right or obligation (namely, that it is required, permitted or prohibited as a matter of law).[256] The test must always be: is there a general practice that is accepted as law?

(3) Where the existence of a general practice accepted as law cannot be established, the conclusion will be that the alleged rule of customary international law does not exist. In the *Colombian-Peruvian asylum case*, for example, the International Court of Justice considered that the facts relating to the alleged existence of a rule of (particular) customary international law disclosed:

> "so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence".[257]

(4) As draft conclusion 2 makes clear, the presence of only one constituent element does not suffice for the identification of a rule of customary international law. Practice without acceptance as law (*opinio juris*), even if widespread and consistent, can be no more than a non-binding usage, while a belief that something is (or ought to be) the law unsupported by practice is mere aspiration; it is the two together that establish the existence of a rule of customary international law.[258] While writers have from time to time sought to devise

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[254] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77.

[255] See, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at pp. 122-123, para. 55; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at pp. 29-30, para. 27; *North Sea Continental Shelf* (see footnote 254 above), at p. 44, para. 77.

[256] For example, in the *Jurisdictional Immunities of the State* case, an extensive survey of the practice of States in the form of national legislation, judicial decisions, and claims and other official statements, which was found to be accompanied by *opinio juris*, served to identify the scope of State immunity under customary international law (*Jurisdictional Immunities of the State* (see footnote 255 above), at pp. 122-139, paras. 55-91).

[257] *Colombian-Peruvian asylum case, Judgment of November 20th 1950: I.C.J. Reports 1950*, p. 266, at p. 277.

[258] In the *Right of Passage* case, for example, the Court found that there was nothing to show that the recurring practice of passage of Portuguese armed forces and armed police between Daman and the Portuguese enclaves in India, or between the enclaves themselves through Indian territory, was permitted or exercised as of right. The Court explained that: "Having regard to the special circumstances of the case, this necessity for authorization before passage could take place constitutes, in the view of the Court, a negation of passage as of right. The practice predicates that the territorial sovereign had the discretionary power to withdraw or to refuse permission. It is argued that permission was always granted, but this does not, in the opinion of the Court, affect the legal position. There is nothing in the record to show that grant of permission was incumbent on the British or on India as an obligation" (*Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at pp. 40-43). In *Legality of the Threat or Use of Nuclear Weapons*, the Court considered that: "The emergence, as *lex lata*, of a customary rule specifically

alternative approaches to the identification of customary international law, emphasizing one constituent element over the other or even excluding one element altogether, such theories are not supported by States or in the case law.

(5) The two-element approach is often referred to as "inductive", in contrast to possible "deductive" approaches by which rules may be ascertained on account of legal reasoning rather than empirical evidence of a general practice and its acceptance as law (*opinio juris*). The two-element approach does not in fact preclude a measure of deduction, in particular when considering possible rules of customary international law that operate against the backdrop of rules framed in more general terms that themselves derive from and reflect a general practice accepted as law (accompanied by *opinio juris*),[259] or when concluding that possible rules of international law form part of an "indivisible regime".[260]

(6) The two-element approach applies to the identification of the existence and content of rules of customary international law in all fields of international law. This is confirmed in the practice of States and in the case law, and is consistent with the unity and coherence of international law, which is a single legal system and is not divided into separate branches, each with its own approach to sources.[261] While the application in practice of the basic approach may well take into account the particular circumstances and context in which an alleged rule has arisen and operates,[262] the essential nature of customary international law as a general practice accepted as law (accompanied by *opinio juris*) must always be respected.

Conclusion 3
Assessment of evidence for the two constituent elements

1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.

2. Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element.

Commentary

(1) Draft conclusion 3 concerns the assessment of evidence for the two constituent elements of customary international law.[263] The two paragraphs of the draft conclusion offer general guidance for the process of determining the existence (or non-existence) and

prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 255, para. 73). See also *Prosecutor v. Sam Hinga Norman*, Special Court for Sierra Leone, Case No. SCSL-2004-14-AR72(E), decision on preliminary motion based on lack of jurisdiction (child recruitment) of 31 May 2004, p. 13, para. 17.

259 This appears to be the approach in *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at pp. 55-56, para. 101.

260 *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, p. 624, at p. 674, para. 139.

261 See conclusions of the work of the Study Group on fragmentation of international law, *Yearbook … 2006*, vol. II (Part Two), para. 251 (1).

262 See draft conclusion 3, below.

263 The term "evidence" is used here as a broad concept relating to all the materials that may be considered as a basis for the identification of customary international law, not in any technical sense as used by particular courts or in particular legal systems.

content of a rule of customary international law from the various pieces of evidence available at the time of the assessment, which reflects both the rigorous analysis required and the dynamic nature of customary international law as a source of international law.

(2) Paragraph 1 sets out an overarching principle that underlies all of the draft conclusions, namely that the assessment of any and all available evidence must be careful and contextual. Whether a general practice that is accepted as law (accompanied by *opinio juris*) exists must be carefully investigated in each case, in the light of the relevant circumstances.[264] Such analysis not only promotes the credibility of any particular decision, but also allows the two-element approach to be applied, with the necessary flexibility, to all fields of international law.

(3) The requirement that regard be had to the overall context reflects the need to apply the two-element approach while taking into account the subject matter that the rule is said to regulate. This implies that in each case any underlying principles of international law that may be applicable to the matter ought to be taken into account.[265] Moreover, the type of evidence consulted (and consideration of its availability or otherwise) is to be adjusted to the situation, and certain forms of practice and evidence of acceptance as law (*opinio juris*) may be of particular significance, depending on the context. For example, in the *Jurisdictional Immunities of the State* case, the International Court of Justice considered that:

> "In the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention [on Jurisdictional Immunities of States and Their Property]. *Opinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States."[266]

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[264] See also *North Sea Continental Shelf* (footnote 254 above), Dissenting Opinion of Judge Tanaka, at p. 175: "To decide whether these two factors in the formative process of a customary law exist or not, is a delicate and difficult matter. The repetition, the number of examples of State practice, the duration of time required for the generation of customary law cannot be mathematically and uniformly decided. Each fact requires to be evaluated relatively according to the different occasions and circumstances."

[265] In the *Jurisdictional Immunities of the State* case, the International Court of Justice considered that the customary rule of State immunity derived from the principle of sovereign equality of States and, in that context, had to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory (*Jurisdictional Immunities of the State* (see footnote 255 above), at pp. 123-124, para. 57). See also *Certain Activities carried out by Nicaragua in the Border Area and Construction of a Road in Costa Rica along the San Juan River* (footnote 249 above), Separate Opinion of Judge Donoghue (paras. 3-10).

[266] *Jurisdictional Immunities of the State* (see footnote 255 above), at p. 123, para. 55. In the *Navigational and Related Rights* case, where the question arose whether long-established practice of fishing for subsistence purposes (acknowledged by both parties to the case) has evolved into a rule of (particular) customary international law, the International Court of Justice observed that: "the

(4) The nature of the rule in question may also be of significance when assessing evidence for the purpose of ascertaining whether there is a general practice that is accepted as law (accompanied by *opinio juris*). In particular, where prohibitive rules are concerned (such as the prohibition of torture) it may sometimes be difficult to find positive State practice (as opposed to inaction); cases involving such rules will most likely turn on evaluating whether the practice (being deliberate inaction) is accepted as law.[267]

(5) Given that conduct may be fraught with ambiguities, paragraph 1 further indicates that regard must be had to the particular circumstances in which any evidence is to be found; only then may proper weight be accorded to it. In the *United States Nationals in Morocco* case, for example, the International Court of Justice, in seeking to ascertain whether a rule of (particular) customary international existed, said:

> "There are isolated expressions to be found in the diplomatic correspondence which, if considered without regard to their context, might be regarded as acknowledgments of United States claims to exercise consular jurisdiction and other capitulatory rights. On the other hand, the Court can not ignore the general tenor of the correspondence, which indicates that at all times France and the United States were looking for a solution based upon mutual agreement and that neither Party intended to concede its legal position."[268]

When considering legislation as practice, what may sometimes matter more than the actual text is how it has been interpreted and applied. Decisions of national courts will count less if they are reversed by the legislature or remain unenforced because of concerns about their compatibility with international law. Statements made casually, or in the heat of the moment, will usually carry less weight than those that are carefully considered; those made by junior officials may carry less weight than those voiced by senior members of the Government. The significance of a State's failure to protest will depend upon all the circumstances, but may be particularly significant where concrete action has been taken, of which that State is aware and which has an immediate negative impact on its interests. And practice of a State that goes against its clear interests or entails significant costs for it is more likely to reflect acceptance as law.

(6) Paragraph 2 states that to identify the existence and content of a rule of customary international law each of the two constituent elements must be found to be present, and explains that this calls for an assessment of evidence for each element. In other words, practice and acceptance as law (*opinio juris*) together supply the information necessary for the identification of customary international law, but two distinct inquiries are to be carried out. While the constituent elements may be intertwined in fact (in the sense that practice may be accompanied by a certain motivation), each is conceptually distinct for purposes of identifying a rule of customary international law.

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practice, by its very nature, especially given the remoteness of the area and the small, thinly spread population, is not likely to be documented in any formal way in any official record. For the Court, the failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period, is particularly significant" (*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at pp. 265-266, para. 141). The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has noted the difficulty of observing State practice on the battlefield: *Prosecutor v. Tadić*, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, para. 99.

[267] On inaction as a form of practice see draft conclusion 6 and the commentary thereto, para. (3).

[268] *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952*, p. 176, at p. 200.

(7) Although customary international law manifests itself in instances of conduct that are accompanied by *opinio juris*, acts forming the relevant practice are not as such evidence of acceptance as law. Moreover, acceptance as law (*opinio juris*) is to be sought with respect not only to those taking part in the practice but also to those in a position to react to it. No simple inference of acceptance as law may thus be made from the practice in question; in the words of the International Court of Justice, "acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature".[269]

(8) Paragraph 2 emphasizes that the existence of one element may not be deduced merely from the existence of the other and that a separate inquiry needs to be carried out for each. Nevertheless, the paragraph does not exclude that the same material may be used to ascertain practice and acceptance as law (*opinio juris*). A decision by a national court, for example, could be relevant practice as well as indicate that its outcome is required under customary international law. The important point remains, however, that the material must be examined as part of two distinct inquiries, to ascertain practice and to ascertain acceptance as law.

(9) While in the identification of a rule of customary international law the existence of a general practice is often the initial factor to be considered, and only then an inquiry is made into whether such general practice is accepted as law, this order of inquiry is not mandatory. The identification of a rule of customary international law may also begin with appraising a written text or statement allegedly expressing a certain legal conviction and then seeking to verify whether there is a general practice corresponding to it.

Part Three
A general practice

As stated in draft conclusion 2, the indispensable requirement for the identification of a rule of customary international law is that both a general practice and acceptance of such practice as law (*opinio juris*) be ascertained. Part Three offers more detailed guidance on the first of these two constituent elements of customary international law, "a general practice". Also known as the "material" or "objective" element,[270] it refers to those instances of conduct that (when accompanied by acceptance as law) are creative, or expressive, of customary international law. A number of factors must be considered in evaluating whether a general practice does in fact exist.

Conclusion 4
Requirement of practice

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

[269] *North Sea Continental Shelf* (see footnote 254 above), at p. 44, para. 76. In the *"Lotus"* case, the Permanent Court of International Justice likewise held that: "Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged … it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty" (*The Case of the S.S. "Lotus"* (see footnote 250 above), at p. 28). See also draft conclusion 10, para. (2), below.

[270] Sometimes also referred to as *usus* (usage), but this may lead to confusion with "mere usage or habit", which is to be distinguished from customary international law: see draft conclusion 9, para. 2, below.

2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.

3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.

Commentary

(1) Draft conclusion 4 specifies whose practice is to be taken into account when determining the existence of a rule of customary international law and the role of such practice.

(2) Paragraph 1 makes clear that it is principally the practice of States that is to be looked to in determining the existence and content of rules of customary international law; the material element of customary international law is indeed often referred to as "State practice".[271] The word "primarily" reflects the primacy of States as subjects of international law possessing a general competence and emphasizes the pre-eminent role that their conduct has for the formation and identification of customary international law. The International Court of Justice held in *Military and Paramilitary Activities in and against Nicaragua* that in order "to consider what are the rules of customary international law applicable to the present dispute … it has to direct its attention to the practice and *opinio juris* of States".[272] At the same time, the word "primarily" indicates that it is not exclusively State practice that is relevant and directs the reader to paragraph 2.

(3) Paragraph 2 concerns the practice of international organizations and indicates that "in certain cases" such practice also contributes to the identification of rules of customary international law. References in the draft conclusions and commentaries to the practice of States should thus be read as including, in those cases where it is relevant, the practice of international organizations. The paragraph deals with practice attributed to international organizations themselves, not that of their member States acting within them (which is attributed to the States in question).[273] The term "international organizations" refers, for the purposes of these draft conclusions and commentaries, to organizations that are established by instruments governed by international law, usually treaties, and that also possess their own international legal personality. The term does not include non-governmental organizations (NGOs).

(4) International organizations are not States.[274] They are entities established and empowered by States (or by States and/or international organizations) to carry out certain

[271] State practice serves other important functions in public international law, including in relation to treaty interpretation (see chap. VI of the present report on "Subsequent agreements and subsequent practice in relation to the interpretation of treaties").

[272] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 246 above), at p. 97, para. 183. In the *Jurisdictional Immunities of the State* case, the Court confirmed that it is "State practice from which customary international law is derived" (*Jurisdictional Immunities of the State* (see footnote 255 above), at p. 143, para. 101).

[273] See also draft conclusions 6, 10 and 12, below, which refer, *inter alia*, to the practice (and acceptance as law) of States within international organizations.

[274] See also the draft articles on the responsibility of international organizations adopted by the Commission in 2011, general commentary, para. (7): "International organizations are quite different from States, and in addition present great diversity among themselves. In contrast with States, they do not possess a general competence and have been established in order to exercise specific functions ('principle of speciality'). There are very significant differences among international organizations with regard to their powers and functions, size of membership, relations between the organization and its members, procedures for deliberation, structure and facilities, as well as the primary rules

functions, and to that end have been granted international legal personality, that is, they may have their own rights and obligations under international law. Their practice in international relations may also count as practice that, when accompanied by acceptance as law (*opinio juris*), gives rise or attests to rules of customary international law in the fields in which they operate,[275] but only in certain cases, as described below.[276]

(5) Most clearly, the practice coming within the scope of paragraph 2 arises where member States have transferred exclusive competences to the international organization, so that the latter exercises some of the public powers of its member States and hence the practice of the organization may be equated with the practice of those States. This is the case for certain competences of the European Union.

(6) Practice within the scope of paragraph 2 may also arise, in certain cases, where member States have not transferred exclusive competences, but have conferred powers upon the international organization that are functionally equivalent to the powers exercised by States. The practice of secretariats of international organizations when serving as treaty depositaries, in deploying military forces (for example, for peacekeeping), or in taking positions on the scope of privileges and immunities for the organization and its officials, might contribute to the formation, or expression, of rules of customary international law in those areas. The acts of international organizations that are not functionally equivalent to the acts of States are unlikely to be relevant practice.

(7) The practice of international organizations may be of particular relevance with respect to rules of customary international law that are addressed specifically to them, such as those on their international responsibility or relating to treaties to which they are parties.

(8) At the same time, caution is required in assessing the relevance and weight of such practice. International organizations vary 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 is carried out on behalf of its member States or endorsed by them, and the larger the number of such member States, the greater weight it may have in relation to the formation, or expression, of rules of customary international law. The reaction of member States to such practice is of importance. Among other factors to be considered in weighing the practice are: the nature of the organization; the nature of the organ whose conduct is under consideration; the subject matter of the rule in question and whether the organization itself would be bound by the rule; whether the conduct is *ultra vires* the organization or the organ; and whether the conduct is consonant with that of the member States of the organization.

(9) Paragraph 3 makes explicit what may be implicit in paragraphs 1 and 2, namely that the conduct of entities other than States and international organizations — for example, NGOs, non-State armed groups, transnational corporations and private individuals — is neither creative nor expressive of customary international law. As such, their conduct does not serve as direct (primary) evidence of the existence and content of rules of customary international law. The paragraph recognizes, however, that such conduct may have an important indirect role in the identification of customary international law, by stimulating

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including treaty obligations by which they are bound" (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 88).

[275] Practice that is external to the international organization (that is, practice in its relations with States, international organizations and others) may be particularly relevant for the identification of customary international law.

[276] See also *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949*, p. 174, at p. 178 ("The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights").

or recording practice and acceptance as law (*opinio juris*) by States and international organizations.[277] Although the conduct of non-State armed groups is not practice that may be said to be constitutive or expressive of customary international law, the reaction of States to it may well be. Likewise, the acts of private individuals may also sometimes be relevant, but only to the extent that States have endorsed or reacted to them.[278]

(10) Official statements of the International Committee of the Red Cross (ICRC), such as appeals and memoranda on respect for international humanitarian law, may likewise play an important role in shaping the practice of States reacting to such statements; and publications of ICRC may serve as helpful records of relevant practice. Such activities may thus contribute to the development and determination of customary international law; but they are not practice as such.[279]

Conclusion 5
Conduct of the State as State practice

State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.

Commentary

(1) Although in their international relations States most frequently act through the executive, draft conclusion 5 explains that State practice consists of any conduct of the State, whatever the branch concerned and functions at issue. In accordance with the principle of the unity of the State, this includes the conduct of any organ of the State forming part of the State's organization and acting in that capacity, whether in exercise of executive, legislative, judicial or "other" functions, such as commercial activities or the giving of administrative guidance to the private sector.

(2) To qualify as State practice, the conduct in question must be "of the State". The conduct of any State organ is to be considered conduct of that State, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. An organ includes any person or entity that has that status in accordance with the internal law of the State; the conduct of a person or entity otherwise empowered by the law of the State to exercise elements of governmental authority is conduct "of the State", provided the person or entity is acting in that capacity in the particular instance.[280]

(3) The relevant practice of States is not limited to conduct *vis-à-vis* other States or other subjects of international law; conduct within the State, such as a State's treatment of its own nationals, may also relate to matters of international law.

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[277] In the latter capacity their output may fall within the ambit of draft conclusion 14. The Commission has considered a similar point with respect to practice by "non-State actors" under its topic "Subsequent agreements and subsequent practice in relation to interpretation of treaties": see chapter VI of the present report, para. 73 (draft conclusion 5, para. 2).

[278] See, for example, *Dispute regarding Navigational and Related Rights* (footnote 266 above), at pp. 265-266, para. 141.

[279] This is without prejudice to the significance of acts of ICRC in exercise of specific functions conferred upon it by, in particular, the 1949 Geneva Conventions.

[280] *Cf.* articles 4 and 5 of the articles on the responsibility of States for internationally wrongful acts, General Assembly resolution 56/83 of 12 December 2001, annex. For the draft articles adopted by the Commission and the commentaries thereto, see *Yearbook … 2001*, vol. II (Part Two) and Corrigendum, paras. 76-77.

(4) State practice may be that of a single State or of two or more States acting together. Examples of practice of the latter kind may include joint action by several States patrolling the high seas to combat piracy or cooperating in launching a satellite into orbit. Such joint action is to be distinguished from action by international organizations.[281]

(5) Practice must be publicly available or at least known to other States[282] in order to contribute to the formation and identification of rules of customary international law. Indeed, it is difficult to see how confidential conduct by a State could serve such a purpose unless and until it is revealed.

Conclusion 6
Forms of practice

1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.

2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.

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

Commentary

(1) Draft conclusion 6 indicates the types of conduct that are covered under the term "practice", providing examples thereof and stating that no type of practice has *a priori* primacy over another. It refers to forms of practice as empirically verifiable facts and avoids, for present purposes, a distinction between an act and its evidence.

(2) Given that States exercise their powers in various ways and do not confine themselves only to some types of acts, paragraph 1 provides that practice may take a wide range of forms. While some writers have argued that it is only what States "do" rather than what they "say" that may count as practice for purposes of identifying customary international law, it is now generally accepted that verbal conduct (whether written or oral) may count as practice; action may at times consist solely in statements, for example a protest by one State addressed to another.

(3) Paragraph 1 further makes clear that inaction may count as practice. The words "under certain circumstances" seek to caution, however, that only deliberate abstention from acting may serve such a role; the State in question needs to be conscious about refraining from acting in a given situation. Examples of such omissions (sometimes referred to as "negative practice") include abstaining from instituting criminal proceedings; refraining from exercising protection in favour of certain naturalized persons; and abstaining from the threat or use of force.[283]

(4) Paragraph 2 provides a list of forms of practice that are often found to be useful for the identification of customary international law. As the words "but are not limited to" emphasize, this is a non-exhaustive list; in any event, given the inevitability and pace of

[281] See also draft conclusion 4, para. 2, above, and the accompanying commentary.

[282] Or, in the case of particular customary international law, to at least one other State or a group of States (see draft conclusion 16, below).

[283] For illustrations, see *The Case of the S.S. "Lotus"* (footnote 250 above), at p. 28; *Nottebohm Case (second phase), Judgment of April 6th, 1955: I.C.J. Reports 1955*, p. 4, at p. 22; *Jurisdictional Immunities of the State* (see footnote 255 above), at p. 135, para. 77.

change, both political and technological, it would be impractical to draw up a list of all the numerous forms that practice might take.[284] The forms of practice listed are no more than examples, which, moreover, may overlap (for example, "diplomatic acts and correspondence" and "executive conduct").

(5) The order in which the forms of practice are listed in paragraph 2 is not intended to be significant. Each is to be interpreted broadly to reflect the multiple and diverse ways in which States act and react; the expression "executive conduct", for example, refers comprehensively to: any executive acts, including executive orders, decrees and other measures; official statements on the international plane, before a legislature or to the media; and claims before national or international courts and tribunals. The expression "legislative and administrative acts" similarly embraces any form of regulatory disposition effected by a public authority. "Operational conduct 'on the ground'" includes law enforcement and seizure of property, as well as battlefield or other military activity, such as the movement of troops or vessels, or deployment of certain weapons. The words "conduct in connection with treaties" cover all acts related to the negotiation and conclusion of treaties, as well as their implementation; by concluding a treaty a State may be engaging in practice in the domain to which the treaty relates, for example maritime delimitation agreements or host country agreements. The reference to "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference" likewise includes all acts by States related to the negotiation, adoption and implementation of resolutions, decisions and other acts adopted by States within international organizations or at intergovernmental conferences, whatever their designation and whether or not they are legally binding. Whether any of these examples of forms of practice are in fact relevant in a particular case will depend, *inter alia*, on the particular alleged rule being considered.[285]

(6) Decisions of national courts at all levels may count as State practice[286] (though it is likely that greater weight will be given to the higher courts); decisions that have been overruled on the particular point are unlikely to be considered relevant. The role of decisions of national courts as a form of State practice is to be distinguished from their potential role as a "subsidiary means" for the determination of rules of customary international law.[287]

(7) Paragraph 3 clarifies that in principle no form of practice has a higher probative value than others in the abstract. In particular cases, however, as explained in the commentaries to draft conclusions 3 and 7, it may be that different forms (or instances) of practice ought to be given different weight when they are assessed in context.

Conclusion 7
Assessing a State's practice

1. Account is to be taken of all available practice of a particular State, which is to be assessed as a whole.

[284] See also "Ways and means for making the evidence of customary international law more readily available", *Yearbook … 1950*, vol. II, document A/1316, Part II, p. 368, para. 31.

[285] See para. (3) of the commentary to draft conclusion 3.

[286] See, for example, *Jurisdictional Immunities of the State* (footnote 255 above), at pp. 131-135, paras. 72-77; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 24, para. 58. The term "national courts" may also include courts with an international element operating within one or more domestic legal systems, such as courts or tribunals with mixed national and international composition.

[287] See draft conclusion 13, para. 2, below. Decisions of national courts may also be evidence of acceptance as law (*opinio juris*), on which see draft conclusion 10, para. 2, below.

2. Where the practice of a particular State varies, the weight to be given to that practice may be reduced.

Commentary

(1) Draft conclusion 7 concerns the assessment of the practice of a particular State in order to determine the position of that State as part of assessing the existence of a general practice (which is the subject of draft conclusion 8). As the two paragraphs of draft conclusion 7 make clear, it is necessary to take account of and assess as a whole all available practice of the State concerned on the matter in question, including its consistency.

(2) Paragraph 1 states, first, that in seeking to determine the position of a particular State on the matter in question, account is to be taken of all available practice of that State. This means that the practice examined should be exhaustive, within the limits of its availability, that is, including the relevant practice of all of the State's organs and all relevant practice of a particular organ. The paragraph states, moreover, that such practice is to be assessed as a whole; only then can the actual position of the State be determined.

(3) The requirement to assess all available practice "as a whole" is illustrated by the *Jurisdictional Immunities of the State* case, where the Hellenic Supreme Court had decided in one case that, by virtue of the "territorial tort principle", State immunity under customary international law did not extend to the acts of armed forces during an armed conflict. Yet a different position was adopted by the Special Supreme Court; by the Greek Government when refusing to enforce the Hellenic Supreme Court's judgment, and in defending this position before the European Court of Human Rights, and by the Hellenic Supreme Court itself in a later decision. Assessing such practice "as a whole" led the International Court of Justice to conclude "that Greek State practice taken as a whole actually contradicts, rather than supports, Italy's argument".[288]

(4) Paragraph 2 refers explicitly to situations where there is or appears to be inconsistent practice of a particular State. As paragraph (3) above demonstrates, this may be the case where different organs or branches within the State adopt different courses of conduct on the same matter or the practice of one organ varies over time. If in such circumstances a State's practice as a whole is found to be inconsistent, that State's contribution to the "general practice" element may be reduced or even nullified.

(5) The use of the word "may" indicates, however, that such assessment needs to be approached with caution, and the same conclusion would not necessarily be drawn in all cases. In the *Fisheries case*, for example, the International Court of Justice held that:

> "too much importance need not be attached to the few uncertainties or contradictions, real or apparent … in Norwegian practice. They may be easily understood in the light of the variety of facts and conditions prevailing in the long period."[289]

In this vein, for example, a difference in the practice of lower and higher organs of the same State is unlikely to result in less weight being given to the practice of the higher organ. For present purposes, practice of organs of a central government will often be more significant than that of constituent units of a federal State or political subdivisions of the State; and the practice of the executive branch is often the most relevant on the international plane, though

[288] *Jurisdictional Immunities of the State* (see footnote 255 above), at p. 134, para. 76. See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 246 above), at p. 98, para. 186.

[289] *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, at p. 138.

account may need to be taken of the constitutional position of the various organs in question.[290]

Conclusion 8
The practice must be general

1. The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.

2. Provided that the practice is general, no particular duration is required.

Commentary

(1) Draft conclusion 8 concerns the requirement that the practice must be general; it seeks to capture the essence of this requirement and the inquiry that is needed in order to verify whether it has been met in a particular case.

(2) Paragraph 1 explains that the notion of generality, which refers to the aggregate of the instances in which the alleged rule of customary international law has been followed, embodies two requirements. First, the practice must be followed by a sufficiently large and representative number of States. Second, such instances must exhibit consistency. In the words of the International Court of Justice in the *North Sea Continental Shelf* cases, the practice in question must be both "extensive and virtually uniform":[291] it must be a "settled practice".[292] As is explained below, no absolute standard can be given for either requirement; the threshold that needs to be attained for each has to be assessed taking account of context.[293] In each case, however, the practice should be of such a character as to make it possible to discern a constant and uniform usage.

(3) The requirement that the practice be "widespread and representative" does not lend itself to exact formulations, as circumstances may vary greatly from one case to another (for example, the frequency with which circumstances calling for action arise).[294] As regards diplomatic relations, for example, in which all States regularly engage, a practice would have to be widely exhibited, while with respect to international canals, of which there are very few, the amount of practice would necessarily be less. This is captured by the word "sufficiently", which implies that the necessary number and distribution of States taking part in the relevant practice (like the number of instances of practice) cannot be identified in the abstract. It is clear, however, that universal participation is not required: it is not necessary to show that all States have participated in the practice in question.[295] The participating States should include those that had an opportunity or possibility of applying

[290] See, for example, *Jurisdictional Immunities of the State* (footnote 255 above), at p. 136, para. 83 (where the Court noted that "under Greek law" the view expressed by the Special Supreme Court prevailed over that of the Hellenic Supreme Court).

[291] *North Sea Continental Shelf* (see footnote 254 above), at p. 43, para. 74. A wide range of terms has been used to describe the requirement of generality, including by the International Court of Justice, without any real difference in meaning being implied.

[292] *Ibid*., at p. 44, para. 77.

[293] See also draft conclusion 3, above.

[294] See also the judgment of 4 February 2016 of the Federal Court of Australia in *Ure v. The Commonwealth of Australia* [2016] FCAFC 8, para. 37 ("we would hesitate to say that it is impossible to demonstrate the existence of a rule of customary international [law] from a small number of instances of State practice. We would accept the less prescriptive proposition that as the number of instances of State practice decreases the task becomes more difficult").

[295] See, for example, 2 BvR 1506/03, German Federal Constitutional Court, Order of the Second Senate of 5 November 2003, para. 59 ("Such practice, however, is not sufficiently widespread as to be regarded as consolidated practice that creates customary international law").

the alleged rule.[296] It is important that such States are representative of the various geographical regions and/or various interests at stake.

(4) In assessing generality, an important factor to be taken into account is the extent to which those States that are particularly involved in the relevant activity or most likely to be concerned with the alleged rule have participated in the practice.[297] It would clearly be impractical to determine, for example, the existence and content of a rule of customary international law relating to navigation in maritime zones without taking into account the practice of coastal States and major shipping States, or the existence and content of a rule on foreign investment without evaluating the practice of the capital-exporting States as well as that of the States in which investment is made. In many cases, all or virtually all States will be equally concerned.

(5) The requirement that the practice be consistent means that where the relevant acts are divergent to the extent that no pattern of behaviour can be discerned, no general practice (and thus no corresponding rule of customary international law) can be said to exist. For example, in the *Fisheries case*, the International Court of Justice found that:

> "although the ten-mile rule has been adopted by certain States … other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law."[298]

(6) In examining whether the practice is consistent it is of course important to consider instances of conduct that are in fact comparable, that is, where the same or similar issues have arisen so that such instances could indeed constitute reliable guides. The Permanent Court of International Justice referred in the *Lotus* case to:

> "precedents offering a close analogy to the case under consideration; for it is only from precedents of this nature that the existence of a general principle [of customary international law] applicable to the particular case may appear".[299]

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[296] A relatively small number of States engaging in a certain practice might thus suffice if indeed such practice, as well as other States' inaction in response, is generally accepted as law (*opinio juris*).

[297] The International Court of Justice has said that "an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform", *North Sea Continental Shelf* (see footnote 254 above), at p. 43, para. 74.

[298] *Fisheries case* (see footnote 289 above), at p. 131. A chamber of the Court held in the *Gulf of Maine* case that where the practice demonstrates "that each specific case is, in the final analysis, different from all the others …. This precludes the possibility of those conditions arising which are necessary for the formation of principles and rules of customary law" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area* (see footnote 250 above), at p. 290, para. 81). See also, for example, *Colombian-Peruvian asylum case* (footnote 257 above), at p. 277 ("The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum … that it is not possible to discern in all this any constant and uniform usage … with regard to the alleged rule of unilateral and definitive qualification of the offence"); *Interpretation of the air transport services agreement between the United States of America and Italy,* Advisory Opinion of 17 July 1965, United Nations, *Reports of International Arbitral Awards*, vol. XVI (Sales No. E/F.69.V.1), pp. 75-108, at p. 100 ("It is correct that only a constant practice, observed in fact and without change can constitute a rule of customary international law").

[299] *The Case of the S.S. "Lotus"* (see footnote 250 above), at p. 21. See also *North Sea Continental Shelf* (footnote 254 above), at p. 45, para. 79; Special Court for Sierra Leone, *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-A, Judgment (Appeals Chamber) of 28 May 2008, para. 406.

(7) At the same time, complete consistency in the practice of States is not required. The relevant practice needs to be virtually or substantially uniform; some inconsistencies and contradictions are thus not necessarily fatal to a finding of "a general practice". In *Military and Paramilitary Activities in and against Nicaragua*, the International Court of Justice held that:

> "It is not to be expected that in the practice of States the application of the rules in question should have been perfect …. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules."[300]

(8) When inconsistency takes the form of breaches of a rule, this does not necessarily prevent a general practice from being established. This is particularly so when the State concerned denies the violation and/or expresses support for the rule. As the International Court of Justice observed:

> "instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."[301]

(9) Paragraph 2 refers to the time element, making clear that a relatively short period in which a general practice is followed is not, in and of itself, an obstacle to determining that a corresponding rule of customary international law exists. While a long duration may result in more extensive relevant practice, time immemorial or a considerable or fixed duration of a general practice is not a condition for the existence of a customary rule.[302] The International Court of Justice confirmed this in the *North Sea Continental Shelf* cases, holding that "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law".[303] As this passage makes clear, however, some time must elapse for a general practice to emerge; there is no such thing as "instant custom".

Part Four
Accepted as law (*opinio juris*)

Establishing that a certain practice is followed consistently by a sufficiently widespread and representative number of States does not suffice in order to identify a rule of customary international law. Part Four concerns the second constituent element of customary international law, sometimes referred to as the "subjective" or "psychological" element: in each case, it is also necessary to be satisfied that there exists among States an acceptance as law (*opinio juris*) as to the binding character of the practice in question.

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[300] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 246 above), at p. 98, para. 186.

[301] *Ibid*. See also, for example, *Prosecutor v. Sam Hinga Norman* (footnote 258 above), para. 51. The same is true when assessing a particular State's practice: see draft conclusion 7, above.

[302] In fields such as international space law or the law of the sea, for example, customary international law has on a number of occasions developed rapidly.

[303] *North Sea Continental Shelf* (see footnote 254 above), at p. 43, para. 74.

Conclusion 9
Requirement of acceptance as law (*opinio juris*)

1. The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation.

2. A general practice that is accepted as law (*opinio juris*) is to be distinguished from mere usage or habit.

Commentary

(1) Draft conclusion 9 seeks to encapsulate the nature and function of the second constituent element of customary international law, acceptance as law (*opinio juris*).

(2) Paragraph 1 explains that acceptance as law (*opinio juris*), as a constituent element of customary international law, refers to the requirement that the relevant practice must be undertaken with a sense of legal right or obligation, that is, it must be accompanied by a conviction that it is permitted, required or prohibited by customary international law. It is thus crucial to establish, in each case, that States have acted in a certain way because they felt or believed themselves legally compelled or entitled to do so by reason of a rule of customary international law: they must have pursued the practice as a matter of right, or submitted to it as a matter of obligation. As the International Court of Justice stressed in the *North Sea Continental Shelf* judgment:

> "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation."[304]

(3) Acceptance as law (*opinio juris*) is to be distinguished from other, extralegal motives for action, such as comity, political expediency or convenience; if the practice in question is motivated solely by such other considerations, no rule of customary international law is to be identified. Thus in the *Colombian-Peruvian asylum* case, the International Court of Justice declined to recognize the existence of a rule of customary international law where the alleged instances of practice were not shown to be, *inter alia*:

> "exercised by the States granting asylum as a right appertaining to them and respected by the territorial States as a duty incumbent on them and not merely for reasons of political expediency. … considerations of convenience or simple political expediency seem to have led the territorial State to recognize asylum without that decision being dictated by any feeling of legal obligation".[305]

[304] *Ibid*., at para. 77; see also *ibid*., at para. 76 (referring to the requirement that States "believed themselves to be applying a mandatory rule of customary international law").

[305] *Colombian-Peruvian asylum case* (see footnote 257 above), at pp. 277 and 286. See also *The Case of the S.S. "Lotus"* (footnote 250 above), at p. 28 ("Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged … it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand … there are other circumstances calculated to show that the

(4) Seeking to comply with a treaty obligation as a treaty obligation, much like seeking to comply with domestic law, is not acceptance as law for the purpose of identifying customary international law, and practice undertaken with such intention does not, by itself, lead to an inference as to the existence of a rule of customary international law.[306] However, a State may recognize that it is bound by a certain obligation by force of both customary international law and treaty; but this would need to be proved. On the other hand, when States act in conformity with a treaty by which they are not bound, or apply conventional obligations in their relations with non-parties to the treaty, this may evidence the existence of acceptance as law in the absence of any explanation to the contrary.

(5) Acceptance as law (*opinio juris*) is to be sought with respect to both the States engaging in the relevant practice and those in a position to react to it; they must be shown to have understood the practice as being in accordance with customary international law.[307] It is not necessary to establish that all States have recognized (accepted as law) the alleged rule as a rule of customary international law; it is broad acceptance together with no or little objection that is required.[308]

(6) Paragraph 2 emphasizes that, without acceptance as law (*opinio juris*), a general practice may not be considered as creative, or expressive, of customary international law; it is mere usage or habit. In other words, practice that States consider themselves legally free either to follow or to disregard does not contribute to or reflect customary international law (unless the rule to be identified itself provides for such a choice).[309] Not all observed regularities of international conduct bear legal significance; diplomatic courtesies, for example, such as the provision of red carpets for visiting heads of State, are not

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contrary is true"); *Military and Paramilitary Activities in and against Nicaragua* (see footnote 246 above), at pp. 108-110, paras. 206-209.

306 See, for example, *North Sea Continental Shelf* (footnote 254 above), at p. 43, para. 76. A particular difficulty may thus arise in ascertaining whether a rule of customary international law has emerged where a non-declaratory treaty has attracted virtually universal participation.

307 See *Military and Paramilitary Activities in and against Nicaragua* (footnote 246 above), at p. 109, para. 207 ("Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'" (citing the *North Sea Continental Shelf* Judgment)).

308 Thus, where "the members of the international community are profoundly divided" on the question of whether a certain practice is accompanied by acceptance as law (*opinio juris*), no such acceptance as law could be said to exist: see *Legality of the Threat or Use of Nuclear Weapons* (footnote 258 above), at p. 254, para. 67.

309 In the *Right of Passage over Indian Territory*, the International Court of Justice thus observed, with respect to the passage of armed forces and armed police, that: "The practice predicates that the territorial sovereign had the discretionary power to withdraw or to refuse permission. It is argued that permission was always granted, but this does not, in the opinion of the Court, affect the legal position. There is nothing in the record to show that grant of permission was incumbent on the British or on India as an obligation" (*Case concerning Right of Passage over Indian Territory* (see footnote 258 above), at pp. 42-43). In the *Jurisdictional Immunities of the State* case, the International Court of Justice similarly held, in seeking to determine the content of a rule of customary international law, that: "While it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon the issue currently under consideration by the Court" (*Jurisdictional Immunities of the State* (see footnote 255 above), at p. 123, para. 55). See also *North Sea Continental Shelf* (footnote 254 above), at pp. 43-44, para. 76.

accompanied by any sense of legal obligation and thus could not generate or attest to any legal duty or right to act accordingly.[310]

Conclusion 10
Forms of evidence of acceptance as law (*opinio juris*)

1. Evidence of acceptance as law (*opinio juris*) may take a wide range of forms.

2. Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.

3. Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.

Commentary

(1) Draft conclusion 10 concerns the evidence from which acceptance of a given practice as law (*opinio juris*) may be deduced. It reflects the fact that acceptance as law may be made known through various manifestations of State behaviour.

(2) Paragraph 1 states the general proposition that acceptance as law (*opinio juris*) may be reflected in a wide variety of forms. States may express their recognition (or rejection) of the existence of a rule of customary international law in many ways. Such conduct indicative of acceptance as law supporting an alleged rule encompasses, as the subsequent paragraphs make clear, both pronouncements and physical actions (as well as inaction) concerning the practice in question.

(3) Paragraph 2 provides a non-exhaustive list of forms of evidence of acceptance as law (*opinio juris*) including those most commonly resorted to for such purpose. Such evidence may also be useful in demonstrating a lack of acceptance as law. There is some common ground between the forms of evidence of acceptance as law and the forms of State practice; in part, this reflects the fact that the two elements may at times be found in the same material (but, even then, their identification requires a separate exercise in each case[311]). In any event, statements are more likely to embody the legal conviction of the State, and may often be more usefully regarded as expressions of acceptance as law (or otherwise) rather than instances of practice.

(4) Among the forms of evidence of acceptance as law (*opinio juris*), an express public statement on behalf of a State that a given practice is permitted, prohibited or mandated under customary international law provides the clearest indication that it has avoided or undertaken such practice (or recognized that it was rightfully undertaken or avoided by others) out of a sense of legal right or obligation. Such statements could be made, for example: in debates in multilateral settings; in introducing draft legislation before the legislature; as assertions made in written and oral pleadings before courts and tribunals; in protests characterizing the conduct of other States as unlawful; and in response to proposals for codification. They may be made individually or jointly with others. Similarly, the effect

[310] The International Court of Justice observed that indeed: "There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty" (*North Sea Continental Shelf* (see footnote 254 above), at p. 44, para. 77).

[311] See draft conclusion 3, above.

of practice in line with the supposed rule may be nullified by contemporaneous statements that no such rule exists.[312]

(5) The other forms of evidence listed in paragraph 2 may also be of particular assistance in ascertaining the legal position of States in relation to certain practices. Among these, the term "official publications" covers documents published in the name of a State, such as military manuals and official maps, in which acceptance as law (*opinio juris*) may be revealed. Published opinions of government legal advisers may likewise shed light on a State's legal position, though not if the State declined to follow the advice. Diplomatic correspondence may include, for example, circular notes to diplomatic missions, such as those on privileges and immunities. National legislation, while it is most often the product of political choices, may be valuable as evidence of acceptance as law, particularly where it has been specified that it is mandated under or gives effect to customary international law. Decisions of national courts may also contain such statements when pronouncing upon questions of international law.

(6) Multilateral drafting and diplomatic processes may afford valuable and accessible evidence as to the legal convictions of States with respect to the content of customary international law, when such matters are taken up and debated by States. Hence the reference to "treaty provisions" and to "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference", whose potential utility in the identification of rules of customary international law is explored in greater detail in draft conclusions 11 and 12.

(7) Paragraph 3 provides that, under certain conditions, failure by States to react, within a reasonable time, may also, in the words of the International Court of Justice in the *Fisheries case*, "[bear] witness to the fact that they did not consider … [a certain practice undertaken by others] to be contrary to international law".[313] Toleration of a certain practice may indeed serve as evidence of acceptance as law (*opinio juris*) when it represents concurrence in that practice. For such a lack of open objection or protest to have this probative value, however, two requirements must be satisfied in order to ensure that it does not derive from causes unrelated to the legality of the practice in question.[314] First, it is essential that a reaction to the practice in question would have been called for:[315] this may

[312] At times the practice itself is accompanied by an express disavowal of legal obligation, such as when States pay compensation *ex gratia* for damage caused to foreign diplomatic property.

[313] *Fisheries case* (see footnote 289 above), at p. 139. See also *The Case of the S.S. "Lotus"* (footnote 250 above), at p. 29 ("the Court feels called upon to lay stress upon the fact that it does not appear that the States concerned have objected to criminal proceedings in respect of collision cases before the courts of a country other than that the flag of which was flown, or that they have made protests: their conduct does not appear to have differed appreciably from that observed by them in all cases of concurrent jurisdiction. This fact is directly opposed to the existence of a tacit consent on the part of States to the exclusive jurisdiction of the State whose flag is flown, such as the Agent for the French Government has thought it possible to deduce from the infrequency of questions of jurisdiction before criminal courts. It seems hardly probable, and it would not be in accordance with international practice, that the French Government in the *Ortigia-Oncle-Joseph* case and the German Government in the *Ekbatana-West-Hinder* case would have omitted to protest against the exercise of criminal jurisdiction by the Italian and Belgian Courts, if they had really thought that this was a violation of international law"); *Priebke, Erich s/ solicitud de extradición*, Case No. 16.063/94, Supreme Court of Justice of Argentina, Judgment of 2 November 1995, Vote of Judge Gustavo A. Bossert, at p. 40, para. 90.

[314] See also, more generally, *North Sea Continental Shelf* (footnote 254 above), at p. 27, para. 33.

[315] The International Court of Justice has observed, in a different context, that: "The absence of reaction may well amount to acquiescence …. That is to say, silence may also speak, but only if the conduct of the other State calls for a response" (*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks*

be the case, for example, where the practice is one that (directly or indirectly) affects — usually unfavourably — the interests or rights of the State failing or refusing to act.[316] Second, the reference to a State being "in a position to react" means that the State concerned must have had knowledge of the practice (which includes circumstances where, because of the publicity given to the practice, it must be assumed that the State had such knowledge), and that it must have had sufficient time and ability to act. Where a State did not or could not have been expected to know of a certain practice, or has not yet had a reasonable time to respond, inaction cannot be attributed to an acknowledgment that such practice was mandated (or permitted) under customary international law.

Part Five
Significance of certain materials for the identification of customary international law

Commentary

(1) Various materials other than primary evidence of alleged instances of practice accepted as law (accompanied by *opinio juris*) may be consulted in the process of identifying the existence and content of rules of customary international law. These commonly include written texts bearing on legal matters, in particular treaties, resolutions of international organizations and conferences, judicial decisions (of both international and national courts) and scholarly works. Such texts may assist in collecting, synthesizing or interpreting practice relevant to the identification of customary international law and may offer precise formulations to frame and guide an inquiry into its two constituent elements. Part Five seeks to explain the potential significance of these materials, making clear that it is of critical importance to study carefully both the content of such materials and the context at the time when they were prepared.

(2) The Commission decided not to include at this stage a separate conclusion on the output of the International Law Commission. Such output does, however, merit special consideration in the present context. As has been recognized by the International Court of Justice and other courts and tribunals,[317] a determination by the Commission affirming the existence and content of a rule of customary international law may have particular value; as may a conclusion by it that no such rule exists. This flows from the Commission's unique mandate from States to promote the progressive development of international law and its codification,[318] the thoroughness of its procedures (including the consideration of extensive surveys of State practice), and its close relationship with States as a subsidiary organ of the General Assembly (including receiving their oral and written comments as it proceeds with

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and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008, p. 12, at pp. 50-51, para. 121). See also *Dispute regarding Navigational and Related Rights* (footnote 266 above), at pp. 265-266, para. 141 ("For the Court, the failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period, is particularly significant").

316 It may well be that a certain practice would be seen as affecting all or virtually all States.

317 See, for example, *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 40, para. 51; *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 56, para. 169; *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, International Criminal Tribunal for Rwanda, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Judgment (Appeals Chamber) of 13 December 2004, para. 518; *Dubai-Sharjah Border Arbitration* (1981), *International Law Reports*, vol. 91, pp. 543-701, at p. 575; 2 BvR 1506/03, German Federal Constitutional Court, Order of the Second Senate of 5 November 2003, para. 47.

318 See the statute of the International Law Commission (1947), adopted by the General Assembly in resolution 174 (II) of 21 November 1947.

its work). The weight to be given to the Commission's determinations depends, however, on various factors, including sources relied upon by the Commission, the stage reached in its work and above all upon States' reception of its output.[319]

Conclusion 11
Treaties

1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:

(a) codified a rule of customary international law existing at the time when the treaty was concluded;

(b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or

(c) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law.

2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.

Commentary

(1) Draft conclusion 11 concerns the significance of treaties, especially widely ratified multilateral treaties, for the identification of customary international law. The draft conclusion does not address conduct in connection with treaties as a form of practice, a matter covered in draft conclusion 6; nor does it directly concern the treaty-making process or draft treaty provisions, which may themselves give rise to State practice and evidence of acceptance as law (*opinio juris*) as indicated in draft conclusions 6 and 10.

(2) While treaties are, as such, binding only on the parties thereto, they "may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them".[320] Their provisions (and the processes of their adoption and application) may shed light on the content of customary international law.[321] Clearly expressed treaty provisions may offer particularly convenient evidence as to the existence or content of rules of customary international law when they are found to be declaratory of such rules. The reference to a "rule set forth in a treaty" seeks to indicate that a rule may not necessarily be contained in a single treaty provision, but could be reflected by two or more provisions read

[319] Once the General Assembly has taken action in relation to a final draft of the Commission, such as by commending and annexing it to a resolution, the output of the Commission may also fall to be considered under draft conclusion 12.

[320] *Continental Shelf* (see footnote 255 above), at pp. 29-30, para. 27 ("It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them"). Article 38 of the 1969 Vienna Convention refers to the possibility of "a rule set forth in a treaty … becoming binding upon a third State as a customary rule of international law, recognized as such".

[321] See *Jurisdictional Immunities of the State* (footnote 255 above), at p. 128, para. 66; "Ways and means for making the evidence of customary international law more readily available", *Yearbook … 1950*, vol. II, document A/1316, Part II, p. 368, para. 29 ("not infrequently conventional formulation by certain States of a practice also followed by other States is relied upon in efforts to establish the existence of a rule of customary international law. Even multipartite conventions signed but not brought into force are frequently regarded as having value as evidence of customary international law").

together.[322] Either way, the words "may reflect" caution that, in and of themselves, treaties cannot create customary international law or conclusively attest to it.

(3) The extent of participation in a treaty may be an important factor in determining whether it corresponds to customary international law; treaties that have obtained near-universal acceptance may be seen as particularly indicative in this respect.[323] But treaties that are not yet in force or which have not yet attained widespread participation may also be influential in certain circumstances, particularly where they were adopted without opposition or by an overwhelming majority of States.[324]

(4) Paragraph 1 sets out three circumstances in which rules set forth in a treaty may be found to reflect customary international law, distinguished by the time when the rule of customary international law was (or began to be) formed. The words "if it is established that" make it clear that establishing whether a conventional rule does in fact correspond to an alleged rule of customary international law cannot be done just by looking at the text of the treaty; in each case the existence of the rule must be confirmed by practice (and acceptance as law). It is important that States can be shown to engage in the practice not (solely) because of the treaty obligation, but out of a conviction that the rule embodied in the treaty is or has become customary international law.[325]

(5) Subparagraph (a) concerns the situation where it is established that a rule set forth in a treaty is declaratory of a pre-existing rule of customary international law.[326] In inquiring whether this is the case with respect to an alleged rule of customary international law, regard should first be had to the treaty text, which may contain an express statement on the

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[322] It may also be the case that a single provision is only partly declaratory of customary international law.

[323] See, for example, Eritrea-Ethiopia Claims Commission, *Partial Award: Prisoners of War, Ethiopia's Claim 4*, 1 July 2003, United Nations, *Reports of International Arbitral Awards*, vol. XXVI (Sales No. E/F.06.V.7), pp. 73-114, at pp. 86-87, para. 31 ("Certainly, there are important, modern authorities for the proposition that the Geneva Conventions of 1949 have largely become expressions of customary international law, and both Parties to this case agree. The mere fact that they have obtained nearly universal acceptance supports this conclusion" (footnote omitted)); *Prosecutor v. Sam Hinga Norman* (see footnote 258 above) at paras. 17-20 (referring, *inter alia*, to the "huge acceptance, the highest acceptance of all international conventions" as indicating that the relevant provisions of the Convention on the Rights of the Child had come to reflect customary international law); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 47, para. 94 ("The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject").

[324] See, for example, *Continental Shelf* (footnote 255 above), at p. 30, para. 27 ("it cannot be denied that the 1982 Convention [on the Law of the Sea — which was not then in force] is of major importance, having been adopted by an overwhelming majority of States; hence it is clearly the duty of the Court, even independently of the references made to the Convention by the Parties, to consider in what degree any of its relevant provisions are binding upon the Parties as a rule of customary international law").

[325] In the *North Sea Continental Shelf* cases, this consideration led to the disqualification of several of the invoked instances of State practice (*North Sea Continental Shelf* (see footnote 254 above), at p. 43, para. 76).

[326] See, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of the International Court of Justice, 3 February 2015, para. 87.

matter.[327] The fact that reservations are expressly permitted to a treaty provision may be significant, but does not necessarily indicate whether or not the provision reflects customary international law.[328] Such indications within the text are, however, rare, or tend to refer to the treaty in general rather than to specific rules contained therein;[329] in such a case, or when the treaty is silent, resort may be had to the treaty's preparatory work (*travaux préparatoires*),[330] including any statements by States in the course of the drafting process that may disclose an intention to codify an existing rule of customary international law. If it is found that the negotiating States had indeed considered that the rule in question was a rule of customary international law, this would be evidence of acceptance as law (*opinio juris*), which would carry greater weight in the identification of the customary rule the larger the number of negotiating States. There would, however, still remain a need to consider whether sufficiently widespread and representative, as well as consistent, instances of the relevant practice supported the rule; this is not only because the fact that the parties

[327] In the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (United Nations, *Treaties Series*, vol. 78, No. 1021, p. 277), for example, the Parties "*confirm* that genocide, whether committed in time of peace or in time of war, is a crime under international law" (art. 1) (emphasis added); and the 1958 Geneva Convention on the High Seas contains the following preambular paragraph: "*Desiring* to codify the rules of international law relating to the high seas" (*ibid*., vol. 450, No. 6465, at p. 82). A treaty may equally indicate that it embodies progressive development rather than codification; in the *Colombian-Peruvian asylum case*, for example, the International Court of Justice found that the preamble to the Montevideo Convention on Rights and duties of States of 1933 (League of Nations, *Treaty Series*, vol. CLXV, No. 3802, p. 19), which states that it modifies a previous convention (and the limited number of States that have ratified it), runs counter to the argument that the Convention "merely codified principles which were already recognized by … custom" (*Colombian-Peruvian asylum case* (see footnote 257 above), at p. 277).

[328] See also the Commission's Guide to Practice on Reservations to Treaties, guidelines 3.1.5.3 (Reservations to a provision reflecting a customary rule) and 4.4.2 (Absence of effect on rights and obligations under customary international law), *Official Records of the General Assembly, Sixty-sixth session, Supplement No. 10* (A/66/10 and Add.1).

[329] The 1930 Convention on Certain Questions relating to the Conflict of Nationality Laws (League of Nations, *Treaty Series*, vol. CLXXIX, No. 4137, p. 89), for example, provides that: "The inclusion of the above-mentioned principles and rules in the Convention shall in no way be deemed to prejudice the question whether they do or do not already form part of international law" (art. 18). Sometimes a general reference is made to both codification and development: in the 1969 Vienna Convention, for example, the States parties express in the preamble their belief that "codification and progressive development of the law of treaties [are] achieved in the present Convention"; in the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (General Assembly resolution 59/38 of 2 December 2004), the States parties consider in the preamble "that the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law" and express their belief that the Convention "would contribute to the codification and development of international law and the harmonization of practice in this area".

[330] In examining in the *North Sea Continental Shelf* cases whether article 6 of the 1958 Convention on the Continental Shelf (United Nations, *Treaty Series*, vol. 499, No. 7302, p. 311) reflected customary international law when the Convention was drawn up, the International Court of Justice held that: "The status of the rule in the Convention therefore depends mainly on the processes that led the [International Law] Commission to propose it. These processes have already been reviewed in connection with the Danish-Netherlands contention of an *a priori* necessity for equidistance, and the Court considers this review sufficient for present purposes also, in order to show that the principle of equidistance, as it now figures in Article 6 of the Convention, was proposed by the Commission with considerable hesitation, somewhat on an experimental basis, at most *de lege ferenda*, and not at all *de lege lata* or as an emerging rule of customary international law. This is clearly not the sort of foundation on which Article 6 of the Convention could be said to have reflected or crystallized such a rule" (*North Sea Continental Shelf* (see footnote 254 above), at p. 38, para. 62). See also *Jurisdictional Immunities of the State* (footnote 255 above), at pp. 138-139, para. 89.

assert that the treaty is declaratory of existing law is (so far it concerns third parties) no more than one piece of evidence to this effect, but also because the customary rule underlying a treaty text may have changed or been superseded since the conclusion of the treaty. In other words, relevant practice will need to confirm, or exist in conjunction with, the *opinio juris*.

(6) Subparagraph (b) deals with the case where it is established that a general practice that is accepted as law (accompanied by *opinio juris*) has crystallized around a treaty rule elaborated on the basis of only a limited amount of State practice. In other words, the treaty rule has consolidated and given further definition to a rule of customary international law that was only emerging at the time when the treaty was being drawn up, thereby later becoming reflective of it.[331] Here, too, establishing that this is indeed the case requires an evaluation of whether the treaty formulation has been accepted as law and does in fact find support in a general practice.[332]

(7) Subparagraph (c) concerns the case where it is established that a rule set forth in a treaty has generated a new rule of customary international law.[333] This is a process that is not lightly to be regarded as having occurred. As the International Court of Justice explained in the *North Sea Continental Shelf* cases, for it to be established that a rule set forth in a treaty has produced the effect that a rule of customary international law has come into being:

> "It would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm creating character such as could be regarded as forming the basis of a general rule of law. … [A]n indispensable requirement would [then] be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; — and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved".[334]

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[331] Even where a treaty provision could not eventually be agreed, it remains possible that customary international law has later evolved "through the practice of States on the basis of the debates and near-agreements at the Conference [where a treaty was negotiated]": *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 23, para. 52.

[332] See, for example, *Continental Shelf* (footnote 255 above), at p. 33, para. 34 ("It is in the Court's view incontestable that … the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown *by the practice of States* to have become a part of customary law" (emphasis added)).

[333] As the International Court of Justice confirmed, "this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed" (*North Sea Continental Shelf* (see footnote 254 above), at p. 41, para. 71). One example may be found in The Hague Regulations annexed to the 1907 Fourth Hague Convention respecting the Laws and Customs of War on Land: although these were prepared, according to the Convention, "to revise the general laws and customs of war" existing at that time (and thus did not codify existing customary international law), they later came to be regarded as reflecting customary international law (see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 172, para. 89).

[334] *North Sea Continental Shelf* (see footnote 254 above), at pp. 41-42 and 43, paras. 72 and 74 (cautioning, at para. 71, that "this result is not lightly to be regarded as having been attained"). See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 246 above), at p. 98, para. 184 ("Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The

In other words, a general practice accepted as law (accompanied by *opinio juris*) "in the sense of the provision invoked" must be observed. Given that the concordant behaviour of parties to the treaty among themselves could presumably be attributed to the treaty obligation, rather than to acceptance of the rule in question as binding under customary international law, the practice of such parties in relation to non-parties to the treaty, and of non-parties in relation to parties or among themselves, will have particular value.

(8) Paragraph 2 seeks to caution that the existence of similar provisions in a considerable number of bilateral or other treaties, thus establishing similar rights and obligations for a broad array of States, does not necessarily indicate that a rule of customary international law is reflected in such provisions. While it may indeed be the case that such repetition attests to the existence of a corresponding rule of customary international law (or has given rise to it), it "could equally show the contrary" in the sense that States enter into treaties because of the absence of any rule or in order to derogate from it.[335] Again, an investigation into whether there are instances of practice accepted as law (accompanied by *opinio juris*) that support the written rule is required.

Conclusion 12
Resolutions of international organizations and intergovernmental conferences

1. A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.

2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for establishing the existence and content of a rule of customary international law, or contribute to its development.

3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).

Commentary

(1) Draft conclusion 12 concerns the role that resolutions adopted by international organizations or at intergovernmental conferences may play in the determination of rules of customary international law. It provides that, while such resolutions, of themselves, can neither constitute rules of customary international law nor serve as conclusive evidence of their existence and content, they may sometimes have value in providing evidence of existing or emerging law.[336]

Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice").

[335] See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 582, at p. 615, para. 90 ("The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary").

[336] See *Legality of the Threat or Use of Nuclear Weapons* (footnote 258 above), at pp. 254-255, para 70; *SEDCO Incorporated v. National Iranian Oil Company and Iran*, second interlocutory award, Award No. ITL 59-129-3 of 27 March 1986, *International Law Reports*, vol. 84, pp. 483-592, at p. 526.

(2) As in draft conclusion 6, the term "resolutions" refers to all resolutions, decisions and other acts adopted by international organizations or at intergovernmental conferences, whatever their designation[337] and whether or not they are legally binding. Special attention is paid in the present context to resolutions of the General Assembly, a plenary organ of near universal participation that may afford a convenient means to examine the collective opinions of its members. Resolutions adopted by organs or at conferences with more limited membership may also be relevant, although their weight in identifying a rule of (general) customary international law is likely to be less.

(3) Although the resolutions of organs of international organizations are acts of those organs, in the context of the present draft conclusion what matters is that they may reflect the collective expression of the views of States members of such organs: when they purport (explicitly or implicitly) to touch upon legal matters, they may afford an insight into the attitudes of their members respecting such matters. Much of what has been said of treaties in draft conclusion 11 applies to resolutions; however, unlike treaties, resolutions are normally not legally binding documents, for the most part do not seek to embody legal rights and obligations, and generally receive much less legal review than proposed treaty texts. Like treaties, resolutions cannot be a substitute for the task of ascertaining whether there is in fact a general practice that is accepted as law (accompanied by *opinio juris*).

(4) Paragraph 1 makes clear that resolutions adopted by international organizations or at intergovernmental conferences cannot independently constitute rules of customary international law. In other words, the mere adoption of a resolution (or a series of resolutions) purporting to lay down a rule of customary international law does not create such law: it has to be established that the rule set forth in the resolution does in fact correspond to a general practice that is accepted as law (accompanied by *opinio juris*). There is no "instant custom" arising out of such resolutions on their own account.

(5) Paragraph 2 states, first, that resolutions may nevertheless assist in the determination of rules of customary international law by providing evidence of their existence and content. As the International Court of Justice observed in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, resolutions "even if they are not binding … can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*".[338] This is particularly so when a resolution purports to be declaratory of an existing rule of customary international law, in which case it may serve as evidence of the acceptance as law of such a rule by those States supporting the resolution. In other words, "[t]he effect of consent to the text of such resolutions … may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution".[339] Conversely, negative votes, abstentions or disassociations from a consensus, along with general statements and explanations of positions, may be evidence that there is no acceptance as law, and thus that there is no rule.

(6) Because the attitude of States towards a given resolution (or a particular rule set forth in a resolution), expressed by vote or otherwise, is often motivated by political or other non-legal considerations, ascertaining acceptance as law (*opinio juris*) from such

[337] There is a wide range of designations, such as "declaration" or "declaration of principles".

[338] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 258 above), at pp. 254-255, para. 70 (referring to General Assembly resolutions).

[339] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 246 above), at p. 100, para. 188. See also *The Government of the State of Kuwait v. The American Independent Oil Company (AMINOIL)*, Final Award of 24 March 1982, *International Law Reports*, vol. 66, pp. 518-627, at pp. 601-602, para. 143.

resolutions must be done "with all due caution".[340] This is denoted by the word "may". In each case, a careful assessment of various factors is required in order to verify whether indeed the States concerned intended to acknowledge the existence of a rule of customary international law. As the International Court of Justice indicated in the *Legality of the Threat or Use of Nuclear Weapons* case:

> "it is necessary to look at [the resolution's] content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule."[341]

The precise wording used is the starting point in seeking to evaluate the legal significance of a resolution; reference to international law, and the choice (or avoidance) of particular terms in the text, including the preambular as well as the operative language, may be significant.[342] Also relevant are the debates and negotiations leading up to the adoption of the resolution and especially explanations of vote, explanations of position and similar statements given immediately before or after adoption.[343] The degree of support for the resolution (as may be observed in the size of the majority and number of the negative votes or abstentions) is critical. Differences of opinion expressed on aspects of a resolution may indicate that no general acceptance as law (*opinio juris*) exists, at least on those aspects, and resolutions opposed by a substantial number of States are unlikely to be regarded as reflecting customary international law.[344]

(7) Paragraph 2 further acknowledges that resolutions adopted by international organizations or at intergovernmental conferences, even when devoid of legal force of their own, may sometimes play an important role in the development of customary international law. This may be the case when, as with treaty provisions, a resolution (or a series of resolutions) provides inspiration and impetus for the growth of a general practice accepted as law (accompanied by *opinio juris*) conforming to its terms, or when it crystallizes an emerging rule.

(8) Paragraph 3, as a logical consequence of paragraphs 1 and 2, clarifies that provisions of resolutions adopted by an international organization or at an intergovernmental conference cannot in and of themselves serve as conclusive evidence of the existence and content of rules of customary international law. This follows from the indication that, for the existence of a rule the *opinio juris* of States, as evidenced by a resolution, must be borne out by practice; other evidence is thus required, in particular to show whether the alleged rule is in fact observed in the practice of States.[345] A provision of a resolution cannot be

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[340] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 246 above), at p. 99, para. 188.

[341] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 258 above), at p. 255, para. 70.

[342] In resolution 96 (I) of 11 December 1946, for example, the General Assembly "*Affirm[ed]* that genocide is a crime under international law", language that suggests that the paragraph is declaratory of existing customary international law.

[343] In the General Assembly, explanations of vote are often given upon adoption by a main committee, in which case they are not usually repeated in the plenary.

[344] See, for example, *Legality of the Threat or Use of Nuclear Weapons* (see footnote 258 above), at p. 255, para. 71 ("several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons").

[345] See, for example, *KAING Guek Eav alias Duch*, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgment, Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber (3 February 2012), para. 194 ("The 1975 Declaration on Torture [resolution 3452 (XXX) of 9 December 1975,

evidence of a rule of customary international law if actual practice is absent, different or inconsistent.

Conclusion 13
Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.

2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules.

Commentary

(1) Draft conclusion 13 concerns the role of decisions of courts and tribunals, both international and national, as an aid in the identification of rules of customary international law. It should be noted that decisions of national courts may serve a dual role in the identification of customary international law. On the one hand, as draft conclusions 6 and 10 indicate, they may rank as practice and/or evidence of acceptance as law (*opinio juris*) of the forum State. Draft conclusion 13, on the other hand, indicates that such decisions may also serve as a subsidiary means for the determination of rules of customary international law when they themselves investigate the existence and content of such rules.

(2) Draft conclusion 13 follows closely the language of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice, according to which judicial decisions are a "subsidiary means" (*moyen auxiliaire*) for the determination of rules of international law, including rules of customary international law. The term "subsidiary means" denotes the ancillary role of such decisions in elucidating the law, rather than being themselves a source of international law, like treaties, customary international law or general principles of law. The use of the term "subsidiary means" is not intended to suggest that such decisions are not important in practice.

(3) Decisions of courts and tribunals on questions of international law, in particular those decisions in which the existence of rules of customary international law is considered and such rules are identified and applied, may offer valuable guidance for determining the existence or otherwise of rules of customary international law. The value of such decisions varies greatly, however, depending both on the quality of the reasoning of each decision (including the extent to which it is founded upon a close examination of evidence of an alleged general practice accepted as law) and on the reception of the decision by States and by other courts. Other considerations might, depending on the circumstances, include the composition of the court or tribunal (and the particular expertise of its members); the size of the majority by which the decision was adopted; and the conditions under which the court or tribunal operates/conducts its work. It needs to be remembered, moreover, that judicial pronouncements on the state of customary international law do not freeze the development

Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] is a non-binding General Assembly resolution and thus more evidence is required to find that the definition of torture found therein reflected customary international law at the relevant time").

of the law; rules of customary international law may have evolved since the date of a particular decision.[346]

(4) Paragraph 1 refers to "international courts and tribunals", a term intended to cover any international body exercising judicial powers that is called upon to consider rules of customary international law. Express mention is made of the International Court of Justice, the principal judicial organ of the United Nations whose Statute is an integral part of the United Nations Charter and whose members are elected by the General Assembly and Security Council, in recognition of the significance of its case law and its particular authority as the only standing international court of general jurisdiction.[347] In addition to the International Court of Justice's predecessor, the Permanent Court of International Justice, the term "international courts and tribunals" includes (but is not limited to) specialist and regional courts, such as the International Tribunal for the Law of the Sea, the International Criminal Court and other international criminal tribunals, regional human rights courts and the World Trade Organization Appellate Body. It also includes inter-State arbitral tribunals and other arbitral tribunals applying international law. The skills and the breadth of evidence usually at the disposal of international courts and tribunals lend significant weight to their decisions, subject to the considerations mentioned in the preceding paragraph.

(5) For the purposes of this draft conclusion, the term "decisions" includes judgments and advisory opinions, as well as orders on procedural and interlocutory matters. Separate and dissenting opinions may shed light on the decision and may discuss points not covered in the decision of the court or tribunal; but they need to be approached with caution since they may only reflect the viewpoint of the individual judge or set out points not accepted by the court or tribunal.

(6) Paragraph 2 concerns decisions of national courts (also referred to as domestic or municipal courts).[348] The distinction between international and national courts is not always clear-cut; as used in these conclusions, the term "national courts" also applies to courts with an international composition operating within one or more domestic legal systems, such as hybrid courts and tribunals involving mixed national and international composition and jurisdiction.

(7) Some caution is called for when seeking to rely on decisions of national courts as a subsidiary means for the determination of rules of customary international law. This is reflected in the different wording of paragraphs 1 and 2, in particular the use of the words "[r]egard may be had, as appropriate" in paragraph 2. Judgments of international tribunals are generally accorded more weight than those of national courts for the present purpose, since the former are likely to have greater expertise in international law and are less likely to reflect a particular national perspective. Also, it has to be borne in mind that national courts operate within a particular legal system, which may incorporate international law

[346] Decisions of international courts and tribunals thus cannot be said to be conclusive evidence for the identification of rules of international law in this respect either.

[347] Although there is no hierarchy of international courts and tribunals, decisions of the International Court of Justice are often regarded as persuasive by other courts and tribunals. See, for example, European Court of Human Rights, *Jones and Others v. the United Kingdom*, nos. 34356/06 and 40528/06, ECHR 2014, para. 198; *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, *ITLOS Reports 1999*, p. 10, at paras. 133-134; *Japan — Taxes on Alcoholic Beverages*, WTO Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, adopted on 1 November 1996, sect. D.

[348] On decisions of national courts being a subsidiary means for the determination of rules of customary international see also, for example, International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as "Pavo", Hazim Delić, Esad Landžo also known as "Zenga"*, Case No. IT-96-21-T, Judgment of 16 November 1998, at para. 414.

only in a particular way and to a limited extent. Unlike international courts, national courts may lack international law expertise and may have reached their decisions without the benefit of hearing argument by States.[349]

Conclusion 14
Teachings

Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law.

Commentary

(1) Draft conclusion 14 concerns the role of teachings (in French, *doctrine*) in the identification of rules of customary international law. Following closely the language of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice, it provides that such works may be resorted to as a subsidiary means (*moyen auxiliaire*) for determining rules of customary international law, that is to say, when ascertaining whether there is a general practice that is accepted as law (accompanied by *opinio juris*). The term "teachings", often referred to as "writings", is to be understood in a broad sense; it includes teachings in non-written form, such as lectures and audiovisual materials.

(2) As with decisions of courts and tribunals, referred to in draft conclusion 13, writings are not themselves a source of customary international law, but may offer guidance for the determination of the existence and content of rules of customary international law. This auxiliary role recognizes the value that they may have in collecting and assessing State practice; in identifying divergences in State practice and the possible absence or development of rules; and in evaluating the law.

(3) There is a need for caution when drawing upon writings, since their value for determining the existence of a rule of customary international law varies; this is reflected in the words "may serve as". First, writers may aim not merely to record the state of the law as it is (*lex lata*) but also to advocate its development (*lex ferenda*). In doing so, they do not always distinguish clearly between the law as it is and the law as they would like it to be. Second, writings may reflect the national or other individual positions of their authors. Third, they differ greatly in quality. Assessing the authority of a given work is thus essential; the United States Supreme Court in the *Paquete Habana Case* referred to:

> "the works of jurists and commentators who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."[350]

(4) The term "publicists", which comes from the Statute of the International Court of Justice, covers all those whose scholarly work may elucidate questions of international law. While most of these will in the nature of things be specialists in public international law, others are not excluded. The reference to "the most highly qualified" publicists emphasizes that attention ought to be paid to the writings of those who are eminent in the field. In the final analysis, however, it is the quality of the particular writing that matters rather than the reputation of the author; among the factors to be considered in this regard are the approach

[349] See also "Ways and means for making the evidence of customary international law more readily available", *Yearbook … 1950*, vol. II, document A/1316, Part II, p. 370, para. 53.

[350] *The Paquete Habana and The Lola*, US Supreme Court 175 US 677 (1900), at p. 700. See also *The Case of the S.S. "Lotus"* (footnote 250 above), at pp. 26 and 31.

adopted by the author to the identification of customary international law and the extent to which his or her text remains loyal to it. The reference to publicists "of the various nations" highlights the importance of having regard, so far as possible, to writings representative of the principal legal systems and regions of the world and in various languages.

(5) The products of international bodies engaged in the codification and development of international law may provide a useful resource in this regard. Such collective bodies include the Institute of International Law (Institut de droit international) and the International Law Association, as well as international expert bodies in particular fields. The value of each output needs to be carefully assessed in the light of the mandate and expertise of the body concerned, the care and objectivity with which it works on a particular issue, the support a particular output enjoys within the body and the reception of the output by States.

Part Six
Persistent objector

Part Six comprises a single draft conclusion on the persistent objector.

Conclusion 15
Persistent objector

1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.

2. The objection must be clearly expressed, made known to other States, and maintained persistently.

Commentary

(1) Rules of customary international law, "by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour".[351] Nevertheless, when a State that has persistently objected to an *emerging* rule of customary international law, and maintains its objection after the rule has crystallized, that rule is not opposable to it. This is sometimes referred to as the persistent objector "rule" or "doctrine" and not infrequently arises in connection with the identification of rules of customary international law.

(2) The persistent objector is to be distinguished from a situation where the objection of a substantial number of States to the formation of a new rule of customary international law prevents its crystallization altogether (because there is no general practice accepted as law),[352] and its application is subject to stringent requirements.

[351] *North Sea Continental Shelf* (see footnote 254 above), at pp. 38-39, para. 63. This is true of rules of "general" customary international law, as opposed to "particular" customary international law (see draft conclusion 16, below).

[352] See, for example, *Entscheidungen des Bundesverfassungsgerichts* (German Federal Constitutional Court), vol. 46 (1978), judgment of 13 December 1977, 2 BvM 1/76, No. 32, pp. 342-404, at pp. 388-389, para. 6 ("This concerns not merely action that a State can successfully uphold from the outset against application of an existing general rule of international law by way of perseverant protestation of rights (in the sense of the ruling of the International Court of Justice in the Norwegian *Fisheries case* (see footnote 289 above), p. 131); instead, the existence of a corresponding general rule of international law cannot at present be assumed").

(3) A State objecting to an emerging rule of customary international law by arguing against it or engaging in an alternative practice may adopt one or both of two stances: it may seek to prevent the rule from coming into being; and/or it may aim to ensure that, if it does emerge, the rule will not be opposable to it. An example would be the opposition of certain States to the emerging rule permitting the establishment of a maximum 12-mile territorial sea. Such States may have wished to consolidate a three-, four- or six-mile territorial sea as a general rule, but in any event were not prepared to have wider territorial seas enforced against them.[353] If a rule of customary international law is found to have emerged, the onus of establishing the right to benefit from persistent objector status lies with the objecting State.

(4) The persistent objector rule is quite frequently invoked and recognized, both in international and domestic case law[354] as well as in other contexts.[355] While there are differing views, the persistent objector rule is widely accepted by States and writers as well as by scientific bodies engaged in international law.[356]

(5) Paragraph 1 makes it clear that the objection must have been made while the rule in question was in the process of formation. The timeliness of the objection is critical: the State must express its opposition before a given practice has crystallized into a rule of customary international law and its position will be more assured if it did so at the earliest possible moment. While the line between objection and violation may not always be an easy one to draw, there is no such thing as a subsequent objector rule: once the rule has come into being, an objection will not avail a State wishing to exempt itself.

(6) If a State establishes itself as a persistent objector, the rule is inapplicable against it for so long as it maintains the objection; the expression "not opposable" is used in order to reflect the exceptional position of the persistent objector. As the paragraph further

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[353] In due course, and as part of an overall package on the law of the sea, States did not in fact maintain their objections. While the ability of effectively preserving a persistent objector status over time may sometimes prove difficult, this does not call into question the existence of the rule.

[354] See, for example, the *Fisheries case* (footnote 289 above), at p. 131; *Michael Domingues v. United States*, Case No. 12.285 (2002), Inter-American Commission on Human Rights, Report No. 62/02, paras. 48 and 49; *Sabeh El Leil v. France* [GC], no. 34869/05, European Court of Human Rights, 29 June 2011, para. 54; WTO Panel Reports, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R and WT/DS293/R, adopted 21 November 2006, at p. 335, footnote 248; *Siderman de Blake v. Republic of Argentina*, United States Court of Appeals for the Ninth Circuit, 965 F.2d 699; 1992 U.S. App., at p. 715, para. 54.

[355] See, for example, the intervention by Turkey in 1982 at the Third United Nations Conference on the Law of the Sea, document A/CONF.62/SR.189, p. 76, para. 150 (available at http://legal.un.org/diplomaticconferences/lawofthesea-1982/Vol17.html); United States Department of Defense, *Law of War Manual*, Office of General Counsel, Washington D.C., June 2015, at pp. 29-34, sect. 1.8 (Customary international law), in particular at p. 30, para. 1.8 ("Customary international law is generally binding on all States, but States that have been persistent objectors to a customary international law rule during its development are not bound by that rule") and p. 34, para. 1.8.4; *Republic of Mauritius v. United Kingdom of Great Britain and Northern Ireland* (Arbitration under Annex VII of the 1982 United Nations Convention on the Law of the Sea), Reply of the Republic of Mauritius, vol. 1 (18 November 2013), p. 124, para. 5.11.

[356] The Commission itself recently referred to the rule in its Guide to Practice on Reservations to Treaties, where it stated that "a reservation may be the means by which a 'persistent objector' manifests the persistence of its objection; the objector may certainly reject the application, through a treaty, of a rule which cannot be invoked against it under general international law" (see para. (7) of the commentary to guideline 3.1.5.3, *Official Records of the General Assembly, Sixty-sixth session, Supplement No. 10* (A/66/10/Add.1)).

indicates, once an objection is abandoned (as it may be at any time, expressly or otherwise), the State in question is bound by the rule.

(7) Paragraph 2 clarifies the stringent requirements that must be met for a State to establish and maintain persistent objector status *vis-à-vis* a rule of customary international law. In addition to being made before the practice crystallizes into a rule of law, the objection must be clearly expressed, meaning that non-acceptance of the emerging rule or the intention not to be bound by it must be unambiguous.[357] There is, however, no requirement that the objection be made in a particular form. In particular, a clear verbal objection, either in written or oral form, as opposed to physical action, will suffice to preserve the legal position of the objecting State.

(8) The requirement that the objection be made known to other States means that the objection must be communicated internationally; it cannot simply be voiced internally. The onus is on the objecting State to ensure that the objection is indeed made known to other States.

(9) The requirement that the objection be maintained persistently applies both before and after the rule of customary international law has emerged. Assessing whether this requirement has been met needs to be done in a pragmatic manner, bearing in mind the circumstances of each case. The requirement signifies, first, that the objection should be reiterated when the circumstances are such that a restatement is called for (that is, in circumstances where silence or inaction may reasonably lead to the conclusion that the State has given up its objection). This could be, for example, at a conference attended by the objecting State at which the rule is reaffirmed. States cannot, however, be expected to react on every occasion, especially where their position is already well known. Second, such repeated objections must be consistent overall, that is, without significant contradictions.

(10) The inclusion of draft conclusion 15 in the present draft conclusions is without prejudice to any issues of *jus cogens*.

Part Seven
Particular customary international law

Part Seven consists of a single draft conclusion, dealing with particular customary international law (sometimes referred to as "regional custom" or "special custom"). While rules of general customary international law are binding on all States, rules of particular customary international law apply among a limited number of States. Even though they are not frequently encountered, they can play a significant role in inter-State relations, accommodating differing interests and values peculiar to only some States.[358]

Conclusion 16
Particular customary international law

1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.

[357] See, for example, *C v. Director of Immigration and another*, Hong Kong Court of Appeal [2011] HKCA 159, CACV 132-137/2008 (2011), at para. 68 ("Evidence of objection must be clear").

[358] It is not to be excluded that such rules may evolve, over time, into rules of general customary international law.

2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*).

Commentary

(1) That rules of customary international law that are not general in nature may exist is undisputed. The jurisprudence of the International Court of Justice confirms this, having referred to, *inter alia*, customary international law "particular to the Inter-American Legal system"[359] or "limited in its impact to the African continent as it has previously been to Spanish America",[360] "a local custom"[361] and customary international law "of a regional nature".[362] Cases where the identification of such rules was considered include the *Colombian-Peruvian asylum case*[363] and the *Case concerning Right of Passage over Indian Territory*.[364] The term "particular customary international law" refers to these rules in contrast to rules of customary international law of general application. It is used in preference to "particular custom" to emphasize that the draft conclusion is concerned with rules of law, not mere customs or usages; there may indeed be "local customs" among States that do not amount to rules of international law.[365]

(2) Draft conclusion 16 has been placed at the end of the set of draft conclusions since the preceding draft conclusions generally apply also in respect of the determination of rules of particular customary international law, except as otherwise provided in the present draft conclusion. In particular, the two-element approach applies, as described in the present commentary.[366]

(3) Paragraph 1, definitional in nature, explains that particular customary international law applies only among a limited number of States. It is to be distinguished from general customary international law, that is, customary international law that in principle applies to all States. A rule of particular customary international law itself thus creates neither obligations nor rights for third States.[367]

(4) Rules of particular customary international law may apply among various types of groupings of States. Reference is often made to customary rules of a regional nature, such as those "peculiar to Latin-American States" (the institution of diplomatic asylum being a common example).[368] Particular customary international law may cover a smaller geographical area, such as a sub-region, or even bind as few as two States. Such a custom was at issue in the *Right of Passage* case, where the International Court of Justice held that:

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[359] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 246 above), at p. 105, para. 199.

[360] *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, at p. 565, para. 21.

[361] *Case concerning rights of nationals of the United States of America in Morocco* (see footnote 268 above), at p. 200; *Case concerning Right of Passage over Indian Territory* (see footnote 258 above), at p. 39.

[362] *Dispute regarding Navigational and Related Rights* (footnote 266 above), at p. 233, para. 34.

[363] *Colombian-Peruvian asylum case* (see footnote 257 above).

[364] *Case concerning Right of Passage over Indian Territory* (see footnote 258 above).

[365] See also draft conclusion 9, para. 2, above.

[366] The International Court of Justice has treated particular customary international law as falling within Article 38, paragraph 1 (b), of its Statute: see *Colombian-Peruvian asylum case* (footnote 257 above), at p. 276.

[367] The position is similar to that set out in the provisions of the 1969 Vienna Convention concerning treaties and third States (Part III, sect. 4).

[368] *Colombian-Peruvian asylum case* (see footnote 257 above), at p. 276.

> "It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States."[369]

Cases in which assertions of such particular customary international law have been examined have concerned, for example, a right of access to enclaves in foreign territory;[370] a co-ownership (condominium) of historic waters by three coastal States;[371] a right to subsistence fishing by nationals inhabiting a river bank serving as a border between two riparian States;[372] a right of cross-border/international transit free from immigration formalities;[373] and an obligation to reach agreement in administering the generation of power on a river constituting a border between two States.[374]

(5) While a measure of geographical affinity usually exists between the States among which a rule of particular customary international law applies, that may not always be necessary. The expression "whether regional, local or other" is intended to acknowledge that although particular customary international law is mostly regional, sub-regional or local, there is no reason in principle why a rule of particular customary international law should not also develop among States linked by a common cause, interest or activity other than their geographical position, or constituting a community of interest, whether established by treaty or otherwise.

(6) Paragraph 2 addresses the substantive requirements for identifying a rule of particular customary international law. In essence, determining whether such a rule exists consists of a search for a general practice prevailing among the States concerned that is accepted by them as governing their relations. The International Court of Justice in the *Colombian-Peruvian asylum* case provided guidance on this matter, holding with respect to Colombia's argument as to the existence of a "regional or local custom particular to Latin-American States" that:

> "The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law'."[375]

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369 *Case concerning Right of Passage over Indian Territory* (see footnote 258 above), at p. 39.

370 *Ibid*., p. 6.

371 See the claim by Honduras in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment of 11 September 1992*, p. 351, at p. 597, para. 399.

372 *Dispute regarding Navigational and Related Rights* (footnote 266 above), at pp. 265-266, paras. 140-144; see also Judge Sepúlveda-Amor's Separate Opinion, at pp. 278-282, paras. 20-36.

373 *Nkondo v. Minister of Police and Another*, South African Supreme Court, 1980 (2) SA 894 (O), 7 March 1980, *International Law Reports*, vol. 82, pp. 358-375, at pp. 368-375 (Smuts J. holding that: "There was no evidence of long standing practice between the Republic of South Africa and Lesotho which had crystallized into a local customary right of transit free from immigration formalities" (at p. 359)).

374 *Kraftwerk Reckingen AG v. Canton of Zurich and others*, Appeal Judgment, BGE 129 II 114, ILDC 346 (CH 2002), 10 October 2002, Switzerland, Federal Supreme Court [BGer]; Public Law Chamber II, para. 4.

375 *Colombian-Peruvian asylum case* (see footnote 257 above), at pp. 276-277.

(7) The two-element approach requiring both a general practice and its acceptance as law (*opinio juris*) thus also applies in the case of identifying rules of particular customary international law. In the case of particular customary international law, however, the practice must be general in the sense that it is a consistent practice "among the States concerned", that is, all the States among which the rule in question applies. Each of these States must have accepted the practice as law among themselves. In this respect, the application of the two-element approach is stricter in the case of rules of particular customary international law.

Bijlage III

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