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Identification of customary international law

Comments and observations received from Governments

Contents

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I. Introduction

1. At its sixty-eighth session, held in 2016, the International Law Commission adopted, on first reading, the draft conclusions on identification of customary international law.[1] In accordance with articles 16 to 21 of its statute, the Commission decided to transmit the draft conclusions, 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.[2] The Secretary-General circulated a note dated 17 January 2017 transmitting the draft conclusions on identification of customary international law, with commentaries thereto, to Governments and inviting their comments and observations in accordance with the request of the Commission.

2. By its resolution 71/140 of 13 December 2016 and 72/116 of 7 December 2017, the General Assembly drew the attention of Governments to the importance for the Commission of having their comments and observations on the draft conclusions by 1 January 2018.

3. As of 13 February 2018, written comments had been received from Austria (22 January 2018), Belarus (12 January 2018), China (26 December 2017), the Czech Republic (3 January 2018), Denmark (on behalf of the Nordic countries: Denmark Finland, Iceland, Norway, and Sweden) (22 December 2017), El Salvador (18 December 2017), Israel (18 January 2018), the Netherlands (23 January 2018), New Zealand (20 December 2017), the Republic of Korea (10 January 2018), Singapore (28 December 2017) and the United States of America (5 January 2018).

4. The comments and observations received from Governments are reproduced below, organized thematically as follows: general comments and observations; comments on specific draft conclusions; and comments on the final form of the draft conclusions.[3]

II. General comments and observations

Austria

[Original: English]

Austria regrets that neither the draft conclusions nor the commentary discuss the significance of the second aspect of the subjective constitutive element of customary international law, the *opinio necessitatis*. The term "*sive*" in "*opinio iuris sive necessitatis*" has a disjunctive function which gives the *necessitas* a separate status. Doctrine has shown that certain, otherwise unlawful conduct of States was considered to be politically, economically or morally necessary. The commentary should address the question of the separate function of the "*opinio necessitatis*".

Belarus

[Original: Russian]

International custom has traditionally been a primary source of international law and continues to be of value to this day. Rules of customary international law fill the

[1] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), para. 57.

[2] *Ibid*., para. 60.

[3] In each of the sections below, comments and observations received are arranged by States, which are listed in English alphabetical order.

legal vacuum in areas that are not regulated by international treaties and ensure the harmonious, systematic and non-contradictory application of treaty rules.

The following issues should be considered when working on this topic:

– Customary rules;

– Main sources used to determine the existence of such rules;

– Main (or "constituent", to use the wording of draft conclusion 2) elements of a rule of customary international law: a general practice (characterized by widespread and consistent application over a long time) and its acceptance as law (*opinio juris*);

– Formation of rules of customary international law in the past;

– Formation of the rules of customary international law today, including the effect of information and communications technology, decisions of international organizations and international courts and tribunals, and international treaty practice;

– Identification of the subjects whose practice could lead to the formation of a custom or the establishment of general, regional and local customary rules.

The Commission will undoubtedly make a substantial contribution to the theory of international law through its examination of the topic. Nonetheless, the main objective of this work must be to assist States and other subjects of international law in identifying the rules of customary international law.

A study of the Commission's work would reveal the range of tools it has used over the years to identify rules of customary law and analyse the process of their formation and evolution. Only the International Court of Justice has comparable institutional memory and experience in this area, and its practice should also be carefully studied.

Belarus supports the Commission's decision not to identify rules of *jus cogens* as a separate category for the present topic. To the extent that those rules represent international custom, they are formed and identified in the same way as any other rules of customary international law. The specific features of those rules will be studied in the context of the relevant topic.

Denmark (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

We agree with the overall scope of the draft conclusions, namely that they are limited to identification of customary international law, and without focus on the relationship to other sources of international law or jus cogens.

El Salvador

[Original: Spanish]

In this connection, it should be borne in mind that — as stated by the Special Rapporteur in the analysis of this topic — the manner in which customary international law is applied is a function of the internal law of States. Therefore, this report will first address the following: (i) particularities of the Salvadoran legal system; and (ii) recognition of customary international law on the basis of the jurisprudence of the national courts of El Salvador; followed by (iii) comments on the draft conclusions adopted on first reading by the Commission (see A/CN.4/L.872).

(i) The nature of the Salvadoran legal system

The Salvadoran legal system is not defined as a system of common law. Rather, it is based on the system of statutory law, under which rules are first drafted by legislators, in keeping with the principle of legal certainty enshrined in article 1 of the Constitution of the Republic.

In other words, the domestic legal framework is made up of a body of rules produced by the different sources operating therein, among which custom is not a primary source of domestic law.

However, there are specific areas in which its use is expressly permitted, such as private, social or commercial law. One example of this is the regulation contained in article 2 of the Civil Code, which provides that custom does not constitute law, unless a piece of legislation so states.

In any event, owing to the nature of the Salvadoran legal system, there is no other more explicit pronouncement on the formation and binding nature of legal custom; notwithstanding that fact, the importance and binding nature of customary international law has been recognized in the jurisprudence of such courts as the Constitutional Chamber of the Supreme Court of Justice.

(ii) Recognition of customary international law on the basis of the jurisprudence of the national courts of El Salvador

As stated above, in its recent jurisprudence the Constitutional Chamber of the Supreme Court of Justice recognized customary international law and its effects in binding the Salvadoran State with regard to various obligations under such law.

One example was the ruling of 1 August 2016 on unconstitutionality proceeding No. 73-2013, in which, referring to the provisions of the United Nations Convention on the Law of the Sea of 1982, the Chamber held that: “the accepted concepts, contained in the Convention, which has been appropriately called the constitution of the oceans … **are already considered in the literature and by courts and tribunals to be universally valid customary international law**. The Convention has contributed considerably to the progressive development and codification of public international law, and to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or landlocked.”

Furthermore, in other areas, the aforementioned Chamber has also expressed its recognition of the universal validity inherent in rules of customary international law. For example, in ruling No. 44–2013/145–2013, of 13 July 2016, the Chamber found that: “the ‘fundamental guarantees’ of ‘humane treatment’, … in order to ensure the protection of life and other fundamental rights of the civilian population and specially protected persons in the context of internal armed conflict, **constitute obligations stemming from a peremptory norm of customary international law** and international humanitarian law in force during the Salvadoran armed conflict”.

Ultimately, despite the fact that the nature of the Salvadoran legal system has not allowed the development of more extensive jurisprudence on custom and its formation, the opinion of the aforementioned Constitutional Chamber nonetheless sets out important considerations concerning the universal value of customary international law and the scope of its obligations.

Israel

[Original: English]

Israel attributes great importance to the adoption of a thorough and rigorous approach to the identification of customary norms, and appreciates the work on the formulation of a set of practical conclusions and commentary towards this end.

Along these lines, Israel wishes to make a number of non-exhaustive comments regarding the draft conclusions as follows.

National acts and statements, as evidence of State practice and opinio juris*: finality of acts*

Current text: The current text does not include an explicit requirement that acts be final and conclusive for them to serve as a potential source of customary international law.

Comments:

– As a general comment, we believe that the draft conclusions and their commentary should clarify that acts (laws, judgements etc.) must be final and conclusive in order to qualify as evidence of customary international law.

– We would not want the Commission to imply that non-definitive acts (such as bills and provisional measures) could possibly point to the existence of customary international law.

Suggested amendments:

– We suggest that, where relevant, the draft conclusions include a clarification that practice and *opinio juris* must be based on **final, definitive** and **conclusive** acts.

Netherlands

[Original: English]

The Kingdom of the Netherlands considers this an important topic, given that this is a key aspect of the use of the sources of international law. The work of the Commission could contribute in significant ways to the development of practice.

The draft conclusions and the related commentary frequently refer to the identification or determination of the "existence and content" of customary international law. It does not become clear whether the process for identifying the existence of a rule is the same as the process for determining the content of that rule. In our view, this is not necessarily the case. For example, in the identification of the content of a particular rule, any underlying principles of international law may need to be taken into account in accordance with draft conclusion 3, paragraph 1, whereas this may not be the case when identifying the existence of the rule. We suggest it would be helpful to make this explicit in the commentary.

New Zealand

[Original: English]

The draft conclusions can be expected to be a helpful reference point for practitioners and others called upon to identify and apply norms of customary international law.

New Zealand supports the description of the Commission's work as "conclusions". New Zealand considers that the draft conclusions are best understood

as representing the outcome of the Commission's own analysis and consideration. As such they will be a useful practical guide but do not themselves have a normative character. In New Zealand's view some aspects of the draft conclusions can be considered to be progressive development, rather than codification, and this should be reflected more clearly in the accompanying commentaries. For example, New Zealand considers draft conclusion 4, paragraph 2, to go beyond the codification of settled law, and notes in this respect the absence of judicial authority in the commentary to this provision.

New Zealand appreciates the Commission's efforts to make the draft conclusions concise and accessible. That is no easy task. At times, however, the desire to keep the draft conclusions brief and not overly prescriptive has resulted in general statements that do not always provide clear guidance. New Zealand understands that the draft conclusions are expected to be read together with their commentaries. But the text of the draft conclusions should still be capable of standing alone. There are a number of occasions in which the commentaries contain significant qualifications to the general language of the draft conclusions. In New Zealand's view these elements should also be included in the text of the draft conclusions themselves.

Republic of Korea

[Original: English]

The Government of the Republic of Korea assesses that the draft conclusions are well organized overall, properly reflecting the current state of international law on the topic.

The draft conclusions are expected to provide authoritative guidelines on the identification and confirmation of customary international law to practitioners in various domestic legal forums. In order for these conclusions to serve as more effective guidelines, a proper balance is required between the clarity of rules and the inherent flexibility of customary international law.

Singapore

[Original: English]

Singapore is of the view that the Commission's final output will be of valuable practical guidance for States, international courts and tribunals and practitioners.

As a preliminary remark on the draft conclusions, we note the Commission's decision not to include a separate draft conclusion on its own output.[4] However, we read with interest the Commission's commentary concerning the circumstances when the Commission's output can have value in identifying the existence of a rule of customary international law, or the lack thereof. Singapore views the Commission's treatment of its own output as timely in the light of increasing attention to its so-called "non-legislative codifications".[5] With the seventieth anniversary of the Commission approaching in 2018, Singapore looks forward to further discussions on this important issue, whether in the context of the Commission's work on the present topic or otherwise.

[4] See paragraph (2) of the accompanying commentary to Part Five of the draft conclusions.

[5] See Fernando Lusa Bordin, "Reflections of customary international law: the authority of Codification Conventions and ILC draft articles in international law", *International and Comparative Law Quarterly*, vol. 63 (2014), p. 535; see also Natalie Y. Morris-Sharma, "The ILC's draft articles before the 69th session of the UNGA: a reawakening?", *Asian Journal of International Law*, vol. 7 (2017), p. 1.

United States of America

[Original: English]

The United States believes that identifying whether a rule has become customary international law requires a rigorous analysis to determine whether the strict requirements for formation — a general and consistent practice of States followed by them out of a sense of legal obligation — are met. Although there is no precise formula to indicate how widespread and consistent a practice must be, the State practice must generally be extensive and virtually uniform, including among States particularly involved in the relevant activity (i.e., specially affected States). This high threshold required to establish that a particular rule is customary international law is important to all aspects of analysing or otherwise identifying customary international law.

Against this background, we agree with many of the propositions in the draft conclusions and commentaries. The Commission and its Special Rapporteur have produced an impressive draft that is already contributing to a better understanding of the formation and identification of customary international law. However, the United States continues to have serious concerns regarding certain issues addressed in the draft conclusions and commentaries. We are particularly concerned about draft conclusions and commentaries that we believe go beyond the current state of international law such that the result is best understood as proposals for progressive development on those issues. Although recommendations regarding progressive development are appropriate in some Commission topics, we believe that they are not well suited to this project, whose purpose and primary value, as we understand it, is to provide non experts in international law, such as national court judges, with an easily understandable guide to the established legal framework regarding the identification of customary international law. [6] Mixing elements of progressive development and established rules in this project risks confusing and misleading readers and undermining the utility, authority, and credibility of the final product. We therefore recommend revising the conclusions and commentaries to focus exclusively on sound, existing legal methodology, and in particular not to depart from established standards on the formation of customary international law. To the extent that the Commission wishes to include recommendations with regard to progressive development in its conclusions and commentary on this topic, we believe it is essential that such recommendations be clearly identified as such and distinguished from elements that reflect the established state of the law or that reflect existing legal methodology.

We take this opportunity to address the most significant of our concerns regarding the draft conclusions and commentaries. We note that our failure to comment on any particular aspect of the commentaries should not be taken as agreement of the United States with it.

[6] The United States agrees with the Special Rapporteur's statement in his first report that "the Commission should aim to describe the current state of international law on the formation and evidence of rules of customary international law, without prejudice to developments that might occur in the future." First report on formation and evidence of customary international law (A/CN.4/663), para. 16.

III. Specific comments on the draft conclusions

A. Part Two — Basic approach

1. Draft conclusion 2 — Two constituent elements

Belarus

[Original: Russian]

We share the view that the specific nature of the formation and evidence of the existence of custom in various areas of international law needs to be studied using the standard two-element approach to the identification of the constituent elements of international custom (the practice of States and *opinio juris*; draft conclusion 2). Ultimately, this will help to identify general trends in the formation and evidence of the existence of rules of customary international law.

Israel

[Original: English]

Applying the two-element approach

Current text:

– Paragraph (2) of the commentary to draft conclusion 2 states: "The identification of such a [customary] rule thus involves a close examination of available evidence to establish their presence in any given case".

– Paragraph (5) of the commentary to draft conclusion 2 states: "*The two-element approach does not in fact preclude a measure of deduction …*".

Comments and suggested amendments:

– With respect to paragraph (2) of the commentary to draft conclusion 2, we believe that given that the draft conclusion set out to provide practice guidelines for the identification of customary international law, it is important to clarify that this process must be **exhaustive, empirical, and objective**, as well as caution against a non-systematic or casual approach in ascertaining whether there is a general practice accepted as law. Accordingly, we recommend referring explicitly to the standard of thoroughness required by amending paragraph (2) of the commentary to draft conclusion 2 so as to read: "The identification of such a rule thus involves an *exhaustive, empirical and objective* examination of available evidence to establish their presence in any given case".

– With respect to paragraph (5) of the commentary to draft conclusion 2, we are concerned that the use of the term deduction will be seen as undermining the empirical nature of the examination process of customary international law. Accordingly, we propose omitting the last sentence of this paragraph, i.e. deleting the text: "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*), or when concluding that possible rules of international law form part of an 'indivisible regime'."

[See also the comments below on draft conclusion 3 and the comment below on draft conclusion 14].

United States of America

[Original: English]

The United States agrees that the two-element approach "does not … preclude a measure of deduction", as stated in paragraph (5) of the commentary to draft conclusion 2. However, we are concerned that that paragraph does not adequately define the circumstances in which deductive reasoning is appropriate and when it would run afoul of the rule in draft conclusion 2 that — to determine the existence of a customary rule — it is necessary to ascertain whether there is a general practice that is accepted as law. We recommend revising paragraph (5) to emphasize that a deductive approach must be used with caution to avoid identifying purported rules as customary international law that do not result from a general and consistent practice of States followed by them out of a sense of legal obligation.

We also believe that the final phrase of paragraph (5), referring to the concept of an "indivisible regime", should be deleted. Although the International Court of Justice used the term in the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* judgment to describe the unique interplay of three provisions of the United Nations Convention on the Law of the Sea, the Court does not suggest that the concept is generally applicable (or define the criteria for its application). Nor is there any basis in State practice that we are aware of that would support the suggestion that "indivisible regimes" are an exception to the requirements of a general practice that is accepted as law.

Practice of international organizations

[See also the comment below on draft conclusion 4.]

The same point should be clarified in draft conclusion 2, which would read:

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 <u>of States</u> that is accepted as law (*opinio juris*).

Corresponding changes need to be made in the commentary.

2. Draft conclusion 3 — Assessment of evidence for the two constituent elements

Belarus

[See the comment below on draft conclusion 8.]

China

[Original: Chinese]

First, paragraphs 1 and 2 of draft conclusion 3 stipulate respectively that, with regard to the identification of a rule of customary international law, consideration must be given to the overall context, the nature of the rule and the particular circumstances, and that the two constituent elements, namely State practice and *opinio juris*, must be separately ascertained. China has no objection in this regard. Considering, however, that customary international law is an important source of international law, generally speaking, a rigorous and systematic approach should be applied to carefully identify relevant rules. China recommends that a third paragraph

be added to draft conclusion 3 stipulating that, in the identification of customary international law, a rigorous and systematic approach shall be applied.

Denmark (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

We appreciate and support the elaborated comments on the nature and function of the second constituent element "acceptance as law" (*opinio juris*). Even though there may be instances, where the same evidence may be used to ascertain both practice and *opinio juris* ("intertwined in fact"), there is still a requirement to separately assess the evidence for each of these two constituent elements, as now explicitly stated in draft conclusion 3. As noted, *opinio juris* is to be distinguished from other extralegal motives for action, such as comity, political expediency or convenience, as practice solely motivated by such considerations will not amount to rules of customary international law. Therefore, the context of practice must be analysed, taking all relevant aspects into consideration.

Israel

[Original: English]

A cumulative requirement of practice and opinio juris

Current text: When defining the *opinio juris* to be reviewed in order to identify a customary rule, paragraph (7) of the commentary to draft conclusion 3 states that *opinio juris* will be sought not only with respect to those taking part in the practice, but also with respect to those who are "in a position to react to it".

Comments:

– General opinions offered by States who have *no practice* with regard to the rule in question are not relevant to the customary international law identification process. If *opinio juris* is expressed on a theoretical level only, it is inadmissible for identifying customary rules, as custom only emerges following sufficient practice coupled, in each instance, with *opinio juris* by the State engaged in that practice.

Suggested amendment:

– We would like to suggest deleting the text referred to in paragraph (7) of the commentary to draft conclusion 3 on this matter and clarifying instead that *opinio juris* concerning a certain rule is relevant only when it follows a practice by the same State.

National acts and statements, as evidence of State practice and opinio juris: *authorized representatives of the State*

Current text: The current draft conclusions and their commentary, when discussing the weight to be attributed to statements of representatives of States, lack clear criteria for ascertaining whether such persons or statements were authorized or made in an official capacity. Furthermore, paragraph (5) of the commentary to draft conclusion 3 stipulates that "[s]tatements made casually, or in the heat of the moment, will usually carry **less weight** than those that are carefully considered" [emphasis added].

Comments:

– In our view, the current text, when dealing with the weight to be attributed to statements delivered by State representatives, does not fully consider the issue of proper authorization of State officials.

– The current wording of paragraph (5) of the commentary to draft conclusion 3 does not entirely rule out that casual, unauthorized statements or statements made in the heat of the moment could be considered as practice or *opinio juris*, but rather proposes that they merely carry less weight. We believe that such casual or spontaneous statements made by officials cannot be used to establish State practice or *opinio juris* for the purposes of identification of customary international law and should not be given any weight in this regard. Such statements, by their very nature, cannot be said to reflect the considered view of the State which is necessary for the purpose of identifying customary international law and as such should not be part of a customary international law analysis.

Suggested amendments:

– We believe that the Commission should make clear that statements of State's representatives should be attributed to the State only if they were properly authorized and made in an official capacity. Those statements should be accorded weight while taking into account the relevant context and the circumstances in which they were made.

– In addition, we would like the commentary edited to reflect that casual, spontaneous or "in the heat of the moment" statements made by State officials are insufficient for the purposes of identification of customary international law and should not be given any weight in this regard.

Applying the two-element approach

Current text: Several paragraphs of the commentary to draft conclusion 3 refer, respectively, to applying the two-element approach with "necessary flexibility" (para. (2)), taking into account "underlying principles of international law" (para. (3)), "adjusting" evidence consulted to the situation (para. (3)), and that the "nature of the rule" is relevant in considering "different types" of evidence for the two-element approach (para. 4).

Comments and suggested amendments:

– With respect to paragraphs (2), (3) and (4) to the commentary to draft conclusion 3 mentioned above, we believe the drafting is not sufficiently precise and, in particular, may be misread to dilute the thoroughness and rigour required in applying the two-element approach to identify the existence of a customary rule, which applies equally to all fields of international law. Thus, we propose deleting the words "necessary flexibility" in paragraph (2), and amending paragraph (3) to read that the type of evidence consulted should be "reviewed", rather than "adjusted ... in light of the particular circumstances of the situation". In addition, with respect to the reference to "underlying principles of international law" in paragraph (3), we would note that such principles maybe relevant to determining the *content or scope* of an examined rule (as in the *Jurisdictional Immunities of the State* case, cited in the footnote 265 of the commentary), but not to the actual identification of the *existence* of a customary rule (i.e. evidence of practice and *opinio juris*). Accordingly, we recommend omitting the sentence referring to underlying principles from paragraph (3).

– Finally, with respect to paragraph (4), while we accept that the nature of a rule is relevant when considering different types of evidence, we believe this notion is only relevant with respect to prohibitive rules where evidence of inaction rather than action may be needed. We propose amending the paragraph accordingly to specify and limit its relevance to a rule that is prohibitive in nature.

[See also the comment above on draft conclusion 2 and the comment below on draft conclusion 14].

Netherlands

[Original: English]

Paragraph (4) of the commentary to draft conclusion 3 states that "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". Insofar as this statement refers to prohibitive rules that already exist, we are of the view that the wording "affirmative State practice" is preferable over "positive State practice". We note that such affirmative State practice may include condemnation by a State of conduct of another State that is considered to be in breach of an existing rule of customary international law.

[See also the comment above under general comments.]

B. Part Three — A general practice

1. Draft conclusion 4 — Requirement of practice

Austria

[Original: English]

Austria would like to draw particular attention to the role of international organizations in the formation of customary international law.

In Austria's view, the present text of the draft conclusions does not sufficiently reflect the growing participation of universal as well as regional international organizations in international relations and therefore also in the formation of customary international law. The draft conclusions refer to the practice of international organizations only in a very restricted way insofar as draft conclusion 4, paragraph 2, states: "In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law."

The activities of international organizations are indispensable for the smooth development of international relations and even for the relations among States, and States often depend on these activities. International organizations even act in areas formerly reserved to States, with the result that in certain cases acts formerly performed by States and constituting the practice relevant for the formation of customary international law are now performed by international organizations. This shift concerns primarily, but not only, international organizations to which States have conferred sovereign rights, as in the particular case of supranational organizations.

The activities of international organizations performed within their powers and attributable to them may be considered as practice having an impact on the formation of customary international law. They are carried out not only in areas of international law which only concern international organizations, but also in relation to rules

applicable to both international organizations and States where the activities of both have common features. Rules developed on the basis of such practice of international organizations are not only applicable to international organizations but also to States. This applies for instance to operations of a military character. During such operations, international organizations apply international humanitarian law and are able to contribute to the formation of new rules of customary international law in this area if their activities are accompanied by *opinio iuris*. Similar considerations apply e.g. to the administration of territories by international organizations or to the functions exercised by the International Committee of the Red Cross (ICRC) under its international mandate. There is no reason to assume that rules resulting from practice to which international organizations or ICRC have contributed would not become rules of customary international law, applicable to both States and international organizations.

However, the draft conclusions do not reflect this role of the international organizations. For this reason, the introductory wording "in certain cases" contained in draft conclusion 4, paragraph 2, should be further elaborated, since the present wording does not provide guidance to determine the situations in which the practice of international organizations has an impact on the formation of customary international law.

Belarus

[Original: Russian]

State practice as it relates to the formation of international custom (draft conclusion 4, paragraph 1) must be understood as referring to action and inaction by States, including in the context of international organizations.

In paragraph (6) of the commentary to draft conclusion 4, it should be stated clearly whether the acts of international organizations are functionally equivalent to those of States. The acts of international intergovernmental organizations, for purposes of identification of rules of customary international law, should be considered only to the extent that they relate to the practice of States acting within those organizations, mainly within their representative organs, not their secretariats, treaty bodies and the like.

It would be worth including a detailed definition of the term "international organization", to allow the draft conclusions to be used without reference to other sources.

It would be valuable to examine the extent to which the practice of States acting within international organizations affects the formation of customary international law (while keeping in mind the views set out in the literature regarding the "artificiality" of such practice). The specific nature and legal consequences of "tacit acceptance" by a State of practice that is formed within international organizations, including when the constituent instruments of those organizations are subject to "dynamic interpretation" by other States or by secretariats, need to be studied further.

Denmark (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

Turning to the role of international organizations and the value of their resolutions: we share the view, as expressed in draft conclusion 4, that in certain instances the practice of international organizations can contribute to the formation, or be the expression, of rules of customary international law. That is particularly the

case in instances where such organizations have been granted powers by member States to exercise competence on their behalf.

Israel

[Original: English]

States as primary actors of customary international law

Current text: Draft conclusion 4, paragraph 2, stipulates that "[in] certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law".

Comments:

– As a rule, international law, including customary international law, is **created almost exclusively by States**. Therefore, generally speaking, no practice or *opinio juris* of other entities, such as international organizations, should serve as the basis for the identification of customary international law.

– While we think that this principle, as well as the primacy of the role of States in relation to the role of international organizations, are properly explained in the commentary to the draft conclusions, the draft conclusions themselves, and particularly draft conclusion 4, do not always adequately reflect this important distinction.

– Given the importance of avoiding the impression that the practice of international organizations can serve as the basis for identifying customary international law in a more general sense, we believe that draft conclusion 4 itself should express the fact that it deals with more limited situations related to practice attributed to international organizations themselves and not to the member States acting within them.

Suggested amendments:

– In the light of the above, we suggest clarifying *in the body* of draft conclusion 4 that while international organizations may, in certain circumstances, serve as relevant actors to identify customary international law, this applies only with respect to practice attributed to the international organizations themselves (rather than the States comprising them) and in limited situations:

  • **International organizations' internal operation** — International organizations can contribute to the formation and expression of customary international law in matters pertaining to their internal operation (such as their internal governance) and in certain circumstances in matters relating to the relations of international organizations with States (but not regarding matters that are ultimately under the exclusive authority of States, such as immunities provided in accordance with national law). In these situations, the duty-bearers of such customary international law may be only international organizations and not States.

  • **The transfer of exclusive competence to international organizations by their member States** — International organizations' practice and *opinio juris* can contribute to the identification of customary international law regarding matters over which they exercise exclusive competence explicitly delegated to them by member States (such as the European Union), as is clarified in the commentary to draft conclusion 4.

Netherlands

[Original: English]

We cannot but note that the role of international organizations in relation to the formation and identification of international law has been a controversial issue in the drafting of the conclusions on this topic. In our view, international organizations can and do play such a role in their own right. We therefore welcome the inclusion of draft conclusion 4, paragraph 2, which reflects this. The possibility for international organizations to contribute to the formation, or expression, of customary international law is a consequence of their status as international legal persons, separate from their member States.

Draft conclusion 4, paragraph 2, limits the role that practice of international organizations plays in the formation or expression of rules of customary international law to "certain cases". The commentary suggests that these cases are (exclusively): (*a*) where member States have transferred exclusive competences to the international organization, or (*b*) 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.

If it is the separate international legal personality of an international organization that determines whether that organization can play a role in the formation and identification of international law, it is unclear why this role should be limited to these two cases. The legal basis for such a limitation remains unclear. It suggests a view of international organizations as mere agents of States rather than as international actors in their own right, and calls into question the idea of international legal personality of such organizations.

As a general matter, the current draft conclusion and commentary leave open a number of questions concerning the role of international organizations in the formation and expression of customary international law. We suggest to develop this further in the commentary. In particular, it would be helpful if the question of how to distinguish practice of the organization from practice of States within the organization would be addressed, as well as how to identify *opinio iuris* of international organizations.

Paragraph (8) of the commentary to this draft conclusion states that "[a]s 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". We propose deleting this sentence, because it does not adequately reflect the fact that this paragraph deals with the practice of international organizations with an international legal personality separate from that of their member States. This separate legal personality stands in the way of taking into account the number of member States when weighing the practice of an international organization. We do, however, agree with the commentary that a relevant factor in weighing the practice of an international organization is the nature of that organization, in particular whether the organization is of a universal character or not.

New Zealand

[Original: English]

Draft conclusion 4, paragraphs 1 and 2: the practice of international organizations

New Zealand has some hesitations about draft conclusions 4, paragraphs 1 and 2, and their relationship to draft conclusion 12.

Draft conclusion 4, paragraph 1, provides that it is "primarily" the practice of States that contributes to the formation, or expression, of rules of customary international law. As noted in the accompanying commentary, the word "primarily" indicates that it is not exclusively State practice that is relevant and directs the reader to draft conclusion 4, paragraph 2. Draft conclusion 4, paragraph 2, in turn provides that "in certain circumstances" the practice of international organizations also contributes to the formation, or expression, or rules of customary international law.

New Zealand considers that there is no difficulty with the proposition that the practice of States within an international organization can contribute to the formation of customary international law. It also is comfortable with the proposition in draft conclusion 12 that resolutions or decisions taken by international organizations may be referred to as evidence to identify the existence or content of a customary international law rule.

New Zealand is cautious, however, about the proposition in draft conclusion 4, paragraph 2, that the practice of an international organization itself may contribute to the formation of customary international law. New Zealand considers that the conceptual basis for that proposition has not been clearly articulated in the draft conclusion or its commentary. The Special Rapporteur's reports identify a number of differing justifications from academic commentators without providing a clear indication as to which is preferred. While New Zealand recognizes the particular situation of the European Union, it is cautious about attempts to identify general conclusions from that limited example.

In the absence of a clear conceptual underpinning it is very difficult to identify the "certain circumstances" in which draft conclusion 4, paragraph 2, would apply. Those identified in the commentary appear to include both:

(*a*) circumstances where the practice of an international organization is carried out on behalf of its member States, including through the transfer of exclusive competence;[7] and, at the other end of the spectrum;

(*b*) circumstances where an international organization acts independently in the exercise of its operational functions.[8]

Further, the factors articulated in paragraph (8) of the commentary are difficult to align with the treatment of resolutions adopted by international organizations in draft conclusion 12. Is a decision of the Security Council expressed in a resolution: the aggregated practice of its member States within the Council contributing to the formation of a rule of customary international law under draft conclusion 4, paragraph 1; the practice of the United Nations contributing to the formation of a rule of customary international law under draft conclusion 4, paragraph 2; or simply evidence of the existence of such a rule under draft conclusion 12?

New Zealand considers that further consideration should be given to this aspect of the draft conclusions. In New Zealand's view, draft conclusion 4, paragraph 2, should be retained only if the "certain circumstances" in which the practice of an

[7] Commentary, paras. (5) and (8).

[8] Commentary, paras. (6), (7) and (8).

international organization may contribute to the formation of customary international law are articulated more clearly in the text of the draft conclusion itself. In this regard, New Zealand notes, in particular, its view that the practice of an international organization cannot contribute to the formation of a rule of customary international law unless: it is authorized by that organization's legal functions and powers; has been generally accepted over time by the organization's member States; and the rule of customary international law is one to which the international organization itself would be bound.

Draft conclusion 4, paragraph 3: the practice of non-State actors

New Zealand agrees with the conclusion regarding the practice of non-State actors expressed in draft conclusion 4, paragraph 3, as discussed in paragraphs (9) and (10) of the Commentary.

[See also the comment above under general comments.]

Singapore

[Original: English]

Singapore agrees with the overarching principle that "it is primarily the practice of States that contributes to the formation, or expression, of rules of customary international law".[9] Consequently, Singapore also agrees that the conduct of non-State actors, such as non-governmental organizations, transnational corporations and private individuals, is not practice that contributes to the formation, or expression of rules of customary international law.[10]

However, the reference to "[i]n certain cases" in draft conclusion 4, paragraph 2, should be revised to state "[i]n limited cases". The expression "limited cases" would more accurately reflect the Commission's description of the circumstances in which the practice of international organizations can contribute to the formation or expression of rules of customary international law.[11]

The commentaries should also emphasize that the reason the practice of an international organization can contribute to customary international law in such limited cases is that, in these cases, the practice of international organizations *reflects the practice of States*. This emphasis would be consistent with the statement in draft conclusion 4, paragraph 1.

As regards paragraph (10) of the commentary, Singapore does not disagree with the general position stated therein. However, given the intended generality of application of the draft conclusions, the Commission may wish to consider referring to the statements and publications of ICRC in the context of paragraph (9) of the commentary.

United States of America

[Original: English]

Practice of international organizations

The United States believes that draft conclusion 4 (Requirement of practice) is an inaccurate statement of the current state of the law to the extent that it suggests that the practice of entities other than States contributes to the formation of customary

[9] See draft conclusion 4, paragraph 1.
[10] See draft conclusion 4, paragraph 3.
[11] See paragraphs (5) to (8) of the accompanying commentary to draft conclusion 4.

international law. In particular, the statement in paragraph 1 that "it is *primarily* the practice of States that contributes to the formation, or expression, of rules of customary international law" (emphasis added) inaccurately suggests that entities other than States contribute to the formation of customary international law in the same way as States. In addition, the statement in paragraph 2 that "[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law" inaccurately suggests that international organizations may contribute to the formation of customary international law in the same way as States.

It is axiomatic that customary international law results from the general and consistent practice of *States* followed by them out of a sense of legal obligation. This basic requirement has long been reflected in the jurisprudence of the International Court of Justice.[12] It is also reflected in the practice of States in their own statements about the elements required to establish the existence of a customary international law rule.[13]

Draft conclusion 4 deviates from this established understanding of the practice requirement by asserting that the practice of international organizations — as distinct from the practice of member States that constitute those international organizations — may, in some cases, similarly contribute to the formation of customary international law. There is no similar support for this proposition either in the practice and *opinio juris* of States or in other authoritative sources, and the commentary to draft conclusion 4 cites none.[14] To the contrary, a number of States have explicitly rejected this proposition in their statements before the General Assembly's Sixth Committee,

[12] See, e.g. *Colombian-Peruvian asylum case, Judgment of November 20th, 1950. I.C.J. Reports 1950*, p. 266, at pp. 276–277; *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 42–43, paras. 73–74; *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. 97-98, paras. 183–186; *Jurisdictional Immunities of the State (Germany* v. *Italy, Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at pp. 122-123, para. 55, p. 143, para 101.

[13] See, e.g., John B. Bellinger, III and William J. Haynes II, "A US Government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*", *International Review of the Red Cross*, vol. 89, No. 866 (2007), p. 444; Trans-Pacific Partnership Agreement, Auckland, 4 February 4, 2016, Annex 9 A ("The Parties confirm their shared understanding that 'customary international law' generally and as specifically referenced in Article 9.6 (Minimum Standard of Treatment) results from a general and consistent practice of States that they follow from a sense of legal obligation.") (reflecting the agreed views of Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam); Dominican Republic Central America United States Free Trade Agreement, Washington, D.C., 5 August 2004, Annex 10 B (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, United States); United States Morocco Free Trade Agreement, Washington, D.C., 15 June 2004, Annex 10 A; Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, Mar del Plata, 4 November 2005, Annex A; United States Oman Free Trade Agreement, Washington, D.C., 19 January 2006, Annex 10 A; United States Colombia Trade Promotion Agreement, Washington, D.C., 22 November 2006, Annex 10 A; United States Panama Trade Promotion Agreement, Washington, D.C., 28 June 2007, Annex 10 A; United States South Korea Free Trade Agreement, Washington, 30 June 2007, Annex 11 A; Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, Kigali, 19 February 2008, Annex A.

[14] Indeed, the only cases the commentary cites on this issue underscore that it is the practice of States from which customary international law is derived. *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 p. 97, para. 183, and *Jurisdictional Immunities of the State (Germany* v. *Italy, Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 143, para. 101.

and others have expressed doubts or seem only to support a role for certain international organizations.[15]

Accordingly, the claim in the draft conclusion with regard to a direct role for the practice of international organizations as such in the formation of customary international law can only be understood as a proposal by the Commission for the progressive development of international law. As noted above, we believe that such proposals are inappropriate to this project, whose principal value is to distill and clarify existing law for non-experts in international law, including judges and practitioners at the national level. If these claims are nonetheless retained, we believe it is essential that they be clearly identified as proposals for progressive development to avoid giving readers the misimpression that they are intended to reflect the established state of the law as it currently exists.

However, even if understood as a proposal for the progressive development of customary international law, the United States does not believe that the statements in draft conclusion 4 suggesting a direct role for international organizations in the development of customary international law are sufficiently explained and developed to provide a meaningful basis on which States could assess their merits. In this regard, we have concerns in at least five respects.

The first way in which the proposition that the practice of international organizations contributes to the formation and expression of customary international law is not adequately developed concerns when it is that such contributions occur. Draft conclusion 4, paragraph 2, states that "[i]n certain cases" the practice of international organizations contributes to the formation, or expression, of rules of customary international law. Yet neither the draft conclusion nor the commentary fully defines what those cases are. Rather, the commentary states that where States have transferred exclusive competences to an international organization, the practice of the organization "most clearly" counts; when States have only conferred powers that are functionally equivalent to those of States, the organization's practice "may" count "in certain [undefined] cases;" and where States have done neither, the organization's practice is "unlikely" to be relevant. However, even when States provide broad State like powers or exclusive competences to an international organization, it is rarely, if ever, with the express authorization that the organization exercise the powers of the member States to generate practice for the purpose of customary international law. Since the mandates of international organizations are generally carefully negotiated in treaties, we would be concerned by a novel interpretation of international law that would implicitly and retroactively expand the mandates of international organizations in this unclear way. Moreover, we note that the commentary does not cite any legal support for the commentary's approach to any of the three categories of practice by international organizations discussed.

The second way in which the proposition is not adequately developed is that the draft conclusions and commentary fail to address how one would determine the *opinio juris* of an international organization. If the practice of an international organization ever directly contributed to the formation or expression of customary international law, it would only be when the international organization engages in the practice out of a sense that it has the legal obligation to do so. See draft conclusion 9. The question that arises is how to determine whether an international organization has the requisite

[15] See, e.g., 2016 statements by Israel (A/C.6/71/SR.22, para. 39), Mexico (ibid., para. 22), and the Russian Federation (A/C.6/71/SR.21, para. 49); 2015 and 2016 statements by Argentina (A/C.6/70/SR.23, para. 70 and A/C.6/71/SR.22, para. 75); 2014 statement by Malaysia (A/C.6/69/SR.27, para. 44), and 2014 statement by Norway on behalf of the Nordic countries (A/C.6/69/SR.25, para. 130). See also the statement of the European Union (A/C.6/71/SR.20, para 45).

opinio juris. Is it the *opinio juris* of the secretary-general (or equivalent), the secretariat, all member States, or a subset thereof? This crucial question is not addressed in the draft conclusions or commentary, and as noted above, is not, in our experience, addressed expressly in the mandates of international organizations.

The third way in which the proposition is not adequately developed is the failure to articulate the types of conduct by international organizations that might constitute practice for the purpose of draft conclusion 4. International organizations are very different from States in that they are created by and composed of States and do not have distinct branches of government. Therefore, the forms of State practice discussed in draft conclusion 6 do not all have clear analogues in the activities of international organizations.

The fourth way in which the proposition is not adequately developed concerns the consequences for a traditional analysis of saying that the practice of some or all international organizations contributes to the creation or expression of customary international law. One implication is that in some circumstances the practice of international organizations may contribute in such a way that the conclusion would be that a customary international rule exists when an analysis of the practice and *opinio juris* of States alone would say that the rule has not attained the status of custom. The reverse might also be true, i.e., the practice and *opinio juris* of States might dictate that a certain act is a requirement of customary international law, but contrary practice by international organizations would preclude that conclusion. The United States does not believe that support exists for either of these important implications of the proposition set forth in draft conclusion 4, paragraph 2.

The fifth way in which the proposition is not adequately developed is the failure to consider the precise range of practice deemed relevant in conducting a customary international law analysis. The practice of *all* States is relevant to whether there is a general and consistent State practice, and the task of analysing State practice is made easier since they number fewer than 200. By contrast, the Commission's text has paid no attention to how such an approach would operate with respect to international organizations. Indeed, we believe that the Commission's approach unnecessarily confuses matters by implying that every time one engages in an analysis of the existence of a rule of customary international law, it is necessary to analyse not just State practice, but the practice of hundreds if not thousands of international organizations with widely varying competences and mandates.

Finally, the United States believes that the discussion in paragraph (8) of the commentary demonstrates why the better approach is to recognize that it is the practice of States within international organizations that is the practice (with *opinio juris*) that contributes to the formation and expression of custom, not the practice of the international organization as such. That paragraph argues that, in weighing the practice of an international organization, one should consider the number of member States and their reaction to the practice of the international organization plus whether the organization's practice is carried out on behalf of the member States, whether the members States have endorsed the practice, and whether the practice is consonant with that of member States. In other words, one should look through the international organization to its member States to see how to value the practice of the international organization. We believe that, as the discussion in paragraph (8) suggests, what is really of relevance is the practice and *opinio juris* of the member States themselves, not the practice of the international organization.

For the above reasons, we believe draft conclusion 4 should be revised as follows:

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.~~

2. Conduct of other actors, such as international organizations, 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~~.

Corresponding changes need to be made in the commentary.

We also note here our recommended changes to paragraph (10) of the commentary to draft conclusion 4, which discusses the role of ICRC. Although we support the important role of ICRC provided in the 1949 Geneva Conventions, the paragraph could be more consistent with the primacy of States in the development and determination of customary international humanitarian law. In particular, we recommend avoiding characterizing the statements of ICRC as "shaping'' the practice of States reacting to such statements, which is a term used with respect to no other non-State actor and also appears inconsistent with the final sentence of the paragraph. (The commentary could perhaps note the role of ICRC in "encouraging" States to act in certain ways). States' reactions to such statements should be considered in line with what is said in the earlier paragraphs of the commentary to this conclusion.

In addition, we note that States have expressed concerns to ICRC that its accounts of relevant practice, at times, do not accurately reflect the actual practice of States. ICRC generally does not involve States in the preparation of ICRC publications that characterize State practice, such as the ICRC study on *Customary International Humanitarian Law* and the ICRC Commentaries to the Geneva Conventions. Outside observers, who are not as familiar with the nuances of a State's practice and internal procedures, may misinterpret the account of ICRC of the State's statements or practice or mistake documents discussed by ICRC as constituting official government views.[16] The commentary's use of the term "records" to describe ICRC publications may also contribute to confusion on this point by suggesting that such publications simply record State practice, as opposed to summarizing and offering the ICRC characterization of it, as is usually the case. For these reasons, we recommend noting that States have expressed concerns with the accuracy or characterization of such accounts and revising the last clause of the first sentence of paragraph (10) to read as follows: "and publications of the ICRC may assist in identifying relevant practice (although the best approach will be to review a State's practice directly)." By way of example, the United States has noted in its comments on the Commission's draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties that the draft commentary

[16] John B. Bellinger, III and William J. Haynes II, "A US Government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*", *International Review of the Red Cross*, vol. 89, No. 866 (2007), p. 447 ("Finally, the Study often fails to distinguish between military publications prepared informally solely for training or similar purposes and those prepared and approved as official government statements. This is notwithstanding the fact that some of the publications cited contain a disclaimer that they do not necessarily represent the official position of the government in question").

inadvertently misinterprets United States practice by relying on the ICRC characterization of such practice in the ICRC study on *Customary International Humanitarian Law*.

[See also the comment above on draft conclusion 2.]

2. Draft conclusion 5 — Conduct of the State as State practice

United States of America

[Original: English]

The United States has concerns with the statement in paragraph (5) of the commentary to draft conclusion 5, which asserts that "[p]ractice must be publicly available or at least known to other States in order to contribute to the formation and identification of rules of customary international law". The statement does not indicate what is meant by the purported requirement that practice be "publicly available" and no authority is cited to support it. The fact that the practice might not otherwise be "publicly available" or known to some would not, in our view, preclude its relevance to the formation and identification of customary international law. For this reason, we suggest that the sentence either be deleted or revised accordingly.

3. Draft conclusion 6 — Forms of practice

Austria

[Original: English]

Draft conclusions 6 to 8 only refer to State practice, but draft conclusion 6 ("Forms of practice") seems to address practice in general. These draft conclusions should also cover the practice of international organizations.

[See the comment above on draft conclusion 4.]

Belarus

[Original: Russian]

With regard to draft conclusion 6, paragraph 2, and draft conclusion 10, paragraph 2, it is worth noting that the practice and *opinio juris* of States are far from always consistent and easy to identify. To a significant extent, this is because not all State practice is public. It is therefore appropriate to distinguish, in determining the existence of an international custom, between observed State behaviour that is known to the public at large, and activities carried out in a non-public manner, such as confidential exchanges in diplomatic correspondence and closed consultations among States. Regarding the practice of international organizations in the formation of customary international law, it would be more productive to take account of the activities of the States members of those organizations rather than the practice of the international organizations themselves, which are secondary subjects of international law.

El Salvador

[Original: Spanish]

Forms of practice (draft conclusion 6)

Although it is stated that customary practice may take a wide range of forms, El Salvador considers that, in fact, the topic cannot be limited to an exhaustive list of those forms; what really matters is to recognize that such repeated practice has the element of legal conviction.

In this regard, the aforementioned Constitutional Chamber alluded to the link between international declarations and custom when it noted that "declarations anticipate an *opinio juris* (a sense of obligation) which States must adhere to with a view to crystallizing an international custom in the medium or long term ... **international declarations, even if not binding, contribute significantly to the formation of binding sources of international law**, whether by anticipating the binding character of a certain State practice, or by promoting the conclusion of a treaty based on certain recommendations" (unconstitutionality ruling No. 26-2006 of 12 March 2007).

On the other hand, in draft conclusion 6, paragraph 1, the wording of the phrase "under certain circumstances" is not effective. In this connection, it is important to remember that inaction, when imbued with legal conviction, may always become a form of practice.

Israel

[Original: English]

Inaction as practice

Current text: Draft conclusion 6, paragraph 1, stipulates that practice "may, under certain circumstances, include inaction".

Comments:

– With regard to the discussion in the draft conclusion as to whether inaction can serve as an indicator of State practice, we would like to see a clarification in the text of the draft conclusion that inaction may be taken into account as practice only when it is **deliberate**. While this element is properly reflected in the commentary (see, e.g., paragraph (3) of the commentary to draft conclusion 6), the draft conclusions themselves, at times, do not fully reflect this position which we believe is of sufficient importance to merit specific mention.

– In addition, while the draft conclusion regarding *opinio juris* in Part Four would apply equally to practice that takes the form of deliberate inaction, we believe that specific mention in the commentary to draft conclusion 6 of the need for the inaction to stem from a sense of customary legal obligation is warranted given the unique and complicated nature of inaction as a potential source of customary international law.

Suggested amendments:

– In addition to describing inaction as "deliberate" in the draft conclusion itself, we believe that the commentary should be more detailed in explaining that the deliberate inaction referred to must stem from a sense of customary legal obligation and not from diplomatic, political, strategic or other non-legal considerations, which while deliberate, should not be regarded as State practice for purposes of identifying customary international law. This approach is also clearly reflected in International Court of Justice judgements, which distinguish between State conduct that is performed out of a sense of customary legal obligation and that which does not derive from such an obligation.[17]

[17] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), I.C.J. Reports 1969*, p. 3, at para. 77.

National acts and statements, as evidence of State practice and opinio juris: *higher national courts' decisions*

Current text: According to the draft conclusion, decisions of national courts could be considered a form of State practice (draft conclusion 6, para. 2) and a form of evidence of *opinio juris* (draft conclusion 10, para. 2).

Comments:

– We would like to stress that decisions of *higher* national courts are generally relevant only as secondary evidence of State practice or *opinio juris* (such as in the factual description of the State's conduct or legal view in a given case), and would only constitute practice or *opinio juris in and of themselves* when the issue in question concerns the conduct or view of judicial bodies (such as the dismissal of a lawsuit by reason of immunity).

– In addition, with regard to reliance on national court decisions, we believe — in line with the abovementioned comment — that only *higher* courts' final and definitive decisions (i.e., that cannot be further appealed) should be taken into account or be considered reflective of the judicial view of the State in question.

– In this context, we would like to note that generally speaking, higher national courts are more likely to have expertise in the interpretation and application of international law than lower ones — an important factor for the identification of customary international law.

Suggested amendments:

– We believe that the draft conclusion should clarify unambiguously that only higher courts' final and definitive decisions (i.e., that cannot be further appealed) should be taken into account or be considered reflective of the legal opinion of the State in question.

– In addition, as noted above, we suggest that the draft conclusion clarify that the decisions of higher national courts only constitute practice or *opinio juris* in and of themselves, as opposed merely to evidence of State practice or *opinio juris*, when the issue in question is the conduct or view of judicial bodies.

Verbal acts

Current text: Draft conclusion 6 states that practice "includes both physical and verbal acts", and paragraph (2) of the commentary refers to the role of verbal acts as practice.

Comments and suggested amendments:

– In our view, draft conclusion 6 does not properly reflect that customary international law overwhelmingly regulates physical acts, whereas customary regulation of verbal conduct is rare. Verbal acts may be counted as practice, as opposed to serving as evidence of practice, only in those limited cases where they themselves comply with a rule or violate it (e.g. threatening to use force in violation of Article 2, paragraph 4, of the Charter of the United Nations).

– In this light, we propose rephrasing the second sentence of draft conclusion 6 as follows: "It includes physical and, *at times*, verbal acts". Likewise, we suggest rephrasing paragraph 2 of the commentary to draft conclusion 6 so as to read: "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. *The words 'at times' emphasize that caution must be exercised when considering verbal conduct as practice*. While *the more*

common approach is 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 *when such conduct itself is regulated by the alleged customary rule*".

Netherlands

[Original: English]

Paragraph 1 of this draft conclusion states that practice may, under certain circumstances, include inaction. The commentary to this draft conclusion clarifies that the words "under certain circumstances" seek to caution that only deliberate abstention from acting may serve such a role. We attach much importance to this important clarification. We therefore suggest that the requirement that inaction must be deliberate, be reflected in the text of the draft conclusion, and not only in the commentary.

New Zealand

[Original: English]

Draft conclusion 6, paragraph 1: inaction as "practice"

New Zealand shares the hesitations that have been expressed by a number of States about the extent to which "inaction" can constitute practice for the purposes of either the formation or identification of rules of customary international law.

New Zealand notes the comments in paragraph (3) of the commentary to draft conclusion 6 that the words "in certain circumstances" in draft conclusion 6, paragraph 1, confirm 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" (emphasis added).

In New Zealand's view this is an important qualification that would be better reflected in the text of the draft conclusion itself. This would be consistent with the approach taken to failure to react in the context of *opinio juris* in draft conclusion 10, paragraph 3.

Draft conclusion 6, paragraph 2: decisions of national courts as "practice"

New Zealand notes the comments in paragraph (6) of the commentary to draft conclusion 6 that: it is "likely" that greater weight will be given to decisions of higher courts; and decisions that have been overruled are "unlikely" to be considered relevant when assessing State practice.

New Zealand agrees that careful consideration must be given to a court's place in the national judicial hierarchy when assessing whether a decision of that court can be considered to be State practice. In general, New Zealand would expect that only decisions of higher courts would be sufficient to be considered to be State practice for the purposes of the formation or identification of rules of customary international law. New Zealand cautions against placing reliance on decisions of lower courts or isolated decisions without supporting authority. In New Zealand's view it is very difficult to imagine a situation in which a decision that has been overruled by a higher court could still be relied upon as State practice in this context.

Republic of Korea

[Original: English]

In this respect, the Government of the Republic of Korea wishes to comment on the relation between paragraph 2 of draft conclusion 6 and paragraph 2 of draft conclusion 10. It is only natural that the form of State practice listed in paragraph 2 of draft conclusion 6 and the evidence of acceptance as law listed in paragraph 2 of draft conclusion 10 overlap to a considerable degree, since in most cases acceptance as law should be identified through State behavior or relevant documentation. Hence, to avoid any possible confusion, it may be necessary to seek consistency in the use of terms as well as the order in which they are listed in both conclusions. An explanation may also be needed to clarify discrepancies, where they exist.

For example, paragraph 2 of draft conclusion 10 does not include "legislative and administrative acts" which could serve as evidence of the acceptance of law, while paragraph 2 of draft conclusion 6 does not include "public statements made on behalf of States" which could be regarded as a form of State practice; paragraph 2 of draft conclusion 10 does not list diplomatic acts, while in paragraph 2 of draft conclusion 6 lists "diplomatic acts and correspondence".

Singapore

[Original: English]

Draft conclusion 6, paragraph 1, states that practice "may, under certain circumstances, include inaction". Paragraph (3) of the accompanying commentary explains that "the words 'under certain circumstances' seek to caution ... that only deliberate abstention from acting may serve such a role[, and that] the State in question needs to be conscious about refraining from acting in a given situation".

For clarity, Singapore proposes that the concept of a deliberate abstention from acting be incorporated into the text of draft conclusion 6, paragraph 1, itself. Specifically, the Commission may wish to consider replacing the expression "inaction" with "deliberate abstention from acting".

Singapore wishes to add that, determining what constitutes a "deliberate" abstention will ultimately be a factual exercise dependent on all the circumstances of the case. In this regard, Singapore notes the Special Rapporteur's finding that "[e]ven more than other forms of practice, inaction may at times be difficult to identify and qualify".[18]

For the avoidance of doubt, we emphasize that any inaction, or deliberate abstention from acting, relied upon in identifying a rule of customary international law must be accompanied by *opinio juris*. This is in line with the general requirement in draft conclusion 9 that a constituent element of customary international law is for the practice of States to be accepted as law. This could take the form of a State's acceptance that its inaction is required by international law. In other cases, this could take the form of a State's belief that it need not act or react because the other State's practice is consistent with international law.

[18] Third report on identification of customary international law (A/CN.4/682), para. 20.

United States of America

[Original: English]

Inaction

The United States shares the concerns reflected in the statements of many States before the General Assembly's Sixth Committee in 2016 regarding the circumstances in which State inaction should be considered either State practice or evidence of *opinio juris* for the purpose of the identification of customary international law. We agree that great caution is appropriate because of the many different factors and motivations that may lead a State to decline to take action, particularly in the international arena.

With regard to inaction as State practice, we agree with the statement in paragraph (3) of the commentary to draft conclusion 6 that "only deliberate abstention from acting may serve" as State practice. Therefore, in order for a State's inaction to "count" as State practice, it must be shown that the State had full knowledge of the facts and deliberately declined to act. However, the United States believes that three edits should be made to this paragraph of the commentary to underscore the limited circumstances in which inaction constitutes relevant State practice. First, to acknowledge the challenge this standard properly imposes, the United States believes a new third sentence should be added to paragraph (3) that reads: "It is recognized that this deliberate abstention may be difficult to demonstrate and should not be presumed to exist". Second, the word "may" should be added to the next sentence to make clear that the examples given of omissions that may constitute State practice only do so if the above standard of deliberate abstention is met. Third, the last example ("abstaining from the threat or use of force") should be deleted as there are so many reasons other than customary international law (including treaty and policy-based reasons) that a State may abstain from threatening or using force that it is unlikely that it could be demonstrated that a State did so out of a belief that it was required by customary international law.

Paragraph (3) would, therefore, read:

> (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. It is recognized that this deliberate abstention may be difficult to demonstrate and should not be presumed to exist. Examples of such omissions (sometimes referred to as "negative practice") may include abstaining from instituting criminal proceedings; and refraining from exercising protection in favour of certain naturalized persons~~; and abstaining from the threat or use of force~~. [footnote omitted]

[See also the comment below on draft conclusion 10.]

Other issues

The United States agrees that State practice comes in a wide variety of forms as stated in draft conclusion 6. We are concerned, however, that the structure of this draft conclusion may be misleading to readers in two respects.

First, we believe that the first paragraph of the draft conclusion should be reworded to add "may" in the second sentence both for consistency with the first and third sentences (both of which use "may") and to underscore that each State act must

be assessed to determine whether it is relevant practice for the purposes of a given customary international law analysis.

Second, the United States believes that the examples of forms of State practice in paragraph 2 of the draft conclusion should be reordered. Although paragraph (5) of the commentary says that the order of the items in paragraph 2 is not intended to be significant, we believe that it is nonetheless more appropriate to start with more action oriented practice as it is frequently the most probative form of practice. A reordering may also help the reader distinguish between practice and *opinio juris*, as statements are more likely to embody the latter.[19]

The United States, therefore, proposes that draft conclusion 6 read:

Conclusion 6

Forms of practice

1. Practice may take a wide range of forms. It may 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~~ executive conduct, including operational conduct "on the ground"; legislative and administrative acts; decisions of national courts; diplomatic acts and correspondence; conduct in connection with treaties; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.

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

Along the same lines, we suggest refining the draft commentary to paragraph 3 to provide more guidance to practitioners in assessing the various forms of practice. As the United States noted in response to the ICRC *Customary International Humanitarian Law* study, "[a]lthough [military] manuals may provide important indications of State behavior and *opinio juris*, they cannot be a replacement for a meaningful assessment of operational State practice in connection with actual military operations".[20] Therefore, we suggest including discussion in the commentary indicating that actual operational conduct is frequently the most probative form of a State's practice.

[19] See paragraph (3) of the commentary to draft conclusion 10.

[20] John B. Bellinger, III and William J. Haynes II, "A US Government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*", International Review of the Red Cross, vol. 89, No. 866 (2007), p. 445.

4. Draft conclusion 7 — Assessing a State's practice

Austria

[See the comment above on draft conclusion 6.]

Israel

[Original: English]

Inconsistent practice by a particular State

Current text: Draft conclusion 7, paragraph 2, states that "[where] the practice of a particular State varies, the weight to be given to that practice may be reduced". Paragraph (4) of the commentary adds that in such situations "that State's contribution to the 'general practice' element may be reduced or even nullified".

Comments and suggested amendments:

– We are concerned that the above-mentioned text may be misleading in the sense that inconsistent practice by a particular State, far from its weight being reduced or nullified in assessing the existence of a customary rule, may be important evidence that States do not view themselves as bound to act in a certain way. To avoid this interpretation, we believe draft conclusion 7, paragraph 2, and paragraph (4) to the commentary should be omitted, or alternatively we propose rephrasing draft conclusion 7, paragraph 2, so as to say: "[w]here the practice of a particular State varies, the weight to be given to that practice *depends on the circumstances*". In such a case, we would also suggest rephrasing paragraph (4) of the commentary to draft conclusion 7 as follows: "…that State's contribution to the 'general practice' element *may be an indication that it believes no customary rule on the matter exists*".

United States of America

[Original: English]

The United States is concerned that paragraph 2 of draft conclusion 7 could be misread to suggest that States with varying practice are afforded less weight relative to the practice of other States under customary international law. A State with varying practice might not support an asserted rule to the same degree as a State whose practice consistently supports the rule. However, it seems inconsistent with the principle of the sovereign equality of States to say that the former State's practice is of less weight than the latter. The former's "weight" is merely placed in support of a different legal rule, or the absence of a rule. For this reason, we would suggest revising paragraph 2 to read:

> 2. Where the practice of a particular State in relation to a purported rule varies, ~~the weight to be given to that practice may be reduced~~ <u>that practice contributes less to the conclusion that such a customary law rule has formed than where a State's practice is consistent in relation to the purported rule</u>.

5. Draft conclusion 8 — The practice must be general

Austria

[See the comment above on draft conclusion 6.]

Belarus

[Original: Russian]

State practice is of key importance when assessing evidence for the two constituent elements (draft conclusion 3), although in some areas of international law, especially international humanitarian law and international outer space law, a long history of stable practice might be less significant (draft conclusion 8). Still, it is premature to jettison the criterion of duration entirely, as may be implied by draft conclusion 8.

China

[Original: Chinese]

Second, it is stipulated in draft conclusion 8 that relevant State practice, in order to be considered general, must satisfy the requirement that it be representative. It is indicated in the commentary that account should be taken of "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". China is of the view that this essentially endorses the relevant jurisprudence of the International Court of Justice, in which the Court emphasized the important role of "specially affected States" with respect to the identification of customary international law. The practice of any country, whether it be big or small, rich or poor, or strong or weak, should receive full consideration, provided that that country has a concrete interest in and actual influence over the formation of rules in a specific arena. As "specially affected States", such countries can play a role in the formulation of rules of customary international law. China recommends that the content of the commentaries to draft conclusions 8 and 9 be expanded in that regard, to emphasize that the practice and *opinio juris* of "specially affected States" should be given fuller consideration.

Israel

[Original: English]

Specially affected States and general practice

Current text:

– Draft conclusion 8, paragraph 1, refers to "general" practice as meaning it must be "sufficiently, widespread and representative, as well as consistent". Paragraph (3) to the commentary of the draft conclusion 8 notes that universal participation is not required.

– When defining the need for relevant practice to be general, draft conclusion 8 does not include reference to the well-established concept of "specially affected States". The Commentary does make some reference to specially affected States, but it does not stipulate that their practice and *opinio juris* **must** exist for custom to evolve, and it does not adequately stress the importance of giving greater weight to specially affected States when examining State practice and *opinio juris*.

– Finally, paragraph (3) of the commentary to draft conclusion 8 states: “The participating States should include those that had an opportunity or possibility of applying the alleged rule”.

Comments:

– With respect to the need for practice to be “general” more broadly, we believe the current draft does not adequately reflect the high threshold State practice must meet for a rule to be identified as customary. While, as noted in the commentary, the necessary number and distribution of States cannot be identified in the abstract, we believe it is clear that States taking part in the practice, accompanied by *opinio juris*, must be significantly and decisively greater than those not engaging in such practice, and that the commentary should be more in line with the language and spirit of the *North Sea Continental Shelf* cases, which required the practice not only be widespread and representative but also “virtually uniform”.

– With respect to the concept of specially affected States, it is well accepted that specially affected States are crucial to the formation and, accordingly, the identification of customary rules. In cases in which the accumulation of practice and *opinio juris* of specially affected States is not in line with the proposed rule, or does not exist *vis-à-vis* such a rule (for example, because no practice of specially affected States can be identified), this should serve as evidence that no such rule exists. This approach is also reflected in paragraph 74 of the International Court of Justice judgment on the *North Sea Continental Shelf* case.

– Moreover, not only is the practice and *opinio juris* of specially affected States an indispensable element of identifying the existence of a customary international rule, but such practice and *opinio juris* must be given significantly greater weight than the practice of other States.

– Regarding the reference in paragraph (3) of the commentary to draft conclusion 8 to States that have an opportunity or possibility of applying the examined rule: while this may not be the intention of the commentary, we are concerned that it could be misinterpreted to mean that even States that have no practice at all with respect to the examined rule are nevertheless relevant in the process of identifying its customary status, as long as they have the opportunity or possibility of applying it. As mentioned above in section 3, inaction may be relevant as practice in limited circumstances only, while the wording of paragraph (3) of the commentary to draft conclusion 8 could be misread as implying that such inaction on the part of these States is automatically relevant even if not deliberate and not stemming from a sense of customary obligation.

Suggested amendments:

– We propose amending draft conclusion 8, paragraph 1, to better reflect the high threshold required for State practice, so as to read: “The relevant practice must be general, meaning that it must be *widespread* and representative, as well as consistent *and virtually uniform. It must include the practice of specially affected States*”.

– We also believe that draft conclusion 8 and draft conclusion 9 should be amended to properly reflect the established and critical concept of specially affected States and stipulate that: (*a*) practice is sufficiently general only when it includes both the practice and *opinio juris* of specially affected States (otherwise, no customary rule exists); (*b*) greater weight must be given in the customary rule identification process to the practice and *opinio juris* of specially affected States. We suggest amending the commentary accordingly, including paragraph (2) of the commentary to draft conclusion 8, so as to further emphasize and explain the

importance of the practice and *opinio juris* of specially affected States to the process of customary international law identification.

– Further to the comment above regarding paragraph (3) of the commentary to draft conclusion 8, we propose amending this paragraph to read: "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 the number of States taking part in the practice must be clearly and decisively greater than the number of relevant States not engaged in such practice*".

– In this context, we also believe that paragraph (4) of the commentary to draft conclusion 8 which notes that "in many cases, all or virtually all States will be equally concerned" should be amended to avoid being an overstatement. We propose amending this paragraph to read as follows: "In some cases, all or virtually all States will be equally *affected*. *In appropriate cases, however, the practice of States that are affected the most must be accorded greater weight*".

– Finally, with regard to the participating States under paragraph (3) of the commentary to draft conclusion 8, we propose deleting this sentence or clarifying that the inaction of States which have the opportunity or possibility of applying an alleged rule is relevant only when deliberate and accompanied by *opinio juris*.

[See also the comment below on draft conclusion 15].

Netherlands

[Original: English]

We note that the commentary to draft conclusion 8 makes reference to specially affected States, but does not clearly define the role of such States. We consider that the importance of specially affected States in the formation and identification of customary international law should be further elucidated. As the International Court of Justice held in its judgment in the *North Sea Continental Shelf* case: "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" (emphasis added).

We suggest that a reference to specially affected States be included in draft conclusions 8 and 9 themselves, and not only in the commentary. More specifically, we propose that the draft conclusions make clear that practice and *opinio iuris* of such States is an indispensable element in identifying the existence of a rule of customary international law. In addition, we propose to state explicitly that practice and *opinio iuris* of such States must be given greater weight than that of other States.

Singapore

[Original: English]

In paragraph (9) of the accompanying commentary, the Commission makes clear that there is no such thing as "instant custom", and that some time must elapse for a general practice to emerge.

Singapore agrees and considers this view to reflect *lex lata*. For the commentary to be of further guidance to States, international courts and tribunals, and practitioners, the Commission may wish to incorporate in the commentary a reference

to, or an explanation on, the origins of the concept of "instant custom".[21] This would be helpful especially since the four reports of the Special Rapporteur have also not extensively addressed the concept.

United States of America

[Original: English]

The United States continues to believe that draft conclusion 8 should define more clearly the quantum and quality of State practice that is required to identify a rule of customary international law. We do not believe that "sufficiently" in the first paragraph of the draft conclusion is adequate for this purpose — indeed, it begs the question of what degree of widespread and representative practice is "sufficient" to meet the standard. Rather, the draft conclusion should incorporate the "extensive and virtually uniform" standard articulated by the International Court of Justice in the *North Sea Continental Shelf* cases,[22] as it is widely recognized by States as the threshold that generally must be met to demonstrate the existence of a customary rule.

The United States also believes that the important role of specially affected States should be addressed in the draft conclusion itself. A requirement that the practice of specially affected States be considered is an integral part of the *North Sea Continental Shelf* standard.[23] Moreover, as noted in the commentary at paragraph (4), "[i]t would clearly be impractical" to determine the existence or content of a rule of customary international law without considering the practice of the States most engaged in the relevant activity. Further, although the commentary makes passing reference to specially affected States in paragraph (4) and footnote 297, we believe that the draft conclusions and commentary may lead to confusion by defining what it means for practice to be "general" in the draft conclusion with no reference to specially affected States, but then suggesting their practice is "an important factor" in paragraph (4) of the commentary and only using the term "specially affected" in a footnote.

Finally, the United States believes that draft conclusion 8 should explicitly acknowledge that the practice of States that does not support a purported rule is to be considered in assessing whether that rule is customary international law.[24] It is critical

[21] See Bin Cheng, "United Nations resolutions on outer space: 'Instant' customary international law?", *Indian Journal of International Law*, vol. 5 (1965), pp. 23–48.

[22] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 43, para. 74.

[23] *Ibid.* ("[A]n 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 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.").

[24] See, e.g., *The Case of the S.S. "Lotus"*, P.C.I.J., Series A, No. 10 (1927), pp. 28–29 ("[I]t will suffice to observe that the decisions quoted sometimes support one view and sometimes the other… [A]s municipal jurisprudence is thus divided, it is hardly possible to see in it an indication of the existence of the restrictive rule of international law which alone could serve as a basis for the contention of the French Government."); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 266, at pp. 311–312 (Dissenting Opinion of Vice-President Schwebel) ("One way of surmounting the antinomy between practice and principle would be to put aside practice. That is what those who maintain that the threat or use of nuclear weapons is unlawful in all circumstances do. … State practice demonstrates that nuclear weapons have been manufactured and deployed by States for some 50 years; that in that deployment inheres a threat of possible use, and that the international community, by treaty and through action of the United Nations Security Council, has, far from proscribing the threat or use of nuclear weapons in all circumstances, recognized in effect or in terms that in certain circumstances nuclear weapons may be used or their use threatened."); *Colombian-Peruvian asylum case, Judgment of November 20th, 1950. I.C.J. Reports 1950*, p. 266, at p. 277 ("The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so

that "negative practice" be given sufficient weight.[25] Just as seeking contrary evidence to disprove a hypothesis is a sound methodological practice that is part of the scientific method, consideration of contrary evidence should also be part of sound methodology for identifying customary international law.

For the foregoing reasons, the United States believes draft conclusion 8 should read as follows:

Conclusion 8

The practice must be general

1. The relevant practice must be general, meaning that it must generally be extensive and virtually uniform, ~~sufficiently widespread and representative, as well as consistent~~ including among States whose interests are specially affected.

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

3. Evidence of contrary practice, i.e. practice evincing a different potential interpretation of the law, is to be considered.

Corresponding edits should be made to the commentary. For example, in paragraph (4) of the commentary to draft conclusion 8, it would be helpful to explain further why it is important to consider 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". In particular, the practice of States that are particularly involved in the relevant activity is likely to be "of a significantly greater quantity and quality" as compared to the practice of States that do not have significant experience in the matter.[26]

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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"); *Jurisdictional Immunities of the State (Germany* v. *Italy, Greece intervening), Judgment, I.C.J. Reports 2012,* p. 99, at p. 134–135, para. 77 ("In the Court's opinion, State practice in the form of judicial decisions supports the proposition that State immunity for *acta jure imperii* continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum State. That practice is accompanied by *opinio juris*, as demonstrated by the positions taken by States and the jurisprudence of a number of national courts which have made clear that they considered that customary international law required immunity. The almost complete absence of contrary jurisprudence is also significant, as is the absence of any statements by States in connection with the work of the International Law Commission regarding State immunity and the adoption of the United Nations Convention or, so far as the Court has been able to discover, in any other context asserting that customary international law does not require immunity in such cases.").

[25] John B. Bellinger, III and William J. Haynes II, "A US Government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*", *International Review of the Red Cross*, vol. 89, No. 866 (2007), p. 445 ("Fourth, although the Study acknowledges in principle the significance of negative practice, especially among those States that remain non-parties to relevant treaties, that practice is in important instances given inadequate weight").

[26] John B, Bellinger, III and William J. Haynes II, "A US Government response to the International Committee of the Red Cross study *Customary international Humanitarian Law*", *International Review of the Red Cross*, vol. 89, No. 866 (2007), pp. 445–46; see also Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, *American Journal of International Law*, vol. 90 (1996), pp. 235–249 ("I find it difficult to accept the view, sometimes advanced, that all states, whatever their geographical situation, military power and

C. Part Four — Accepted as law (*opinio juris*)

1. Draft conclusion 9 — Requirement of acceptance as law (*opinio juris*)

Belarus

[Original: Russian]

Any conduct by a State that indicates that the State is applying a rule of customary international law despite having to forego some advantages and benefits is one form of evidence of acceptance of the rule as law. This aspect should be included in draft conclusion 9.

China

[See the comment above on draft conclusion 8.]

Israel

[See the comment above on draft conclusion 8.]

Netherlands

[See the comment above on draft conclusion 8.]

Singapore

[See the comment above on draft conclusion 6.]

United States of America

[Original: English]

Opinio juris *and "rights"*

The United States notes that the State practice that contributes to the formation of customary international law has often been referred to historically as practice that is undertaken out of "a sense of legal obligation".[27] The draft conclusions and commentaries expand this language to include practice undertaken with a sense of legal right. In particular, paragraph 1 of draft conclusion 9 provides that:

> **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

interests, inter alia, have an equal role in this regard. Belligerency is only one factor here. The practice and opinion of Switzerland, for example, as a neutral state, surely have more to teach us about assessment of customary neutrality law than the practice of states that are not committed to the policy of neutrality and have not engaged in pertinent national practice. The practice of 'specially affected states' — such as nuclear powers, other major military powers, and occupying and occupied states — which have a track record of statements, practice and policy, remains particularly telling. I do not mean to denigrate state equality, but simply to recognize the greater involvement of some states in the development of the law of war, not only through operational practice but through policies expressed, for example, in military manuals").

[27] See, e.g., Restatement Third of the Foreign Relations Law of the United States, sect. 102 (2); John B. Bellinger, III and William J Haynes II, "A US Government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*", *International Review of the Red Cross*, vol. 89, No. 866 (2007), p. 444.

in question must be undertaken with a sense of legal right or obligation. (underlining added)

2. ...

Similar language is found in the commentaries, including repeated references to a requirement that the State practice be accompanied by a conviction that it is "permitted, required or prohibited"[28] (underlining added).

As an initial matter, we suggest using "out of" rather than "with" because "out of" more clearly conveys that the entirety of the practice must be out of a sense of legal obligation. For example, a practice might be conducted that was driven only partially by legal considerations. The entirety of the practice might be understood to be undertaken "with" a sense of legal obligation, but only that part of the practice that was done "out of" a sense of legal obligation would be the practice that is accepted as law.

The United States agrees, in principle, that international law recognizes that States have certain rights (such as the inherent right of self-defence, or navigational rights and coastal state entitlements under the law of the sea), and that States exercising those rights may do so with the legal view that they are legally entitled to do so. However, we believe that, in this context, expressly including the concept of a legal right in draft conclusion 9 is unnecessary because States have generally understood the phrase undertaken out of "a sense of legal obligation" to encompass, where appropriate, State practice undertaken out of a sense of legal right or obligation (or, in the words of the International Court of Justice, a "recognition that a rule of law or legal obligation is involved"[29]). For example, one State's legal obligation can sometimes be characterized as a right of other States (e.g., one State's obligation not to commit acts of aggression is also the right of other States to be free from acts of aggression), and vice versa. Adding "right or" to the draft conclusion risks creating the misimpression that the concept of legal rights is not already contemplated in the phrase "a sense of legal obligation".

Addition of the phrase "right or" is also potentially confusing by suggesting that the same inquiry into State practice and *opinio juris* to identify whether States *must* act in a certain way is also needed to ascertain whether States *may* act. The United States believes that it is important that the draft conclusion and commentary adhere to common, widely used language on this issue, both to avoid suggesting any conflict with existing State practice and in order to avoid being misunderstood to affect the longstanding principle that States are free to act in the absence of a legal restriction. See *The Case of the S.S. "Lotus"*, P.C.I.J., Series A, No. 10 (1927), p. 18. States are not required to establish *opinio juris* or that a general and consistent practice of States supports an action as lawful before they can lawfully engage in a practice that is not otherwise legally restricted.

Given the potential for misunderstanding on this issue and the longstanding use of "a sense of legal obligation", we therefore believe the text of the draft conclusion should retain the common formulation and omit "right or", which was not found in the Special Rapporteur's initial draft of the draft conclusion.[30] We believe the commentary should then explain that the widely used phrasing "a sense of legal obligation" can encompass not merely legal obligations but also, in appropriate circumstances, legal rights. The commentary should also be explicit that, where there is no legal restriction, a State need not identify a specific customary international law

[28] See, e.g., paragraph (2) to the commentary to draft conclusion 9.

[29] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 43, para. 74.

[30] Report of the International Law Commission, Sixty-sixth Session (2014), *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), pp. 240–241, footnote 830.

right to justify its action, but instead the State may rely on the general principle that States are free to act in the absence of legal restrictions.

For the foregoing reasons, the United States believes that draft conclusion 9 should be edited as follows:

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~~ out of 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.

In any event, the United States also believes language along the following lines should be added to the commentary:

(#) Acceptance of a rule as law (*opinio juris*) has commonly been described in terms of "a sense of legal obligation", and draft conclusion 9 adheres to this phrasing to avoid suggesting any change in the common understanding. In appropriate circumstances, however, States have long understood the concept to encompass legal rights as well as legal obligations — showing, in the words of the International Court of Justice, a "general recognition that a rule of law or legal obligation is involved".[31]

(##) Draft conclusion 9, however, does not suggest that, where there is no legal restriction, a State needs to identify a specific customary international law right to justify its action. In other words, consistent with the longstanding principle that States are free to act in the absence of a legal restriction, it is not necessary to establish *opinio juris* or a general and consistent State practice that an action is lawful before a State may engage in the activity. See *The Case of the S.S.* "*Lotus*", P.C.I.J., Series A, No. 10 (1927), p. 18.

2. Draft conclusion 10 — Forms of evidence of acceptance as law (*opinio juris*)

Austria

[Original: English]

Similarly, draft conclusion 10 ("Forms of evidence of acceptance as law (*opinio juris*)") solely addresses the acceptance as law by States. It would be useful to clarify how opinio iuris relating international organizations is established.

[See the comment above on draft conclusion 4.]

Belarus

[See the comment above on draft conclusion 6.]

Czech Republic

[Original: English]

Failure to react as evidence of opinio iuris — draft conclusion 10, paragraph 3

The draft conclusion 10, paragraph 3, provides that "failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that

[31] *North Sea Continental Shelf Judgment, I.C.J. Reports 1969*, p. 3, at p. 43, para. 74.

States were in a position to react and the circumstances called for some reaction". The commentary to this draft conclusion adds that two requirements have to be satisfied in such a case: first, "it is essential that a reaction to the practice in question would have been called for" and "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".

Comments:

The Czech Republic is of the opinion that this draft conclusion (together with the commentary thereto) does not adequately reflect different types of the inaction or the "failure to react" by individual States and different significance it may have for the existence or creation of a customary law norm.

There could be various reasons why States do not react to practice of other States, even if they could be generally presumed to do so. States may fail or refuse to react simply due to diplomatic and political considerations or because of lack of capacity or lack of direct interest in the relevant concrete conduct of other State (States). Thus, the reasons why States do not react in a specific case may have nothing to do with the legal assessment of the practice and their (non-)reaction to such practice.

Therefore, the Czech Republic suggests that more attention is paid, *inter alia*, to the differentiation between, on the one hand, failure to react by States which are particularly (specially, directly) interested, concerned and affected by relevant practice of other States and are aware of the legal significance of their reaction or failure to react, and, on the other hand, inaction or failure to react by other States, which may be based on political, practical or other non-legal considerations and which does not stem from the sense of customary legal obligation.

In addition, we are of the opinion that the Commission should also analyse the differences between the failure to react to relevant practice in cases when a new rule of customary international law might be potentially created in areas which have not yet been regulated by any rule of customary international law on the one hand, and, on the other hand, in cases when a potential new rule would deviate from an already established customary rule. The fact that certain customary rule already exists serves as a stabilizing factor and, in general, reduces the need to react to practice of other States which deviates from such a rule (the principle being that a deviation from already established rule is regarded as the breach of that rule and not as the beginning of creation of a new rule).

Having regard to the comments above, the Czech Republic proposes that the draft conclusion 10, paragraph 3, is deleted or substantially reformulated.

Israel

[Original: English]

Failure to react as opinio juris

Current text: Draft conclusion 10 refers to the inference on the State's *opinio juris* from situations under which the State has "failed to react".

Comments:

– We believe that draft conclusion 10 does not adequately reflect the difficulty and complexity associated with relying on the failure to react as evidence of *opinio juris*.

– Admittedly, and in general terms, a *deliberate* failure to act *out of a sense of compliance with a rule of customary international law* is indeed negative practice on the part of a State relevant to the identification of customary international law. For example, when a State deliberately refrains from torture because it believes it is customarily obligated to do so, the failure to act constitutes State practice. However, mere failure to react does not, on its own, constitute practice to begin with: when a State simply refrains from acting, it *lacks* practice. For this reason, only express evidence explaining the State's reasons for refraining from acting can indicate whether it lacks practice *vis-à-vis* the alleged customary rule (as should be the default case), or whether it deliberately abstained due to *opinio juris* and thus had negative practice.

– This conclusion also applies, *mutatis mutandis*, to a State's failure to react to another State's practice in circumstances addressed in draft conclusion 10. *Opinio juris* is a subjective element, representing the actual belief of a State as to its rights and duties under customary international law, and it must therefore be pronounced actively and expressly. Accordingly, when a State fails to protest against another State fishing in its maritime zones, for example, its failure to react alone does not constitute *opinio juris* indicating that it views such fishing activity as permissible under international law. It may very well be that the motivation for not protesting and allowing the practice is political or diplomatic, or that the State is in fact protesting the practice but for various reasons only does so in a private and confidential manner. Consequently, silence by the State in these circumstances cannot in itself be seen as *opinio juris*.

– In other words — and contrary to draft conclusion 10, paragraph 3, and paragraph (7) of its commentary — failure to react requires more than a reaction being called for in the given circumstances and the State being in a position to react. It also requires evidence that the failure to react itself stemmed from a sense of customary legal obligation.

Suggested amendments:

– We would propose that draft conclusion 10 and its commentary address the practical difficulty of ascertaining evidence of "negative" practice or "negative" *opinio juris*, and stress, in line with the comments above, that a State's failure to react cannot be interpreted in and of itself (and absent additional evidence) as indicating either practice or *opinio juris*.

– Alternatively, we propose that the situation of a State's failure to react not be directly addressed, as the type of evidence needed for ascertaining the two elements is not different than in other situations.

National acts and statements, as evidence of State practice and opinio juris*: higher national courts' decisions*

[See the comment above on draft conclusion 6.]

Netherlands

[Original: English]

Draft conclusion 10 includes decisions of national courts as a form of evidence of *opinio iuris*. In our view, this should be qualified. Decisions of national courts can only form evidence of *opinio iuris* when such decisions are not rejected by the State's executive. Such rejection can be said to exist when the executive considers and externally presents such decisions as not representing the State's position on the issue. This qualification follows from the proposition that *opinio iuris* requires consistency of the different branches of government.

Draft conclusion 10, in paragraph 3, refers to failure to react to a practice as evidence of *opinio iuris*. We appreciate the generally careful approach against drawing too many conclusions from the silence or inaction of States, and for underlining that what is essential is that consequences may only be attached to the absence of a reaction where such a reaction would be expected. This implies that the rule is not that silence implies acquiescence, but rather that in a particular situation in which it was clear that reaction was called for, no such reaction came. We suggest that the commentary in this context take into account the role of explanations that States may at a later stage give for certain positions and their possible silence. We also suggest that the commentary pay attention to the possibility that a State does protest but does so in a confidential, or at least not public, manner. In the latter case, we are of the view that the fact that there is no public reaction to certain conduct cannot be taken as evidence of acceptance as law of that conduct.

Draft conclusion 10 does not make any reference to *opinio iuris* of international organizations. We suggest that such a reference be included in the commentary, making clear that there is also the possibility of *opinio iuris* of an international organization. This follows from the international legal personality of such organizations, already referred to above.

New Zealand

[Original: English]

Draft conclusion 10, paragraph 3: failure to react as evidence of opinio juris

New Zealand shares the caution expressed by a number of other States regarding the extent to which a State's failure to react to the practice of another State may be used to infer *opinio juris*. A failure to react may, in some circumstances, imply acceptance of law. But this cannot be presumed. There are many legitimate reasons why a State may not publicly react to, or protest against, the actions of another State. States must balance a range of interests when considering whether and how to respond to the actions of another State, including the maintenance of friendly relations and the effective functioning of international affairs. This is particularly the case where a State has not been directly affected by the actions taken or has no other particular interest in them. In other cases, a State may judge it more appropriate to react on a confidential basis.

New Zealand accordingly supports the proviso in draft conclusion 10, paragraph 3, that a failure to react will only serve as evidence of *opinio juris* where: the State concerned was in a position to react; and the circumstances called for some official public reaction. New Zealand further agrees with the elaboration of this proviso in paragraph (7) of the commentary. New Zealand considers that the additional elements identified in that paragraph would be more appropriate in the draft conclusion text. In particular, New Zealand considers that the State must have: been directly affected by the practice in question; known of that practice; and had sufficient time and the ability to respond.

[See the comment above on draft conclusion 6.]

Republic of Korea

[See the comment above on draft conclusion 6.]

United States of America

[Original: English]

Inaction

Situations in which a State's inaction reflects the State's *opinio juris* are even more exceptional than those situations in which the State's inaction is deliberate and thus may constitute practice. Most State behaviour (both action and inaction) is not motivated by international legal considerations. Therefore, a State's failure to act rarely evidences its views on international law. For example, one could not infer from a State's decision not to exercise diplomatic protection in a given circumstance that the State had concluded a particular act (a regulation or other measure) was not wrongful under international law. There are many instances where a State may believe that it has valid grounds to exercise diplomatic protection and that the international responsibility of the other State has been engaged, but for political or practical reasons decides not to espouse the claim (e.g., to avoid a bilateral irritant, to address domestic political concerns, or for other non-legal reasons).

Given this context, we recommend changes both to the text of draft conclusion 10 and to paragraph (7) to the commentary to it.

In order to make clear that a State's deliberate inaction must be motivated by legal considerations to reflect *opinio juris*, we recommend that paragraph 3 of draft conclusion 10 be revised to read as follows:

> 3. Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that the States ~~were~~ was in a position to react and the circumstances called for some reaction, and that the State's decision not to react was made out of a sense of legal obligation.

In addition, although we agree with the two "requirements" for silence to serve as acceptance as law stated in paragraph (7) to the commentary on draft conclusion 10, we believe that the first requirement needs to be revised in order to reflect the fact that States frequently choose for political (international or domestic) or other reasons, such as limited government resources, to refrain from engaging in legally permissible acts.

Therefore, we believe that the sentence beginning "First" in paragraph (7) should read:

> 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 to such a degree or under such circumstances that its failure to react is evidence of its legal position. [footnotes omitted]
>
> [See also the comment above on draft conclusion 6.]

Other issues

Please see the discussion above for United States concerns with regard to the circumstances in which the inaction or silence of a State may properly be viewed as State practice or evidence of the *opinio juris* of the State concerned.

The United States wishes also to note with regard to paragraph (5) of the commentary to draft conclusion 10 that caution must be exercised in assessing what constitutes evidence of the *opinio juris* of the State. For example, official government publications frequently (if not most commonly) reflect policy and domestic legal

considerations rather than, or in addition to, any international law factors. Moreover, as the United States noted in response to the ICRC's *Customary International Humanitarian Law* study, "[a]lthough [military] manuals may provide important indications of State behavior and *opinio juris*, they cannot be a replacement for a meaningful assessment of operational State practice in connection with actual military operations".[32] Similarly, decisions of national courts are generally based on domestic law, rather than international law. Evidence must therefore be carefully assessed to determine whether it in fact reflects a State's views on the current state of customary international law.

In addition, in many instances, limited information about the full range of relevant State practice or *opinio juris* should warrant caution in reaching conclusions about whether a customary law rule has formed. Some practice of States may be known to other States but not otherwise publicly available. In addition, most legal advice that is given within the executive branches of governments is provided on a confidential basis. Care must be taken to account for all relevant practice and *opinio juris*, even such practice and *opinio juris* as may be inaccessible to the public, in reaching conclusions about whether a customary law rule exists.[33]

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

1. Draft conclusion 11 — Treaties

Belarus

[Original: Russian]

With regard to the interaction between customary international law and international treaty law (draft conclusion 11), the concept of a universal multilateral international treaty "spilling over" into international custom (draft conclusion 11, paragraph 1, subparagraph (c)) needs to be studied further. The qualitative and/or quantitative criteria for such "spillover" and its driving forces and legal scope need to be identified.

[32] John B. Bellinger, III and William J. Haynes II, "A US Government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*", *International Review of the Red Cross*, vol. 89, No. 866 (2007), p. 445.

[33] See, e.g., Daniel Bethlehem, "The secret life of international law", *Cambridge Journal of International and Comparative Law*, vol. 1, p. 23, at p. 24 (2012) ("And, uniquely in the case of international law, the interpretation and application of the law by states is an important part of the creation and development of the law — through state practice, through *opinio juris*, through the conduct of states in the interpretation and application of treaties — for example, under some of the sub-provisions of Article 31 of the Vienna Convention on the Law of Treaties, such as subsequent practice in the interpretation of treaties — in their conduct relevant to the interpretation and application of Security Council resolutions, and so on. Given this, if one is concerned to undertake a rigorous, considered exercise of deciding what the law is, you cannot simply look at the text of an instrument. You have to look more widely at a whole range of other things. And some of this is visible and collected, for example, in the British Yearbook, British practice. Most of it, however, is invisible to the world at large because it happens internally within governments and never needs to be, and sometimes would not appropriately be, made public").

Israel

[Original: English]

Treaties as evidence of custom

Current text: Draft conclusion 11 and its accompanying commentary concern "the significance of treaties, especially widely ratified multilateral treaties, for the identification of customary international law". Paragraph (3) of the commentary stresses that "treaties that have obtained near-universal acceptance may be seen as particularly indicative in this respect".

Comments and suggested amendments:

– As draft conclusion 11 and its accompanying commentary accurately state, treaties and custom are different sources of international law which must be kept separate. Indeed, States may choose to join treaties precisely because their normative characteristic is different (for example, while *ex post* withdrawal from custom is not possible, it is generally possible with respect to treaties).

– One important difference between treaties and custom has to do with the nature of State consent. When a State joins a treaty, it consents to take certain obligations *unto itself*. When a State articulates its *opinio juris*, however, it expresses its belief that *other States* are likewise bound. Consequently, it is impossible to use a State's consent to a treaty alone as evidence necessarily for *opinio juris*.

– While paragraph (7) of the commentary to draft conclusion 11 accurately distinguishes between treaties and custom in this context, paragraph (3) of the commentary may appear to conflate the two, especially with respect to treaties enjoying wide conventional acceptance, even though they do not necessarily reflect customary international law. Accordingly, we propose deleting paragraph (3) of the commentary to draft conclusion 11. Alternatively, we suggest omitting the reference at the end of paragraph (3) of the commentary to draft conclusion 11, to treaties that are not yet in force or which have not yet attained widespread participation.

New Zealand

[Original: English]

New Zealand supports the general approach of draft conclusion 11 regarding the role of treaties in the formation of rules of customary international law. In New Zealand's view, the formulation of this draft conclusion accords with the principle expressed in article 38 of the Vienna Convention on the Law of Treaties.

New Zealand considers that the three categories identified in draft conclusion 11, paragraph 1 (a) to (c), are helpful and accurately capture the role that treaties can play in this context. It notes the importance of the expression "if it is established" in the chapeau to draft conclusion 11, paragraph 1, and welcomes the clarification in paragraph (4) of the commentary that the existence of the rule must be confirmed by evidence of both practice and *opinio juris*.

New Zealand also supports the inclusion of draft conclusion 11, paragraph 2, and the particular caution regarding the reliance on bilateral treaties expressed in paragraph (8) of the commentary.

Singapore

[Original: English]

Draft conclusion 11, paragraph 1, currently provides three means by which a rule set forth in a treaty may reflect a rule of customary international law. The accompanying commentary clarifies that, for subparagraph (c), the process of a treaty rule generating a new rule of customary law is one that is not lightly to be regarded as having occurred.

This distinction in treatment between the ways in which a treaty rule can reflect customary international law is not apparent from the text of draft conclusion 11, paragraph 1. Singapore therefore proposes that draft conclusion 11, paragraph 1, be revised so that this distinction is clearly reflected in the text of the draft conclusion itself.

Singapore also wishes to emphasize that, in determining whether there exists a treaty rule that reflects a rule of customary international law, the content, scope and ambit of that particular treaty rule should first be determined by applying the law on treaty interpretation to interpret that treaty text.[34] A rule of customary international law should not be assumed to be reflected in a treaty rule only because another similarly worded treaty rule in a separate other treaty has been found to be reflective of customary international law.

United States of America

[Original: English]

The United States agrees with the text of draft conclusion 11 (Treaties) and believes it accurately reflects the ways in which a treaty provision may come to reflect a rule of customary international law.

We are, however, concerned about aspects of the commentary to the draft conclusion.

First, we believe that the last phrase of the first sentence of paragraph (3) of the commentary (“treaties that have obtained near universal acceptance may be seen as particularly indicative in this respect”) and accompanying footnote should be deleted. We believe that this passage is likely to be misunderstood to suggest that widely ratified treaties most likely reflect customary international law norms, when that is not the case. Similarly, we believe that the quotations included in footnote 323 may inaccurately suggest that the requirement to demonstrate both a general practice and acceptance as *customary international law* may be bypassed in the case of widely ratified treaties.

Second, the last sentence of paragraph (3) of the commentary should be edited to replace “participation” with “ratification”, which would be more precise. “Participation” could be misunderstood to suggest that a treaty negotiated by only a handful of States is likely to be influential, when it is not. In addition, this paragraph should be supplemented to observe that mere ratification by States of a treaty does not itself reflect that particular provisions of the treaty may correspond to customary international law. To the extent, for example, that particular provisions of a widely ratified treaty are not implemented in practice by States parties to the treaty, such lack of implementation would cast doubt on the conclusion that the requisite State practice existed to establish that the treaty rules in question reflected customary international law.

[34] See articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties.

Third, with respect to paragraph 2 of the draft conclusion on rules set forth in multiple treaties, we strongly agree with the statement in paragraph (8) of the commentary to the effect that the fact that a rule is set forth in a number of treaties does not create a presumption that the rule is reflective of customary international law. Indeed, the need to repeat the rule in many treaties may be evidence of exactly the opposite — that the rule is not customary international law. In order to determine whether an oft repeated treaty provision is a customary rule, the same assessment of State practice and *opinio juris* is required as for any other potential customary rule. It is not sufficient to show that States have treaty obligations. States must be shown to have expressed the view that they have an obligation under customary international law as well.

2. Draft conclusion 12 — Resolutions of international organizations and intergovernmental conferences

Belarus

[Original: Russian]

In general, Belarus shares the Commission's opinion regarding the significance of resolutions adopted by international organizations and other documents, as reflected in draft conclusions 12 to 14. The following should be noted with regard to the writings of international jurists and decisions of international courts and tribunals, however.

These sources are undeniably valuable for identifying rules of customary international law, as they frame the evidence for the presence of the constituent elements of a rule of customary international law in a more accessible, clear and reasoned form. In that regard, they are undeniably relevant to the topic at hand. At the same time, since international custom is based exclusively on State practice, these sources cannot be considered in any other context.

In paragraph (6) of the commentary to draft conclusion 12, it would be more appropriate to refer not only to the expression by a State of direct objections to resolutions (voting "against") but also to the absence of clear support by the State concerned. Even resolutions that are adopted by consensus may be evidence not of the existence of *opinio juris* but rather of the lack of interest among the majority of States in the issues being addressed by the resolution or of the very general nature of its provisions, which therefore make them, ipso facto, of little legal consequence.

Denmark (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway, and Sweden)

[Original: English]

Furthermore, we appreciate the elaboration in the commentary on draft conclusion 12 regarding resolutions of international organizations. We note, as was suggested in the Sixth Committee, the special mention of the General Assembly's relevance, as a forum of near universal participation. As was also stated by Special Rapporteur Sir Michael Wood in his third report, General Assembly resolutions may be particularly relevant as evidence of or impetus for customary international law. However, as the report also notes, caution is required when determining the normative value of such resolutions, since "the General Assembly is a political organ in which it is often far from clear that their acts carry juridical significance". The Nordic countries believe that further elaboration in the commentary on two particular aspects would benefit the discussion of the normative value of General Assembly resolutions: Firstly, a further discussion of the unique characteristics of the General Assembly of the United Nations and what sets it apart from other international organizations.

Secondly, the importance of General Assembly resolutions' content and the conditions of their adoption. In other words, are there particular areas where resolutions tend to be expressive of *opinio juris*.

New Zealand

[Original: English]

New Zealand generally agrees with the conclusions in draft conclusion 12 and the additional clarifications in its accompanying commentary. In New Zealand's view there is ample judicial authority to support the conclusion that resolutions adopted by an international organization may, in certain circumstances, be referred to as evidence of the existence or content of a rule of customary international law. Similarly, New Zealand agrees that such resolutions may contribute to the development of such rules. In this regard, New Zealand is conscious of the contribution of such resolutions as the Universal Declaration of Human Rights to the development of customary international law. The language of such declarative resolutions, when clearly expressed and widely supported, can be compelling evidence of *opinio juris*. New Zealand also agrees with the conclusion in draft conclusions 12, paragraph 1 and 12, paragraph 3, that, absent corresponding State practice, such resolutions do not in themselves create customary international law. As one delegation put it in a previous Sixth Committee debate, resolutions may "distil but not declare" a customary international law rule.

As noted above, New Zealand considers that further thought should be given to the relationship between draft conclusion 12 and draft conclusion 4, paragraph 2. As paragraph (3) of the commentary to draft conclusion 12 acknowledges, the adoption of a resolution is a legal act of the organ of the international organization concerned. It would be helpful therefore to have a clearer analysis of why such acts are not considered to be the "practice" of that organization as provided for in draft conclusion 4, paragraph 2.

[See the comment above on draft conclusion 4.]

Singapore

[Original: English]

Singapore agrees with draft conclusion 12, paragraphs 1 and 3. Singapore also endorses the position in paragraph (4) of the accompanying commentary that "[t]here is no "instant custom" arising out of [the resolutions adopted by international organizations or intergovernmental conferences] on their own account".

However, we propose revising draft conclusion 12, paragraph 2, to state that it is only "in certain circumstances" that 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. The expression "certain circumstances" mirrors the language of the International Court of Justice in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*.[35] The expression would also clarify, in the text of the draft conclusion itself, that it is not *all* such resolutions that can provide evidence of or contribute to the development of customary international law.

[35] See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, at pp. 254–255, para. 70: "The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*..." (emphasis added).

Paragraph (6) of the accompanying commentary cautions that "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" by the adoption of a resolution by an international organization or at an intergovernmental conference. Singapore's view is that a consideration of the particular powers, membership and functions of the international organization or intergovernmental conference would also be relevant to this assessment.[36] The accompanying commentary to draft conclusion 12 should therefore incorporate these factors.

United States of America

[Original: English]

The United States appreciates the care with which the Commission and Special Rapporteur have addressed the question of resolutions of international organizations and intergovernmental conferences as evidence of customary international law. The United States agrees that such resolutions may provide relevant information regarding a potential rule of customary international law, most likely regarding the *opinio juris* of States, although potentially also their practice. However, as the draft conclusion and commentary reflect, resolutions must be approached with a great deal of caution. The United States notes that the General Assembly of the United Nations alone adopted 329 resolutions in its seventy-first session. By necessity, many resolutions of international organizations and conferences are adopted with minimal debate and consideration and through procedures (such as by consensus) that provide limited insight into the views of particular States. Moreover, because of the volume of resolutions and the limited capacity of States, the choice of whether to support or oppose a resolution may be made for political or other reasons in lieu of a legal analysis of its content, or despite disagreement with the articulation or assessment of a purported rule of customary international law addressed therein.[37] As a result, even widely supported resolutions may provide limited or ambiguous insight into the practice and *opinio juris* of the States that support them. As a result, they must be approached with a degree of skepticism when proffered as evidence of State practice or *opinio juris*. Such resolutions are certainly insufficient on their own to prove the existence of a customary law rule. It must be established that the provision corresponds to a general practice that is accepted as law (*opinio juris*) as stated in draft conclusion 12.

In order to reflect the caution with which resolutions should be approached when assessing a potential customary international law rule, and consistent with the language of the International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion cited in paragraph (5) of the commentary, the

[36] The Commission referred to the varying powers, membership and functions of international organizations in the context of the practice of international organizations in paragraph (8) of the accompanying commentary to draft conclusion 4.

[37] The United States agrees with the statements in the commentary regarding the relevance of general statements, explanations of vote, explanations of position, and disassociations from consensus in determining whether a particular resolution is relevant to the identification of a particular rule of customary international law. Such statements may indicate that one or more States held views that departed significantly from specific language of a resolution despite the States' support for the resolution as a whole. However, it is also important to note that not all States make extensive use of such statements, even if they do not fully support the language of a resolution. Moreover, even where explanations of position or similar statements have been given, they may be challenging to locate years later, making it difficult to determine whether the language of a resolution reflected the views of all States supporting it at the time it was adopted.

United States believes that the words “in certain circumstances” should be added to the second paragraph of draft conclusion 12. It would then read:

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

3. Draft conclusion 13 — Decisions of courts and tribunals

Belarus

[See the comment above on draft conclusion 12.]

New Zealand

[Original: English]

Draft conclusion 13: decisions of national courts

New Zealand agrees with the comment in paragraph (7) of the commentary to draft conclusion 13 that caution should be applied to the findings of national courts regarding the existence or content of customary international law rules. The judges of national courts are not always experts in international law and, as noted, may not always receive arguments from States. New Zealand agrees that the judgments of international courts and tribunals should be accorded greater weight in this regard, and suggests that this could be reflected more directly in the language of draft conclusion 13 itself.

Singapore

[Original: English]

Singapore notes that draft conclusion 13 closely follows the wording of article 38, paragraph 1 (d), of the Statute of the International Court of Justice, which provides that judicial decisions are a “subsidiary means” for the determination of rules of international law. Singapore therefore affirms draft conclusion 13 to the extent that it reflects existing law under Article 38, paragraph 1(d), of the Court’s Statute.

With respect to the Commission’s definition of “national courts” in paragraph (6) of the accompanying commentary, Singapore considers that this would include the Singapore International Commercial Court, which provides for international commercial dispute resolution, adjudicated by a panel of both Singapore and international judges.

United States of America

[Original: English]

Draft conclusions 13 and 14 address circumstances in which decisions of courts and tribunals and teachings may serve as subsidiary means for the identification of customary international law rules. The commentaries to these draft conclusions appropriately note the important point that (except where national court decisions may constitute State practice) these are not themselves sources of international law, but rather are sources that may help elucidate rules of law where they accurately compile and soundly analyse evidence of State practice and *opinio juris*. In line with this point, we recommend that the Commission clarify in the commentary some of the limitations on the value of judicial opinions as subsidiary means in efforts to identify customary international law.

For example, as reflected in the qualification in Article 38 of the Statute of the International Court of Justice that was omitted from draft conclusion 13, decisions of international tribunals are generally only binding on the parties before the tribunal. Even the International Court of Justice does not offer interpretations of customary international law that are binding on all States.

As a case in point, in the context of litigation, States may choose to assert or decline to contest that rules are customary in nature for reasons of litigation strategy rather than out of a thorough assessment that such rules are customary in nature. In one case, a tribunal might accept without analysis that a rule is customary based on nothing more than the absence of a dispute between the parties, while in another case, a tribunal might carefully consider the issue after robust argument by parties and amici. Similar considerations might apply in relation to assessments of customary law by international criminal tribunals, especially when States do not appear as parties or amici to the proceedings to provide their views on such questions.

Consideration should also be given to those instances in which tribunals give conflicting decisions or eminent experts disagree on complex questions of customary international law. It would be helpful to recommend that those using these subsidiary means seek out conflicting or divergent views to allow for the most accurate assessment of the law.

Adding the above points to the commentary could usefully assist readers to assess more critically the pronouncements on customary law by courts, tribunals or publicists.

4. Draft conclusion 14 — Teachings

Belarus

[Original: Russian]

While the Commission's main goal — the codification of international law and the development of draft international treaties — is valuable, the identification of customary international law (generally for the purpose of its future codification) has been a key aspect of the Commission's work, to a greater or lesser degree, throughout its existence. Therefore, the Commission's writings deserve explicit mention in the draft conclusions as a subsidiary means for the identification of customary international law (for example, in the commentary to draft conclusion 14).

[See the comment above on draft conclusion 12.]

Israel

[Original: English]

Applying the two-element approach

[See the comment above on draft conclusion 2 and the comment above on draft conclusion 3.]

A similar amendment is recommended in paragraph (4) of the commentary to draft conclusion 14 regarding the work of publicists which should also be exhaustive, empirical and objective in nature.

United States of America

[See the comment above on draft conclusion 13.]

E. Part Six — Persistent objector

1. Draft conclusion 15 — Persistent objector

Belarus

[Original: Russian]

There are some contradictions in the treatment of the case of a State that has persistently objected to the formation of a rule of customary international law. Draft conclusion 15 and the commentary thereto should examine in greater detail the circumstances under which a State may be exempted from fulfilling the obligations arising from a customary rule that has already emerged. This issue should be examined together with the issue of inaction as a form of practice and/or as constituting acceptance as law, and the issue of tacit agreement with the formation of a customary rule.

The open and official objection by a State to the formation of an international custom, we believe, could make the customary rule not opposable to the State concerned, provided that this is not contested by the majority of other States for reasons of importance to the international community and to preserve the integrity of the international legal system as a whole.

In draft conclusion 15, paragraph 1, the time frame for the formation of a rule of customary international law needs to be specified. The principle of the sovereign equality of States and the idea that obligations cannot be imposed upon States without their express and clear consent should be given special attention. Perhaps it should be stated here that the emerging rule is not binding and does not create obligations for the persistent objector.

It is not entirely clear how a State could be required to maintain its objection persistently while a rule is in the process of formation and being accepted as binding (draft conclusion 15, paragraph 2). The requirement is also burdensome for States. It is possible that the absence of an objection by a State within a somewhat short time could be misinterpreted as tacit agreement with the rule and imply the acceptance by the objecting State of the existence of an obligation under international law. In our view, this could give rise to unfounded expectations regarding the future behaviour of the State concerned. We propose that this aspect be developed further and, following the example of draft conclusion 10, paragraph 3, that the draft conclusion include a reference to whether the State was in a position to react and whether the circumstances called for such reaction.

China

[Original: Chinese]

Third, in draft conclusion 15, which establishes rules on “persistent objectors”, with respect to the determination of whether an objection has been “maintained persistently”, it is indicated in the commentary that “States cannot, however, be expected to react on every occasion, especially where their position is already well known”. China views that as generally being consistent with international practice. However, the determination that a country is a “persistent objector” should be context-specific, and comprehensive consideration should be given to various factors, including whether in a given case the country concerned is in a position to express its opposition. Moreover, if the country concerned has previously expressed its unequivocal opposition at an appropriate time, it need not do so again. China recommends that further clarification in this regard be added to the commentary to draft conclusion 15.

Denmark (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway, and Sweden)

[Original: English]

Recalling our comments made in previous years, we welcome the inclusion of the persistent objector rule. The Nordic countries share the view that when a State has persistently objected to an emerging rule of customary international law, and maintained its objection after the rule has crystallized, that rule is not opposable to it. Particular attention must in this context be paid to the category of a rule to which a State objects, and consideration must be given to universal respect for fundamental rules, particularly those for the protection of individuals. We also share the view that once a rule of customary international law has come into being, an objection will not avail a State other than a persistent objector wishing to exempt itself. Finally, we concur with the commentary in that the inclusion of a draft conclusion on persistent objector is without prejudice to any issue of *jus cogens*.

El Salvador

[Original: Spanish]

It should be noted that, in draft conclusion 15, which refers to the "persistent objector" mechanism, it is important to specify that the use of this mechanism is understood to be without prejudice to any question of *jus cogens*, in order to give greater clarity to its regulation.

Ultimately, no mechanism can be considered to contradict the universal and binding nature of the rules of *jus cogens*. This has been recognized in the jurisprudence of the Constitutional Chamber which, referring to the international obligation to ensure the effective punishment under law of crimes against humanity and war crimes, holds that "the non-applicability of the statute of limitations to such crimes is affirmed as an expression of a common and customary recognition by States, **elevated to the status of a peremptory principle of general and binding international law (*jus cogens*)**, regardless of its incorporation into specific conventions or domestic law, in other words, without the need for a specific obligation, emanating from a given international treaty" (unconstitutionality ruling No. 44-2013/145-2013, of 13 July 2016).

Israel

[Original: English]

Persistent objection

Current text: Paragraph (9) of the Commentary to draft conclusion 15 interprets the idea that an objection must be "maintained persistently" as requiring that the objection should be "reiterated when the circumstances are such that a restatement is called for", while noting that this would occur in circumstances where silence or inaction may reasonably lead to the conclusion that the State has given up its objection.

Comments:

– We believe it is appropriate to include clear criteria not only for persistent objection, but also for the retraction of such objections. We suggest clarifying in the text of draft conclusion 15 that a retraction from an objection must be **clearly expressed** as an effective reconsideration of the State's *opinio juris*. It would be problematic to interpret retraction from mere silence; the lack of repeated reiterations of the position; or inaction (particularly because such

silence or inaction may stem from other, non-legal, considerations). Indeed, in light of the principle of State sovereignty, it would be inappropriate to seek to nullify the clearly expressed objection of a sovereign State on the basis of the interpretation of its conduct alone.

– We are also concerned that the concept of "maintained persistently" in draft conclusion 15, when read together with the draft commentary, could be misread to suggest that an objection needs to be constantly repeated in order to have effect. Even if this is not the intention of the commentary, it seems necessary and helpful — both as a matter of principle and with due regard to the efficient conduct of diplomatic relations and international conferences — to clarify that an objection clearly expressed by a sovereign State during the process of the formation of a customary rule is sufficient to establish that objection, and does not generally need to be repeated to remain in effect.

Suggested amendments:

– In line with the spirit of the *Anglo-Norwegian Fisheries* case, we propose amending draft conclusion 15 so as to read: "... for so long as it *retains* its objection".

– We recommend that the draft conclusion and the commentary include clear criteria for the retraction of an objection, whereby it must be clearly expressed as a change in the State's *opinio juris* and made known to other States and not merely inferred. We also recommend that the commentary clarify that, as a rule, an objection clearly expressed at the appropriate time is sufficient to render the State an objector to the formation of a given customary rule, and need not be constantly repeated. In this context, we would also propose to acknowledge, in paragraph (5) of the commentary to draft conclusion 15, that it is difficult to recognize the exact moment of crystallization of a rule, because the process of formation is not clearly defined and delineated.

Specially affected States and general practice

Current text: In addition, paragraph (2) of the commentary to draft conclusion 15 states: "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)".

Comments:

– With respect to paragraph (2) of the commentary to draft conclusion 15 mentioned above, we are concerned that the reference to the need for a "substantial" number of States to object to a rule in order to prevent its emergence as customary law, could be misunderstood as reversing the burden well established in the in the North Sea Continental Shelf cases, which enables custom to emerge only following widespread, representative and virtually uniform practice.

Suggested amendments:

– In addition, in order to avoid the misreading referred to above and taking into account the above-mentioned comments regarding specially affected States, we propose amending paragraph (2) of the commentary to draft conclusion 15 as follows: "the objection of a *sufficient* number of States to the formation of a new rule of customary international law prevents its crystallization altogether".

[See the comment above on draft conclusion 8.]

Netherlands

[Original: English]

We would like to reiterate our persistent objection, first made during the discussion of the Commission's report in the Sixth Committee in 2015, to the requirement in draft conclusion 15 that an objection must be "maintained persistently". We would question where this requirement comes from, as it does not seem to be theoretically or logically correct. At the heart of the notion of persistent objector is the notion that international law is a consensual system. While the need for explicit consent is visible in the establishment of treaties, this is much less the case in customary international law. In the formation of customary international law, no explicit consent is needed for States to become bound. On the contrary, only explicit, consistent and clearly expressed objections will prevent a State from becoming bound. On one crucial condition: these objections must be made during the formation of the rule, objections afterward will not have the desired effect of not being bound. If this is the case, then it stands to reason that — once the position of persistent objector has been acquired through the required steps, and the customary rule has been established — this position does not require any further maintenance in the form of continuing objections. There cannot be an obligation to repeat the desire not to be bound, if the State has made its wish not to be bound sufficiently clear during the formative period of the rule. We would suggest that the rule is in fact the opposite: only when there is subsequent practice, or expressions of legal opinion by the persistent objector in support of the "new" rule, and in deviation from its original position as persistent objector, will it lose that position. We therefore suggest that with regard to persistent objectors, the draft commentary make clear that, as a rule, an objection clearly expressed during the formation of a rule is sufficient to render the State a persistent objector, unless and until such time as there is subsequent practice, or expressions of legal opinion by the persistent objector, in support of the "new" rule and in deviation from its original position as persistent objector.

New Zealand

[Original: English]

New Zealand generally supports the articulation of the persistent objector rule in draft conclusion 15. It supports the clarification in draft conclusion 15, paragraph 1, that the existence of a persistent objector does not in itself prevent the formation of a rule of customary international law. At the same time, New Zealand acknowledges that, where objections have been expressed by a number of States, it is unlikely that practice will be sufficiently widespread to satisfy the first constituent element for the formation of a rule of customary international law. This point is helpfully explained in paragraph (8) of the commentary to draft conclusion 15.

New Zealand agrees with a number of other States that have previously noted that it is not possible for a State to maintain a persistent objection against a *jus cogens* norm. New Zealand does not consider that paragraph (10) of the commentary to draft conclusion 15 is adequate in this regard. It does not consider that the relationship between the persistent objector rule and *jus cogens* necessarily falls outside the scope of the current topic and is concerned that the failure to address this principle leaves the draft conclusions incomplete. In New Zealand's view, the principle should be reflected more fully in the commentary and the text of the draft conclusion itself.

Republic of Korea

[Original: English]

Regarding draft conclusion 15 which deals with the so-called "persistent objector", the Government of the Republic of Korea notes that the doctrine of the persistent objector is one of the most controversial issues in the theory of customary international law. Our government considers that this doctrine has substantial implications for the norm-creating process in international law, therefore requiring further review with great caution.

Singapore

[Original: English]

Singapore affirms the existence of the "persistent objector" principle as stated in draft conclusion 15, paragraph 1, and considers its existence to be *lex lata*.

Concerning draft conclusion 15, paragraph 2, Singapore welcomes in particular the Commission's acknowledgment that, in maintaining its persistent objection, a State is not expected to object on every single occasion, especially where the position is already well known, and the determination of whether the requirement that a State's objection be maintained persistently should be done in a "pragmatic manner, bearing in mind the circumstances of each case".

Finally, Singapore notes that the Commission's inclusion of draft conclusion 15 is without prejudice to issues of *jus cogens*, and further notes that the Commission is undertaking separate work on the topic of peremptory norms of general international law (*jus cogens*). We agree that, given the different stages of work on the two topics, it may be premature for the Commission to settle on a position regarding the relation between *jus cogens* and the persistent objector principle.

United States of America

[Original: English]

The United States agrees with the observation in paragraph (9) of the commentary to draft conclusion 15 that assessing whether an objection to a customary law rule has been maintained persistently must be done in a pragmatic manner, bearing in mind the circumstances of each case, and with its important affirmation that States cannot "be expected to react [restate their objection] on every occasion, especially where their position is already well known". In this context, we are concerned that the particular example used in paragraph (9) involving "a conference attended by the objecting State at which the rule is reaffirmed" may be misleading. In our view, it would rarely, if ever, be necessary for a State to object at a particular conference to maintain its status as a persistent objector to a rule of customary international law accepted by other States. For example, a State might decline to make a statement at a diplomatic conference for a variety of political or practical reasons that do not evince a legal view, and it seems strange that a statement after the conference would not have the same effect under customary international law as a statement at the conference. More generally, the example could misleadingly suggest that there is a particular significance to international conferences as forums for practice relevant to the formation of customary international law, which we do not believe to be the case. Accordingly, we believe this example should be deleted from the commentary.

F. Part Seven — Particular customary international law

1. Draft conclusion 16 — Particular customary international law

Belarus

[Original: Russian]

With respect to draft conclusion 16, it would be helpful if a more appropriate alternative could be found to replace the expression "particular custom", although the proposed wording does meet the main objective: to recognize the existence of the phenomenon and the fact that it is not determined exclusively by geography. For example, it is widely accepted that there are certain customs that are followed by the "space-faring nations" or by other nations in a high-tech field.

In certain cases, the practice giving rise to a rule of international customary law could depend on technological, scientific, geographical or other State strengths or characteristics. Consequently, it may be appropriate to introduce a category of States "whose interests are specially affected" (as one of the possible alternatives to "particular customary international law" as used in draft conclusion 16). The formation of rules of international customary law by such States must not encroach on the legitimate interests of the other subjects of international law or on the principle of the sovereign equality of States.

The requirements for establishing the existence of a particular custom must be stronger than those for rules of customary international law. It is very important that a particular (or local) custom be accepted in clearly expressed fashion by all the States concerned.

Draft conclusion 16 would benefit, in our opinion, from the addition of some criteria according to which States are included in any group of States for which a particular customary international law is formed. Objective criteria (geographical, historical, military and political, technological or other) should be given greater weight to offset statements by States concerning the formation of groups, coalitions and the like.

Czech Republic

[Original: English]

"Non-localized" particular customary international law — draft conclusion 16, paragraph 1

According to conclusion 16, paragraph 1, of the draft conclusions, "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". In its commentary (para. (5)), the Commission adds 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".

Comments:

The Czech Republic would like to express reservations concerning this draft conclusion, namely the analysis of "non-localized" particular customary international law.

The Czech Republic would like to point to the fact that the existence of particular customary international law, being in the nature of an exception, is a matter of strict proof, i.e. the standard of proof required is higher than in cases where an ordinary or general custom is alleged. In addition, as also noted in the Commission's discussions on the subject, the principal case law to date in this area has been driven by geographical nexus (the existence of "non-localized" custom being a theoretical concept).

In this regard, we note that neither the Commission in its commentary, nor the Special Rapporteur in its report suggesting this conclusion, have adduced any practical example of such alleged "non-localized" particular custom. In addition, it is not clear how such a vague criterion as "common cause, interest or activity" (or "community of interest") could be clearly identified in practice and could form a solid basis for existence of a rule of particular customary international law deviating from the rules of general customary international law.

Therefore, we propose that the Commission substantially expand and elaborate its analysis concerning the alleged existence of "non-localized" customary international law, using relevant concrete examples, if any, from State practice. Alternatively, we propose that the "non-localized" customary international law is not addressed in the draft conclusions.

Denmark (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway, and Sweden)

[Original: English]

Finally, regarding the issue of particular customary international law: We concur with the Commission's use of this term instead of "particular custom" in order to emphasize that draft conclusion 16 is also concerned with rules of law, not mere customs or usages. As noted, there may indeed be local customs among States that do not amount to rules of international law. We agree that a measure of geographical affinity usually exists between States among which a rule of particular customary international law applies. We do not rule out that in principle particular customary international law can develop among States linked by other common causes, interests or activities. However, we find it important to emphasize that such common denominators should be very clearly identifiable among the States concerned. The importance of clarity also applies to the general practice and its acceptance as law. In this context, we agree that the practice must be general in the sense that it is a consistent practice among the States concerned and that each of these states must have accepted the practice as law among themselves.

El Salvador

[Original: Spanish]

In this regard, although the term "particular" is considered somewhat vague, El Salvador endorses the definition set out in draft conclusion 16, paragraph 1. Indeed, non-general rules of customary international law that apply to particular areas or regions are what doctrine in this field refers to as "regional custom".

Regional custom is characterized as having emanated from a group of States with their own characteristics. For example, since 1991, with the signing and subsequent ratification of the Tegucigalpa Protocol to the Charter of the Organization of Central American States, the Republic of El Salvador has been part of the economic and political community of States known as the Central American Integration System. The functioning of the System's *pro tempore* presidency has been based on a customary practice according to which one member State serves as the link between

Governments and the System's organs and institutions, ensuring the ongoing implementation of the regional integration agenda, for a period of six months in the order of rotation that the Central American States themselves agree in a normative instrument. In the Central American integration process, the rules of procedure of the *pro tempore* presidency of the Central American Integration System, adopted in March 2009, which are in effect as of this date, constitute a legal instrument in which this customary practice has now been crystallized, because States have recognized the legal conviction in its implementation.

Thus, given the specific way in which such types of regional customary practice are formed, El Salvador considers that the Spanish phrase " Estados interesados" in draft conclusion 16, paragraph 2, does not appropriately reflect the meaning that can be attributed to such customary practices, since States are bound by them as a result of the legal conviction that they give them, which is something that goes beyond a mere expression of interest.

Netherlands

[Original: English]

Draft conclusion 16 refers to a rule of customary international law "that applies … among a limited number of States". We are of the view that the use of the verb "apply" could lead to confusion in this context. We suggest to replace the phrase with "that binds only a limited number of States".

New Zealand

[Original: English]

Draft conclusion 16: rules of particular customary international law

New Zealand supports the inclusion of draft conclusion 16 regarding rules of particular customary international law. Such rules may be developed to implement general rules of international law in a particular common geographic or other context; or where no such general rule of international law exists. In New Zealand's view, however, they cannot replace or derogate from fundamental principles of international law, including *jus cogens* norms, or obligations *erga omnes*. This should be reflected in the accompanying commentary.

It is important that it is very clear which States have participated in the formation of such rules and therefore can be considered to be bound by them. In this regard, New Zealand supports the qualification in paragraph (7) of the commentary that practice must be consistent among all of the States to which the rule of particular customary international law is considered to apply. That is a significant qualification, which New Zealand considers should be reflected in the text of draft conclusion 15, paragraph 2, itself.

United States of America

[Original: English]

Draft conclusion 16, titled "Particular customary international law", is also of concern for the United States for two reasons. First, we question whether paragraph 2 of the draft conclusion adequately defines when a rule of particular customary international law should be determined to exist. Notably, by stating only that "it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*)", the draft conclusion leaves open the nature of the *opinio juris* that must be held by the States concerned. As a result, it is unclear whether the *opinio juris* requirement would be met if the States concerned

simply mistakenly believe the rule is a rule of general customary international law or whether they must correctly understand the rule to apply among themselves only.

Our second concern is regarding the ideas of bilateral custom and custom among groups of States other than regional groups. The commentary does not provide any evidence that State practice has generally recognized the existence of bilateral customary international law or particular customary law involving States that do not have some regional relationship. In this regard, we appreciate the language in paragraph (5) of the commentary that "there is no reason *in principle* why a rule of particular customary international law should not also develop" among States linked by something other than geography (emphasis added). However, we do not believe this language will make clear to the reader that particular customary international law among States other than those linked by geography, and bilateral customary international law generally, are theoretical concepts only and are not yet recognized parts of international law. We believe that it is important that this fact be made clear in the commentary to avoid confusing readers.

For the foregoing reasons, the United States suggests that draft conclusion 16 be reworded as follows:

Conclusion 16

Particular customary international law

1. A rule of particular customary international law, whether regional~~,~~ or 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*) applicable only among the States concerned.

The commentary would need to be conformed to the above changes. If any discussion of bilateral or "other" custom is retained, we believe the commentary should make clear that the concepts are not yet recognized in international law, but constitute examples of progressive development.

IV. Comments on the final form of the draft conclusions

Belarus

[Original: Russian]

The topic is too narrow to justify the development of a convention based on the Commission's output; rather, the Commission could simply formulate conclusions, guidelines or other material that would provide practitioners of international law with the tools for identifying the rules of customary international law.

China

[Original: Chinese]

With respect to the final form of this topic, China has no objection to the plan to formulate a set of conclusions and hopes that the conclusions and commentaries, and the results of the research conducted by the Secretariat, can provide unified and clear guidance on international law and practice.