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Third report on identification of customary international law

by Michael Wood, Special Rapporteur*

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I. Introduction

1. In 2012, the International Law Commission placed the topic "Formation and evidence of customary international law' in its current programme of work, and held an initial debate on the basis of a preliminary note by the Special Rapporteur.[1]

2. In 2013, the Commission held a general debate[2] on the basis of the Special Rapporteur's first report[3] and a memorandum by the Secretariat.[4] The Commission changed the title of the topic to "Identification of customary international law".[5]

3. A second report by the Special Rapporteur,[6] prepared for the Commission's sixty-sixth session in 2014, covered the approach to the identification of rules of customary international law, and contained a detailed enquiry into the nature and role of the two constituent elements and how to determine whether they are present. It proposed 11 draft conclusions divided into four parts. As was explained, it seemed desirable to cover in the same report both practice and acceptance as law, given the close relationship between the two,[7] while noting that further draft conclusions relating to these and other matters would be proposed in the third report.

4. The Commission held a debate on the second report from 11 to 18 July 2014,[8] which confirmed the general support among members of the Commission for the "two element" approach. There continued to be widespread agreement that among the main materials for seeking guidance on the topic were decisions of international courts and tribunals, in particular the International Court of Justice, and that the outcome should be a practical guide for assisting practitioners in the task of identifying customary international law. One point discussed was the need to strike the right balance between the draft conclusions and the commentaries, as well as between the need for clarity in respect of the guidance offered and the need to maintain the flexibility inherent in custom as a source of international law. A number of issues raised in the report, such as the significance of inaction and the relevance of international organizations to the identification of customary international law, were highlighted as requiring further analysis and discussion.

5. Following the debate, the 11 draft conclusions proposed in the second report were referred to the Drafting Committee, which provisionally adopted 8 draft conclusions. (The Committee was unable to consider two draft conclusions because of lack of time, and one draft conclusion was omitted.) On 7 August 2014, the Chairman of the Drafting Committee presented an interim report to the plenary on

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[1] See Document A/CN.4/653: *Note on the formation and evidence of customary international law*.

[2] See summary records A/CN.4/SR.3181, 3182, 3183, 3184, 3185, 3186 (17, 18, 19, 23, 24, 25 July 2013); Document A/68/10: *Report of the International Law Commission on its Sixty-fifth session (6 May-7 June and 8 July-9 August 2013)*, paras. 66-107.

[3] Document A/CN.4/663.

[4] Document A/CN.4/659: *Elements in the previous work of the International Law Commission that could be particularly relevant to the topic* (hereinafter: '*Secretariat Memorandum*').

[5] Summary record A/CN.4/SR.3186 (25 July 2013), pp. 5-6.

[6] Document A/CN.4/672.

[7] *Ibid.*, para. 10.

[8] Summary records A/CN.4/SR.3222, 3223, 3224, 3225, 3226, 3227 (11, 15, 16, 17, 18 July 2014); Document A/69/10: *Report of the International Law Commission on its Sixty-sixth session (5 May-6 June and 7 July-8 August 2014)*, paras. 137-185.

the work of the Committee on the topic in 2014.[9] The eight draft conclusions provisionally adopted by the Committee were reproduced in an annex to the interim report. As stated by the Chairman of the Committee, the Committee hoped to submit formally a set of draft conclusions, including those covered in the interim report (revised as necessary in light of the present report and further discussion in the plenary and the Drafting Committee), for adoption by the Commission at its sixty-seventh session in 2015.

6. The eight draft conclusions provisionally adopted by the Drafting Committee in 2014 are divided into three parts: (a) introduction; (b) basic approach; and (c) a general practice. It is proposed that a fourth part, to include the draft conclusions from the second report not yet discussed, will be entitled "Acceptance as law (*opinio juris*)". Two further parts, to be entitled "Particular forms of practice and evidence" and "Exceptions to the general application of rules of customary international law", are suggested in the present report.

7. There was general support in the Sixth Committee debate in 2014 for the preparation of a practical guide, in the form of a set of conclusions with commentaries, to assist practitioners in identifying rules of customary international law. Delegations fully supported the two-element approach, with several adding that the view according to which, in some fields, one constituent element alone would be sufficient to establish a rule of customary international law was not supported by international practice and in the jurisprudence. Some suggested exploring the variation in the respective weights of the two elements in specific fields of international law. While several delegations acknowledged that it was primarily the practice of States that was to be taken into account when identifying a rule of customary international law, some also emphasized the importance of the practice of international organizations in the formation and identification of customary rules, especially in instances where Member States had transferred competences to them.[10]

8. The present report should be read together with the two earlier reports of 2013 and 2014, the work of the Drafting Committee in 2014, and the debates in the Commission and in the Sixth Committee. It seeks to complete the set of draft conclusions proposed by the Special Rapporteur. In doing so, it addresses certain matters not covered in the second report, and others to which it was agreed the Commission would return in 2015. Each of the sections into which this report is divided covers a specific area: section II addresses further the relationship between the two constituent elements; section III encompasses a more detailed enquiry into inaction as practice and/or evidence of acceptance as law; section IV examines the role of treaties and resolutions adopted by international organizations and at international conferences; section V addresses judicial decisions and writings; section VI; returns to the issue of the practice of international organizations; sections VII and VIII examine two particular issues, namely, particular custom and the persistent objector; and section IX suggests the future programme of work on the topic. For convenience, the draft conclusions proposed in this report, which need

[9] Summary record A/CN.4/SR.3242; the verbatim text of the Chairman's report of 7 August 2014 may be found at <http://legal.un.org/ilc/sessions/66/DC_ ChairmanStatement%28IdentificationofCustom%29.pdf>.

[10] Document A/CN.4/678: *Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-ninth session, prepared by the Secretariat*, paras. 52-59.

to be read together with those proposed earlier by the Special Rapporteur and the Drafting Committee, are set out in an annex.

9. At its 2014 session, the Commission:

> "(R)eiterate(d) its request to States to provide information, by 31 January 2015, on their practice relating to the formation of customary international law and the types of evidence suitable for establishing such law in a given situation, as set out in:
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> (a) official statements before legislatures, courts and international organizations; and
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> (b) decisions of national, regional and subregional courts."[11]

In addition, the Commission indicated that it "would welcome information about digests and surveys on State practice in the field of international law".[12]

10. As of the date of submission of this report, in addition to the contributions received in 2014,[13] six additional contributions had been received.[14] Further contributions are welcome at any time.

11. Various institutions again organized meetings on aspects of the topic, which were both encouraging and stimulating. The Asian-African Legal Consultative Organization (AALCO) is discussing the identification of customary international law, and it is understood that its Informal Expert Group has considered its Special Rapporteur's report and adopted a set of comments for consideration at the Consultative Organization's session in April 2015.[15] In addition, since the preparation of the second report, there have been further decisions of courts and tribunals, as well as writings, which are taken into account by this report.

II. Relationship between the two constituent elements

12. The need to consider further the relationship between the two constituent elements of customary international law was raised within the Commission and the Sixth Committee in 2014.[16] The issues highlighted in this regard included the temporal aspect of the two elements, and the application of the two-element approach in different fields of international law.

13. Customary international law, being general practice accepted as law, is formed by, and manifests itself in, instances of conduct that are coupled with *opinio juris*. As the International Court of Justice has repeatedly stated, "[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out

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[11] A/69/10, *supra* note 8, at para. 29.

[12] *Ibid*., para. 30.

[13] The Kingdom of Belgium; the Republic of Botswana; Cuba; the Czech Republic; the Republic of El Salvador; the Federal Republic of Germany; Ireland; the Russian Federation; the United Kingdom of Great Britain and Northern Ireland; and the United States of America.

[14] Austria; the Czech Republic; Finland; the Federal Republic of Germany; the Republic of Korea; and the United Kingdom of Great Britain and Northern Ireland.

[15] The Fifty-Fourth Annual Session of the Asian African Legal Consultative Organization (AALCO) is scheduled to be held in Beijing, People's Republic of China from 13 to 17 April 2015, sometime after the date of submission of the present report.

[16] A/69/10, *supra* note 8, at para. 153; A/CN.4/678, *supra* note 10, at para. 53.

in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it".[17] The two constituent elements of customary international law have been described as "not two juxtaposed entities, but rather only two aspects of the same phenomenon: a certain action which is subjectively executed or perceived in a certain fashion".[18]

14. While the two elements of customary international law are indeed "really inseparable; one does not exist without the other"[19] in seeking to ascertain whether a rule of customary international law has emerged, it is necessary to consider and verify the existence of each element separately.[20] This generally requires an assessment of different evidence for each element because, as explained in the

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[17] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77. See also *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. 109; *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 122, para. 55.

[18] B. Stern, "Custom at the Heart of International Law", *Duke Journal of Comparative and International Law*, 11 (2001), pp. 89, 92. See also G.M. Danilenko, *Law-Making in the International Community* (Martinus Nijhoff Publishers, 1993), at pp. 81-82 ("although *opinio juris* is recognized as a separate element of custom, as a practical matter it can be made cognizable only through overt manifestations of state behavior. Within the framework of the customary law-making process, the rules of behavior created by evolving state practice are accepted as law through acts that also form part of practice in a broad sense. Moreover, the same acts and actions making up the relevant practice can express both the attitude of states towards the content of the emerging rule of conduct and the recognition of this rule as legally binding. It follows that the element of *opinio juris* cannot be entirely separated from practice"); H. Thirlway, *The Sources of International Law* (Oxford University Press, 2014), at p. 62 ("Practice and *opinio juris* together supply the necessary information for it to be ascertained whether there exists a customary rule, but the role of each — practice and *opinio* — is not uniquely focused; they complement one another"); W.T. Worster, "The Transformation of Quantity into Quality: Critical Mass in the Formation of Customary International Law", *Boston University International Law Journal*, 31 (2013), pp. 1, 8-9 ("The objective and subjective elements are not separated … we do not conduct an inquiry into the sufficiency of practice and, only once that inquiry is confirmed, move to an inquiry into whether states hold *opinio juris*. Instead, we assess, or should assess, the sufficiency of practice when it is done with *opinio juris*, meaning that we are also looking for a critical mass of practice with *opinio juris*").

[19] R. Müllerson, "On the Nature and Scope of Customary International Law", *Austrian Review of International & European Law*, 2 (1997), pp. 341, 344-345, 346-347 (adding that "like heads and tails, [the two elements] may be separated for analytical purposes but [] cannot exist independently from each other … the question whether there are customary norms without any of the two elements — practice and *opinio juris* — is an artificial (imagined) question. There is always some 'actual' practice, otherwise one could not simply speak of patterns of behaviour which may be (or may not be) legally binding").

[20] In Mr. Hmoud's words, "while there are merits to the arguments that the two elements intertwine and that formation and evidence of the two elements may combine in many instances, the fact remains that those are two separate matters for the purpose of identification" (summary record A/CN.4/SR.3226 (17 July 2014)). See also A. Pellet, "Article 38", in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary*, 2nd edition (Oxford University Press, 2012), pp. 731, 813 ("a splitting up of the definition of custom into two distinct elements — a 'material' or 'objective' one represented by practice and a 'psychological', 'intellectual' or 'subjective' one, usually called *opinio juris* … constitutes an extremely useful tool for 'discovering' customary rules"); J. Crawford, *Brownlie's Principles of Public International Law*, 8th edition (Oxford University Press, 2013), at p. 23 ("the existence of a custom … is the conclusion drawn by someone (a legal adviser, a court, a government, a commentator) as to two related questions: (a) is there a general practice; (b) is it accepted as international law?").

second report, the very practice alleged to be prescribed by customary international law could usually not attest in itself to its acceptance as law:[21] "[t]he bare fact that such things are done does not mean that they have to be done".[22]

15. When seeking to identify the existence of a rule of customary international law, evidence of the relevant practice should therefore generally not serve as evidence of *opinio juris* as well: such "double counting" (repeat referencing[23]) is to be avoided.[24] As Thirlway has remarked, "[t]here may well be overlap between the 'manifestations of practice' and the 'forms of evidence of acceptance' of such practice as law; generally, this does not mean that given acts can constitute both, as that would amount to a return of the single-element theory".[25]

16. Customary international law has often been described in terms of a practice's hardening into law with the addition of (concomitant) *opinio juris*. Yet, it is increasingly recognized that while the actual practice engaged in by States may well

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[21] A/CN.4/672, *supra* note 6, at paras. 72-74.

[22] M.N. Shaw, *International Law*, 7th edition (Cambridge University Press, 2014), at p. 53. See also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 76 ("acting, or agreeing to act in a certain way, does not itself demonstrate anything of a juridical nature"), and para. 77 ("even if these instances of action … were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris* … The frequency, or even habitual character of the acts is not in itself enough"); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 253-254, paras. 65-68; *Ahmadou Sadio Diallo, (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 582, at p. 615, para. 90 ("The fact … that various international agreements … have established special legal regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary"); *The Case of the S.S. "Lotus" (France/Turkey)*, PCIJ, Series A, No. 10, p. 28; Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia, Criminal, Case No. 002/19-09-2007-EEEC/OICJ (PTC38), *Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)*, 20 May 2010, para. 53 ("A wealth of State practice does not usually carry with it a presumption that *opinio juris* exists").

[23] Summary record A/CN.4/SR.3223 (15 July 2014) (Mr. Murase).

[24] See also A/CN.4/672, *supra* note 6, at para. 74; as suggested therein, "[a]pplying this rule to 'nonactual' practice may also serve to guarantee that abstract statements could not, by themselves, create law".

[25] H. Thirlway, "Human rights in customary law: an attempt to define some of the issues", *Leiden Journal of International Law*, 28 (2015) (forthcoming) (adding that "[t]he two-element theory necessarily implies that there has to be something present that can be described as State practice, and something present that indicates, or from which the conclusion can be drawn, that States consider that a rule of customary law exists"). See also M.H. Mendelson, "The Formation of Customary International Law", 272 *Recueil des cours* (1998), pp. 155, 206-207 ("What must, however, be avoided is counting the same act as an instance of both the subjective and the objective element. If one adheres to the 'mainstream' view that it is necessary for both elements to be present, and in particular for the subjective element to be accompanied by 'real' practice, this must necessarily preclude treating a statement as both an act and a manifestation of belief (or will)"); M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press, 1999), at pp. 136-141. At the same time, "[q]uite often, both elements coincide; even in the cases where it has proclaimed the validity of the theoretical distinction between practice and *opinio juris,* the [International] Court mixes them up" (Pellet, *supra* note 20, at p. 827); but see A.G. Koroma, "The Application of International Law by the International Court of Justice", *Collected Courses of the Xiamen Academy of International Law*, Vol. 4 (Martinus Nijhoff Publishers, 2013), at p. 101.

"constitute[] the initial factor to be brought into account",[26] not all rules of customary international law must "have their roots in the soil of actual usage".[27] In other words, it is possible that an acceptance that something ought to be the law (nascent *opinio juris*) may develop first, and then give rise to practice that embodies it so as to produce a rule of customary international law.[28] As stressed by the representative of South Africa in the Sixth Committee, in identifying a rule of customary international law "what mattered was that both elements should be present, rather than their temporal order".[29]

17. The two-element approach, widely supported within the Commission and by States within the context of the present topic, and in international practice more broadly and in case law, as well as in the literature,[30] applies to the formation and identification of all rules of customary international law. At the same time, as was noted in the second report, "[t]here may … be a difference in application of the two-element approach in different fields [of international law] (or, perhaps more precisely, with respect to different types of rules)".[31] This reflects the inherently flexible nature of customary international law, and its role within the international legal system. Accordingly, in some cases, a particular form (or particular instances) of practice, or particular evidence of acceptance as law, may be more relevant than

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[26] Shaw, *supra* note 22, at p. 54. See also P. Tomka, "Custom and the International Court of Justice", *The Law & Practice of International Courts and Tribunals*, 12 (2013), pp. 195, 208 (referring to the *Military and Paramilitary Activities* case when saying that "[b]ehind this inquiry into *opinio juris* there is, of course, an assumption that sufficient practice existed").

[27] To borrow the words of H.W.A. Thirlway, *International Customary Law and Codification* (A.W. Sijthoff, 1972), at p. 68.

[28] Of course, *opinio juris*, as strictly defined, cannot precede the practice which it is meant to accompany: rather, there may be a view that a rule should exist (or a mistaken view that it exists). If thereafter practice is observed consistent with this view, it will be easily referable to it. In that sense the *opinio* can, as it were, be backdated; but when it was expressed it was only *opinio*, not *opinio juris*. See also K. Wolfke, *Custom in Present International Law*, 2nd edition (Martinus Nijhoff Publishers, 1993), at p. 64-65; P. Dailler, M. Forteau, A. Pellet, *Droit international public*, 8th edition (L.G.D.J., 2009), at p. 262 ("Traditionellement, la pratique est à l'origine de l'*opinio juis.* C'est la répétition des précédents dans le temps qui fait naître le sentiment de l'obligation. On assiste cependent, dans certain cas, à une inversion du processus: l'expression d'un 'besoin de droit' … est à l'origine d'une pratique qui parachève la formation de la norme coutumière. Aux coutumes 'sages' s'opposent ce que l'on a appelé les coutumes 'sauvages'"); J. Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Routledge, 2010), at pp. 80-85.

[29] Statement available online on the United Nations' PaperSmart Portal <http://www.un.org/en/ga/sixth/>. The point was also made in the Commission's debate last year by Mr. Park, Mr. Murase and Mr. Nolte (summary records A/CN.4/SR.3223 (15 July 2014), A/CN.4/SR.3226 (17 July 2014)). See also A. Cassese, *International Law in a Divided World* (Clarendon Press, 1986), at p. 180 ("Of course, the two elements need not [both] be present from the outset").

[30] A/CN.4/672, *supra* note 6, at paras. 21-27. Mr. Huang explained in the Commission's 2014 debate that "[c]ustomary international law could be compared to a human being, with general practice forming the body, and *opinio juris*, the soul: in other words, both elements were vital" (summary record A/CN.4/SR.3226 (17 July 2014)).

[31] A/CN.4/672, *supra* note 6, at para. 28. In Mr. Šturma's words, "admitting that in different areas of international law the weight put on practice and on *opinio juris* may be different does not imply, in my view, to replace the uniform theory of international custom by sectorial theories of customs in human rights law, international humanitarian law, international criminal law, etc." (summary record A/CN.4/SR.3226 (17 July 2014)); See also Mr. Park, Mr. Hassouna and Mr. Hmoud (summary records A/CN.4/SR.3223 (15 July 2014), A/CN.4/SR.3225 (17 July 2014), and A/CN.4/SR.3226 (17 July 2014)).

in others; in addition, the assessment of the constituent elements needs to take account of the context in which the alleged rule has arisen and is to operate.[32] In any event, the essential nature of customary international law as a general practice accepted as law must not be distorted.[33]

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[32] See also L. Condorelli, "Customary International Law: The Yesterday, Today, and Tomorrow of General International Law", in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012), at pp. 147, 148 (referring to the ascertainment of customary international law when observing that "it is the operation that consists in gathering evidence to prove the social effect of the rules in question. This evidence may be multiple, and the weight of each piece may also be different in different situations: an extended period may sometimes be necessary, or at other times the evidence may work synchronously. In all cases it should be deemed sufficient if it enables the assessment that the rule sought indeed has social effect in the international community. In short, the object sought is single, and there is also a single method to use, but paths to go through to find it may be different: longer and more difficult here, faster there, and sometimes, perhaps, very fast"); Thirlway, *supra* note 25 ("It is of course possible to concede that both *opinio juris* and practice are needed to establish a customary rule of human rights law, but to hold that each element, but particularly practice, in this special domain, may be of a different character from that generally required to establish custom"); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 230 (Dissenting Opinion of Judge Lachs) ("There are certain areas of State activity and international law which by their very character may only with great difficulty engender general law, but there are others, both old and new, which may do so with greater ease"), and at pp. 175, 176, 178 (Dissenting Opinion of Judge Tanaka) ("To decide whether these two factors in the formative process of a customary law exist or not, is a delicate and difficult matter … Each fact requires to be evaluated relatively according to the different occasions and circumstances … The appraisal of factors must be relative to the circumstances and therefore elastic; it requires the teleological approach ... In short, the process of generation of a customary law is relative in its manner according to the different fields of law, as I have indicated above. The time factor, namely the duration of custom, is relative; the same with factor of number, namely State practice. Not only must each factor generating a customary law be appraised according to the occasion and circumstances, but the formation as a whole must be considered as an organic and dynamic process. We must not scrutinize formalistically the conditions required for customary law and forget the social necessity, namely the importance of the aims and purposes to be realized by the customary law in question"); K. Wolfke, "Some Persistent Controversies Regarding Customary International Law", *Netherlands Yearbook of International Law*, 24 (1993), pp. 1, 15 ("As regards these ways and means of proving whether a custom already exists no full list of guidelines can be drawn up").

[33] See also Thirlway, *supra* note 27, at p. 145 ("The nature of the two constitutive elements in custom may also develop, provided development does not become distortion from the essential nature of custom"); H. Waldock, "General Course on Public International Law", 106 *Recueil des cours* (1962), p. 49 ("The essential problem in each case … is to assess the consistency, duration and generality of the practice and to weigh them in the balance with other elements, such as the political, economic and social considerations which motivate the practice. In doing this, a judge or the legal adviser of a Government will draw upon his own knowledge of international affairs and of the attitudes and policies of States. But the ultimate test must always be: "is the practice accepted as law?" This is especially true in the international community, where those who participate in the formation of a custom are sovereign States who are the decision-makers, the law-makers within the community. Their recognition of the practice as law is in a very direct way the essential basis of customary law"). Simma and Paulus's words may also be relevant in this context: "So far, it seems, the traditional sources of international law have displayed enough flexibility to cope with new developments. Even if they may not satisfy the intellectual quest for unity in the international legal system, these sources have stood the test of time and have been widely accepted. As long as no alternative legal processes that would be universally accepted are in sight, the old ones will simply have to do. And yet, the vision of an international law more amenable to the realization of global values remains compatible with the regime of traditional sources … to the extent these values find 'sufficient expression in legal form'" (B. Simma,

18. The following draft paragraph 2 of draft conclusion 3 [4] is suggested:

Draft conclusion 3 [4]

Assessment of evidence for the two elements

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2. Each element is to be separately ascertained. This generally requires an assessment of specific evidence for each element.

III. Inaction as practice and/or evidence of acceptance as law

19. As mentioned in the second report, inaction (also referred to as passive practice, abstention from acting, silence or omission) "may be central to the development and ascertainment of rules of customary international law".[34] In light of the discussions held in 2014, the Special Rapporteur has undertaken, to elaborate further thereon in this report.[35]

20. Inaction is a form of practice that (when general and coupled with acceptance as law) may give rise to a rule of customary international law.[36] Well-known examples include refraining from exercising protection in favour of certain naturalized persons;[37] abstaining from the threat or use of force against the

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A.L. Paulus, "The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View", *American Journal of International Law*, 93 (1999), pp. 302, 316 (citation omitted)).

[34] A/CN.4/672, *supra* note 6, at para. 42. See also draft conclusion 6[7], para. 1, as provisionally adopted by the Drafting Committee in 2014 (*supra* note 9).

[35] A/69/10, *supra* note 8, at para. 180.

[36] See also *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. 99, para. 188 ("The Court has however to be satisfied that there exists in customary international law an *opinio juris* as to the binding character of such abstention"); G.I. Tunkin, "Remarks on the Juridical Nature of Customary Norms of International Law", *California Law Review*, 49 (1961), pp. 419, 421 ("The custom to abstain from action under certain circumstances may undoubtedly lead to the creation of a rule of conduct that may become a juridical norm. Obviously, everything said before about the elements of repetition, time, and continuity applies equally to the practice of abstinence"); M. Akehurst, "Custom as a Source of International Law", *British Yearbook of International Law*, 47 (1977), pp. 1, 10 ("State practice … can also include omissions and silence on the part of States"); G.M. Danilenko, "The Theory of International Customary Law", *German Yearbook of International Law*, 31 (1988), pp. 9, 28 ("usual or habitual abstentions from specific actions may constitute a practice leading to a rule imposing a duty to abstain from such actions in similar situations, i.e., a practice constituting a prohibitive norm of international law"); J.-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. I (Cambridge University Press, 2005), at pp. xlv-xlvi ("If the practice largely consists of abstention combined with silence, there will need to be some indication that the abstention is based on a legitimate expectation to that effect from the international community"); M. Mendelson, "State Acts and Omissions as Explicit or Implicit Claims", in *Le droit international au service de la paix, de la justice et du développement. Mélanges offerts à Michel Virally* (Pedone, 1991), at pp. 373-382; Koroma, *supra* note 25, at p. 93; *Restatement of the Law, Third, Foreign Relations Law of the United States*, §102, comment b ("Inaction may constitute state practice").

[37] *Nottebohm Case (second phase), Judgment of April 6th, 1955: I.C.J. Reports 1955*, p. 4, at p. 22.

territorial integrity or political independence of any State;[38] and abstaining from instituting criminal proceedings in certain circumstances.[39] Even more than other forms of practice, inaction may at times be difficult to identify and qualify; in any event, as with other forms of practice, "bare proof of … omissions allegedly constituting State practice does not remove the need to interpret such … omissions" in an attempt to verify whether, indeed, they are accepted as law.[40] Where such acceptance cannot clearly be established, the inaction may be termed an "ambiguous omission".[41]

21. Inaction may also serve as evidence of acceptance as law (*opinio juris*), when it represents concurrence in a certain practice. This is, for purposes of identifying a rule of customary international law. inaction of a different kind:[42] in essence, we are here concerned with the toleration by a State of a practice of another or other States, in circumstances that attest to the fact that the State choosing not to act considers such practice to be consistent with international law.[43] Such acquiescence, in the

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[38] *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. 99, para. 188.

[39] *The Case of the S.S. "Lotus" (France/Turkey)*, PCIJ, Series A, No. 10, p. 28. See also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 253, para. 65 (the Court referring to proponents of a prohibition attempting to rely on "a consistent practice of non-utilization of nuclear weapons by States"); *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 135, para. 77 ("The almost complete absence of contrary jurisprudence is also significant, as is the absence of any statements by States"); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 134 (Separate Opinion of Judge Petrén, referring to the practice of non-recognition when saying that the term "implies not positive action but abstention from acts signifying recognition"); *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952*, p. 176, at p. 221 (Dissenting Opinion of Judges Hackworth, Badawi, Levi Carneiro and Sir Benegal Rau); *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at pp. 198, 199 (Separate Opinion of Judge Jessup, referring to the United States Department of State declining to make representation on behalf of an American company, and to the United States not raising a certain argument as a basis for resisting a claim in an inter-State dispute).

[40] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 423 (Dissenting Opinion of Judge Shahabuddeen). Ireland suggested in the 2014 Sixth Committee debate that "[c]ontext was particularly important in the assessment of inaction as a form of practice, and was likely to play a greater role there than in the assessment of other forms of practice" (statement available online on the United Nations' PaperSmart Portal, <http://www.un.org/en/ga/sixth/>).

[41] Thirlway, *supra* note 18, at p. 61.

[42] Mr. Hmoud put it thus: "[w]hile it is recognized that inaction may be considered a negative action, there has to be a distinction between inaction as a conduct, which belongs to the objective element (practice), and inaction as representative of acquiescence, thus falling under the second, subjective element" (summary record A/CN.4/SR.3226 (17 July 2014)). See also Mr. Forteau's intervention in the Commission's debate in 2014 (summary record A/CN.4/SR.3225, 17 July 2014); Danilenko, *supra* note 36, at pp. 28-29 ("Under the heading of "passive" or "negative" practice a practice of [two different types] may be understood").

[43] Manley O. Hudson, as Special Rapporteur on Article 24 of the Statute of the International Law Commission, listed "general acquiescence in the practice by other States" as an element required for the emergence of a rule of customary international law (Article 24 of the Statute of the International Law Commission — Working Paper by Manley O. Hudson, A/CN.4/16 and Add.1, *Yearbook of the International Law Commission*, Vol. II (1950), p. 26); elsewhere he refers to the necessary elements of customary international law as "the concordant and recurring action of

words of the Chamber of the International Court of Justice in *Gulf of Maine*, "is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent".[44]

22. As there could be various reasons for a refusal or failure to act, including a lack of capacity to do so or a lack of direct interest,[45] not every instance of inaction

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numerous States in the domain of international relations, the conception in each case that such action was enjoined by law, and the failure of other States to challenge that conception at the time" (M.O. Hudson, *The Permanent Court of International Justice 1920-1942* (Macmillan, 1943), at p. 609). See, for example, Special Tribunal for Lebanon, Case No. CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing (Appeals Chamber), para. 47 ("The combination of a string of decisions in this field [of inherent powers of courts and tribunals], coupled with the implicit acceptance or acquiescence of all the international subjects concerned, clearly indicates the existence of the practice and *opinio juris* necessary for holding that a customary rule of international law has evolved"); *Priebke, Erich s/ solicitud de extradición* (Argentinian Supreme Court), causa No 16.063/94, 2 November 1995, para. 90. See also K. Skubiszewski, "Elements of Custom and the Hague Court", *ZaöRV*, 31 (1971), pp. 810, 838 ("The assertion of a right by one State or States, the toleration or admission by others that the former are entitled to that right, the submission to the obligation — these are phenomena that are evidence of the States' opinion that they have moved from the sphere of facts into the realm of law"); Shaw, *supra* note 22, at p. 64 ("where states are seen to acquiesce in the behaviour of other states without protesting against them, the assumption must be that such behaviour is accepted as legitimate"); M. Akehurst, *supra* note 36, at p. 39 ("If actions by some States (or claims that they are entitled to act) encounter acquiescence by other States, a permissive rule of international law comes into being; if they encounter protest, the legality of the actions in dispute is, to say the least, doubtful"); H. Meijers, "How is International Law Made? — The Stages of Growth of International Law and the Use of Its Customary Rules", *Netherlands Yearbook of International Law*, 9 (1978), pp. 3, 4-5 ("the inactive are carried along by the active … lack of protest — lack of open objection to the development of the new rule — is sufficient for the creation of a rule of customary law (and for the obligation to abide by it)"). MacGibbon has observed that acquiescence "… imparts a welcome measure of controlled flexibility to the process of formation of rules of customary international law" (I.C. MacGibbon, "Customary International Law and Acquiescence", *British Yearbook of International Law*, 33 (1957), pp. 115, 145 (offering, however, a particular view on the relationship between *opinio juris* and acquiescence)).

[44] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at p. 305, para. 130. The notion, in the present context, of inaction as concurrence borrows from ideas of acquiescence and estoppel in international law, which are normally applicable in a bilateral context; while the analogy may not be exact, it may nevertheless be helpful. See also I.C. MacGibbon, "The Scope of Acquiescence in International Law", *British Yearbook of International Law*, 31 (1954), pp. 143, 145 ("The function of acquiescence may be equated with that of consent, which was described by Professor Smith as 'the legislative process of international law'; it constitutes a procedure for enabling the seal of legality to be set upon rules which were formerly in process of development and upon rights which were formerly in process of consolidation … its value lies mainly in the fact that it serves as a form of recognition of legality and condonation of illegality and provides a criterion which is both objective and practical"); N.S. Marques Antunes, "Acquiescence", in *Max Planck Encyclopedia of Public International Law* (2006), para. 2 ("In international law, the term 'acquiescence' — from the Latin *quiescere* (to be still) — denotes consent. It concerns a consent tacitly conveyed by a State, unilaterally, through silence or inaction, in circumstances such that a response expressing disagreement or objection in relation to the conduct of another State would be called for. Acquiescence is thus consent inferred from a juridically relevant silence or inaction").

[45] Mr. Kittichaisaree has similarly said that "many plausible explanations can be made for a failure to protest interstate breaches other than the belief in the legality of the action", and Ms. Jacobsson stressed that "while it is possible that inaction may serve as evidence of acceptance as law, the reverse may also be true: namely that inaction may not be interpreted as

will amount to concurrence: only "qualified silence",[46] as detailed in the following paragraphs, may be construed as concurrence in the relevant practice.[47] The interpretation of inaction should generally be made "in relative terms, account taken of the specific (sequence of) facts and the relationship between the States involved".[48]

23. First, inaction could be relevant only to establishing concurrence where reaction to the relevant practice is called for: As the International Court of Justice stated in *Malaysia/Singapore*, "[t]he absence of reaction may well amount to acquiescence...[t]hat is to say, silence may also speak, but only if the conduct of the other State calls for a response".[49] This implies that the relevant practice ought to be one that affects the interests or rights of the State failing or refusing to act;[50] at the

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acceptance" (summary records A/CN.4/SR.3225 and A/CN.4/SR.3226 (17 July 2014), respectively). See also Crawford, *supra* note 20, at p. 25 ("Silence may denote either tacit agreement or a simple lack of interest in the issue"); Shaw, *supra* note 22, at p. 57 ("Failures to act are in themselves just as much evidence of a States' attitudes as are actions. They similarly reflect the way in which a nation approaches its environment … A failure to act can arise from either a legal obligation not to act, or an incapacity or unwillingness in the particular circumstances to act"). Cf. *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 42, para. 73 ("That non-ratification may sometimes be due to factors other than active disapproval of the convention concerned can hardly constitute a basis on which positive acceptance of its principles can be implied: the reasons are speculative, but the facts remain").

[46] M.E. Villiger, *Customary International Law and Treaties*, 2nd edition (Kluwer Law International, 1997), at p. 39.

[47] See also MacGibbon, *supra* note 44, at p. 183 ("To preclude its application to circumstances which do not warrant it, and to ensure its acceptance where appropriate, the doctrine [of acquiescence] is qualified by certain necessary safeguards").

[48] Marques Antunes, *supra* note 44, at para. 19. See also I. Brownlie, "Some Problems in the Evaluation of the Practice of States as an Element of Custom", in *Studi di diritto internazionale in onore di Gaetano Arangio Ruiz*, Vol. I (2004), at pp. 313, 315 ("A minority of academics have asserted that, in the case of the Security Council, a failure to condemn a particular action by a State constitutes approval of the action concerned. This approach is much too simplistic. Everything depends upon the context and the precise content of the records of the debates. Failure to express disapproval of the conduct of a State may have a number of procedural and political causes unconnected with the issue of legality").

[49] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/ Singapore), Judgment, I.C.J. Reports 2008*, p. 12, at pp. 50-51, para. 121 (in the context of establishing sovereignty). In Ms. Escobar Hernández's words, "[i]naction must be assessed in the light of the surrounding circumstances and with special regard to whether the State could reasonably have been expected to act" (summary record A/CN.4/SR.3226 (17 July 2014)). See also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 130, para. 31 (Separate Opinion of Judge Ammoun); M. Bos, "The Identification of Custom in International Law", *German Yearbook of International Law*, 25 (1982), pp. 9, 37 ("it should be emphasized that silence may not always be taken to mean acquiescence: for States cannot be deemed to live under an obligation of permanent protest against anything not pleasing them. For legal consequences to ensue, there must be good reason to require some form of action"); MacGibbon, *supra* note 44, at p. 143 ("Acquiescence thus takes the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection"). It will be recalled that draft conclusion 9 (2) of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as provisionally adopted by the Commission in 2014, provides that "Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction" (*Report of the Commission 2014*, paras. 75 and 76).

[50] See also the intervention by Greece in the 2014 Sixth Committee debate on the work of the Commission, available online on the United Nations' PaperSmart Portal, <http://www.un.org/en/ga/sixth/> ("It [is] the conscious inaction of an interested State with regard to the practice in

same time, it has been suggested that "[i]n areas of relations affecting the common interests of all mankind the presence of a general interest of all states may give sufficient grounds for assuming that absence of protests implies acquiescence".[51]

24. Second, a State whose inaction is sought to be relied upon in identifying whether a rule of customary international law has emerged must have had actual knowledge of the practice in question or the circumstances must have been such that the State concerned is deemed to have had such knowledge.[52]

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question, often considered in relation to an act, proposal or assertion of another State calling for a reaction, that might be relevant, not just any form of inaction"); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 229 (Dissenting Opinion of Judge Lachs) ("… [States that] have acquiesced in [a practice] when faced with legislative acts of other States affecting them"); G.I. Tunkin (L.N. Shestakov, ed., W.E. Butler, ed., trans.), *Theory of International Law* (Wildy, Simmonds & Hill, 2003), at p. 139 ("Assuredly, not every silence can be regarded as consent. Particularly in those instances when the respective forming of a customary norm does not affect a State's interests at the given time, its silence cannot be considered to be tacit recognition of this norm. But in those instances when an emerging rule affects the interests of a particular State, the absence of objections after a sufficient time can, as a rule, be regarded as tacit recognition of this norm"); Akehurst, *supra* note 36, at p. 40 ("Failure to protest against an assertion *in abstracto* about the content of customary law is less significant than failure to protest against concrete action taken by a State in a specific case which has an immediate impact on the interests of another State"); Danilenko, *supra* note 18, at p. 108 ("Under existing international law, absence of protests implies acquiescence only if practice affects interests and rights of an inactive state … Ascertainment of the fulfillment of … [this] requirement usually involves the evaluation of specific characteristics of practice taking into account, in particular, the sphere and subject matter of regulation. As a rule, not only direct but also indirect interests may be taken into account"); Skubiszewski, *supra* note 43, at p. 846 ("The attitude of mere toleration, i.e. lack of protest linked to lack of express consent or acquiescence, is sufficient when the claims put forward by the participants in the practice do not impose any duties on the non-participants … But when a correlative duty follows from the right claimed in the practice, the attitude of non-participants — in order to contribute to the creation of custom — must be of a more explicit nature. That is, it must be either express consent or unequivocal acquiescence").

[51] Danilenko, *supra* note 18, at p. 108.

[52] See also *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, at pp. 138-139; Shaw, *supra* note 22, at p. 58 ("acquiescence must be based upon full knowledge of the [alleged] rule involved. Where a failure to take a course of action is in some way connected or influenced or accompanied by a lack of knowledge of all the relevant circumstances, then it cannot be interpreted as acquiescence"); J.I. Charney, "Universal International Law", *American Journal of International Law*, 87 (1993), pp. 529, 536 ("acceptance may be established by acquiescence. The acquiescence of states is often not tantamount to knowing and voluntary consent. For acquiescence to acquire that status, the state must be aware of the subject of the consent and must know that failure to object will be taken as acceptance. Thus, acquiescence, if it obliges, must be tantamount to actual consent, but consent expressed by nonaction rather than by action"); Akehurst, *supra* note 36, at p. 39 ("acts or claims by one State which other States could not have been expected to know about carry very little weight, and no conclusion can be drawn from failure to protest against such acts or claims"); Villiger, *supra* note 46, at p. 39 ("Of course, passive conduct could only amount to qualified silence if a State knows of the practice of other States and of the (emerging) customary rule"). In the *Gulf of Maine* case, Canada argued that "[t]he essence of the principle of acquiescence is one government's knowledge (actual or constructive) of the conduct or assertion of rights of the other government concerned, and its failure to protest that conduct or assertion of rights … The knowledge, coupled with silence, is taken to be a tacit acceptance" (*I.C.J. Pleadings*, Vol. V, 81-82). Arangio-Ruiz has suggested that "[p]articularly nowadays any action or omission of a State is known all over the world with the immediateness of a ray of light" (G. Arangio-Ruiz, "Customary Law: A Few More Thoughts

25. Third, and related to the requirement of knowledge of the practice in question, is the need for the inaction to be maintained over a sufficient period of time.[53]

26. It is proposed that draft conclusion 11 (3) in the second report (which has yet to be considered by the Drafting Committee) could read as follows:

Draft conclusion 11

Evidence of acceptance as law

…

3. Inaction may also serve as evidence of acceptance as law, provided that the circumstances call for some reaction.

IV. The role of treaties and resolutions

27. The practical importance, for the formation and identification of customary international law, of treaties and treaty-making (particularly multilateral treaty-making), and of resolutions of international organizations and conferences, is well recognized. With the advance of international organization and the codification of international law, customary international law has been "increasingly characterized by the strict relationship between it and written texts".[54] In the words of Judge

about the Theory of 'Spontaneous' International Custom", in N. Angelet (ed.), *Droit Du Pouvoir, Pouvoir Du Droit: Mélanges offerts à Jean Salmon* (Bruylant, 2007), at pp. 93, 100).

[53] See also *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at pp. 310-311, para. 151 ("too brief to have produced a legal effect"); *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, at p. 138 ("The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it"); Meijers, *supra* note 43, at pp. 23-24 ("all states which could become bound by their inaction must have the time necessary to avoid implicit acceptance by resisting the rule"); A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, 2008), at p. 94 ("Mere toleration is not the same as acceptance of practice as law … There are implications for the doctrine of acquiescence, the burden of proof for which is very high, presupposing long and consistent inaction accompanied by consciousness of legal change"); I. Sinclair, "Estoppel and Acquiescence", in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice* (Cambridge University Press, 1996), at pp. 104, 120 ("the Court has shown wisdom and restraint in requiring in effect that conduct that might arguably amount to acquiescence must be maintained over a certain period of time").

[54] T. Treves, "Customary International Law", in *Max Planck Encyclopedia of Public International Law* (2006), para. 2 (adding, at para. 25, that "[t]he intensification of practice within international organizations and conferences, the adoption of multilateral treaties, and the existence and activity of specialized international tribunals has contributed to the acceleration of the formation of customary rules in these and other fields"). See also *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, at p. 291 (Dissenting Opinion of Judge Tanaka) ("The appearance of organizations such as the League of Nations and the United Nations, with their agencies and affiliated institutions, replacing an important part of the traditional individualistic method of international negotiation by the method of 'parliamentary diplomacy' (Judgment on the *South West Africa* cases, *I.C.J. Reports 1962*, p. 346), is bound to influence the mode of generation of customary international law"); J. Charney, "Remarks on the Contemporary Role of Customary International Law", in *ASIL/NVIR Proceedings* (1995), p. 23 ("While customary law is still created in the traditional way, that process has increasingly given way in recent years to a more structured method … Developments in international law often get their start or substantial

Tomka, "the increasing prevalence of the expression of legal views in precise written form — through treaties, codification works, resolutions and the like — has had significant effects for the way in which" customary international law may be ascertained.[55]

28. Such written texts may reflect already existing rules of customary international law (codification of *lex lata*); they may seek to clarify or develop the law (progressive development); or they may state what would be new law. Often the need is thus "not to clarify the rule of law, but to determine whether a clearly-expressed rule adopted in a [written] instrument in fact corresponded to customary law".[56]

29. Caution is required when seeking, through written texts, such as treaties and resolutions, to identify rules of customary international law.[57] As will be highlighted below, all the surrounding circumstances need to be considered and weighed.

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support from proposals, reports, resolutions, treaties or protocols debated in such [multilateral] forums"); J. Barboza, "The Customary Rule: From Chrysalis to Butterfly", in C.A. Armas Barea et al. (eds.), *Liber Amicorum 'In Memoriam' of Judge José María Ruda* (Kluwer Law International, 2000), at pp. 1, 14 ("Customs, nowadays, are usually the product of the injection of texts in the body of existing practices"); Danilenko, *supra* note 18, at pp. 79-80 ("The emergence, in the framework of international conferences and organizations, of new forms of state practice, made up of purely verbal claims and declarations, leads to an increasing "formalization" of the customary law-making process. Such practice may establish a broad consensus that determines the outlines of preferred conduct of states before the emergence of actual practice, and thereby affects subsequent developments. Such a modified customary "negotiating" process renders more cognizable elements of conscious will aimed at creating or modifying customary legal obligations"); S.D. Murphy, *Principles of International Law*, 2nd edition (West, 2012), at p. 98 ("An important dynamic within international law is the manner in which treaties shape and develop customary international law"); Condorelli, *supra* note 32, at p. 151 ("More and more nowadays, international custom is perceived as *'consuetudo scripta'*: we find, that is, a broad correspondence between general customary norms and those written down in large international conventions of (basically) universal character"); O. Corten, *Méthologie du droit international public* (Editions de l'Université de Bruxelles, 2009), at pp. 161-178 ("Les sources documentaires pertinentes en vue de l'établissement d'une règle coutumière").

[55] Tomka, *supra* note 26, at p. 196 (referring to the way in which the International Court goes about identifying the content of a customary norm and adding, at p. 215, that "[t]he landscape of international law has changed in dramatic ways since international custom was first defined as a general practice accepted as law. Most notably, the content of international law has been increasingly specified through the adoption of binding and non-binding instruments purporting to codify the rules of international law"). See also G. Gaja, 364 *Recueil des cours* (2012), pp. 37, 38, 39 ("Rather than on a thorough analysis of the attitude of States, the [International] Court often relies on a text which carries some authority … In many instances the text in question is a codification convention, even if it is not applicable as a treaty to the dispute in hand … There are several decisions by the Court which take as authoritative, for ascertaining a rule of customary law, a declaration made by the General Assembly or a conference of States").

[56] Tomka, *supra* note 26, at p. 205 (referring to codification conventions).

[57] See also *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, para. 184 ("The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States. Bound as it is by Article 38 of its Statute to apply, *inter alia*, international custom "as evidence of a general practice accepted as law", the Court may not disregard the essential role played by general practice … in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice"); I. Sinclair, "The Impact of the Unratified Codification Convention", in A. Bos, H. Siblesz (eds.),

30. The following subsections deal with two forms of written texts adopted by States to which recourse is frequent had when rules of customary international law are to be identified. Similar considerations may apply to other written texts, such as those produced by the International Law Commission, particularly when they, too, have been the object of action by States.

A. Treaties

31. Draft conclusion 4 [5], paragraph 2, as provisionally adopted by the Drafting Committee in 2014, includes "acts in connection with treaties" among the forms that State practice may take.[58] Draft conclusion 11 in the second report (which has not yet been considered by the Drafting Committee) includes "treaty practice" among the forms of evidence of acceptance of a general practice as law.[59] In the debates in the Commission and in the Sixth Committee in 2014, it was suggested that the role of treaties be explored further in the third report. While the interaction between treaties and customary international law raises a number of important issues, in the present context we are concerned with the relevance of treaties and treaty-making to the formation and identification of customary international law.

32. The relevance of treaties to the identification of customary international law has been considered by the Commission from time to time, as has been described in the Secretariat memorandum.[60] Indeed, as early as its 1950 report to the General Assembly, the Commission stated that:

> A principle or rule of customary international law may be embodied in a bipartite or multipartite agreement so as to have, within the stated limits, conventional force for the States parties to the agreement so long as it is in force; yet it would continue to be binding as a principle or rule of customary international law for other States. Indeed, not infrequently conventional formulation by certain States of a practice also followed by other States is relied upon in efforts to establish the existence of a rule of customary

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Realism in Law-Making: Essays on International Law In Honour of Willem Riphagen (Martinus Nijhoff Publishers, 1986), at pp. 211, 220 ("complex considerations … have to be taken into account in determining whether, and if so to what extent, a new rule embodied in a codification convention may be regarded as expressive of an existing or emerging norm of customary law. Any such rule has to be analyzed in its context and in the light of the circumstances surrounding its adoption. It also has to be viewed against the background of what may be a rapidly developing State practice in the sense of the new rule"); O. Schachter, "Entangled Treaty and Custom", in Y. Dinstein, M. Tabory (eds.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff Publishers, 1989), at pp. 717, 721, 730-731 ("… caution is called for in respect of treaty rules. Various factors need to be assessed in evaluating the evidence of *opinio juris*. In many cases, the record of discussions, expert opinions, and close analysis of the rules in question enable a judgment to be made that there is a general belief that the rules are part of customary law, binding on all States. An important caveat is that conclusions as to general *opinio juris* cannot rest on the views of numerical majorities alone. An essential element is that the collectivity of States include the opinions of those States specially interested in the matter covered and those which possess the ability and determination to give effect to their conviction concerning the legal obligation in question").

[58] *Interim report of the Chairman of the Drafting Committee*, 7 August 2014, annex; see also A/CN.4/672, *supra* note 6, at para. 41(h).

[59] A/CN.4/672, *supra* note 6, at para. 76 (f).

[60] *Secretariat Memorandum*, at para. 23 (footnote 55) and para. 29 (footnote 84).

international law. Even multipartite conventions signed but not brought into force are frequently regarded as having value as evidence of customary international law. For present purposes therefore, the Commission deems it proper to take some account of the availability of the materials of conventional international law in connexion with its consideration of ways and means for making the evidence of customary international law more readily available.[61]

33. The provisions of treaties do not in and of themselves constitute rules of customary international law,[62] but such provisions, as "an explicit expression of the will of states",[63] may offer valuable evidence of the existence (or otherwise) and content of such rules.[64] In particular, they may contain relatively precise

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[61] *Yearbook of the International Law Commission 1950*, Vol. II, p. 268, para. 19.

[62] See also A. Boyle and C. Chinkin, *The Making of International Law* (Oxford University Press, 2007), at p. 236 ("support for a treaty rule, however universal, cannot by itself create 'instant' law. Such [law-making] treaties will only create new law if supported by consistent and representative state practice over a period of time. That practice can in appropriate cases consist mainly of acquiescence, or the absence of inconsistent practice"); R. Bernhardt, "Custom and treaty in the law of the sea", 205 *Recueil des cours* (1987), pp. 265, 272 ("I think that at least one statement can be safely made: if only the treaty rule exists and if it is not supported by any additional proof, this is not enough for the emergence of a customary norm. Provisions in a treaty can only be considered as expressing customary norms if additional elements of State practice supported by *opinio juris* can be adduced"); Schachter, *supra* note 57, at p. 723 ("Certainly there is no support by courts or scholars for concluding that a treaty becomes customary law solely by virtue of its conclusion or entry into force").

[63] I.F.I. Shihata, "The Treaty as a Law-Declaring and Custom-Making Instrument", *Revue égyptienne de droit international*, 22 (1966), pp. 51, 73.

[64] See *KAING Guek Eav alias Duch*, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgment, Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber (3 February 2012), para. 94 ("It must be recognised that treaty law and customary international law often mutually support and supplement each other. As such, treaty law may serve as evidence of customary international law either by declaring the *opinio juris* of States Parties, or articulating the applicable customary international law that had already crystallised by the time of the treaty's adoption"); Villiger, *supra* note 46, at p. 132 ("conventional texts may — though not invariably so — *offer evidence of a customary rule*. Like codes and resolutions, such texts merely reflect or declare, but (on account of the independence of sources) do not actually constitute, the underlying customary rule the existence of which depends on other conditions of State practice and *opinio juris*, and which does not require the additional contractual basis for its binding force"); Shihata, *supra* note 63, at p. 89 ("In fact, every treaty has some evidential value beyond its contractual limits. This value differs in degree from one treaty to another, but the range of difference is not so great as to deprive a treaty of all evidential value or to make it in itself a conclusive evidence"); J.I. Charney, "International Agreements and the Development of Customary International Law", *Washington Law Review*, 61 (1986), pp. 971, 990 ("Conferences held to negotiate international agreement provide a vehicle by which states communicate their views for the purpose of producing rules of law. Agreements reached at such fora do change nations' perceptions of their rights and duties. If this process were irrelevant to customary law development, some law may become frozen in time and fail to reflect movement realized at international negotiations. The gap that could develop between custom and treaty law might complicate interstate relations"); I.L. Lukashuk, "Customary Norms in Contemporary International Law", in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Kluwer Law International, 1996), at pp. 487, 499 ("The content of multilateral and bilateral treaties represents the most lucid and authoritative evidence specifically of legal practice"); A.M. Weisburd, "Customary international Law: The Problem of Treaties", *Vanderbilt Journal of Transnational* Law, 21 (1988), pp. 1, 5 ("Treaties, like statutes, are legal documents, more or less precisely phrased accessible with relative ease. The more weight given to them in the determination of customary law rules, the

formulations of possible customary rules, and reflect the views of States as to their nature (at least as of the time when the relevant treaty is concluded).[65] Treaties may thus allow a preliminary consideration of "whether a customary rule applicable to the case had already been identified before finding it necessary to examine the primary evidence of custom *de novo*";[66] the International Court of Justice has indeed said that it "can and must take them into account in ascertaining the content of the customary international law".[67]

34. Treaty texts alone cannot serve as conclusive evidence of the existence or content of rules of customary international law: whatever the role that a treaty may play vis-à-vis customary international law (see below), in order for the existence in customary international law of a rule found in a written text to be established, the rule must find support in external instances of practice coupled with acceptance as law.[68] In the words of the *Continental Shelf (Malta v. Libyan Arab Jamahiriya)*

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easier it is to make such determinations"); R.R. Baxter, "Multilateral Treaties as Evidence of Customary International Law", *British Yearbook of International Law*, 41 (1965-66), pp. 275, 278 ("a treaty to which a substantial number of States are parties must be counted as extremely powerful evidence of the law. Of course, as is true of any rule extracted from the State practice of a number of nations, the force of the purported rule is enhanced or diminished by the absence or presence of conflicting practice on the part of other States"); K. Wolfke, "Treaties and Custom: Aspects of Interrelation", in J. Klabbers, R. Lefeber (eds.), *Essays on the Law of Treaties: A Collection of Essays In Honour of Bert Vierdag* (Martinus Nijhoff Publishers, 1998), pp. 31, 36 ("the establishment of international customary rules is a cumbersome task in which treaties play a very important role"; adding that "[t]he evidential role of treaties is closely combined with their role in the custom-forming process").

[65] See also Baxter, *supra* note 64, at pp. 278, 297 ("since the treaty speaks with one voice rather than [many], it is much clearer and more direct evidence of the state of the law than the conflicting, ambiguous and multi-temporal evidence that might be amassed through an examination of the practice of each of the individual [signatory] States … a structure of treaty law is more persuasive and authoritative than a structure constructed of the diverse and jumbled materials of State practice"); Schachter, *supra* note 57, at p. 721-722 ("The accessibility of the treaty — its black letter law — is an important practical factor"); J. Kirchner, "Thoughts About a Methodology of Customary International Law", *Austrian Journal of Public and International Law*, 43 (1992), pp. 215, 231 ("Treaties in any case supply a reservoir for the language of a possible rule. They facilitate the [International] Court's task of drafting the wording of the customary rules in question. This is to avoid the laborious task of forming general rules out of a sequence of individual acts. Instead, the Court can compare state practice with the contents of a rule previously drafted").

[66] Tomka, *supra* note 26, at p. 201 (adding, at p. 206, that "in the presence of a codification, the Court no longer proceeds by distilling a rule from instances of practice through pure induction, but rather by considering whether the instances of practice support the written rule").

[67] *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 (having come to the conclusion that there was a large overlap between the treaties in question and customary international law, the Court said that it "must not lose sight of the Charter of the United Nations and that of the Organization of American States, notwithstanding the operation of the multilateral treaty reservation … the Court … can and must take them into account in ascertaining the content of the customary international law"). See also *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at p. 30 ("it cannot be denied that the 1982 Convention is of major importance, having been adopted by an overwhelming majority of States; hence it is clearly the duty of the Court, even independently of the references made to the Convention by the Parties, to consider in what degree any of its relevant provisions are binding upon the Parties as a rule of customary international law").

[68] See also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 104 (Separate Opinion of Judge Ammoun) ("Proof of the formation of custom is not to be deduced from

judgment, "[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them".[69]

35. There are at least three ways in which a treaty provision may reflect or come to reflect a rule of customary international law,[70] or, in other words, assist in determining the existence and content of the rule: the provision may (a) codify a rule that exists at the time of the conclusion of the treaty; (b) lead to the crystallization of a rule that may be emerging; or (c) lead to a general practice accepted as law, such that a new rule of customary international law comes into being. While it is helpful to note that these are three distinct processes, in a given case, they may shade into one another.

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statements in the text of a convention; it is in the practice of States that it must be sought"); *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 435 (Dissenting Opinion of Judge Barwick) ("Conventional law limited to the parties to the convention may become in appropriate circumstances customary law. On the other hand, it may be that even a widely accepted … treaty does not create or evidence a state of customary international law …"); Shihata, *supra* note 63, at p. 90 ("one treaty in itself and in its inception unsupported by any prior practice cannot by itself form or prove the existence of a general rule, although it may mark the first step in the formation of such a rule"); Charney, *supra* note 64, at p. 996 ("such [international conference] negotiations [and international agreements] provide useful evidence of new rules of international law … [but] they should be carefully viewed in the context of state practice and *opinio juris*"); Weisburd, *supra* note 64, at p. 6 ("treaties are simply one more form of state practice and [] one cannot answer questions as to the content of customary international law simply by looking to the language of treaties").

[69] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at pp. 29-30, para. 27. See also *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. 98, para. 184 ("Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice"); Boyle and Chinkin, *supra* note 62, at p. 234 ("a treaty does not 'make' customary law, but … it may both codify existing law and contribute to the process by which new customary law is created and develops").

[70] The status of a treaty provision as codifying or developing a rule of customary international law may, of course, change according to the point in time at which the provision's status is assessed.

36. First, treaties may codify pre-existing rules of customary international law.[71] In these circumstances, they are in their "origins or inception"[72] declaratory of such rules, that is to say, "the framers of the treaty identify rules of customary international law existing at the commencement of the drafting of the codification treaty and give these rules expression in the form of *jus scriptum*".[73] The States parties to the Geneva Convention on the High Seas (1958), for example, refer, in the preamble of the Convention to their desire "to codify the rules of international law relating to the high seas" and to "the following provisions as generally declaratory of established principles of international law" On the other hand, the drafters of the United Nations Convention on Jurisdictional Immunities of States and Their Properties (2004), while considering, in the preamble to the Convention that "the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law", express their belief that an international convention "would contribute to the codification and [progressive] development of

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[71] Articles 4, 38 and 43 of the Vienna Convention on the Law of Treaties confirm the possibility of parallel treaty and customary rules. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015, para. 88 ("Where a treaty states an obligation which also exists under customary international law, the treaty obligation and the customary law obligation remain separate and distinct"; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, at p. 424 ("The fact that … [principles of customary and general international law], recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions"); *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. 94-96; p. 207 (Separate Opinion of Judge Ni); and p. 302 (Dissenting Opinion of Judge Schwebel); *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, at p. 24, para. 45, and pp. 30-31, para. 62; *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952*, p. 176, at p. 220 (Dissenting Opinion of Judges Hackworth, Badawi, Levi Carneiro and Sir Bengal Rau); *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at p. 135 (Separate Opinion of Judge Shahabuddeen); Weisburd, *supra* note 64, at pp. 19-20. For the range of opinions as to the effect of codifying treaties on the customary rules they purport to embody, see Villiger, *supra* note 46, at pp. 151-154.

[72] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 45, para. 81; see also at p. 242 (Dissenting Opinion of Judge Sørensen) ("There are treaty provisions which simply formulate rules of international law which have already been generally accepted as part of international customary law, and it is beyond dispute that the rules embodied and formulated in such provisions are applicable to all States, whether or not they are parties to the treaty").

[73] Y. Dinstein, "The Interaction Between Customary International Law and Treaties", 322 *Recueil des cours* (2006), pp. 243, 357. As Baxter explains, "[t]he declaratory treaty is most readily identified as such by an express statement to that effect, normally in the preamble of the instrument, but its character may also be ascertained from preparatory work for the treaty and its drafting history": R.R. Baxter, "Treaties and Custom", 129 *Recueil des cours* (1970), pp. 27, 56. See also Wolfke, *supra* note 64, at p. 36 ("if a treaty contains an express, or even an indirect, recognition, of an already existing customary rule, such recognition constitutes additional evidence of the customary rule in question"). Weisburd correctly explains that "Even when this type of statement [that the treaty is declarative of custom] is an inaccurate description of the state of the law as of the date of the treaty's conclusion, it amounts to an explicit acknowledgment by the parties to the treaty that they would be legally bound to the treaty's rules even if the treaty did not exist": Weisburd, *supra* note 64, at p. 23.

international law and the harmonization of practice in this area". In other cases, the notion of codification may also be implicit in the text.[74]

37. Treaties purporting to codify rules of customary international law, however, "are not self-verifying on that point".[75] Codification conventions" may (and often do) contain provisions that develop the law[76] or represent particular arrangements decided on by the negotiating parties, and even a single provision may be only partly declaratory of customary international law.[77] There is also the possibility that the assertion in a treaty text regarding the status of customary international law is incorrect, or that customary international law has evolved since the treaty was concluded.[78] It is thus necessary in each case to verify whether the provision in question was indeed intended to codify custom, and whether it reflects existing customary international law, that is, it is necessary to confirm that "the existence of

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[74] As in the case of the Genocide Convention, in which the Parties "confirm" that genocide is a crime under international law (see also *Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951*, p. 15, at p. 23).

[75] J.K. Gamble, Jr., "The Treaty/Custom Dichotomy: An Overview", *Texas International Law Journal*, 16 (1981), pp. 305, 310. See also *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, para. 184 ("The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States. Bound as it is by Article 38 of its Statute to apply, inter alia, international custom 'as evidence of a general practice accepted as law', the Court may not disregard the essential role played by general practice. … in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice"); Murphy, *supra* note 54, at p. 99 ("absent evidence to the contrary, there is a respectable argument that a new treaty is not codifying existing customary international law since, if it were, there would be no need for the treaty"); Danilenko, *supra* note 18, at p. 154 ("it should be emphasized that codifying conventions, even those which expressly state that they embody existing customary law, can never be considered as conclusive evidence of customary law"); A.T. Guzman, "Saving Customary International Law", *Michigan Journal of International Law*, 27 (2005), pp. 115, 162 ("one of the main functions of treaties is to establish new obligations among states — obligations that do not exist under CIL. When faced with practice based on treaty obligations, then, it is difficult to know if this reflects *opinio juris*"); L.B. Sohn, "Unratified Treaties as a Source of Customary International Law", in A. Bos and H. Siblesz (eds.), *Realism in Law-Making: Essays in International Law in Honour of Willem Riphagen* (Martinus Nijhoff Publishers, 1986), at pp. 231, 237 ("a treaty may represent not the accepted law but a derogation from it as between the parties to it").

[76] The preamble to the United Nations Convention on the Law of the Sea, 1982, for example, refers to "the codification and progressive development of the law of the sea achieved by this Convention".

[77] See also F. Pocar, "To What Extent Is Protocol I Customary International Law?", in A.E. Wall (ed.), *Legal and Ethical Lessons of NATO's Kosovo Campaign* (Naval War College, 2002), at pp. 337, 339 ("as the codification process necessarily requires an assessment of the customary rule or principle concerned as well as a written definition thereof, the resulting written text may be regarded as affecting its scope and content. Consequently, any precision or new element that may have been added — as is normally the case — by the treaty provision to the principle of customary law which it codifies must be checked carefully in order to establish whether it has come to be accepted as generally applicable. However, the addition of new elements by a treaty provision to a customary principle should be distinguished from specifications deriving by necessary implication from the accepted general customary principle").

[78] See also K. Wolfke, *supra* note 64, at p. 35 ("a treaty could at most be an approximate replica of a living practice, like a picture of a living person").

the rule in the *opinio juris* of States is confirmed by practice".[79] In doing so, one has to look to the statements and conduct of States: "the evidence of the practice of the parties consolidated in the treaty must be weighed in the balance with all other [consistent and inconsistent] evidence of customary international law according to the normal procedure employed in the proof of customary international law", in particular "past practice or declarations of the asserting State[s]".[80] The *travaux préparatoires* of the provision in question may suggest whether and to what extent the parties to the treaty considered the provision to be declaratory of existing international law;[81] statements made subsequent to the treaty may be relevant as well.[82] Examining practice outside the treaty, i.e., that of non-parties or of parties towards non-parties, may be particularly important.

38. Second, treaties (or, perhaps more accurately, treaty-making) may crystallize rules of customary international law that may be emerging. This occurs when the law evolves "through the practice of States on the basis of the debates and near-agreements at the conference … arising out of the general consensus revealed" at such conference.[83] In the words of Judge Sørensen: "[A] treaty purporting to create

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[79] *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. 98, para. 184.

[80] Baxter, *supra* note 73, at pp. 43, 44.

[81] See, for example, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 47, para. 94 ("The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject"). Where the *travaux préparatoires* indicate that the relevant provision generated significant opposition or required substantive compromises, for example, this may suggest that it did not reflect a customary rule. See also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 38, para. 62; Villiger, *supra* note 46, at pp. 131-132 ("if the preparatory phases disclose inconsistencies in the practice of States, or if States reject or denounce the (declaratory) conventional rule, this will weaken the case for the customary rule").

[82] See Akehurst, *supra* note 36, at pp. 49-52.

[83] *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 23, para. 52 ("… after that Conference the law evolved through the practice of States on the basis of the debates and near-agreements at the Conference. Two concepts have crystallized as customary law in recent years arising out of the general consensus revealed at that Conference …"). See also *Continental Shelf (Tunisia/ Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 38, para. 24; and at p. 170, para. 23 (Dissenting Opinion of Judge Oda) ("It is however possible that, before the draft of a multilateral treaty becomes effective and binding upon the States Parties in accordance with its final clause, some of its provisions will have become customary international law through repeated practice by the States concerned"); *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 305 (Separate Opinion of Judge Ammoun) ("Conventions which do not contemplate the codification of existing rules can nonetheless amount to elements of a nascent international custom"); Sohn, *supra* note 75, at pp. 245-246 ("The Court is thus willing to pay attention not only to a text that has codified a pre-existing customary law but also to one that has crystallized an "emergent rule of international law". It is sufficient for that purpose to have the rule in question adopted by an international conference by consensus or … without a dissenting voice … A new rule is created by its general acceptance by all States concerned … If most States, including almost all States having a special interest in the application of the rule, act in accordance with it, there is a clear presumption that the rule agreed upon at the conference, though the agreement has not yet been ratified, has become an accepted rule of customary international law"); Cassese, *supra* note 29, at p. 183 ("An interesting feature of the

new law may be based on a certain amount of State practice and doctrinal opinion which has not yet crystallized into customary law. It may start, not from *tabula rasa*, but from a customary rule *in statu nascendi*."[84] It could then come to reflect a rule of customary international law that was "only in *statu nascendi* at the outset of the codification exercise…\the embryonic custom will [] crystallize [not by drafting the treaty per se but] thanks to the reactions of Governments to the negotiations and consultations during the work in progress".[85] An important example is the development of the concept of the exclusive economic zone during the Third United Nations Conference on the Law of the Sea (1973-1982), and its acceptance by States as customary international law even before the adoption of the United Nations Convention on the Law of the Sea in 1982 and its entry into force in 1994.[86]

39. Third, while "[i]t is a principle of international law that the parties to a multilateral treaty, regardless of their number or importance, cannot prejudice the legal rights of other States",[87] treaties may also provide the basis for the

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present stage of the development of the world community is the fact that customary international law develops on the margin, as it were, of diplomatic conferences set up to codify and progressively develop international law"); E. Jiménez de Aréchaga, "General Course in Public International Law", 159 *Recueil des Cours* (1978), pp. 16-18; *London Statement of Principles Applicable to the Formation of General Customary International Law*, with commentary: Resolution 16/2000 (Formation of General Customary International Law), adopted at the sixty-ninth Conference of the International Law Association, in London, on 29 July 2000 (hereinafter: "*ILA London Statement of Principles*"), p. 49 ("if State practice is developing in parallel with the drafting of the treaty … the latter can influence the former (as well as vice-versa) so that the emerging customary law is indeed consolidated and given further definition. Similarly for the final stage — the adoption of a convention. Indeed, the longer the drafting and negotiating process takes, the more scope there may be for State practice to become crystallized in this way"); J.-M. Henckaerts, "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict", *International Review of the Red Cross*, 87 (2005), pp. 175, 183 ("In practice, the drafting of treaty norms helps to focus world legal opinion and has an undeniable effect on the subsequent behaviour and legal conviction of States").

[84] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 243 (Dissenting Opinion of Judge Sørensen) (adding, at p. 244, that "a convention adopted as part of the combined process of codification and progressive development of international law may well constitute, or come to constitute the decisive evidence of generally accepted new rules of international law. The fact that it does not purport simply to be declaratory of existing customary law is immaterial in this context. The convention may serve as an authoritative guide for the practice of States faced with the relevant new legal problems, and its provisions thus become the nucleus around which a new set of generally recognized legal rules may crystallize").

[85] Dinstein, *supra* note 73, at p. 358 (explaining that "[t]he scenario is that, before the initiation of the treaty-making effort, custom has been burgeoning but has not yet blossomed. The on-going negotiations and consultations contribute to an acceleration of State practice — if it was desultory in the past, it now moves apace — and to securing the communal *opinio juris*. The treaty then articulates the crystallized custom as positive law … The key to successful crystallization is that it becomes evident in the course of the formulation of a treaty that a new customary *lex lata* has congealed").

[86] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I. C.J. Reports 1985*, p. 13 at p. 33, para. 34 ("It is in the Court's view incontestable that … the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law"). For the development of the concept of the exclusive economic zone, see for example, Y. Tanaka, *The International Law of the Sea* (Cambridge University Press, 2012), at pp. 124-5.

[87] *International status of South-West Africa, Advisory Opinion: I.C.J. Reports 1950*, p. 128, at p. 165 (Separate Opinion of Judge Read). See also *Fisheries Jurisdiction (United Kingdom* v.

development of new rules of customary international law.[88] As the International Court of Justice observed, the process by which a rule of a conventional origin may pass into general international law "is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed".[89] This "mechanism of

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Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 3, at p. 90 (Separate Opinion of Judge De Castro) ("The existence of a majority trend, and even its acceptance in an international convention, does not mean that the convention has caused the rule to be crystallized or canonized as a rule of customary law"); *Vienna Convention on the Law of Treaties*, Article 34.

[88] Article 38 of the Vienna Convention on the Law of Treaties 1969 is entitled "Rules in a treaty becoming binding on third States through international custom" (and reads: "Nothing in articles 34 to 37 [dealing with treaties and third States] precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such"). Article 38 of the 1986 Vienna Convention is in similar terms: "Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State or a third organization as a customary rule of international law, recognized as such". On article 38 of the Vienna Conventions, see G. Gaja, "Article 38" in O. Corten, P. Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, 2nd edition (Oxford University Press, 2011), at pp. 949-960.

[89] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 41, para. 71; see also at p. 96 (Separate Opinion of Judge Padilla Nervo) ("A treaty does not create rights or obligations for a third State without its consent, but the rules set forth in a treaty may become binding upon a non-contracting State as customary rules of international law"); at p. 225 (Dissenting Opinion of Judge Lachs) ("It is generally recognized that provisions of international instruments may acquire the status of general rules of international law. Even unratified treaties may constitute a point of departure for a legal practice. Treaties binding many States are, *a fortiori*, capable of producing this effect, a phenomenon not unknown in international relations"); and at p. 241 (Dissenting Opinion of Judge Sørensen ("It is generally recognized that the rules set forth in a treaty or convention may become binding upon a non-contracting State as customary rules of international law or as rules which have otherwise been generally accepted as legally binding international norms"). See also Special Tribunal for Lebanon, Case No. STL-11-01/I, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (Appeals Chamber), 16 February 2011, paras. 107-109; *Prosecutor* v. *Delalić*, Case No. IT-96-21-T, Judgment (Trial Chamber of the International Tribunal for the Former Yugoslavia), 16 November 1998, paras. 301-306 (remarking that "this development [of a treaty provision becoming a part of customary international law] is illustrative of the evolving nature of customary international law, which is its strength"); *Prosecutor* v. *Kallon* (Special Court of Sierra Leone Appeals Chamber), Cases Nos. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, para. 82; *Prosecutor* v. *Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber of the International Tribunal for the Former Yugoslavia), 2 October 1995, para. 98 ("… the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law"); *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, para. 135 ("The Chamber observes that the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law"); *Prosecutor* v. *Furundžija*, Case No. IT-95-17/1-T, Judgment (Trial Chamber of the International Tribunal for the Former Yugoslavia), 10 December 1998, paras. 138, 168 ("That these treaty provisions [prohibiting torture] have ripened into customary rules is evinced by various factors. First, these treaties … have been ratified by practically all States of the world … the practically universal participation in these treaties shows that all States accept among other things the prohibition on torture … Secondly, no State has ever claimed that it was authorized to practice torture in times of armed conflict, not has any State shown or manifested opposition to the implementation of treaty provisions against torture … Thirdly, the International

expansion",[90] by which the application of rules set forth in treaty provisions may be extended to non-parties, "is not lightly to be regarded as having been attained".[91] It requires, first, "that the provision concerned should … be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law".[92] For example, such provisions are unlikely to include those providing a role

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Court of Justice has authoritatively, albeit not with express reference to torture, confirmed this custom-creating process"); *Domingues* v. *United States*, Inter-American Commission on Human Rights Report No. 62/02, Case 12.285 (2002), para. 104 ("The norms of a treaty can be considered to crystallize new principles or rules of customary law. It is also possible for a new rule of customary international law to form, even over a short period of time, on the basis of what was originally a purely conventional rule, provided that the elements for establishing custom are present"); *Camuzzi International S.A.* v. *The Argentine Republic* (International Centre for Settlement of Investment Disputes (ICSID), Decision on Objections to Jurisdiction, 11 May 2005), para. 144 ("there is no obstacle in international law to the expression of the will of States through treaties being at the same time an expression of practice and of the *opinio juris* necessary for the birth of a customary rule if the conditions for it are met"); *van Anraat* v. *The Netherlands*, Application No. 65389/09, Decision on Admissibility (European Court of Human Rights), 6 July 2010, para. 88 ("As the International Court of Justice expounds … it is possible for a treaty provision to become customary international law. For this it is necessary that the provision concerned should, at all event potentially, be of a fundamentally norm creating character such as could be regarded as forming the basis of a general rule of law; that there be corresponding settled State practice; and that there be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it (*opinio iuris sive necessitatis*)"). But see Barboza, *supra* note 54, at p. 12 ("According to our view, however, it would be practically impossible that a custom could originate directly from a text. New though a certain field of law might be, it must have been preceded by some activities and those activities surely have given rise to practices moulded by necessity and principles applied by analogy. Had there not been *any activity*, it is hardly conceivable that a treaty deal with a subject …").

[90] Barboza, *supra* note 54, at p. 4 (referring to a "pioneer [legal] community" of those States who, in drafting a convention, play "a pioneer role in the 'legislative' process" and whose "weight in international relations [owing to the participation, usually, of some of the world Powers and most of the States specially affected by the relevant topic of the convention] gives considerable strength to [that] community's invitation to join in").

[91] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 41, para. 71. See also *Mondev International Ltd* v. *United States of America* (ICSID, Award, 11 October 2002), para. 111 ("It is often difficult in international practice to establish at what point obligations accepted in treaties, multilateral or bilateral, come to condition the content of a rule of customary international law binding on States not party to those treaties"); S.M. Schwebel, "The Influence of Bilateral Investment Treaties on Customary International Law", *Proceedings of the Annual Meeting (American Society of International Law)*, 98 (2004), pp. 27, 29 ("The process by which provisions of treaties binding only the parties to those treaties may seep into general international law and thus bind the international community as a whole is subtle and elusive"); P. Weil, "Towards Relative Normativity in International Law?", *American Journal of International Law*, 77 (1983), pp. 413, 433-438.

[92] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 41-42, para. 72. See also P.-H. Verdier, E. Voeten, "Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory", *American Journal of International Law*, 108 (2014), pp. 389, 426 (suggesting that the criterion of 'norm-creating character' "appears to require that the rule be articulated in general terms, so as to potentially be universally binding"); Thirlway, *supra* note 27, at p. 84 ("it must be of such a kind that it can operate as a general rule"); C. Brölmann, "Law-Making Treaties: Form and Function in International Law", *Nordic Journal of International Law*, 74 (2005), 383, 384; B.B. Jia, "The Relations between Treaties and Custom", *Chinese Journal of International Law*, 9 (2010), pp. 81, 92 (suggesting that "fundamentally norm creating" is "an ambitious task accomplishable only by means of multilateral treaties"); Villiger, *supra* note 46, at pp. 177, 179 ("General rules may be defined as intending to regulate *pro futuro*, with regard to a potentially unlimited, general number of subjects, rather than

for particular institutions established by the treaty.[93] It is further required that "State practice, including that of States whose interest are specially affected, should [be] both extensive and virtually uniform in the sense of the provision invoked; — and should moreover [occur] in such a way as to show a general recognition that a rule of law or legal obligation is involved".[94]

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individualized ones … A further criterion … is that "law-making" conventional rules are also of an abstract nature, i.e. potentially regulatory of an abstract number of situations, rather than concerning concrete situation"). But see R. Kolb, "Selected Problems in the Theory of Customary International Law", *Netherlands International Law Review*, 50 (2003), pp. 119, 147-148 ("Different interpretations of that sentence have been advanced, for example, that the Court meant rules capable of binding states generally, or the fact that a provision does not contain too many exceptions which weaken its normative content. In any case, the 'fundamentally law-creating' criterion does not seem very convincing. It is based on some form of logical inversion. It is not because a rule is fundamentally law-creating that that it may become customary; it is because it will have become customary through the practice of states that it may be termed, if this is desired, fundamentally law-creating. However, in such a case, the criterion becomes superfluous. It may only mean that in interpreting a provision with a view to establishing its customary nature, it may be reasonable to presume that an excessively narrow or specific norm does not easily qualify as general international law. But that is all. Even a very specific norm (e.g., setting a time-bar in figures), may become customary if states adopt it in their practice. Thus, what really counts is the effective practice of states and eventually their *opinio juris*, not any intrinsic quality of the norm at stake. Moreover, one could add that every norm is by its very nature, to some extent, 'law-creating', i.e. normative or capable of generalization. The question is one of degree, and thus for contextual interpretation"); *ILA London Statement of Principles*, pp. 52-53; Baxter, *supra* note 73, at p. 62.

[93] In *Nicaragua* v. *Colombia*, the International Court found that paragraph 1 of Article 76 of UNCLOS (outer limit of the continental shelf) reflected customary international law, but did not address subsequent paragraphs: *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 624 at p. 666, para. 118 ("The Court considers that the definition of the continental shelf set out in Article 76, paragraph 1, of UNCLOS forms part of customary international law. At this stage … it does not need to decide whether other provisions of Article 76 of UNCLOS form part of customary international law").

[94] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 43, para. 74. See also B. Cheng, "Custom: The Future of General State Practice In a Divided World", in R. St. John Macdonald, D.M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (Martinus Nijhoff Publishers, 1983), at pp. 513, 533 ("In each instance, whether such a metamorphosis [of treaty a provision into a rule of general international law] has taken place or not is a question of fact to be established by concrete evidence, as in attempts to ascertain the existence of any rule of general international law"); G.L. Scott, C.L Carr, "Multilateral Treaties and the Formation of Customary International Law", *Denver Journal of International Law and Policy*, 25 (1996), pp. 71, 82 ("multilateral treaties themselves cannot generally create "instant" customary international law for all of the states in the international system, but rather must await their subsequent reactions"). The International Court said also that if "a very widespread and representative participation in the convention … provided it included that of States whose interests were specially affected", is registered, that might suffice of itself to transform a conventional rule into a rule of customary international law (at para. 73). In other words, a multilateral treaty could, in certain circumstances, "because of its own impact" (para. 71), give rise to a rule of customary international law. As has recently been written, however, "the Court was careful not to determine definitely whether the method was even a possible one … In any event, widespread participation in a codification convention has never, in the jurisprudence of the Court, been sufficient on its own for the confirmation of a customary rule" (Tomka, *supra* note 26, at p. 207). See also *ILA London Statement of Principles*, at 52, 54 ("it should be noted that the Court failed either to give examples or properly to develop the point. Too much emphasis should therefore probably not be placed on the few words it did utter. And certainly, evidence of a more than merely contractual intention will not normally be

40. Many examples could be given of the ways in which the provisions of treaties, particularly so-called "law-making" treaties, reflect or come to reflect rules of customary international law. The law of the sea is a particularly rich field in this regard, extending from the influence of the 1958 Convention on the Continental Shelf on the acceptance of that concept in customary international law to the emergence of the concept of the exclusive economic zone.[95] Likewise, many of the provisions of the Vienna Convention on the Law of Treaties already reflected customary international law or have since become regarded as such.[96] Among the most important rules in the Vienna Convention are those on the interpretation of treaties, which have repeatedly been found by international and domestic courts and tribunals to reflect customary international law, and as such have even been applied to treaties dating from long ago.[97] State immunity is another area where multilateral conventions have become central for the identification of rules of customary international law,[98] although different courts have on occasion reached different conclusions.[99]

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present in a convention … It follows from the foregoing analysis that a single plurilateral or bilateral treaty cannot instantly create general customary law "of its own impact", and it seems improbable that even a series of such treaties will produce such an effect, save in (at most) the rarest of circumstances"); Schachter, *supra* note 57, at pp. 724-726; Thirlway, *supra* note 27, at pp. 86-91. But see *Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951*, p. 15, at pp. 52-53 (Dissenting Opinion of Judge Alvarez); *Prosecutor* v. *Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion based on Lack of Jurisdiction (Special Court of Sierra Leone Appeals Chamber), 31 May 2004, paras. 18-20, 50.

[95] T. Treves, "Codification du droit international et pratique des Etats dans le droit de la mer", 223 *Recueil des cours* (1990), pp. 9-302; J.A. Roach, "Today's Customary International Law of the Sea", *Ocean Development and International Law*, 45 (2014), pp. 239-259.

[96] See the section on "customary status" in respect of each article of the Vienna Convention in O. Corten, P. Klein, *The Vienna Convention on the Law of Treaties: A Commentary*, 2nd edition (Oxford University Press, 2011). See also I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edition (Manchester University Press, 1984), at pp. 5-28.

[97] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I C.J. Reports 1999*, p. 1045, at p. 1059, para. 18 (applying the Vienna Convention rules on interpretation to a treaty of 1890). The case-law is well-summarized by the Arbitral Tribunal in the *Iron Rhine* (IJzeren Rijn) (*Belgium/Netherlands*) case, Award of 24 May 2005, para. 45 (Permanent Court of Arbitration, Award Series (T.M.C. Asser Press, 2007). See also draft conclusion 1, para. 1, of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties (and paras. (4) to (6) of the commentary) provisionally adopted by the Commission in 2013: report of the Commission 2013 (A/68/10), para. 39.

[98] See also R. O'Keefe, C.J. Tams, *The United Nations Convention on Jurisdictional Immunities of States and Their Property. A Commentary* (Oxford University Pres, 2013), at p. xli ("There can be little doubt that the process of the Convention's elaboration has, through the close involvement of States, revealed, and where not simply revealed then crystallized, the content of the contemporary customary international law of State immunity. This is not to say that each and every substantive provision in its entirety is necessarily consonant with custom … both international and national courts have already looked to the Convention as persuasive evidence of today's customary rules …"). See, in particular, *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, *passim* and especially at p. 123, para. 55 ("State practice of particular significance is to be found in … the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention").

[99] In its judgment of 5 February 2015 in *Benkharbouche and Anor* v. *Embassy of the Republic of Sudan* [2015] EWCA Civ 33, the Court of Appeal of England and Wales considered whether Art. 11 ("Contracts of employment") of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property reflected customary international law: In doing so, the Court said

41. The practice of parties to a treaty (among themselves) is likely to be chiefly motivated by the conventional obligation, and thus is generally less helpful in ascertaining the existence or development of a rule of customary international law.[100] Such practice is normally just that, sometimes serving as a means of interpretation of the treaty under the rules set forth in article 31 (3) (b) or article 32 of the Vienna Convention on the Law of Treaties (a matter being considered by the Commission under the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties"). As pointed out by Baxter, this may pose particular difficulty in ascertaining whether a rule of customary international law has emerged when a treaty attracts quasi-universal participation.[101] Such a problem does not arise with respect to the conduct of non-parties, and of parties towards

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(at para. 36) "[i]t is … necessary to examine each of its provisions with care in order to establish whether it satisfies the stringent requirements to be considered customary international law"; after considering judgments and legislation of other jurisdictions, the Court (at para. 46) "found it impossible to conclude that there is any rule of international law which requires the grant of immunity in respect of employment claims by members of the service staff of a mission in the absence of some special feature …". In considering the scope of the 'territorial tort' exception under Art. 12 ('Personal injuries and damage to property") of the 2004 Convention, the International Court had to contend with the differing views of national courts (*Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at pp. 129-135, paras. 62-79).

[100] See, for example, *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 43, para. 76 ("over half the States concerned, whether acting unilaterally or conjointly, were or shortly became parties to the Geneva Convention, and were therefore presumably, so far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law in favour of the equidistance principle"); *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952*, p. 176, at p. 199; *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. 531 (Dissenting Opinion of Judge Jennings) ("there are obvious difficulties about extracting even a scintilla of relevant "practice" on these matters from the behaviour of those few States which are not parties to the Charter; and the behaviour of all the rest, and the *opinio juris* which it might otherwise evidence, is surely explained by their being bound by the Charter itself"); *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 422, at p. 479, para. 37 (Separate Opinion of Judge Abraham). Cf. *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. 96-97, para. 181 ("… the Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter, to such an extent that a number of rules contained in the Charter have acquired a status independent of it").

[101] Baxter, *supra* note 73, at p. 64 ("the proof of a consistent pattern of conduct by non-parties becomes more difficult as the number of parties to the instrument increases. The number of participants in the process of creating customary law may become so small that the evidence of their practice will be minimal or altogether lacking. Hence the paradox that as the number of parties to a treaty increases, it becomes more difficult to demonstrate what is the state of customary international law dehors the treaty"). See also *Prosecutor* v. *Delalić*, Case No. IT-96-21-T, Judgment (Trial Chamber of the International Tribunal for the Former Yugoslavia), 16 November 1998, para. 302 ("The evidence of the existence of such customary law — State practice and *opinio juris* — may, in some situations, be extremely difficult to ascertain, particularly where there exists a prior multilateral treaty which has been adopted by the vast majority of States. The evidence of State practice outside of the treaty, providing evidence of separate customary norms or the passage of the conventional norms into the realms of custom, is rendered increasingly elusive, for it would appear that only the practice of non-parties to the treaty can be considered as relevant").

non-parties, which may clearly constitute practice for purposes of identifying a rule set out in a treaty as having customary force as well.[102] In any event, as Crawford has recently said: "State practice requires that the Baxter paradox hold — that is, that treaty participation is not enough. Custom is more than treaty, more even than a generally accepted treaty … [yet] the coexistence of custom and treaty suggests that the Baxter paradox is not actually a genuine paradox."[103]

42. As noted in the second report,[104] although the repetition of similar or identical provisions in a large number of bilateral treaties may give rise to a rule of customary international law or attest to its existence,[105] it does not necessarily do so. Here, too, the provisions (and the treaties in which they are incorporated) need to be analysed in their context and in the light of the circumstances surrounding their adoption. This is particularly so as "[t]he multiplicity of … treaties … is as it were a double-edged weapon":[106] "[T]he concordance of even a considerable number of treaties per se constitutes neither sufficient evidence nor even a sufficient presumption that the international community as a whole considers such treaties as evidence of general customary law. On the contrary, there are quite a few cases where such treaties appear to be evidence of exceptions from general regulations."[107]

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[102] See also Henckaerts and Doswald-Beck, *supra* note 36, at p. l ("This study takes the cautious approach that widespread ratification is only an indication and has to be assessed in relation to other elements of practice, in particular the practice of States not party to the treaty in question. Consistent practice of States not party has been considered as important positive evidence. Contrary practice of States not party, however, has been considered as important negative evidence. The practice of States party to a treaty vis-à-vis States not party is also particularly relevant").

[103] J. Crawford, 365 *Recueil des cours* (2013), 107, 110. See also Kolb, *supra* note 92, at pp. 145-146 (suggesting that the paradox is only real when stated in the abstract, as "in concrete cases contextual specificities usually dispel" it); Villiger, *supra* note 46, at p. 155.

[104] A/CN.4/672, at para. 76 (f).

[105] See also Thirlway, *supra* note 27, at p. 59 ("a series of bilateral treaties concluded over a period of time by various States, all consistently adopting the same solution to the same problem of the relationships between them, may give rise to a new rule of customary international law"); *Mondev International Ltd* v. *United States of America* (ICSID, Award, 11 October 2002), para. 125 ("… current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce").

[106] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 306 (Separate Opinion of Judge Ammoun).

[107] K. Wolfke, *supra* note 64, at p. 35. See also *Ahmadou Sadio Diallo, (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 582, at p. 615 ("The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal régimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary."); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 317-318 (Dissenting Opinion of Vice-President Schwebel) ("Why conclude these [multiple] treaties if their essence is already international law …?"); Schachter, *supra* note 57, at p. 732 ("States do not generally regard such standardized treaties as evidence of customary law since in most cases the bilateral agreements are negotiated *quid pro quo* arrangements"); Danilenko, *supra* note 18, at p. 143; L. Kopelmanas, "Custom as a Means of the Creation of International Law", *British Yearbook of International Law*, 18 (1937), pp. 127, 137; *ILA London Statement of Principles*, pp. 47-48 ("There is no presumption that a succession of similar treaty provisions gives rise to a

43. As was also suggested in the second report,[108] whether the States being considered have indeed signed and/or ratified the treaty,[109] and the ability of parties to make reservations to provisions of the treaty,[110] may also be relevant in assessing the existence of *opinio juris* with respect to the relevant provisions. Again, the particular circumstances surrounding the adoption of the treaty text must be examined carefully, along with the practice corresponding to its content.

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new customary rule with the same content"); W.W. Bishop, 147 *Recueil des cours* (1965), pp. 147, 229-230.

[108] A/CN.4/672, para. 76 (f).

[109] See also *Continental Shelf (Tunisia/ Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 38 ("[the Court] could not ignore any provision of the draft convention if it came to the conclusion that the content of such provision is binding upon all members of the international community because it embodies or crystallizes a pre-existing or emergent rule of customary law"); *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 277 ("The limited number of States which have ratified this Convention reveals the weakness of this argument [according to which the Convention in question has merely codified principles which were already recognized by custom] …"); 'Ways and Means for Making the Evidence of Customary International Law More Readily Available', Report of the International Law Commission on its Second Session (A/CN.4/34), *Yearbook of the International Law Commission, 1950*, Vol. II, 368 ("Even multipartite conventions signed but not brought into force are frequently regarded as having value as evidence of customary international law"); Sinclair, *supra* note 57, at p. 227 ("it is fair to say that even sparsely ratified codification conventions may well be looked upon, in general, as providing some evidence of *opinio juris* on the subject-matter involved. The *quality* of the evidence will depend on the provenance of the particular provision which may be in issue. If the *travaux préparatoires* of a specific codification convention demonstrate that a particular provision was adopted at the codification conference on a sharply divided vote, and that the controversy thus engendered may have led a number of States to refuse to participate in the convention, there is clearly a strong case for discounting the value of that provision in the context of later codification efforts"); Villiger, *supra* note 46, at p. 165 ("unratified instruments do not invariably have detrimental effects [on the underlying rule of customary international law], just as a convention cannot create instant customary law"); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 226 (Dissenting Opinion of Judge Lachs) ("Delay in ratification of and accession to multilateral treaties is a well-known phenomenon in contemporary treaty practice … the number of ratifications and accessions cannot, in itself, be considered conclusive evidence with regard to the general acceptance of a given instrument"); G.E. Do Nascimento E Silva, "Treaties as Evidence of Customary International Law", in *International Law at the Time of Its Codification: Essays in Honour of Robert Ago* (Dott. A. Giuffre Editore, 1987), at pp. 387, 397 ("A non-ratified convention will gain in authority in terms of general international law if it was approved by a large majority and received the ratifications of a large and representative number of States. *Contrariu sensu*, such a convention will lose strength if a long period of time lapses and very few States ratify or adhere to it. The importance of non-ratified conventions will also accrue if it is subsequently supplemented by international practice, especially if the International Court of Justice took into account practice based on their provisions"); Thirlway, *supra* note 27, at p. 87 ("it must be borne in mind that any assessment of the significance of a ratification of a codifying treaty must be a cautious one, as must any assessment also be of abstentions from ratification").

[110] Guideline 3.1.5.3 of the Commission's *Guide to Practice on Reservations to Treaties* (2011) reads: "The fact that a treaty provision reflects a rule of customary international law does not in itself constitute an obstacle to the formulation of a reservation to that provision". As the Commission explained in its commentary to this guideline, the International Court of Justice in *North Sea* was quite circumspect about the deductions called for by the exclusion of certain reservations (commentary 4). It was not true, the Commission said, that the International Court had affirmed the inadmissibility of reservations in respect of treaty provisions reflecting customary law.

44. The following draft conclusion is proposed (to be placed within a new **part five**, entitled "**Particular forms of practice and evidence**"):

Draft conclusion 12

Treaties

A treaty provision may reflect or come to reflect a rule of customary international law if it is established that the provision in question:

(a) **at the time when the treaty was concluded, codifies an existing rule of customary international law;**

(b) **has led to the crystallization of an emerging rule of customary international law; or**

(c) **has generated a new rule of customary international law, by giving rise to a general practice accepted as law.**

B. Resolutions adopted by international organizations and at international conferences

45. It is widely accepted that resolutions adopted by States within international organizations and at international conferences may, in certain circumstances, have a role in the formation and identification of customary international law. Indeed, among written texts to which reference is made in practice for the identification of rules of customary international law, such resolutions are accorded considerable importance.

46. In this context, courts and writers have paid special attention to resolutions of the United Nations General Assembly, a forum with near universal participation, and much of the present section will deal specifically with them. Such resolutions may be particularly relevant as evidence of or impetus for customary international law.[111] However, other meetings and conferences of States may be important, too.[112] Organs of international organizations[113] and international conferences with

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[111] G. Cahin, *La coutume internationale et les organisations internationals* (Pedone, 2001) contains a wealth of learning on the resolutions of international organizations, and on all aspects of the role of international organizations with regard to customary international law. See also J. Castañeda, *Legal Effects of United Nations Resolutions* (Columbia University Press, 1970); J. Castañeda, "Valeur juridique des résolutions des Nations Unies", 129 *Recueil des cours* (1970), p. 205; M. Forteau, "Organisations internationales et sources du droit", in E. Lagrange, J.-M. Sorel (eds.) *Traité de droit des organisations internationales* (L.G.D.J., 2013), at p. 257; Cassese, *supra* note 29, at p. 193 ("It stands to reason that the unique opportunity afforded by the UN for practically all members of the world community to get together and exchange their views cannot fail to have had a strong impact on the emergence or reshaping of customary rules").

[112] For example, the International Court has referred to the Helsinki Final Act of 1975: *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. 107, para. 204 ("it can be inferred that the text testifies to the existence … of a customary principle [of non-intervention] which has universal application.").

[113] For example, the UN Security Council: see O. Corten, "La participation du Conseil de sécurité à l'élaboration, à la crystallisation ou à la consolidation de règles coutumières", *Revue belge de droit international* (2004), pp. 552-567; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at pp. 437-438, para. 81; *Prosecutor* v. *Tadić*, Case No. IT-94-1, Decision on the Defence

more limited membership may have a similar function, but will generally have less weight in evidencing general customary international law; they may, however, have a central role in the formation and identification of particular custom (in this regard, see sect. VII below).

47. While such resolutions cannot in and of themselves create customary international law, they "may sometimes have normative value" in providing evidence of existing or emerging law.[114] Caution is required, however, when

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Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber of the International Tribunal for the Former Yugoslavia), 2 October 1995, para. 133 ("Of great relevance to the formation of *opinio juris* to the effect that violations of general international humanitarian law governing internal armed conflicts entail the criminal responsibility of those committing or ordering those violations are certain resolutions unanimously adopted by the Security Council"). In Security Council resolution 2125 (2013) on Somalia, para. 13, the Security Council underscored that "this resolution shall not be considered as establishing customary international law"; see also, in the same context, para. 8 of Security Council resolution 1838 (2008).

[114] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, 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*"). General Assembly resolution 3232 (XXIX) of 12 November 1974, which was adopted by consensus, contains the following provision: "*Recognizing* that the development of international law may be reflected, *inter alia*, by declarations and resolutions of the General Assembly which may to that extent be taken into consideration by the International Court of Justice". See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 31, and *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at pp. 31-33 (referring to the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) as a "further important stage" in the development of international law concerning non-self-governing territories); *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. 103, para. 195 ("This description, contained in … the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law"); *Libyan American Oil Company (LIAMCO)* v. *Government of the Libyan Arab Republic, 62 International Law Reports* (1982), 141, 189 ("… the said Resolutions, if not a unanimous source of law, are evidence of the recent dominant trend of international opinion …"); Institute of International Law's Conclusions of the Thirteenth Commission with respect to Resolutions of the General Assembly of the United Nations, available at <http://www.idi-iil.org/idiE/resolutionsE/1987_caire_02_en.PDF>, Conclusion 1 ("Although the Charter of the United Nations does not confer on the General Assembly the power to enact rules binding on States in their relations *inter se*, the Assembly may make recommendations contributing to the progressive development of international law, its consolidation and codification. This may be accomplished through a variety of Resolutions"); G. Abi-Saab, "La coutume dans tous ses états ou le dilemme du développement du droit international général dans un monde éclaté", in *Le droit international à l'heure de sa codification, Etudes en l'honneur de Roberto Ago* (Giuffré, 1987), at pp. 1, 53, 56 ("à l'heure actuelle la très grande majorité de la doctrine est d'avis que les résolutions normatives de l'Assemblée générale peuvent susciter les mêmes modes d'interaction avec la coutume que ceux que la Cour a identifié par rapport aux traités de codification, c'est-à-dire qu'elles peuvent produire les mêmes effets potentiels que ceux-ci, déclaratoires, cristallisants ou générateurs de règles coutumières"); J. A. Barberis, "Les résolutions des organisations internationales en tant que source du droit des gens", in *Recht zwischen Umbruch und Bewahrung, Festschrift für R. Bernhardt* (Springer, 1995), at pp. 21, 22-23 ("l'Assemblée générale de l'O.N.U. est dépourvue, en général, du pouvoir de formuler des résolutions liant juridiquement les Etats membres selon la Charte, et … elle n'a pas pu davantage acquérir cette faculté par la voie coutumière. Néanmoins, il est indubitable que les résolutions de l'Assemblée générale

determining whether a given resolution does indeed do so: "in each case there is a process of articulation, appraisal and assessment".[115] Importantly, "[a]s with any declaration by a state, it is always necessary to consider what states actually mean when they vote for or against certain resolutions in international fora".[116] As States themselves often stress, the General Assembly is a political organ in which it is often far from clear that their acts carry juridical significance.[117] Establishing

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constituent un facteur important dans la formation de la coutume."); S. Rosenne, *Practice and Methods of International Law* (Oceana Publications, 1984), at p. 111 ("Resolutions adopted by organs of intergovernmental organizations are today to be included in the general storehouse of international materials for which the … lawyer must have regard"); Thirlway, *supra* note 27, at p. 44 ("There can be no doubt that such [declaratory United Nations General Assembly] resolutions do have an important contribution to make to the development of international law … but this does not … give them a legislative character"); C. Tomuschat, "The Concluding Documents of World Order Conferences", in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Kluwer Law International, 1996), at pp. 563, 568 ("International conferences do not qualify as law-making bodies. When governments draft a text summarizing the results of a conference, they generally do not act with the intention to create binding law. Rather, their aim is to indicate a political course of action to be pursued in the future … Even if agreement is reached in a final document, binding legal effects come into being solely if so wished by the parties concerned. Indeed, if governments intend to enter into a legal commitment, they always have the possibility to opt for an unequivocal treaty instrument … Nonetheless, it would be shortsighted to dismiss the outcome of all of these gatherings, to the extent that they have not materialized in binding legal instruments in the traditional sense, as pure political rhetoric not being susceptible of producing legal effects" (on "disclaimers and reservations" see also pp. 568-580)); Weil, *supra* note 91, at p. 417 ("Resolutions, as the sociological and political expression of trends, intentions, wishes, may well constitute an important *stage* in the process of elaborating international norms; in themselves, however, they do not constitute the formal *source* of new norms").

[115] Crawford, *supra* note 103, at pp. 90, 112. See also Boyle and Chinkin, *supra* note 62, at p. 225 ("Resolutions of international organizations and multilateral declarations by states may also have effects on customary international law. Whether … [they do] will depend on various factors which must be assessed in each case"); Treves, *supra* note 54, at paras. 44-46.

[116] G. Boas, *Public International Law: Contemporary Principles and Perspectives* (Edward Elgar, 2012), 88. See also Shaw, *supra* note 22, at p. 63.

[117] See also M.D. Öberg, "The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ", *European Journal of International Law*, 16 (2006), pp. 879, 902 ("The GA has the attractive quality of being very broadly representative of the existing states, as well as constituting a centralized, highly convenient means of simultaneously identifying the points of view of all present Member States on a specific topic. However, the GA is also a political organ, which does not make it an ideal forum for establishing the law. States may indeed have reasons other than legal ones for voting the way they do, such as moral, political, or pragmatic (for instance, as part of a bargain deal). Moreover, a state may vote against a resolution because it finds that it goes too far, or not far enough. Besides, it is hardly fair to bind a state to a favourable vote, when states 'act within certain rules and mechanisms that normally affect the legal meaning of their votes' and when resolutions are imputed not to individual members but to the adopting body and organization. Finally, the state representatives who vote in the Assembly usually do not have the power to legally commit their states" (citations omitted)); M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005), at pp. 434-435 ("Do we have the right to assume that a positive vote reflects the State's views about the law? This is quite uncertain. The vote may have been given as a political gesture, a confirmation of an alliance, for example, and wholly unrelated to what the State regards as custom. It may also have been given due to pressure exerted by a powerful State or in order to embarrass one's adversary. In neither case does it "reflect" any *opinio juris* in the State concerned. Moreover … it is possible (and frequent) to interpret UN decision-making in the light of the assumption — evidenced by the lack of full powers of State representatives — that it is non-binding");

whether a given resolution has such normative value is thus a task to be carried out "with all due caution".[118] As the International Court of Justice has explained: "[I]t is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule."[119]

48. In such an assessment, the particular wording used in a given resolution is of critical importance: "as with state practice, the content of the particular decision and the extent to which legal matters were considered must be examined before legal

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Kirchner, *supra* note 65, at p. 235 ("We have to keep in mind that resolution by their nature generally do not create legal obligations. States which do not use the form of a treaty, presumably, do not want to be bound at all").

[118] *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. 99, para. 188.

[119] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 255, para 70. See also R. Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, 1994), at p. 28 ("As with much of international law, there is no easy answer to the question: What is the role of resolutions of international organizations in the process of creating norms in the international system? To answer the question we need to look at the subject-matter of the resolutions in question, at whether they are binding or recommendatory, at the majorities supporting their adoption, at repeated practice in relation to them, at evidence of *opinio juris*. When we shake the kaleidoscope and the pattern falls in certain ways, they undoubtedly play a significant role in creating norms"); B. Sloan, "General Assembly Resolutions Revisited (Forty Years Later)", *British Yearbook of International Law*, 58 (1987), pp. 39, 138 ("Many or all of the foregoing factors, in a mix appropriate for each resolution, may be taken into account in considering the various effects or weight to be given to a particular resolution. The factors may not be of equal relevance or importance with respect to different effects such as effectiveness, general acceptability as an interpretation, declaratory effect or binding force. Their significance may vary with individual resolutions"); I. Brownlie, "Presentation", in A. Cassese and J. H. H. Weiler (eds.), *Change and Stability in International Law-Making* (Walter de Gruyter, 1988), at p. 69 ("s*ome* General Assembly resolutions, not General Assembly resolutions in general, but *some* General Assembly resolutions, are important evidence of the state of general international law. The text of the resolution and the debates leading up to the resolution, the explanation of the votes by delegations, are all evidence, but not more than that, of the state of international law. When I say evidence I do not necessarily mean to say evidence that is favourable, or positive. Thus the evidence may reveal such differences of opinion on various aspects of the resolution that, viewed in terms of the criteria of customary international law, it suggests that we are still some distance away from customary international law-forming on a given subject"); C. Economidès, "Les actes institutionnels internationaux et les sources du droit international", *Annuaire Français de Droit International*, 34 (1988), 131, 143-144 ("si les conditions précitées sont réunies (contenu normatif, grande majorité etc.), ces résolutions peuvent évoluer en règles coutumières, à condition toutefois que les Etats les appliquent réellement dans les faits, ce qui est toujours indispensable à la création d'une coutume"); Thirlway, *supra* note 27, at p. 65 ("It is essential to consider each possible type of resolution, if not each resolution on its merits, since the relative weight of the resolution itself and of the positions of Member States will vary according to the form and subject matter of the resolution in question").

weight is ascribed".[120] Resolutions drafted "in normative language"[121] are those that may be of relevance, and the choice (or avoidance) of particular terms may be significant. The nature of the language used in the resolution "is said to illuminate the *intent* of the Member States as to the legal significance of the resolution".[122]

49. Also important in this regard are the circumstances surrounding the adoption of the resolution in question. These include, in particular, the method employed for adopting the resolution; the voting figures (where applicable); and the reasons provided by States for their position (for example, while negotiating the resolution or in an explanation of position, an explanation of vote, or another other kind of statement). Clearly: "[T]he degree of support is significant. A resolution adopted by consensus or by unanimous vote will necessarily carry more weight than one supported only by a two-thirds majority of states. Resolutions opposed by even a small number of states may have little effect if those states are among the ones most immediately affected."[123]

50. In any event, as Dame Rosalyn Higgins has put it: "[O]ne must take care not to use General Assembly resolutions as a short cut to ascertaining international practice in its entirety on a matter — practice in the larger world arena is still the relevant canvas, although UN resolutions are part of the picture. Resolutions cannot

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[120] Crawford, *supra* note 20, at pp. 194-195. See, for example, *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. 102-103, para. 193; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 255, para. 72. See also Barberis, *supra* note 114, at p. 34 ("n'ont pas de caractère prescriptif les résolutions qui formulent des recommandations, émettent des vœux, incitent à adopter une conduite déterminée, sollicitent une collaboration, invitent à prendre certaines mésures ou emploient des expressions semblables. Les résolutions qui utilisent ce vocabulaire ne confèrent aucun droit et n'imposent aucune obligation sur le plan juridique; elles se bornent à contenir une recommandation ou une invitation, ce qui n'entre pas dans la sphère normative").

[121] Tomka, *supra* note 26, at p. 198. See also Institute of International Law's Conclusions of the Thirteenth Commission with respect to Resolutions of the General Assembly of the United Nations, available at <http://www.idi-iil.org/idiE/resolutionsE/1987_caire_02_en.PDF>, Conclusion 10 ("The language and context of a Resolution help to determine its normative purport. References to international law or equivalent phrases, or their deliberate omission, are relevant but not in themselves determinative"); Boyle and Chinkin, *supra* note 62, at p. 225 ("A law-making resolution or declaration need not necessarily proclaim rights or principles as law, but as with treaties, the wording must be 'of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law" (citing to the *North Sea Continental Shelf Cases*)).

[122] M. Prost, P.K. Clark, "Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?", *Chinese Journal of International Law*, 5 (2006), pp. 341, 362.

[123] Boyle and Chinkin, *supra* note 62, at p. 226 (adding that "even consensus adoption will not be as significant as it may at first appear if accompanied by statements which seriously qualify what has been agreed, or if it simply papers over an agreement to disagree without pressing matters to a vote"). See also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 255, para. 71 ("several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons"); Öberg, *supra* note 117, at pp. 900-901 ("Large majorities are thus crucial … It is [also] reasonable that those states which are actually engaged in a certain activity have a strong say in how the activity is regulated … [also relevant is] the mode of adoption of the resolution"); Akehurst, *supra* note 36, at pp. 6-7.

be a substitute for ascertaining custom: this task will continue to require that other evidences of state practice be examined alongside those collective acts evidenced in General Assembly resolutions."[124]

51. In cases where a resolution purports to declare the law (rather than seeks to advance a new rule, although in practice such a distinction is not always easy to make[125]), such resolutions (even if termed "declarations"[126]) do not constitute conclusive evidence and have to be carefully assessed: First, only in some circumstances, as suggested above, may the consent of States to the text "be understood as an acceptance of the validity of the rule or set of rules declared by the

[124] Higgins, *supra* note 119.

[125] See also Öberg, *supra* note 117, at p. 896 ("Granted, in practice it can be hard to draw the line between what, on the one hand, is merely interpretive or declaratory and what, on the other hand, is truly creative").

[126] See also *memorandum of The Office of Legal Affairs of the Secretary General of the United Nations*, E/CN.4/L.610, 2 April 1962 ("A 'declaration' or a 'recommendation' is adopted by resolution of a United Nations organ. As such it cannot be made binding upon Member States, in the sense that a treaty or convention is binding upon the parties to it, purely by the device of terming it a 'declaration' rather than a 'recommendation' … However in view of the greater solemnity and significance of 'declaration,' it may be considered to import, on behalf of the organ adopting it, a strong expectations that Members of the international community will abide by it. Consequently, insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon states"); E. Suy, "Innovation in International Law-Making Processes", in R. St. John Macdonald et al. (eds.), *The International Law and Policy of Human Welfare* (Sitjhoff & Noordhoff, 1978), at pp. 187, 190 ("The General Assembly's authority is limited to the adoption of resolutions. These are mere recommendations having no legally binding force for member states. Solemn declarations adopted either unanimously or by consensus have no different status, although their moral and political impact will be an important factor in guiding national policies. Declarations frequently contain references to existing rules of international law. They do not create, but merely restate and endorse them. Other principles contained in such declarations may appear to be new statements of legal rules. But the mere fact that they are adopted does not confer on them any specific and automatic authority … The General Assembly, through its solemn declarations, can therefore give an important impetus to the emergence of new rules, despite the fact that the adoption of declarations per se does not give them the quality of binding norms"); *KAING Guek Eav alias Duch*, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgment, Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber (3 February 2012), para. 194 ("The 1975 Declaration on Torture is a non-binding General Assembly resolution and thus more evidence is required to find that the definition of torture found therein reflected customary international law at the relevant time").

resolution".[127] Second, the rule concerned must also be observed in the practice of States.[128]

52. Resolutions may also "exert a strong influence on the development of international customary law".[129] This is the case when a resolution provides impetus for the growth of a general practice accepted as law in conformity with its text. Put differently, "[t]he resolution may provide a text about which the positions of States may coalesce, and here a hortatory effect may be relevant in influencing State

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[127] *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. 100, para. 188 ("The effect of consent to the text of such resolutions cannot be understood as merely that of a 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves"). See also at p. 184 (Separate Opinion of Judge Ago) ("There are … doubts which I feel bound to express regarding the idea … that the acceptance of certain resolutions or declarations drawn up in the framework of the United Nations or the Organization of American States, as well as in another context, can be seen as proof conclusive of the existence among the States concerned of a concordant *opinio juris* possessing all the force of a rule of customary international law"); I. Detter, "The Effect of Resolutions of International Organizations", in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Kluwer Law International, 1996), pp. 381, 387 ("An overwhelming vote of the General Assembly may be an indication that a legal rule exists but it is no conclusive proof: all situations must be examined on their merit. If the recommendations in these cases reflect already existing law it is, naturally, not recommendations which are binding in these cases, by their own force: they are binding by the underlying source of obligation in treaties or in customary law"); Schachter, *supra* note 57, at p. 730 ("Support for law-declaring resolutions in the UN General Assembly would have to be appraised in the light of the conditions surrounding such action. It is far from clear that voting for a law-declaring resolution is in itself conclusive evidence of a belief that the resolution expresses a legal rule. Other factors may be involved"); Gaja, *supra* note 55, at p. 40 ("a resolution declaring the existence of a certain principle or rule of international law may be taken as an expression of the *opinio juris* of the quasi-totality of States: those which voted in favour or accepted the resolution by consensus. However, one reason for hesitating to give weight to such a resolution as an expression of *opinio juris* is that the resolution is often accepted as "only a statement of political intention and not a formulation of law", as the United States Government put it when explaining its vote in favour of the resolution on non-intervention"); *Restatement (Third) of the Foreign Relations Law of the United States* (1987), §103, comment c ("International organizations generally have no authority to make law, and their determinations of law ordinarily have no special weight, but their declaratory pronouncements provide some evidence of what the states voting for it regard the law to be. The evidentiary value of such resolutions is variable. Resolutions of universal international organizations, if not controversial and if adopted by consensus or virtual unanimity, are given substantial weight").

[128] See also Bernhardt, *supra* note 62, at pp. 247, 267 ("it must be admitted that verbal declarations cannot create customary rules if the real practice is different"); S.M. Schwebel, "United Nations Resolutions, Recent Arbitral Awards and Customary International Law", in A. Bos and H. Siblesz (eds.), *Realism in Law-Making: Essays in International Law in Honour of Willem Riphagen* (Martinus Nijhoff Publishers, 1986), at pp. 203, 210 ("To be declaratory is to be reflective of the perceptions and practice of the international community as a whole; if the mirror is broken, its reflection cannot be unbroken. Not only is virtual unanimity or, in the least, the purposeful support of all groups, required; conformity with the practice of States also is required, if what is declared to be the existing law is to be an accurate declaration of what actually exists. The General Assembly, not being endowed with legislative powers, cannot make or unmake the law simply by saying so (even unanimously and repeatedly). The States which come together in the General Assembly can only declare the law when they exceptionally mean to declare it and when they do so in conformity with the practice of States which underlies the law").

[129] Danilenko, *supra* note 35, at p. 25.

conduct".[130] Similarly, a resolution may consolidate an emerging rule of customary international law.[131]

53. The United Nations General Assembly has recommendatory powers, and its resolutions are not binding as such.[132] As described above, such resolutions may very well play a significant part in the formation and identification of rules of customary international law;[133] they cannot, however, of themselves and ipso facto

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[130] Sloan, *supra* note 119, at p. 70. See also Supreme Court of El Salvador, Case No. 26-2006 (12 March 2007), p. 14-15 ("international declarations perform an indirect normative function, in the sense that they propose a non-binding but desirable conduct. … 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 [included in such declarations]"); German Constitutional Court, Order of the Second Senate of 8 May 2007, 2 BvM 1-5/03, 1, 2/06, para. 39 ("The document [ILC codification draft on State responsibility] was accepted by the United Nations General Assembly on 12 December 2001. This, however, leads neither *eo ipso* to customary-law application, nor to legally binding application for another reason, but may serve as an indication of a legal conviction as is necessary to form customary law"); *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case, I.C.J. Reports 1995*, p. 288, at p. 406 (Dissenting Opinion of Judge Sir Geoffrey Palmer) ("It can confidently be stated that some of those principles stated in the [Stockholm] Declaration [of the United Nations Conference on the Human Environment] have received such widespread support in State practice coupled with a sense on the part of States that they are legally binding that they have by now entered into the framework of customary international law"); Institute of International Law's Conclusions of the Thirteenth Commission with respect to Resolutions of the General Assembly of the United Nations, available at <http://www.idi-iil.org/idiE/resolutionsE/1987_ caire_02_en.PDF>, Conclusion 1, Conclusion 22 ("Principles and rules proclaimed in a Resolution may influence State practice, or initiate a new practice that constitutes an ingredient of new customary law. A Resolution may contribute to the consolidation of State practice, or to the formation of the *opinio juris communis*").

[131] See also Thirlway, *supra* note 27, at p. 70 ("It can certainly be accepted that a General Assembly resolution may contribute to the crystallization process, and that the existence of such a resolution declaring, or purporting to declare, the law will require only comparatively slight evidence of actual practice to support the conclusion that the rule in question has passed into general customary law. Nevertheless it must be emphasized that the Assembly cannot change the law or create new law … The idea of law being *created* by a General Assembly resolution is … inappropriate except in certain limited fields linked with the Charter"); Institute of International Law's Conclusions of the Thirteenth Commission with respect to Resolutions of the General Assembly of the United Nations, available at <http://www.idi-iil.org/idiE/resolutionsE/1987_ caire_02_en.PDF>, Conclusion 14 ("In situations where a rule of customary law is emerging from State practice or where there is still doubt whether a rule, though already applied by an international organ or by some States, is a rule of law, a Resolution adopted without negative vote or abstention may consolidate a custom or remove doubts that might have existed").

[132] Except for budgetary and other matters internal to the United Nations. See also, for example, S.M. Schwebel, "The Effect of Resolutions of the U.N. General Assembly on Customary International Law", *Proceedings of the Annual Meeting (American Society of International Law)*, 73 (1979), p. 301 ("It is trite but no less true that the General Assembly of the United Nations lacks legislative powers. Its resolutions are not, generally speaking, binding on the States Members of the United Nations or binding in international law at large. It could hardly be otherwise. We do not have a world legislature … not a phrase of the Charter suggests that it is empowered to enact or alter international law").

[133] But see *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at p. 99 (Separate Opinion of Vice-President Ammoun) ("The General Assembly has affirmed the legitimacy of

create customary international law. This reflects not only the terms of the Charter of the United Nations, but also the basic requirement for a general practice (accepted as law), in order for a rule of customary international law to emerge (or be ascertained): "The most one could say [of General Assembly resolutions] is that overwhelming (or even unanimous) approval is an indication of *opinio juris sive necessitatis*; but this does not create law without any concomitant practice, and that practice will not be brought about until states modify their national policies and legislation."[134] In other words, "[t]he resolution does not have any legal force of its

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that struggle [for liberation from foreign domination] in at least four resolutions … which taken together already constitute a custom"); B. Cheng, "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?", *Indian Journal of International Law*, 5 (1965), pp. 23, 37 ("there is no reason why an *opinio juris communis* may not grow up in a very short time among all or simply some Members of the United Nations with the result that a new rule of international customary law comes into being among them. And there is also no reason why they may not use an Assembly resolution to 'positivize' their new common *opinio juris*"); *ILA London Statement of Principles*, p. 61 ("Resolutions accepted unanimously or almost unanimously, and which evince a clear intention on the part of their supporters to lay down a rule of international law, are capable, very exceptionally, of creating general customary law by the mere fact of their adoption…"); G.H. Lockwood, "Report on the Trial of Mercenaries: Luganda, Angola", *Manitoba Law Journal*, 7 (1977), pp. 183, 195-197; R. Wolfrum, "Sources of International Law", in *Max Planck Encyclopedia of Public International Law* (2011), para. 43 ("repeated General Assembly resolutions adopted by consensus or unanimously may be considered State practice, thus establishing new customary international law").

134 Suy, *supra* note 126, at p. 190. See also *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, at pp 169-170 (Separate Opinion of Judge Van Wyk) ("Applicants did not seek to apply the traditional rules regarding the generation of customary law. On the contrary Applicants' contention involved the novel proposition that the organs of the United Nations possessed some sort of legislative competence whereby they could bind a dissenting minority. It is clear from the provisions of the Charter that no such competence exists, and in my view it would be entirely wrong to import it under the guise of a novel and untenable interpretation of Article 38 (1) (*b*) of the Statute of this Court"); T. Buergenthal, S.D. Murphy, *Public International Law in a Nutshell*, 5th edition (West Publishing, 2013), at p. 36 ("how states vote and what they say in international organizations is a form of state practice. Its significance in the law-making process depends upon the extent to which this state practice is consistent with the contemporaneous conduct and pronouncements of states in other contexts"); Tomka, *supra* note 26, at p. 211 ("The resolution does not have any legal force of its own, and it must be considered whether there is indeed a general view, held by States, that the resolution expresses a binding rule of international law, such that instances of State practice in accordance with that rule could be said to be motivated by that rule"); Öberg, *supra* note 117, at p. 904 ("Because the resolutions only inform the *opinio juris*, while the practice element of customary law is, in current ICJ jurisprudence, extraneous, the resolutions do not have any actual and autonomous substantive effects. Their effects are, one may say, pre-substantive, laying the ground for a real substantive effect if the missing element is provided"); P. de Visscher, "Observations sur les résolutions déclaratives de droit adoptées au sein de l'Assemblée générale des l'Organisation des Nations Unies", in *Festschrift für Rudolf Bindschedler* (Stämpfli, 1980) at pp. 173, 182 ("Certes, les votes, même unanimes et répétés, de telles résolutions ne constitueront jamais la pratique interétatique qui est l'élément premier de toute coutume. Ces votes peuvent toutefois, quant à la genèse même d'une coutume, en constituer l'élément subjectif c'est-à-dire l'*opinio juris* ou la conviction de la juridicité de la norme. C'est ce que l'on désigne habituellement en parlant de consolidation ou de cristallisation d'une coutume en voie de formation. En outre, de tels votes fournissent un élément de preuve persuasif de l'existence d'une coutume contestée"); A.M. Weisburd, "The International Court of Justice and the Concept of State Practice", *University of Pennsylvania Journal of International Law*, 31 (2009), pp. 295, 363 ("There is a further problem beyond that presented by the knowledge of States and their representatives that General Assembly resolutions have no legal effect — one of logic … a vote for a resolution can

own, and it must be considered whether there is indeed a general view, held by States, that the resolution expresses a binding rule of international law, such that instances of State practice in accordance with that rule could be said to be motivated by that rule".[135] Repetitive pronouncements in consecutive resolutions are no different in this regard.[136]

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indicate *opinio juris* only if it commits the voting state to the proposition that whatever rule the resolution asserts is legally binding. But if the vote is non-binding, it is unclear how it can commit the state to anything"); M. Mendelson, "The International Court of Justice and the Sources of International Law", in V. Lowe, M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice* (Cambridge University Press, 1996), at p. 87 ("although it is at any rate arguable that making a statement or casting a vote in the Assembly is a (weak) form of practice, to treat the same action as both practice and *opinio juris* seems, as already pointed out, to be a form of double counting, impermissible not only because of its inconsistency with the Court's identification of two separate elements of customary law, but also because the consequence would be 'instant (customary) law'. This is something that was not intended by the drafters of the Charter, and which, even today, states in general show no signs of welcoming").

[135] Tomka, *supra* note 26, at 211 (adding that "[i]n the end, it is the 'general practice accepted as law' that constitutes the source of custom, but determining that States accept a certain General Assembly resolution as normative will be important evidence implying that concordant practice is accepted as law"). See also I. MacGibbon, "Means for the Identification of International Law. General Assembly Resolutions: Custom, Practice and Mistaken Identity", in B. Cheng (ed.), International Law: Teaching and Practice (Stevens & Sons, 1982), at pp. 10, 22 ("The role of resolutions is … no more than indirect. It may initiate future practice; it may clarify or confirm past or present practice; it is part of the law-making process, but it is not in itself law-creative. The law-making or binding effect arises from the combination of the relevant practice and acceptance as law"); P.-M. Dupuy, "Théorie des sources et coutume en droit international contemporain", in *Le droit international dans un monde en mutation, Liber amicorum E. Jiménez de Aréchaga* (Fundación de cultura universitaria, 1994), at pp. 51, 67 ("l'assentiment étatique au caractère juridiquement liant de ces règles [des déclarations de l'Assemblée générale] sera toujours nécessaire sous une forme ou sous une autre, qu'il s'agisse d'une déclaration formelle en sa faveur, d'une pratique effective attestant la conviction de son auteur, ou d'un silence tôt ou tard considéré comme approbateur").

[136] See also MacGibbon, *supra* note 135, at p. 17 ("Indeed the absence of any new conventional or customary rule of international law conferring on the General Assembly the law-making capacity which it presently lacks seems bound to defeat any attempt to ascribe legally binding effect either to a single General Assembly resolution per se or to a series or succession of such resolutions, however numerous. A recommendation is not translated into a legal obligation simply by being re-affirmed or re-cited, no matter how many times … Mere repetition works no magical change in the legal nature of a resolution"); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 532 (Dissenting Opinion of Judge Weeramantry) ("The declarations of the world community's principal representative organ, the General Assembly, may not themselves make law, but when repeated in a stream of resolutions, as often and as definitively … provide important reinforcement … [to a view whether something is legal or not] under customary international law"); *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253, at pp. 435-436 (Dissenting Opinion of Judge Barwick) ("… it may be … that resolutions of the United Nations and other expressions of international opinion, however frequent, numerous and emphatic, are insufficient to warrant the view that customary law now embraces a prohibition on the testing of nuclear weapons"). But see *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, at p. 292 (Dissenting Opinion of Judge Tanaka) ("Of course, we cannot admit that individual resolutions, declarations, judgments, decisions, etc., have binding force upon the members of the organization. What is required for customary international law is the repetition of the same practice; accordingly, in this case resolutions, declarations, etc., on the same matter in the same, or diverse, organizations must take place repeatedly").

54. The following draft conclusion is proposed for inclusion in the new **part five**:

Draft conclusion 13

Resolutions of international organizations and conferences

Resolutions adopted by international organizations or at international conferences may, in some circumstances, be evidence of customary international law or contribute to its development; they cannot, in and of themselves, constitute it.

V. Judicial decisions and writings

55. Judicial decisions and the teachings of publicists (writings) are subsidiary means for the determination of rules of international law (Article 38.1 (d) of the Statute of the International Court of Justice). As such, they are potentially relevant in respect of all the formal sources of international law, and this is especially so for customary international law.[137]

56. Article 38.1 (d) of the Statute of the International Court of Justice provides:

> "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> …
>
> "d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

57. The practical importance of judicial pronouncements and the writings of publicists for the identification of rules of customary international law was highlighted in the Secretariat memorandum, which noted that "the Commission has on many occasions considered judicial pronouncements and writings of publicists in its analysis of customary international law".[138] The memorandum included five "observations" referring to these matters, with examples.[139]

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[137] And for general principles of law within the meaning of Art. 38.1(c), Statute of the International Court of Justice. These are a source of law distinct from customary international law, and as such are beyond the scope of the present topic. When accompanied by practice and *opinio juris* they may crystallize into rules of customary international law (H. Waldock: "there will always be a tendency for a general principle of national law recognized in international law to crystallize into customary law" (*supra* note 33, at pp. 39, 62)). They may thus be viewed as a 'transitory source', in the sense that their repeated use at the international level may transform them into rules of customary international law: A. Pellet, "L'adaptation du droit international aux besoins changeant de la société internationale", 329 *Recueil des cours* (2007), p. 26.

[138] *Secretariat Memorandum*, para. 30.

[139] Ibid., paras. 30-33. Observations 1 and 15 to 18 read:

- "To identify the existence of a rule of customary international law, the Commission has frequently engaged in a survey of all available evidence of the general practice of States, as well as their attitudes or positions, often in conjunction with the decisions of international courts and tribunals, and the writings of jurists."
- "The Commission has, on some occasions, relied upon decisions of international courts or tribunals as authoritatively expressing the status of a rule of customary international law."

A. Judicial decisions[140]

58. Decisions[141] of national courts may play a dual role in relation to customary international law: not only as State practice,[142] but also as a means for the determination of rules of customary international law.[143] In the latter capacity, they have to be approached with particular caution, since "national courts consider international law differently from international courts".[144]

59. While the decisions of international courts and tribunals as to the existence of rules of customary international law and their content are not "practice", they do

– "Furthermore, the Commission has often relied upon judicial pronouncements as a consideration in support of the existence or non-existence of a rule of customary international law."
– "At times, the Commission has also relied upon decisions of international courts or tribunals, including arbitral awards, as secondary sources for the purpose of identifying relevant State practice."
– "The writings and opinions of jurists have often been considered by the Commission in the identification of rules of customary international law."

[140] See H. Lauterpacht, "Decisions of Municipal Courts as a Source of International Law", *British Yearbook of International Law*, 10 (1929), p. 65; H. Lauterpacht, *The Development of International Law by the International Court*, 2nd edition (Stevens, 1958, reprinted Grotius, 1982, Cambridge University Press, 1996); C. Parry, *The Sources and Evidences of International Law* (Manchester University Press, 1965), pp. 91-103; R. Jennings, "The Judiciary, National and International, and the Development of International Law", 102 *International Law Reports*, pp. ix-xiii; R. Jennings "Reflections on the Subsidiary Means for the Determination of Rules of Law", in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz* (Editoriale Scientifica Napoli, 2004), at pp. 319-338; R. Jennings, A. Watts, *Oppenheim's International Law*, 9th edition, Vol. 1 (Longman, 1992), at pp. 41-42; S. Rosenne, *The Law and Practice of the International Court*, 1920-2005 (Martinus Nijhoff Publishers, 2006), at pp. 1552-1558; P. Daillier, M. Forteau, and A. Pellet, *Droit International Public*, 8th edition (L.G.D.J., 2009), paras. 259-260; Pellet, *supra* note 20, at MN 306-334; Crawford, *supra* note 20, at pp. 37-42; H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty years of jurisprudence* (Oxford University Press, 2013), at pp. 247-252, 1206-1210; M. Diez de Velasco, *Instituciones de derecho internacional público*, 18th edition (tecnos, 2013), at pp. 127-131; Shaw, *supra* note 22, at pp. 78-80.

[141] The term "decisions" in this context includes advisory opinions and orders in incidental proceedings. While international courts and tribunals are often organs of international organizations, their decisions are better viewed as subsidiary means for determining rules of law rather than as contribution as "practice" of the organization.

[142] A/CN.4/672, *supra* note 6, at para. 41(e). See also A. Gattini, "Le rôle du juge international et du juge national et la coutume internationale", in D. Alland et al. (eds.), *Unité et diversité du droit international: écrits en l'honneur du professeur Pierre-Marie Dupuy* (Martinus Nijhoff, 2014), at pp. 253-273.

[143] This is sometimes questioned, but it is difficult to see why the decisions of national courts, in which questions of international law frequently arise, should be excluded from the term "judicial decisions" in art. 38.1(d). There is no reason to suppose that the drafters of the Statute intended such a result.

[144] C. Greenwood, "The Contribution of National Courts to the Development of International Law", Annual Grotius Lecture, 4 February 2014, summary available online at <http://www.biicl.org/documents/159_annual_grotius_lecture_2014_summary.pdf>. For two recent studies of national courts, see A. Reinisch, P. Bachmayer, 'The Identification of Customary International Law by Austrian Courts', available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2289788>; A. Pellet, A. Miron, *Les grandes décisions de la jurisprudence française de droit international public* (Dalloz, 2015).

serve an important role as "subsidiary means for the determination of rules of law".[145]

60. There is no doctrine of *stare decisis* in international law.[146] The decisions of international courts and tribunals cannot be said to be conclusive for the identification of rules of customary international law. Their weight varies depending on the quality of the reasoning, the composition of the court or tribunal, and the size of the majority by which they were adopted. In addition, it needs to be borne in mind that customary international law may have developed since the date of the particular decision.[147] Nevertheless, judicial pronouncements, especially of the International Court of Justice and of specialist tribunals, such as the International Tribunal for the Law of the Sea, are often seen as authoritative.[148] The same is true of certain arbitral awards.[149]

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[145] A/CN.4/672, *supra* note 6, para. 46; but see Bernhardt, *supra* note 62, at p. 270 ("As is well known, Article 38 of the International Court's Statute mentions among the sources of international law judicial decisions, but only "as subsidiary means for the determination of rules of law". This formula underestimates the role of decisions of international courts in the norm-creating process. Convincingly elaborated judgments often have a most important influence on the norm-generating process, even if in theory courts apply existing law and do not create new law"). In any event, decisions of international courts and tribunals and writings may be also secondary sources for identifying State practice: see *Secretariat Memorandum*, observation 17 and para. 33. See also J.A. Barberis, "Réflexions sur la coutume internationale", *Annuaire Français de Droit International*, 36 (1990), pp. 9, 22 ("Le droit coutumier peut également être créé par le biais des décisions des tribunaux internationaux. Ainsi, on a considéré que la règle selon laquelle une Partie ne peut opposer à une autre le fait de n'avoir pas rempli une obligation ou de ne pas s'être servie d'un recours judiciaire si la première, par un acte contraire au droit, a empêché cette dernière de remplir l'obligation ou d'avoir recours à la juridiction, est «un principe généralement reconnu par la jurisprudence arbitrale internationale». Les règles principales qui constituent les bases de la procédure arbitrale ont été établies par la pratique des tribunaux arbitraux. Dans ce sens, on peut citer en premier lieu la norme selon laquelle tout juge est juge de sa propre compétence. Cette norme, connue généralement sous le nom de «règle de la compétence de la compétence», tire son origine des sentences arbitrales … . … La norme qui accorde à un tribunal la faculté d'édicter des mesures conservatoires relève aujourd'hui du droit coutumier et a été créée par la jurisprudence internationale. De même, certaines règles d'interprétation ont la même origine et, à titre d'exemple, on peut mentionner la règle de l'effet utile").

[146] G. Acquaviva, F Pocar, "*Stare decicis*", in *Max Planck Encyclopedia of Public International Law* (2007).

[147] See also J.A. Green, *The International Court of Justice and Self-Defence in International Law* (Hart, 2009), at p. 25 ("there exists a danger for States and scholars in perceiving judgments [of international courts and tribunals] as an expression of international law, when in fact any judgment represents at best a 'freeze-frame' of that law").

[148] See also J. Crawford, "The Identification and Development of Customary International Law", Keynote speech at the Spring Conference of the ILA British Branch, 23 May 2014 ("Even if the Court's judgments have a binding effect only between the parties involved, and are merely 'subsidiary means for the determination of rules of law', in practice they are treated as 'authoritative pronouncements of the current state of international law'. This is evident in state practice in response to the Court's decisions regarding customary international law. After *Nicaragua*, the customary character of common Articles 1 and 3 of the 1949 Geneva Conventions is 'now taken for granted and almost never questioned'. It is also apparent in the influence the Court exerts over other international courts and tribunals" (citations omitted)).

[149] There are various collections of arbitral awards, most notably the important United Nations publication, *Reports of International Arbitral Awards* (UNRIAA).

61. Examples of reliance upon judicial decisions for the identification of rules of customary international law are legion. The International Court of Justice frequently relies on its own previous decisions or those of its predecessor, the Permanent Court of International Justice. Indeed, it seems very reluctant to depart from its previous decisions.

B. Writings[150]

62. It is sometimes suggested that writings were particularly important for the systematization and even for the development of the law of nations in centuries past.[151] Their role is now seen as perhaps less prominent, but, depending largely on their quality, they remain a useful source of information and analysis for application to the identification of rules of customary international law.

63. The role of "the teachings of the most highly qualified publicists of the various nations"[152] as a subsidiary means for the determination of rules of law was well captured in the oft-cited words of Mr. Justice Gray in *The Paquete Habana* case: "Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."[153]

64. The views of authors must be considered while bearing in mind various factors, such as the extent to which they seek to reflect the positions of particular States or groups of States, what approach they have adopted with respect to the identification of customary international law, and whether they are seeking to promote a particular viewpoint or to formulate proposals for new rules of law.[154]

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[150] See G. Schwarzenberger, "The Province of Doctrine of International Law", in G. W. Keeton, G. Schwarzenberger (eds.), *Current Legal Problems* (Stevens, 1956), at pp. 235-65; J. François, "L'influence des publicistes sur le développement du droit international", in *Mélanges en l'honneur de Gilbert Gidel* (Sirey, 1961), at pp. 275-281; C. Parry, *supra* note 140, at pp. 103-108; E. Münch, "Zur Aufgabe der Lehre im Völkerrecht", in Université Genève et Institut de Hautes Études Internationales Genève, *Recueil d'études de droit international en hommage à Paul Guggenheim* (Imprimerie de La Tribune Genève, 1968), at pp. 490-507; M. Lachs, "Teachings and Teaching of International Law", 151 *Recueil des cours* (1976), pp. 161-252; A. Oraison, "Réflexions sur la "doctrine des publicistes les plus qualifiés des différentes nations": Flux et reflux des forces doctrinales académiques et finalisées", *RBDI*, 24 (1991), pp. 507-80; Rosenne, *supra* note 140, at pp. 1558-1560; Pellet, *supra* note 20, at MN 335-339; M. Wood, "Teachings of the Most Highly Qualified Publicists (Art. 38 (1) ICJ Statute)", in *Max Planck Encyclopedia of Public International Law* (2010); Daillier, Forteau and Pellet, *supra* note 140, at paras. 256-258; M. Diez de Velasco, *supra* note 140, at p. 131; Thirlway, *supra* note 18, at pp. 126-128; Shaw, *supra* note 22, at pp. 80-81.

[151] Greig suggests that "before there existed any great wealth of state practice or judicial precedent, writers on international law held a pre-eminent position": D.W. Greig, *International Law* (Butterworth, 1970), at p. 40.

[152] They are often referred to simply as "writings" or "the literature" (*doctrine* in French).

[153] *The Paquete Habana and The Lola*, US Supreme Court [8 January 1900] 175 US 677 at 700. Chief Justice Fuller, dissenting, warned of writers that "[t]heir lucubrations may be persuasive, but not authoritative" (at 720).

[154] R. Jennings, *supra* note 140, at pp. 328-329 ("These and such other sources of doctrine may or may not in particular instances make it clear whether they are dealing with the *lex lata* or the *lex ferenda* … pressure groups creating doctrine often find it advantageous to blur the distinction and to dress their proposals as existing law …"). See also J. Kammerhofer, "Law-Making by

65. Among writings, special importance may be attached to collective works, in particular the texts and commentaries emerging from the work of the International Law Commission,[155] but also to those of private bodies such as the Institute of International Law and the International Law Association. As with all writings, however, it is important, if not always easy, to distinguish between those that are intended to reflect existing law (codification, or *lex lata*) and those that are put forward as embodying progressive development (or *lex ferenda*). As has been said in connection with the Commission's articles on the responsibility of international organizations: "[C]ourts and others should approach the articles…with a degree of circumspection. They should … weigh the evidence when determining the status of particular provisions within the draft."[156]

66. Examples of explicit reliance upon the writings of individual authors (as opposed to those of the International Law Commission and certain other collective works) remain very rare in the case law of the International Court of Justice.[157] This does not necessarily mean that those writings are unimportant, and in fact they are often found in separate or dissenting opinions, and in decisions of other international courts and tribunals and of domestic courts.[158]

Scholars", in C. Brölmann and Y. Radi (eds.), *Research Handbook on the Theory and Practice of International Law-Making* (Edward Elgar, 2015, forthcoming), available at <SSRN:http://ssrn.com/abstract=2182547>.

[155] Examples include the reference to the ILC's work on the law of treaties in the *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v. United States of America)* in respect of ius cogens (at para. 190); and reliance on the first reading of the Draft Articles on State Responsibility in the *Gabčikovo-Nagymaros (Hungary/Slovakia)* case (at para. 50). More recently, there have been references by the International Court to the final Draft Articles on Responsibility of States for Internationally Wrongful Acts, for example in its 19 December 2005 judgment in the *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (at para. 160), where the Court referred to Arts 4, 5, and 8 of the 2001 Articles. And in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, the Court referred extensively to the ILC's Articles on State Responsibility. See also Tomka, *supra* note 26, at p. 202 ("the codifications produced by the International Law Commission have proven most valuable [to the Court in ascertaining whether a rule of customary international law exists], primarily due to the thoroughness of the procedures utilized by the ILC …").

[156] M. Wood, "Weighing the articles on responsibility of international organizations", in M. Ragazzi (ed.), *The Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff, 2013), at pp. 55, 66.

[157] M. Peil, "Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice", *Cambridge Journal of International and Comparative Law*, 1 (2012), p. 136.

[158] See, for example, *Yong Vui Kong v. Public Prosecutor*, [2010] 3 S.L.R. 489 [2010] SGCA 20 (Supreme Court of Singapore — Court of Appeal, 14 May 2010), paras. 95, 98; German Constitutional Court, Order of the Second Senate of 8 May 2007, 2 BvM 1-5/03, 1, 2/06, paras. 64-65; *Kaunda and Others v. The President of the Republic of South Africa and Others*, Judgment of the Constitutional Court of South Africa (4 August 2004), paras. 25-29; *Prosecutor v. Ntakirutimana*, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Judgment (Appeals Chamber), International Criminal Tribunal for Rwanda, para. 518; Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia, Criminal Case No. 002/19-09-2007-EEEC/OICJ (PTC38), Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, para. 61 (referring also to previous ICTY case on the matter); *Prosecutor* v. *Delalić*, Case No. IT-96-21-T, Judgment (Trial Chamber of the International Tribunal for the Former Yugoslavia), 16 November 1998, para. 342; *KAING Guek Eav alias Duch*, Case

67. The following draft conclusion is proposed for inclusion in the new **part five**:

Draft conclusion 14
Judicial decisions and writings

Judicial decisions and writings may serve as subsidiary means for the identification of rules of customary international law.

VI. The relevance of international organizations

68. The second report indicated that the practice of international organizations could also be relevant to the identification of customary international law.[159] This was for the most part supported within the Commission,[160] but various questions arose regarding the particular nature of such a role.[161] Draft conclusion 4 [5], paragraph 2, as provisionally adopted by the Drafting Committee in 2014, provided:

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

In a footnote to the report of the Chairman of the Drafting Committee, it was indicated that draft conclusion 4 [5] would be considered again at the Commission's 2015 session in light of the analysis of the question of the practice of international organizations in the present report. In a footnote to draft conclusion 6 [7], it was

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No. 001/18-07-2007-ECCC/SC, Appeal Judgment, Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber (3 February 2012), paras. 114-116; *Prosecutor* v. *Šainović and Others*, Case No. IT-05-87-A, Judgment (Appeals Chamber of the International Tribunal for the Former Yugoslavia), 23 January 2014, para. 1647 (and the reference therein); *2 BvR 1506/03*, Order of the Second Senate of 5 November 2003 (German Federal Constitutional Court), para. 47; *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, para. 169.

[159] A/CN.4/672, paras. 43-44. The second report proposed that the term "international organization" be defined (for the purposes of the draft conclusions) as "an intergovernmental organization". However, in 2014 the Drafting Committee felt that it might be premature to choose between the possible definitions pending consideration of the present report. The Special Rapporteur's intention is that the term "international organization" in the draft conclusions should refer to those organizations with international legal personality whose members are primarily States or other international organizations. The Special Rapporteur does not at present consider it necessary to include a definition in the draft conclusions, provided that an explanation is given in the commentary. This is a matter which the Drafting Committee may wish to consider further.

[160] The Commission recognized already in 1950 that "[r]ecords of the cumulating practice of international organizations may be regarded as evidence of customary international law with reference to States' relations to the organizations" ("Ways and Means for Making the Evidence of Customary International Law More Readily Available", Report of the International Law Commission on its Second Session (A/CN.4/34), *Yearbook of the International Law Commission, 1950*, Vol. II, p. 372, para. 78); see also *Secretariat Memorandum*, Observation 13 ("Under certain circumstances, the practice of international organizations has been relied upon by the Commission to identify the existence of a rule of customary international law. Such reliance has related to a variety of aspects of the practice of international organizations, such as their external relations, the exercise of their functions, as well as positions adopted by their organs with respect to specific situations or general matters of international relations").

[161] See, for example, Mr. Murphy's intervention: summary record A/CN.4/SR.3224 (16 July 2014). For a subsequent reflection on some of the issues raised, see M. Wood, "International Organizations and Customary International Law", *Vanderbilt Journal of Transnational Law*, 48 (2015).

similarly indicated that "[f]orms of practice of international organizations would be examined in the future".[162]

69. The Commission has recently had occasion to refer to the differences between States and international organizations. In its general commentary to the 2011 articles on the responsibility of international organizations, the Commission stated:

> International organizations are quite different from States, and in addition present great diversity among themselves. In contrast with States, they do not possess a general competence and have been established in order to exercise specific functions ("principle of speciality"). There are very significant differences among international organizations with regard to their powers and functions, size of membership, relations between the organization and its members, procedures for deliberation, structure and facilities, as well as the primary rules including treaty obligations by which they are bound.[163]

70. States remain the primary subjects of international law and, as explained in the second report, it is primarily their practice that contributes to the formation, and expression, of rules of customary international law.[164] It is also States that (for the most part) create and control international organizations, and empower them to perform, as separate international legal persons, a variety of functions on the international plane in pursuit of certain goals common to their members.[165] It thus

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[162] See also *Interim Report of the Chairman of the Drafting Committee*, 7 August 2014, pp. 9-10.

[163] Draft articles on the responsibility of international organizations, General commentary, para. 7 (*Report of the International Law Commission 2011*, A/66/10, para. 88), reproduced in M. Ragazzi (ed.), *The Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff, 2013), at pp. 449-451.

[164] A/CN.4/672, at para. 43.

[165] See also L. Hannikainen, "The Collective Factor as a Promoter of Customary International Law", *Baltic Yearbook of International Law*, 6 (2006), pp. 125, 130 ("The rising importance of international organizations does not mean that they have risen above States or constitute a serious challenge to State sovereignty. States continue to be the leading actors in the international arena; as the founders and members of international organizations they are able to control these institutions created by them — even to dissolve them. At the same time it should be kept in mind that States have purposefully given international organizations different kinds of powers, even supranational powers to certain international organizations …"); A. Roberts, S. Sivakumaran, "Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law", *Yale Journal of International Law*, 37 (2012), pp. 107, 117-118 ("Normatively, state-empowered bodies are created and empowered by states, which creates a basis for arguing that any lawmaking powers exercised by such bodies are derived from state consent. In addition, after any initial delegation of lawmaking powers has been made, states retain a variety of formal and informal powers to sanction state-empowered bodies if they overreach in their lawmaking efforts … Any role that state-empowered bodies play in in law creation is thus dependent on initial state consent and at least some level of ongoing state consent"); C. Parry, *supra* note 140, at pp. 8-9 ("if any element of international legislation is to be discerned in the operations of international organizations, enthusiasts for such structures would do well to remember that the theory upon which they were built was one of delegation from the State"). States (both members of the organizations and non-members) may also object to the conduct of an international organization: see, for example, D. Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (Oxford University Press, 2005), at p. 116 ("a State may wish to object in a persistent manner to the way in which delegated powers are being exercised within an organization precisely in order to prevent any future rule of custom that may result from the organization's acts binding the State and thus constraining its unilateral exercise of powers outside the context of the organization"); J. E. Alvarez, *International Organization as Law-Makers* (Oxford University Press, 2005), at p. 593.

generally "seems premature to equate such normative power [that some international organizations may hold] with genuinely autonomous law-making power";[166] at the same time, bearing in mind that indeed "[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community",[167] the exercise by international organizations of their functions may certainly be of relevance for the identification of customary international law. This general notion found significant support in the 2014 Sixth Committee debate.[168]

71. At the outset, two distinctions should be made. First — and this is fundamental — we need to distinguish the practice of States within international organizations from that of the international organizations as such. While this may not always be easy to do (in particular in cases where the relevant organ of an organization is composed of States),[169] and while there is often a lack of clarity in the literature, in principle the

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[166] Prost and Clark, *supra* note 122, at pp. 354, 367-368 (adding that "[t]he decisive factor, for present purposes, is whether the organization is capable of expressing a truly autonomous will, i.e. one which is not only the sum of its members' individual wills, and whether this independent will is binding on the Member States … On this issue, there remains … wide-ranging debate … IOs, at this stage of development of the international legal community, are still largely incapable of instituting an emergence of a power which is truly separated from Sovereign States. Indeed, the institutional logic never eclipses the State logic. On the contrary, it presupposes, mirrors and to some extent magnifies the nation-State system" (citations omitted)). See also J. Klabbers, "International Organizations in the Formation of Customary International Law", in E. Cannizzaro, P. Palchetti (eds.), *Customary International Law on the Use of Force* (Martinus Nijhoff Publishers, 2005), pp. 179, 183 ("in order to say anything meaningful about the role of international organizations in the formation of customary international law, what is required is something of a perspective on the relationship between organizations and their members. On the one hand, those who regard organizations as little more than vehicles for their member states will have fairly little problem accepting the idea that acts of organs [of international organizations] can somehow be counted as acts of states. On the other hand, those who insist on the separate identity of the organization may be less easily inclined to consider acts of organizations as state acts").

[167] *Reparations for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at 178.

[168] See, for example, the statements on behalf of Austria, France, Greece, Islamic Republic of Iran (international organizations relevant for the identification of customary international law "to the extent that it reflected the practice of States"), Jamaica, Republic of Korea, The Netherlands, the Nordic countries, Poland, Portugal, Romania, Slovakia, Slovenia, South Africa, Spain, Trinidad and Tobago, and the United States ("in some defined circumstances") (see the summary records; the verbatim statements are also available online on the United Nations' PaperSmart Portal, <http://www.un.org/en/ga/sixth/>).

[169] As Ms. Jacobsson stated, "on occasion it might [] be difficult to separate [States and international organizations] in terms of their involvement" (summary record A/CN.4/SR.3226 (17 July 2014)). See also Akehurst, *supra* note 36, at p. 11 ("… the practice of international organizations can also create rules of customary law. It is true that most organs of most international organizations are composed of representatives of States, and that their practice is best regarded as the practice of States. But the practice of organs which are not composed of representatives of States, such as the United Nations Secretariat, can also create rules of customary law … Nor must one overlook the legal opinions of the United Nations Secretariat"); R.A. Wessel, S. Blockmans, "The Legal Status and Influence of Decisions of International Organizations and other Bodies in the European Union", College of Europe, Department of European Legal Studies Research Paper in Law 01/2014 ("an important function of international organizations is to reveal state practice (and *opinio juris*) and to allow for a speedy creation of customary law, although one needs to remain aware of the distinction between state practice and the practice of an international organization"); D.M. DeBartolo, "Identifying International Organizations' Contributions to Custom", *AJIL Unbound*, 23 December 2014, available online at

practice of international organizations, as separate international legal persons, should not be assimilated to that of the States themselves (of "representatives of Members, that is to say, of persons delegated by their respective Governments, from whom they receive instructions and whose responsibility they engage").[170] The present report, like the second report, proceeds on the basis of the determination that, where appropriate, the practice of States within international organizations is to be attributed to States themselves.[171]

72. Another distinction to be made is that between conduct of the organization that relates to the internal operation of the organization (often referred to as "the practice of the organization", or "the established practice of the organization"; see the definitions of "rules of the organization" in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations and in the 2011 articles on the responsibility of international organizations) and conduct of the organization in its relations with States, international organizations and others (external practice). While the former may in certain circumstances give rise to "a kind of customary law of the organization, formed by the organization and applying only to the organization",[172] it is in

<http://www.asil.org/blogs/identifying-international-organizations%E2%80%99-contributions-custom> ("Though such acts [in connection with resolutions of international organizations, for example] take place in an IO forum, they are State acts, carried out by State officials (generally members of a State's delegation or permanent mission to the IO), and as such constitute State practice, not IO practice"); J.E. Alvarez, "International Organizations: Then and Now", *American Journal of International Law*, 100 (2006), pp. 324, 333 ("Although some may prefer to describe them as merely "arenas" for lawmaking action, IOs … are for all practical purposes a new kind of lawmaking actor, to some degree autonomous from the states that establish them"); I. Johnstone, "Law-Making Through the Operational Activities of International Organizations", *George Washington International Law Review*, 40 (2008), p. 87 ("to the extent that international organizations act autonomously in engaging in [] practices, the law-making process is one step removed from state consent"); J. Wouters, P. De Man, "International Organizations as Law-Makers", in J. Klabbers and Å. Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (Edward Elgar, 2011), at p. 208.

[170] To borrow the words of *Article 3, Paragraph 2, of the Treaty of Lausanne*, Advisory Opinion, PCIJ Series B — No. 12 (1925), p. 29 (discussing, in a different context, the composition of the Council of the League of Nations).

[171] See also Treves, *supra* note 54, at para. 50 ("As subjects of international law, intergovernmental organizations participate in the customary process in the same manner as States. Ascertainment and assessment of such participation and of its relevance must, nevertheless, be made with particular caution: first, because of the limited scope of the competence of the organizations, and, secondly, because it may be preferable to consider many manifestations of such practice, such as resolutions of the UN General Assembly, as practice of the States involved more than of the organizations").

[172] C. Peters, "Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?", *Goettingen Journal of International Law*, 3 (2011), pp. 617, 630-631 (adding, however, that "[y]et it is not entirely that simple because at the same time established practice has a characteristic which is due to its origins in the organization: it is based to a large extent on secondary law of the organization, on the binding resolutions and decisions of its organs"). Such customary law would embrace "mainly rules referring to relations between the organs of organizations and between such organizations and the members of their staff" (Wolfke, *supra* note 28, at p. 80). Such 'custom' lies beyond the scope of the present topic.

principle the latter that may be relevant to the formation and identification of customary international law.[173]

73. The fact that there is a great variety of international organizations calls for particular caution in assessing their practice and the weight to be attributed to it.[174] For example, the more member States the organization has,[175] or the more the practice of the organization is explicitly endorsed (in one way or another) by the

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[173] See also, for example, Pellet, supra note 20, at pp. 816-817 ("… the practice of the [international] organizations themselves, can also be of paramount importance in establishing the existence of the material element. In this respect, it is, however, necessary to make a distinction between the internal and purely institutional practice, giving rise to a customary rule within the 'proper law' of the organization concerned, on the one hand, and the contribution of the organization(s) to the formation of general rules of customary law applicable outside the framework of the organization on the other") (citations omitted); Barberis, supra note 145, at p. 33 ("S'agissant de la pratique des organisations internationales, il est nécessaire de distinguer entre l'activité que leurs organes déploient en leur sein et qui a trait à l'ordre juridique interne de l'organisation, et l'activité qu'ils déploient sur le plan international. L'activité déployée au sein de l'organisation peut dponner naissance à des règles coutumières relevant de l'ordre juridique interne de cette organisation. … Toutefois, la pratique d'une organisation sur le plan international peut créer des normes coutumières internationales"). For a different conceptual approach according to which nowadays "most decisions of international organizations have an internal and an external normative impact … [and] the line between internal and external law-making is fading" see Wouters and De Man, supra note 169, at p. 194. The Secretariat Memorandum observes that "[o]n some occasions, the Commission has referred to the possibility of the practice of an international organization developing into a custom specific to that organization. Such customs may relate to various aspects of the organization's functions or activities, e.g. the treaty-making power of an international organization or the rules applicable to treaties adopted within the organization" (Observation 14).

[174] Malaysia suggested in the Sixth Committee 2014 debate that "[s]ince international organizations differed in terms of their membership and structure, it should not be presumed that the acts or inaction of any of them represented the general practice of States for the purposes of establishing customary international law"; Singapore similarly stated that "considerable caution was required in assessing the relevance of the acts, including inaction, of international organizations. There were wide variations in the organizational structure, mandate, composition of decision-making organs and decision-making procedures of such organizations, all factors that had a bearing on such organizations' role, if any, in the formation of customary international law" (statements available online on the United Nations' PaperSmart Portal, <http://www.un.org/en/ga/sixth/>). See also Wouters and De Man, *supra* note 169, at pp. 190, 208 ("Whether actions of international organizations can be attributed to the State community as a whole is a complex question and the answer depends on such divergent factors as, inter alia, the nature of the organization (political vs. technical), the inclusiveness of its membership (universal and total vs. regional and limited), the composition of the relevant organ adopting a certain measure (plenary vs. partial) and the decision-making method applied (unanimity and consensus vs. majority)").

[175] See Cahin, *supra* note 111, for a comprehensive treatment of all aspects. See also K. Skubiszewski, "Forms of Participation of International Organizations in the Lawmaking Processes", *International Organization*, 8 (1964), pp. 790, 791 ("international custom is modified and developed by the practice of states and international organizations, especially the universal ones"); I. Gunning, "Modernizing Customary International Law: The Challenge of Human Rights", *Virginia Journal of International Law*, 31 (1991), pp. 211, 225 ("The greater the number of states and the broader the representation of states which support the agency and hence delegated authority to the agency, the stronger the case that the agency's actions create customary law"); C.H. Alexandrowicz, *The Law Making Functions of the Specialized Agencies of the United Nations* (Angus and Robertson, 1973), at p. 98 ("Being mostly universal, the [Specialized] Agencies [of the United Nations] are a proper forum for the generation of customary rules which enjoy a world-wide acceptance").

member States, the greater the weight the practice may have. Such considerations reflect the centrality of States in the customary process.

74. Practice associated with international organizations might arise in different ways, though it may sometimes be difficult to draw clear lines between them. First, acts of international organizations may reflect the practice and convictions of their member States.[176] As discussed in section IV above, resolutions of organs composed of States reflect the views expressed and the votes cast by States within them, and may thus constitute State practice or evidence of *opinio juris*.[177] Similarly, policies adopted by international organizations and acts performed by them are often closely considered and/or endorsed by their member States.

75. Second, the conduct of international organizations may serve to catalyse State practice. In essence, the work of international organizations on the international plane may prompt reactions by States, which may count as practice or attest to their legal opinions.[178] This is the case, for example, when international organizations

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[176] Crawford has written that "[t]he activities of international organizations do not feature in the sources of international law enumerated in Article 38 of the Statute of the International Court. But they are well placed to contribute to its development. This is due primarily to the capacity for international organizations to express collectively the practice of member states" (Crawford, *supra* note 20, at p. 192). See also Gunning, *supra* note 175, at p. 222 ("The argument that international organizations should influence custom is based on the premise that the practices of international organizations … constitute a collective state action").

[177] See also Prost and Clark, *supra* note 122, at p. 360 ("however important resolutions might be in the contemporary customary process, it remains doubtful whether the legal authority really resides with IOs. In the declaration, the crystallization and the process of "instant" germination of custom, the autonomy of IOs is in fact mainly formal, while the power to make law — the genuine and substantive legal authority — tends to remain in the hands of the Member States. Again, this is, by no means, a denial of the role played by IOs in the channeling and modeling of States' power. The fact remains, however, that where resolutions are regarded as constitutive, in whole or in part, of customary law, the inter-State dynamic is essentially preserved and the autonomy of IOs is generally constrained by the permanence, behind the veil of the organization, of the Member States"); Klabbers, *supra* note 166, at p. 188 ("In what is, conveniently perhaps, the leading case on both the formation of customary international law and the prohibition of the use of force in international law, the Nicaragua case, the ICJ steadfastly adhered to the view that the activities of international organizations and the results of international conferences were, at the end of the day, the work of states").

[178] See, for example, *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 258, para. 81 (report of the United Nations Secretary-General "unanimously approved by the Security Council"). See also Cassese, *supra* note 29, at p. 193 ("… the UN encourages States to develop their views on matters on which they are often called upon to comment. This again ensures that a host of pronouncements are collected which would otherwise only be obtainable with difficulty"); Charney, *supra* note 52, at pp. 543-544; D. Vignes, 'The Impact of International Organizations on the Development and Application of Public International Law', in in R. St. John Macdonald, D.M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (Martinus Nijhoff Publishers, 1983), 809, 829; Hannikainen, *supra* note 165, at p. 140 ("Resolutions are not the only important form of activity of international organizations for the creation of customary norms. Many international organs conduct dialogue with States with the purpose of persuading them to adopt certain good practices or forms of conduct. There are strong international organs which may not limit themselves to persuasion but can also employ forms of pressure vis-à-vis a member State"); L.-C. Chen, *An Introduction to Contemporary International Law: A Policy-Oriented Perspective*, 2nd edition (Yale University Press, 2000), 346 ("Contrary to the lingering myth that such [international governmental] organizations enjoy little direct prescriptive competence, they play an increasingly important role as forums for the flow of explicit communications and acts of collaboration that create people's expectations about authoritative community policy. This is especially true of the United Nations and its affiliated agencies").

introduce draft texts for debate by States, or engage in activities to which States respond. Similarly, reports produced or endorsed by organs of international organizations, or statements on their behalf, often provoke reaction by States. Resolutions calling on States to act, i.e., to adopt national legislation or other domestic measures, may also give rise to State practice.

76. Third, the practice of international organizations relating to the international conduct of the organization or international organizations generally may, as such, serve as relevant practice for purposes of formation and identification of customary international law.[179] To a great extent, this "is perhaps best exemplified in the acts of administrative or operational organs",[180] and relates to "operational activities" of

[179] See also German Federal Constitutional Court, 2 BvR 1506/03, Order of the Second Senate of 5 November 2003, para. 52 ("more recent developments on the international level, which are characterised by increasing differentiation and an increasing number of acknowledged subjects of international law, must be taken into consideration when ascertaining state practice. The acts of bodies of international organisations … therefore deserve special attention"); Jennings and Watts, *supra* note 140, at p. 47 ("international organizations are themselves international persons. They can in their own right give rise to practices which may in time acquire the character of customary law or contribute to its development, there being nothing in Article 38 of the Statute of the International Court of Justice to restrict international custom to the practice of states only. However, the international personality imposes limits upon the areas of international law which their practices can directly affect"); Higgins, *supra* note 119, at p. 25 ("The repeated practice of the [UN] organ, in interpreting the treaty, may establish a practice that, if the treaty deals with matters of general international law, can ultimately harden into custom. Although organ practice may not be good evidence of the intention of the original state parties, it is of probative value as customary law. Here the United Nations is a participant in the international legal process"); Skubiszewski, *supra* note 175, at p. 791 ("The application of customary international law by and in the organs of the organization may well lead to the growth of new rules"); L. Boisson de Chazournes, "Qu'est-ce que la pratique en droit international?", in Société française pour le droit international, *La pratique et le droit international: Colloque de Genève* (Pedone, 2004), at pp. 13, 38 ("De manière générale, en tant que sujets de droit international, les organisations internationales contribuent au façonnement du droit international. Cette contribution revêt différents visages, montrant là encore le caractère pluriel de la pratique. … Ainsi, une organisation internationale peut être véhicule de pratique pour ses Etats membres. Elle peut avoir sa propre pratique externe par l'intermédiaire de ses organes politiques et intégrés. Elle peut également développer des pratiques qui lui sont propres dans son ordre interne."); Danilenko, *supra* note 36, at p. 20 ("It is undisputed that the practice of States exerts a decisive influence on the formation of custom. At the same time, it is widely recognized that the practice of international organizations also contributes to the creation of customary rules in areas of their competence"); Henckaerts and Doswald-Beck, *supra* note 36, at p. xli ("International organisations have international legal personality and can participate in international relations in their own capacity, independently of their member States. In this respect, their practice can contribute to the formation of customary international law"); V. Lowe, "Can the European Community Bind the Member States on Questions of Customary International Law?", in M. Koskenniemi (ed.), *International Law Aspects of the European Union* (Kluwer Law International, 1998), at pp. 149, 158 ("Nor am I asking whether such [European] Community statements may count as State practice under Article 38(1)(b) of the [international] Court Statute. Clearly, in as much as they are acts of an international person, they can"); M. Akehurst, "The Hierarchy of the Sources of International Law", *British Yearbook of International Law*, 47 (1975), pp. 273, 281 ("Many acts of international organizations are not sources of international law in their own right, *either because they are merely part of the practice from which customary international law develops*, or because they merely record agreements between (or promises by) States") (emphasis added); Mendelson, *supra* note 25, at p. 201 ("what is conveniently and traditionally called State practice … is, more precisely, the practice of subjects of international law"); *ILA London Statement of Principles*, p. 19 ("The practice of intergovernmental organizations in their own right is a form of "State practice").

[180] Sloan, *supra* note 119, at p. 74 (suggesting that "[a]s international organizations are subjects of international law, organizational practice is also relevant to the creation of custom"). See also

the organizations that are akin to the activities undertaken by States, defined by one author as "the programmatic work of international organizations carried out as part of their overall mission or in fulfilment of a specific mandate".[181] Such activities are extremely varied, and depending on the functions and powers attributed to international organizations, may range from enforcement measures by the United Nations to the Secretariat's treaty depositary functions. Except in such fields, the acts and views of the Secretariat are unlikely to amount to practice.[182]

77. The contribution of international organizations as such to the formation and identification of rules of customary international law is most clear-cut in instances where States have assigned State competences to them: "When, as in the case of the [European Union], the international organization replaces, in whole or in part, its Member States in international relations, its practice may be relevant in broader areas [than of just the legal subjects that are directly relevant to its participation in international relations]."[183] In essence, such practice may be equated with the practice of States. As explained in the second report, if one were not to equate the practice of such international organizations with that of States, this would mean not only that the organization's practice would not be taken into account, but also that its Member States would themselves be deprived of or reduced in their ability to contribute to State practice.[184]

O. Schachter, "The Development of International Law Through the Legal Opinions of the United Nations Secretariat", *British Yearbook of International Law*, 25 (1948), pp. 91, 93 (referring to interventions of the United Nations Secretary-General in important political controversies, which "have almost always been for the purpose of presenting legal statements").

[181] Johnstone, *supra* note 169, at p. 94 (discussing such activities, however, in a somewhat different context; and distinguishing these activities "from the more explicitly normative functions of international organizations, such as treaty making or adopting resolutions, declarations, and regulations by intergovernmental bodies"). See also K. Schmalenbach, "International Organizations or Institutions, General Aspects", *in Max Plank Encyclopedia of Public International Law* (2014), para. 79 ("some organizations operate in the same domain or in the same manner as States. In these cases, both contribute with their practice and their *opinio iuris* to the creation of the same rules of customary law, provided that the specific nature of an international organization does not demand modifications"); Crawford, *supra* note 20, at p. 195 ("Organizations may make agreements with member and non-member states and with other organizations, and may present international claims and make official pronouncements on issues affecting them. Subject to what has been said about the need for care in evaluating acts of political organs, the practice of organizations provides evidence of the law. In addition, the behaviour of international organizations 'in the field' may influence the discourse of international law, and thereby indirectly influence the formation of custom").

[182] O. Corten, *supra* note 54, at p. 173 ("Il arrive régulièrement que le secrétaire général des Nations unies exprime sa position au sujet de la licéité d'une operation militaire … De telles prises de position ne manquent pas d'intérêt, dans la mesure où elles peuvent susciter des réactions officielles de la part des États membres de l'ONU. En tant que telle, cependent, une déclaration du secrétaire général n'est pas de nature à engager juridiquement les Nations unies en tant qu'organisation internationale. Ni a fortiori les Etats membres de l'organisation").

[183] Treves, *supra* note 54, at para 52. See, for example, *Prosecutor* v. *Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber of the International Tribunal for the Former Yugoslavia), 2 October 1995, para. 115 (reference to declarations of the Council of the European Union).

[184] A/CN.4/672, para. 44. In the Sixth Committee 2014 debate, the representative of the European Union stressed that "in areas where, according to the rules of the EU Treaties, only the Union can act it is the practice of the Union that should be taken into account with regard to the formation of customary international law alongside the implementation by the Member States of the EU legislation" (see summary record; statement available on the UN PaperSmart Portal, <http://www.un.org/en/ga/sixth/>). See also J. Vanhamme, "Formation and Enforcement of

78. Further, where the practice of international organizations may be relevant, considerations set out in this and earlier reports and draft conclusions that apply to the practice of States may be relevant, mutatis mutandis, to the practice of international organizations.[185]

79. In light of the above, no change is proposed to draft conclusion 4 [5], paragraph 2, as provisionally adopted by the Drafting Committee in 2014, which reads: "In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law." However, in order to clarify the position in regard to non-State actors, as reflected in the 2014 debate, it is proposed to omit "primarily" in draft conclusion 4 [5], paragraph 1 (as provisionally adopted by the Drafting Committee), and include a new paragraph 3:

Draft conclusion 4 [5]

Requirement of practice

…

3. Conduct by other non-State actors is not practice for the purposes of formation or identification of customary international law.

VII. Particular custom

80. The consideration of the present topic thus far has been directed towards "general" customary international law, that is, rules of customary international law that are "of general application, valid for all States".[186] There may, however, be rules of customary international law that are binding on certain States only. This has been recognized by the International Court of Justice[187] and by individual judges of

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Customary International Law: The European Union's Contribution", *Netherlands Yearbook of International Law*, 39 (2008), pp. 127, 130 ("It can [] be stated with confidence that all EU external relations based on the EC Treaty count as relevant practice under international law"); F. Hoffmeister, "The Contribution of EU Practice to International Law", in M. Cremona (ed.), *Developments in EU External Relations Law* (Oxford University Press, 2008), at pp. 37-128. The European Union's founding treaties provide that the Union "shall contribute … to the strict observance and the development of international law" (Treaty on European Union, article 3, paragraph 5).

[185] A/CN.4/672, *supra* note 6, at para. 43.

[186] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at pp. 292-293, para. 90 ("… principles already clearly affirmed by customary international law, principles which, for that reason, are undoubtedly of general application, valid for all States").

[187] See *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 276 (where the Court addressed Colombia's argument for a "an alleged regional or local custom peculiar to Latin-American States"); *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952*, p. 176, at p. 200 ("a local custom"); *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 39 ("a local custom"); *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. 105, para. 199 ("… customary international law, whether of a general kind or that particular to the Inter-American legal system"); *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, at p. 565, para. 21 ("… not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it has previously been to Spanish America …"); *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua),*

the Court,[188] as well as by national courts,[189] Governments[190] and writers.[191] These are rules of "particular" custom, which have also been referred to as rules of "special" custom, and have manifested themselves, for the most part, as regional or local (bilateral) custom.[192]

Judgment, I.C.J. Reports 2009, p. 213, at p. 233, paras. 34, 36 ("customary international law … either of universal scope or of a regional nature … universal or regional custom").

[188] See, for example, *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at pp. 79, 94 (Separate Opinion of Judge de Castro) ("regional customs or practices, as well as special customs"); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 62 (Separate Opinion of President Bustamante y Rivero) ("a regional customary law"); *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 290-291 (Separate Opinion of Judge Ammoun).

[189] See, for example, *Nkondo v. Minister of Police and Another*, South African Supreme Court (Orange Free State Provincial Division), 7 March 1980, 82 *International Law Reports* (1990), 358, 368-375 (Smuts J holding that there was no evidence of long standing practice between the Republic of South Africa and Lesotho which had crystallized into a local customary right of transit free from immigration formalities); *Service of Summons in Criminal Proceedings* case, Austrian Supreme Court, 21 February 1961, 38 *International Law Reports* (1969), 133, 135 (referring to the "general rules of international law applicable in Continental Europe").

[190] See, for example, the Swiss Federal Department of Foreign Affairs Advice of 15 December 1993 that *non-refoulement* has evolved to be a rule of regional customary international law in Europe (L. Caflisch, 'Pratique suisse en matière de droit international public 1993', *Revue suisse de droit international et de droit européen*, 5 (1994), 601-603); *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, Supplementary replies from Belgium to the question put to it by Judge Greenwood at the close of the hearing held on 16 March 2012, paras. 21 and 37-38 (http://www.icj-cij.org/docket/files/144/17640.pdf).

[191] See, for example, K. Skubiszewski, *supra* note 43, at p. 830 ("Generality [of practice] does not equal universality, and the term "general" is here [in Article 38(1)(b) of the Statute of the International Court of Justice] a relative one. In different fields of State external activities this term encompasses smaller or larger groups of States"); H. Thirlway, *supra* note 18, at pp. 88-89 ("If the practice and the *opinio juris* is not general, but confined to States belonging to an identifiable group, or otherwise linked by a common interest, a custom may still come into existence, but it will apply only between members of that group, and cannot be enforced upon, or relied upon in relation to, other States"); Mendelson, *supra* note 25, at p. 191; *Restatement (Third) of the Foreign Relations Law of the United States* (1987), §102, Section 102, comments b, e (referring to both "particular customary law" and "[g]eneral and special custom"). The question of hierarchy between general and particular rules of customary international law is beyond the scope of the present topic.

[192] Basdevant has referred to "relative" custom (J. Basdevant, "Règles générales du droit de la paix", 58 *Recueil des cours* (1936), p. 486); Cohen-Jonathan to "local custom" (G. Cohen-Jonathan, "La coutume locale", *Annuaire français de droit international*, 7 (1961), pp. 119, 120); MacGibbon to "special or exceptional customs" (MacGibbon, *supra* note 43, at pp. 116-117). Akehurst proposed "to use the term 'special custom' to cover regional customs and all other customs which are practiced by limited groups of States" (Akehurst, *supra* note 36, at p. 29); and Wolfke refers to "exceptional customary rules" (Wolfke, *supra* note 32, at p. 13). See also V.D. Degan, *Sources of International Law* (Martinus Nijhoff Publishers, 1997), at pp. 243-244 ("It would appear useful to introduce an order in this terminology, because not all the customary rules of this kind are the same … Nevertheless, all this sort of customary rules have some common features in international law. They should be therefore encompassed under the generic name of "*particular custom*", as distinct from general customary law"). But see J.M. Gamio, "Costumbre Universal y Particular", in M. Rama-Montaldo (ed.), *El derecho internacional en un mundo en transformacion*, Vol. 1 (Foundación de cultura universitaria, 1994), at pp. 69-98 (arguing that it is wrong to speak of particular custom, as the differences as compared to general custom are so great that it is in fact a different legal source, which more to do with general principles of law or treaties than with custom).

81. While rules of particular custom often bind States of a certain geographical area or those constituting a community of interest,[193] they may also be bilateral: As the International Court stated in the *Right of Passage* case: "[I]t is difficult to see why the number of States between which a local custom may be established on the basis of a long practice must necessarily be larger than two".[194] The distinction between general and particular customary international law is thus "conceptually simple: [g]eneral customary law applies to all States, while special custom concerns relations between a smaller set of States".[195]

82. Rules of particular custom evolve from a practice accepted as law among a limited number of States, and as such do not bind third States that have not participated in the practice or expressed a form of assent to being bound thereby.[196] They may "develop autonomously, or result from the disintegration of a general customary rule, or even a conventional rule",[197] allowing for the "taking into account, in the creation or adaptation of rules of restricted territorial scope, of geographical, historical and political circumstances which are peculiar to the

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[193] See also A.G. Koroma, *supra* note 25, at p. 106 ("Special custom takes the form of a customary rule that has emerged between two States, a group of States, or in a particular region"); Wolfke, *supra* note 28, at p. 90 ("The division of particular rules of customary international law may, certainly also be based on various other than geographical criteria — for example, political, ethnic, economic, religious, membership in organizations, etc."); Villiger, *supra* note 46, at p. 56 ("Non-regional special customary law is conceivable, for instance, among States sharing socio-economic interests, or, ultimately, nothing but the interest in the customary rule"); O. Elias, "The Relationship Between General and Particular Customary International Law", *African Journal of International & Comparative Law*, 8 (1996), pp. 67, 72 ("nothing is needed for the practice of a State to become relevant beyond interest in a particular subject-matter, and [] the reasons for such interest may or may not be related to geography"); Rosenne, *supra* note 114, at p. 68.

[194] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 39 (adding that "The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States"). See also *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at pp. 265-266, paras. 140-144.

[195] A.A. D'Amato, "The Concept of Special Custom in International Law", *American Journal of International Law*, 63 (1969), pp. 211, 212. See also M.S. McDougal and H.D. Lasswell, "The Identification and Appraisal of Diverse Systems of Public Order", in *International Law in the Twentieth Century* (American Society of International Law, 1969), at pp. 169, 178 ("Some prescriptions are inclusive of the globe; other prescriptions recognize self-direction by smaller units"). Thirlway has remarked, however, that "in matters of local customary law in general it may often be difficult to ascertain exactly what are the boundaries of the "community" to which the custom in question is to be treated as applying": Thirlway, *supra* note 27, at p. 135.

[196] See also Thirlway, *supra* note 140, at pp. 1198-1200; MacGibbon, *supra* note 43, at p. 117 ("As with all types of customary rules, the process of formation is similar, namely, the assertion of a right, on the one hand, and consent to or acquiescence in that assertion, on the other").

[197] M.E. Villiger, *supra* note 46, at p. 56.

[States] concerned".[198] The possibility is not to be excluded that such rules may evolve into rules of general customary international law over time.[199]

83. In ascertaining whether rules of particular customary international law exist, the International Court of Justice has applied Article 38.1 (b) of the Statute.[200] Given the nature of particular custom as binding only a limited number of States, however, it is necessary to identify clearly which States have participated in the practice and accepted it as law.[201] A strict criterion thus applies.[202]

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[198] *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 333 (Dissenting Opinion of Judge Azevedo, who refers there to diplomatic asylum in Latin America). Dupuy referred in this context to the advantage of "pluralisme coutumier" (R.-J. Dupuy, "Coutume Sage et Coutume Sauvage", in *La communauté internationale: mélanges offerts à Charles Rousseau* (Pedone, 1974), at pp. 75, 82).

[199] See also Barboza, *supra* note 54, at p. 14 ("A special custom, i.e. one binding for particular reasons a certain number of States may remain as such or change, by spreading, into a universal custom. A regional custom may stay as such forever or fall into desuetude and in both cases consent will be the key factor. It may also change into a universal custom").

[200] See *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 276 ("[t]he Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. [It] must prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right [or a duty] … This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law'"). See also L. Crema, "The "Right Mix" and "Ambiguities" in Particular Customs: A Few Remarks on the Navigational and Related Rights Case", in N. Boschiero et al (eds.), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (Asser Press, 2013), at pp. 65, 66; O. Elias, *supra* note 193, at pp. 75-76. But see *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 130-131 (Separate Opinion of Judge Ammoun); A.A. D'Amato, *The Concept of Custom in International Law* (Cornell University Press, 1971), 249-250.

[201] *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 276. See also *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952*, p. 176, at p. 200; *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 130-131 (Separate Opinion of Judge Ammoun) ("while a general rule of customary law does not require the consent of all States, as can be seen from the express terms of [Article 38, paragraph 1 (*b*) of the Statute of the International Court of Justice] … it is not the same with a regional customary rule, having regard to the small number of States to which it is intended to apply and which are in a position to consent to it. In the absence of express or tacit consent, a regional custom cannot be imposed upon a State which refuses to accept it"); *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 279, para. 24 (Separate Opinion of Judge Sepúlveda-Amor); Waldock, *supra* note 33, at p. 50 ("in order to invoke a [general] custom against a State it is not necessary to show specifically the acceptance of the custom as law by that State; its acceptance of the custom will be presumed so that it will be bound unless it can adduce evidence of its actual opposition to the practice in question. The Court in applying a general custom may well refer to the practice, if any, of the parties to the litigation in regard to the custom; but it has never yet treated evidence of their acceptance of the practice as a *sine qua non* of applying the custom to them. The position is, of course, quite different in regard to a particular custom between two or three States, as in the *Right of Passage* case, because that is a derogation from the general law and the acceptance of the custom by the parties to the litigation themselves is the whole basis of the exceptional rule"); Pellet, *supra* note 20, at pp. 830-831.

[202] See also M. Forteau, "Regional International Law", in *Max Planck Encyclopedia of Public International Law* (2006), para. 20 ("There is one alternative: either the custom claimed is general in character and the claimant has to prove the existence of a general practice accepted as law emanating from the majority of Stats; or it is considered as regional, local, or bilateral in

84. The following draft conclusion is proposed, which could be placed in a new **part six** entitled **"Exceptions to the general application of rules of customary international law"**:

Draft conclusion 15

Particular custom

1. A particular custom is a rule of customary international law that may only be invoked by and against certain States.

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

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character, and the claimant has to fulfil a rather strict criterion. In these cases, custom is of consensualist nature and it must be proven that 'the rule invoked … is in accordance with a constant and uniform usage practiced by [all] the States' concerned (*Asylum* Case 276)"); Crawford, *supra* note 103, at pp. 246, 247 ("The Court treated the existence of this "alleged regional or local custom peculiar to Latin-American States" [in the *Asylum* case] as in effect a *bilateral* question … It seems clear that the Court, despite its invocation of Article 38 (1) (*b*) of its Statute, was applying a stricter standard of proof than it would have done to a "universal" rule of international law … This is not to imply that regional or local custom can *never* be relied on, just that it must be proved as between the particular States parties to the dispute; it makes no difference whether the "region" in which the custom exists comprises two or twenty-two States … This point is well illustrated in the *Right of Passage* case"); J. Combacau, S. Sur, *Droit international public*, 10th edition (Montchrestien, 2012), at p. 72 ("puisque ces règles sont propres à certains États, il faut définir positivement le cercle des sujets concernés, ce qui ne peut être fait qu'en établissant leur participation directe. De l'autre et surtout, ces coutumes sont virtuellement en conflict, ou dérogatoires par rapport à des coutumes générals également obligatoires. Dès lors il faut établir que les États en cause se sont expressément affranchis dans leurs rapports mutuels, et seulement dans ces rapports, de la règle générale"); Shaw, *supra* note 22, at p. 66 ("In such cases [of regional or local custom], the standard of proof required, especially as regards the obligation accepted by the party against whom the local custom is maintained, is higher than in cases where an ordinary or general custom is alleged … a local custom needs the positive acceptance of both (or all) parties to the rule. This is because local customs are all exceptions to the general nature or customary law, which involves a fairly flexible approach to law-making by all states, and instead constitutes a reminder of the former theory of consent whereby states are bound only by what they assent to. Exceptions may prove the rule, but they need greater proof than the rule to establish themselves"); Degan, *supra* note 192, at p. 245 ("For those States, or other subjects, which were passive in law-creating practice, which did not show any interest for it, and for which no *opinio juris* can be proved, a particular customary rule is a *res inter alios acta*, just as is a treaty in regard to third States to it. Exactly for these reasons there are important differences with regard to *the burden of proof* of particular customary rules in comparison with general custom"); Villiger, *supra* note 46, at p. 56 ("The implication was that special rules differ from general rules only in that the special rules require for their formation *express (or implied) recognition* by the States adhering to the rule, on which States, incidentally, also rests the burden of proof" (referring to the *Asylum* case judgment)). But see *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 294 (Dissenting Opinion of Judge Alvarez): "A principle, custom, doctrine, etc., need not be accepted by all of the States of the New World in order to be considered as part of American international law [binding upon all the States of the New World]. The same situation obtains in this case as in the case of universal international law". Judge de Castro had said that "The Court must apply [general customary international law] ex officio; it is its duty to know it as *quaestio iuris: iura novit curia*. Only regional customs or practices, as well as special customs, have to be proved": *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 79 (Separate Opinion of Judge de Castro).

VIII. Persistent objector

85. While rules of (general) customary international law "by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour",[203] it is widely held that a State that has persistently objected to an *emerging* rule of customary international law, and maintains its objection after the rule has crystallized, is not bound by it.[204] This is referred to as the "persistent objector rule".[205]

86. Decisions of international and domestic courts and tribunals have referred to the rule, and, as emphasized in the London Statement of the International Law Association, there are no decisions that challenge it.[206] In the *Asylum Case*, the International Court of Justice held that: [I]t could not "find that the Colombian Government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include [the rule in question]."[207] In the *Fisheries Case*, the Court similarly found that: "[T]he ten-mile rule has not acquired the authority of a general rule of international law. In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch

[203] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 38-39, para. 63.

[204] The application of the rule of persistent objector in the context of peremptory norms of international law (*jus cogens*) is beyond the scope of the current topic.

[205] This is to be distinguished, of course, from a situation in which an emerging rule is met with opposition that prevents it from crystallizing into a binding (general) rule. In Judge Ammoun's words, "it is sufficiently well known for it to be unnecessary to dwell on the point, what the consequences are, for the growth of a custom, of opposition which is not thought to need to be so massive" (*Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 308 (Separate Opinion of Judge Ammoun). See also *Kaunda and Others* v. *The President of the Republic of South Africa and Others*, Judgment of the Constitutional Court of South Africa (4 August 2004), para. 148 (separate opinion of Ngcobo J) ("One of the greatest ironies of customary international law is that its recognition is dependent upon the practice of States evincing it. Yet at times States refuse to recognise the existence of a rule of customary international law on the basis that State practice is insufficient for a particular practice to ripen into a rule of customary international law. In so doing, the States deny the practice from ripening into a rule of customary international law").

[206] *ILA London Statement of Principles*, p. 27.

[207] *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at pp. 277-278. See also *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. 107, para. 203.

as she has always opposed any attempt to apply it to the Norwegian coast."[208] Individual Opinions have referred to the rule in other cases.[209]

87. While it has been stated that the persistent objector rule has "played a surprisingly limited role in the actual legal discourse of states",[210] judicial proceedings, in particular, furnish a number of instances where States have sought to

[208] *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, at p. 131. Some authors have questioned the significance of the passages in the *Fisheries* and *Asylum* judgments as supporting the existence of the persistent objector rule: see, for example, C. Tomuschat, "Obligations Arising for States Without or Against Their Will", 241 *Recueil des Cours* (1993), pp. 284-287; J.I. Charney, "The Persistent Objector Rule and the Development of Customary International Law", *British YearBook of International Law*, 56 (1985), pp. 1, 9-11; M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Clarendon Press, 1997), at p. 60, fn. 79 (writing with respect to the *Asylum* case that "this case related to the existence of a local custom. Local customs do not produce general effects, and the claimant State must give evidence that the opposing State has consented to the rule. Therefore, the question of the persistent objector cannot really arise, in the strict sense, with respect to a local custom"). But see, in response, Mendelson, *supra* note 25, at pp. 228-232; D. Kritsiotis, "On the Possibilities of and for Persistent Objection", *Duke Journal of Comparative & International Law*, 21 (2010), pp. 121, 129 ("For the Court … these cases [the *Asylum Case* of 1950 and the *Fisheries Case* of 1951] were both about the actualization of persistent objection in practice"); Akehurst, *supra* note 36, at pp. 24-25. See also H.C.M. Charlesworth, "Customary International Law and the Nicaragua Case", *Australian Yearbook of International Law*, 11 (1984-1987), pp. 1, 30 ("In its discussion of whether a customary norm of non-intervention exists, the Court acknowledges the possibility that a persistent objector will not be bound by a rule of customary international law").

[209] See *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 97 (Separate Opinion of Judge Padilla Nervo) and p. 229 (Dissenting Opinion of Judge Lachs); *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, at p. 291 (Dissenting Opinion of Judge Tanaka); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 312 (Dissenting Opinion of Judge Schwebel).

[210] T.L. Stein, "The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law", *Harvard International Law Review*, 26 (1985), 457, 463. See also, for example, P.-M. Dupuy, "A propos de l'opposabilité de la coutume générale: enquête brève sur l'« objecteur persistant »", in *Le droit international au service de la paix, de la justice et du développement, Mélanges offerts à Michel Virally* (Pédone, 1991), at p. 266 ("Peu ou pas invoqué dans la pratique étatique, désertant les arrêts de la Cour, l'objecteur persistant semble décidément bien évanescent").

rely on the rule (and courts and tribunals have acknowledged its existence).[211] In addition, there is other State practice in support of the rule.[212]

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[211] See, for example, pleadings by the United Kingdom and Norway in the *Fisheries* case (*I.C.J. Pleadings*, Vol. I, Contre-Mémoire de la Norvège, pp. 381-383, paras. 256-260; Vol. II, Reply of the United Kingdom, pp. 428-489, paras. 162-164; Vol. III, Duplique de la Norvège, pp. 291-296, paras. 346-353); *Democratic Republic of the Congo v FG Hemisphere Associates LLC*, Hong Kong Court of Final Appeal FACV Nos, 5, 6 & 7 of 2010 (2011), para. 121 ("Since I am not speaking of — and cannot speak of — the position in the Mainland, it is unnecessary for me to say whether I consider restrictive immunity to be a rule of customary international law. Nor is it necessary for me to decide whether persistent objection works. If it were necessary to do so, I would accept that China has been a persistent objector to restrictive immunity"); *Entscheidungen des Bundesverfassungsgerichts* (German Federal Constitutional Court), vol. 46, Beschluss vom 13. Dezember 1977 (2 BvM 1/76), Nr. 32 (Tübingen, 1978), pp. 388-9, para. 6 ("This concerns not merely action that a State can successfully uphold from the outset against application of an existing general rule of international law by way of perseverant protestation of rights (in the sense of the ruling of the International Court of Justice in the Norwegian Fisheries Case, ICJ Reports 1951, p. 131); instead, the existence of a corresponding general rule of international law cannot at present be assumed"); *C* v *Director of Immigration*, Hong Kong Court of Appeal [2010] HKCA 159 (2011), para. 68 ("The concept of "persistent objector" is a principle in public international law where "a State ... in the process of formation of a new customary rule of international law, disassociate[s] itself from that process, declare[s] itself not to be bound, and maintain[s] that attitude" (*Fitzmaurice* pp. 99-100). Evidence of objection must be clear"); *Republic of Mauritius* v. *United Kingdom of Great Britain and Northern Ireland* (Arbitration under Annex VII of the 1982 United Nations Convention on the Law of the Sea), Reply of the Republic of Mauritius (2013), p. 124, para 5.11 ("The persistent objector rule requires a State to display persistent objection during the formation of the norm in question"); *Roach* v. *United States*, Inter-American Commission on Human Rights Report No. 3/87, Case 9647 (1987), para. 52 ("The evidence of a customary rule of international law requires evidence of widespread state practice. Article 38 of the Statute of the International Court of Justice (I.C.J.) defines "international custom, as evidence of a general practice accepted as law." The customary rule, however, does not bind States which protest the norm"); *Domingues* v. *United States*, Inter-American Commission on Human Rights Report No. 62/02, Case 12.285 (2002), paras. 48, 49 ("Once established, a norm of international customary law binds all states with the exception of only those states that have persistently rejected the practice prior to its becoming law. While a certain practice does not require universal acceptance to become a norm of customary international law, a norm which has been accepted by the majority of States has no binding effect upon a State which has persistently rejected the practice upon which the norm is based … as customary international law rests on the consent of nations, a state that persistently objects to a norm of customary international law is not bound by that norm"); *BG Group Plc* v. *Republic of Argentina*, Final Award (24 December 2007), para. 410, fn. 328; *Siderman de Blake v. Republic of Argentina*, United States Court of Appeals for the Ninth Circuit, 965 F.2d (1992), 699, 715, para. 54: "A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm"; *El Leil* v. *France*, Application no. 34869/05, Judgment (European Court of Human Rights, Grand Chamber), 29 June 2011, para. 54 (recalling that a treaty provision may also be binding on a non-party as customary international law "provided it has not opposed it"). See also G. Guillaume, *Avis d*'amicus curiae, *Revue française de droit administratif*, 28 (2012), 19, 20, para. 11 (arguing in an amicus brief solicited by the Conseil d'État that a State could be a persistent objector if the rule in Article 53 of the Vienna Convention on the Law of Treaties (*Jus cogens*) were customary international law; the judgment of the Conseil d'Etat did not deal with *jus cogens* (see No. 303678, 23 December 2011)).

[212] See, for example, the intervention by Turkey at one of the plenary meetings of the Third United Nations Conference on the Law of the Sea, where it was argued that "in the course of the preparatory stages of the Conference as well as during the Conference, [Turkey] has been a persistent objector to the 12-mile limit. As far as the semi-enclosed seas are concerned, the amendments submitted and the statements made by the Turkish delegations manifest Turkey's

88. The existence of the persistent objector rule is widely endorsed in the literature,[213] although occasionally it has been questioned by certain writers.[214] In the words of Waldock: [T]he view of most international lawyers is that … when a custom satisfying the definition in Article 38 is established, it constitutes a general rule of international law which, subject to one reservation, applies to every State.

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consistent and unequivocal refusal to accept the 12-mile limit on such seas. In view of the foregoing considerations, the 12-mile limit cannot be claimed vis-à-vis Turkey" (Document A/CONF.62/SR.189, p. 76, para. 150); J.B. Bellinger, W.J. Haynes, "A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law", *International Review of the Red Cross*, 89 (2007), pp. 443, 457, fn. 43 ("The U.S. Government believes that the doctrine [of the persistent objector] remains valid"). See also Danilenko, *supra* note 18, at p. 112 ("the possibility of effective preservation of the persistent objector status should not be confused with the legally recognized right not to agree with new customary rules").

[213] See, for example, Murphy, *supra* note 54, at pp. 95-96; H. Lauterpacht, 'International Law — The General Part', in E. Lauterpacht (ed.), *International Law: Collected Papers of Hersch Lauterpacht*, Vol. I (Grotius, 1970), at p. 66 ("although it is not necessary to prove the consent of every State, express dissent in the formative stage of a customary rule will negative the existence of custom at least in relation to the dissenting State"); Skubiszewski, *supra* note 43, at p. 846 ("once custom has been made, it binds States unless in the formative period they voiced their opposition"); D. Armstrong, T. Farrell and H. Lambert, *International Law and International Relations*, 2nd edition (Cambridge University Press, 2012), at p. 180 ("It may be possible for a state through persistent objection not to be bound by an emerging rule of customary law (this possibility does not exist for established customary rules)"); Dailler, Pellet and Forteau, *supra* note 28, at para. 231; M. Diez de Valesco, *supra* note 140, at p. 140; C. Santulli, *Introduction au droit international* (Pedone, 2013), at pp. 54-55; Danilenko, *supra* note 36, at p. 41 ("In accordance with existing international law, an individual State is not bound by customary rule, despite widespread practice and relevant *opinio juris*, if this State has persistently objected to an emerging rule"); Ragazzi, *supra* note 208, at pp. 60-65; C. Quince, *The Persistent Objector and Customary International Law* (Outskirts Press, 2010). See also *Restatement (Third) of Foreign Relations Law* §102 cmt. d ("Although customary law may be built by the acquiescence as well as by the actions of states … and become generally binding on all states, in principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures."); J.A. Green, 'Persistent objector teflon? Customary international human rights law and the United States in international adjudicative proceedings', in J.A. Green and C. Waters (eds.), *Adjudicating International Human Rights: Essays in Honour of Sandy Ghandhi* (Brill Nijhoff, 2015), 167-191; Koskenniemi, *supra* note 117, at p. 443 ("Although case-law on the persistent objector is thin, doctrine has overwhelmingly assumed it").

[214] See, for example, G. Abi-Saab, 207 *Recueil des Cours* (1987), pp. 180-182; Charney, *supra* note 208, at pp. 1-24; A. Cassese, *International Law,* 2nd edition (Oxford University Press, 2005), 162-163; P. Dumberry, 'Incoherent and Ineffective: The Concept of Persistent Objector Revisited', *International and Comparative Law Quarterly*, 59 (2010), 779-802; H. Lau, 'Rethinking the Persistent Objector Doctrine in International Human Rights Law', *Chicago Journal of International Law*, 6 (2005), 495-510 (suggesting that consent has a non-absolute and diminishing role in international law and that the doctrine of the persistent objector, to human rights cases in particular, should be limited). Lowe responds as follows: "Some writers have doubted the validity of the principle of persistent objection, regarding it an anachronistic survival of the nineteenth-century consensualist view of international law. But once the limited scope of the principle, and its extremely limited invocation in practice, are understood, it is hard to see why such doubts exist. It is plainly right that a State should not be bound by obligations set out in a treaty to which it is not a Party. Why, then, should other States be able to bind the State by claiming that their practice has generated a rule of customary international law, if (and only if) the State has persistently made known its objection to the rule?" (V. Lowe, *International Law* (Oxford University Press, 2007), at p. 58).

The reservation concerns the case of a State which, while the custom is in the process of formation, unambiguously and persistently registers its objection to the recognition of the practice as law."[215] Koroma likewise notes that "the principle is well-established and accepted in international law".[216]

89. The Commission referred to the persistent objector rule in its recent Guide to Practice on Reservations to Treaties, stating: "[A] reservation may be the means by which a 'persistent objector' manifests the persistence of its objection; the objector may certainly reject the application, through a treaty, of a rule which cannot be invoked against it under general international law."[217]

90. The persistent objector rule is perceived as a safeguard against the transformation of customary international law into "the sole preserve of the mighty",[218] and is particularly attractive because there is no possibility of dissent from an established rule. In addition, the rule "is often regarded as a logical consequence, if not an illustration, of the essentially consensual nature of customary international law".[219] Further reasons for the existence of the persistent objector

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[215] Waldock, *supra* note 33, at p. 49.

[216] A.G. Koroma, *supra* note 25, at pp. 113-114.

[217] Guide to Practice on Reservations to Treaties, commentary (7) to guideline 3.1.5.3. *Yearbook of the International Law Commission 2011*, Add.1.

[218] Mendelson, *supra* note 25, at p. 227. See also Akehurst, *supra* note 36, at p. 26 ("If the dissent of a single State could prevent the creation of a new rule, then new [customary] rules would hardly ever be created. If a dissenting State could be bound against its will, customary law would in effect be created by a system of majority voting; but it would be impossible to reach agreement about the size of the majority required, and whether (and, if so, what) the 'votes' of different States should be weighed. Moreover, States which were confident of being in a majority would adopt an uncompromising attitude towards the minority"); O. Elias, "Persistent Objector", in *Max Planck Encyclopedia of Public International Law* (2006), para. 2 ("the principle of the persistent objector furnishes an avenue for non-consenting States to exempt themselves from the majoritarian tendencies that have been identified as having come to characterize the process of creating customary international law since the middle of the 20th century"); Stein, *supra* note 210, at pp. 457-482 (arguing that in the contemporary highly self-conscious customary law-creation process, the persistent objector rule has an increasingly important part to play); *ILA London Statement of Principles*, p. 28 ("As a matter of policy, the persistent objector rule could be regarded as a useful compromise. It respects States' sovereignty and protects them from having new law imposed on them against their will by a majority; but at the same time, if the support for the new rule is sufficiently widespread, the convoy of the law's progressive development can move forward without having to wait for the slowest vessel").

[219] Elias, *supra* note 218, at para. 2. See also Weil, *supra* note 91, at pp. 433-434 (describing the ability of an individual State to opt out of an emerging rule of customary international law as "the acid test of custom's voluntarist nature" within the orthodox doctrine of the sources of international law); Murphy, *supra* note 54, at p. 96 ("This 'persistent objector' rule is a nod to the centrality of state consent in international law"); M.E. Villiger, *Customary International Law and Treaties: A Study of Their Interactions and Interrelations with Special Consideration of the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, 1985), at p. 17 ("the notion of persistent objection is *essential*, in view of the structure of the State community. If States are the law-creating subjects of international law, they may, for reasons of their own, *in casu* and for themselves, opt out of the law-making process"); D.A. Colson, "How Persistent Must the Persistent Objector Be?", *Washington Law Review*, 61 (1986), pp. 957-958 ("The principle of the persistent objector is the logical consequence of the consensual nature of the formation of international law"); W.M. Reisman et al, *International Law in Contemporary Perspective* (Foundation Press, 2004), 15 ("In line with the traditional conception of the consensual nature of international law, states that persistently object to a new limitation on their freedom to act by an emerging customary law may successfully avoid being bound by it").

rule have been traced to the "fundamental ethical principles of significant state autonomy and unity in diversity" and the assertion that States themselves have come to recognize it as forceful.[220] It has been found to play "a number of important roles within the system of customary law" through, for example, allowing objecting States "the facility, in the short term, to adjust to the new realities that they may need to face" and enabling "the modification of the new rule in order to achieve an accommodation between the views of States that subscribe to the new rule and those of the objecting State or States",[221] as well as providing "a means whereby a State may protect its legal interests without using confrontational actions",[222] and reducing the costs to the international legal system caused by States' non-compliance with it (and to the objecting State itself by enabling it to avoid being in breach with international law).[223]

91. In the words of Fitzmaurice: "(T)he essence of the matter is dissent from the rule *while it is in process of becoming one, and before it has crystallized into a definite and generally accepted rule of law*."[224] The line between objection and violation may not always be an easy one to draw,[225] but it is clear that once a rule of customary law has crystallized States may no longer invoke de novo the persistent objector rule.[226]

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[220] B.D. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press, 2010), at p. 229; D.P. Fidler, "Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law", *German Yearbook of International Law*, 39 (1996), pp. 198, 209.

[221] Elias, *supra* note 218, at para. 6.

[222] Colson, *supra* note 219, at p. 964.

[223] See Guzman, *supra* note 75, at p. 169 (demonstrating that rational choice theory of customary international law supports the persistent objector doctrine). But see J.P. Kelly, "The Twilight of Customary International Law", *Virginia Journal of International Law*, 40 (2000), pp. 449, 523-526; Verdier and Voeten, *supra* note 91, at pp. 427-429 (arguing that the doctrine has limited practical significance).

[224] G. Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law", *British Yearbook of International Law*, 30 (1953), pp. 1, 26.

[225] See also Colson, *supra* note 219, at p. 958 ("The line between these two cases [of States objecting to new trends in international legal practice and States objecting to trends that have crystallized into law] is never clear, except perhaps in retrospect"); O. Elias, "Some Remarks on the Persistent Objector Rule in Customary International Law", *Denning Law Journal*, 6 (1991), pp. 37, 38 ("There may well be cases in which the distinction between persistent objection and subsequent objection is difficult to draw, but in principle the distinction is not problematic").

[226] See, for example, *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 336 (Dissenting Opinion of Judge Azevedo) ("those occasional denials constitute violations of an already established rule, for a State cannot oppose a custom previously accepted"); J.B. McClane, "How Late in the Emergence of a Norm of Customary International Law May a Persistent Objector Object?", *ILSA Journal of International Law*, 13 (1989), pp. 1, 7 ("By definition an objection after the norm has come into existence is a subsequent objection, and as such, is ineffective"); Akehurst, *supra* note 36, at p. 24 ("Opposition which is manifested for the first time after the rule has become firmly established is too late to prevent the State being bound"); Thirlway, *supra* note 27, at p. 110 ("if there is general acceptance of the practice "as law", and the dissentient States have not made their views heard until after the rule has crystallised and become firmly established, the rule will be binding on all, including the dissentient States"); Mendelson, *supra* note 25, at p. 244 ("the persistent objector rule … applies only to those who make their objection at the time the general rule is emerging: there is no 'subsequent objector' rule"); Barberis, *supra* note 145, at p. 39 ("Un Etat ne peut se dégager des liens d'une norme coutumière que s'il s'y est opposé d'une manière claire et réitérée dès le moment de sa formation. … L'opposition claire et réitérée a un effet

There can be no "subsequent objector".[227] A State should object to a developing rule as early as possible.[228]

92. For persistent objection to be effective, it must be clearly expressed.[229] There is, however, "no requirement that a statement of position be made in a particular form or tone".[230] In particular, verbal objection, as opposed to a requirement for physical action, would suffice to preserve the legal position of the objecting State.[231] In practice, a State may deny that an emerging rule has become a rule of

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lorsqu'elle a commencé dès le moment de la formation de la norme coutumière mais devient inefficace si l'opposition se manifeste alors que la norme coutumière a déjà pris naissance").

[227] For the suggestion that subsequent objection ought to be permitted in certain circumstances see C.A. Bradley, M. Gulati, "Withdrawing from International Custom", *Yale Law Journal*, 120 (2010), pp. 202-275; Guzman, *supra* note 75, at pp. 169-171; and the response to such a suggestion by S. Estreicher, "A Post-Formation Right of Withdrawal From Customary International Law?: Some Cautionary Notes", *Duke Journal of Comparative and International Law*, 21 (2010), pp. 57-64.

[228] See, Elias, *supra* note 218, at para. 15 ("the State in question mast express its objection as early as possible"); A. Kaczorowska, *Public International Law*, 4th edition (Routledge, 2010), at p. 41 ("a State should raise its objection as early as possible and react to unwelcome developments not only when the subject matter of new developments will affect directly its interest but also when, in the immediate future, those developments have no great relevance to that State").

[229] See, for example, A. Steinfeld, "Nuclear Objections: The Persistent Objector and the Legality of the Use of Nuclear Weapons", *Brooklyn Law Review*, 62 (1996), pp. 1635, 1652 ("The dissenting state should meet public statements of legal policy with a public objection if it plans to reserve a certain legal right under current international law"); D.J. Bederman, "Acquiescence, Objection and the Death of Customary international Law", *Duke Journal of Comparative & International Law*, 21 (2010), pp. 31, 35 ("States are obliged to protest loud and often if they wish to avoid being bound by a norm of emerging global custom"); Mendelson, *supra* note 25, at pp. 240-241 ("First of all, obviously the objection must be expressed: it is no use government officials and ministers voicing doubts amongst themselves, but not communicating them to the outside world. If a State which is directly affected by a practice does not object, it can in many instances reasonably be taken to have acquiesced or to be otherwise precluded from objecting to the rule"); I.C. MacGibbon, 'Some Observations on the Part of Protest in International Law', *British Yearbook of International Law*, 30 (1953), pp. 293, 318 (a state must protest "vigorously and unambiguously"); Stern, *supra* note 18, at p. 108. See also *Republic of Mauritius* v. *United Kingdom of Great Britain and Northern Ireland* (Arbitration under Annex VII of the 1982 United Nations Convention on the Law of the Sea), Reply of the Republic of Mauritius (2013), p. 124, para 5.11 ("The objection must be expressed: it is not sufficient for government officials to voice objections to themselves, but not communicate them outside the confines of their home working environment").

[230] Colson, *supra* note 219, at p. 969. See also Lepard, *supra* note 220, at p. 238 ("In short, it is not possible to assert that objection must take a particular form or manifest a certain level of intensity in every case"); Wolfke, *supra* note 28, at p. 67 ("The ways of expressing effective individual dissent against the emergence of a custom may be various, express and indirect, that is tacit. The most effective are, of course, unequivocal, express protests against a practice, its acceptance as law or the ripe customary rule, for inference of dissent from simple conduct is much less conclusive and difficult to prove"). Some have argued that the objection must be principled (a "conscientious defection"), but see G.J. Postema, "Custom in International Law: A Normative Practice Account", in A. Perreau-Saussine and J.B. Murphy (eds.), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge University Press, 2007), a p. 299; Lepard, *supra* note 220, at pp. 230-232. Stein argues that persistent objection should be permitted "whether on grounds of principle or expediency", yet suggests that "a requirement of substantive consistency" in objections could prove advantageous (Stein, *supra* note 210, at p. 476).

[231] See also *ILA London Statement of Principles*, p. 28 ("Verbal protests are sufficient: there is no rule that States have to take physical action to preserve their rights"); C.G. Guldahl, "The Role

customary international law, or object to the applicability of the rule to itself, or do both.[232]

93. A State must maintain its objection both persistently and consistently, lest it be taken as having acquiesced.[233] It has been said that the objection "must be repeated as often as circumstances require (otherwise it will not be 'persistent')",[234] although

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of Persistent Objection in International Humanitarian Law", *Nordic Journal of International Law*, 77 (2008), pp. 51, 55 ("Although it is established that evidence of State practice under customary international law in general may consist of both verbal and physical acts, such a requirement [for persistent objectors to actually exercise the right they claim] would ensure that this exception to the general application of customary international law would in fact only be relied upon in exceptional circumstances, by States that are truly committed to their position. It would also make a State's legal positions clearer. However, it could have adverse and indeed disastrous consequences, as in the case of a prohibition on the use of nuclear weapons, or, to give a less extreme example, in the case of belligerent reprisals being used against civilians. It is clear that such a requirement is not desirable, and it is generally not considered to be required"); Mendelson, *supra* note 25, at p. 241 ("merely verbal objection, unaccompanied by physical action to back up that objection, seems to be sufficient. Indeed, it would be subversive to world peace were it to be otherwise, as well as disadvantaging States lacking the military resources or the appropriate technical personnel to take such action"); Colson, *supra* note 219, at pp. 963-965 ("a statement of objection may be couched in a variety of ways and may be communicated through various means. National positions probably do not need to be expressed in deeds to form a valid legal objection. Words, clear but gently stated, are sufficient in international law to protect the position of the persistent objector"); Lepard, *supra* note 220, at p. 239 ("Of course, even in cases in which persistent objection should be difficult, fundamental ethical principles such as the nonuse of force imply that unambiguous protest should not require nonverbal action (and especially military action) to impose implementation of the rule. Mere verbal protest should be sufficient").

[232] See also O.A. Elias and C.L. Lim, *The Paradox of Consensualism in International Law* (Kluwer Law International, 1998), at p. 106; Elias, *supra* note 218, at para. 17 ("it would also appear that it does not matter whether objecting States express their objection or lack of consent in relation to the formation or existence of a rule, or whether they express their objection to the applicability of the rule in question to themselves only").

[233] See also Gaja, *supra* note 55, at p. 43 ("the opposition that the Court considered relevant [in the *Fisheries (United Kingdom* v. *Norway*) case] consisted in something more than a simple negative attitude to a rule. It concerned an opposition to "any attempt to apply" the rule, with the suggestion that those attempts had failed. Thus what seems relevant, with regard to a dissenting State, is whether a rule has become effective also towards that State"); Crawford, *supra* note 103, at p. 247 ("Persistent objection … but must be consistent and clear, and is not manifested by a simple failure to ratify a treaty"); Elias, *supra* note 218, at para. 16 ("If a State does not maintain its objection, it may be considered to have acquiesced"); Kritsiotis, *supra* note 208, at pp. 129-130 ("Objections must therefore be properly and appropriately timed, and they must be, in a manner of speaking, persistent; we can safely assume that that sporadic or isolated objections will not do"); Mendelson, *supra* note 25, at p. 241 ("the protest must be maintained. This is indeed implied in the word 'persistent' … if the State, having once objected, fails to reiterate that objection, it may be appropriate (depending on the circumstances) to presume that it has abandoned it").

[234] *ILA London Statement of Principles*, p. 28. See also Elias, *supra* note 218, at para. 16 ("The more widespread and notorious the practice, the greater evidence of objection that will be required of the objecting State, as lack of objection in the face of practice that is considered to be sufficiently general to result in a new rule can amount to acquiescence"); Steinfeld, *supra* note 229, at p. 1652 ("the nature of the custom itself must determine the nature of the objection required").

it may be unrealistic to demand total consistency.[235] The State may, of course, abandon its objection at any time.

94. The burden of proving the right to benefit from the persistent objector rule lies with the objecting State, which must rebut the presumption that the relevant rule of customary international law, as such, is binding on it.[236]

95. The following draft conclusion, to be placed in **part six**, is proposed:

Draft conclusion 16

Persistent objector

A State that has persistently objected to a new rule of customary international law while that rule was in the process of formation is not bound by the rule for so long as it maintains its objection.

IX. Future programme of work

96. As indicated in section I, this report seeks to complete the set of draft conclusions proposed by the Special Rapporteur.[237] The future programme of work depends on the progress made by the Commission at its session in 2015. If the Commission is able to adopt provisionally a set of draft conclusions, with commentaries, in 2015, then the Special Rapporteur, in his next report in 2016, will suggest any changes that might be made to the conclusions and the commentaries, in light of the debate in the Sixth Committee in 2015 and of any written observations received from Governments and others. The aim remains, to conclude work on the topic, if possible, at the Commission's 2016 session, following a detailed and thorough review and revision at that session of the text of the draft conclusions and commentaries, as adopted in 2015.[238] It will be important, however, not to press forward with undue haste if more time appears to be needed.[239]

97. In the fourth report, the Special Rapporteur intends to consider, in addition to (but separate from) the draft conclusions and commentaries, practical means of

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[235] See *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, at p. 138 ("The Court considers that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice…"); Colson, *supra* note 219, at p. 957 ("any answer to the question of 'how persistent must the persistent objector be' must take into account the context in which the principle is applied").

[236] See also Crawford, *supra* note 103, at p. 247 ("importantly, all the while, there is a rebuttable presumption of acceptance of the norm"); Dupuy, *supra* note 198, at p. 78 ("son inopposabilité [de la coutume] est subordonnée à la preuve, par l'Etat qui s'en prévaut, de protestations, déclarations manifestant clairement qu'il ne fait pas partie de la communauté juridique servant d'assise à la coutume").

[237] See para. 8 above.

[238] It will be recalled that a similar procedure was followed in connection with the *Guide to Practice on Reservations to Treaties*, a full version of which was provisionally adopted by the Commission in 2010, with the adoption of a final version one year later, in 2011 (see Document A/66/10, paras. 54-64). It will be recalled that at the 2011 session the draft guidelines were considered in detail by a working group (chaired by Mr. Vásquez-Bermúdez).

[239] In 2014, Mr. Forteau recalled the wise saying, *festina lente* (summary record A/CN.4/SR.3225 (17 July 2014)).

enhancing the availability of materials on the basis of which a general practice and acceptance as law may be determined.[240]

98. The Special Rapporteur also intends to prepare, and circulate for review by members of the Commission, a bibliography relating to the topic.

[240] See also A/CN.4/672, *supra* note 6, at para. 35 ("One significant difficulty is ascertaining the practice of States. The dissemination and location of practice remain an important practical issue in the circumstances of the modern world, notwithstanding the development of technology and information resources").

Annex

Further proposed draft conclusions

Draft conclusion 3 [4]

Assessment of evidence for the two elements

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2. Each element is to be separately ascertained. This generally requires an assessment of specific evidence for each element.

Draft conclusion 4 [5]

Requirement of practice

….

3. Conduct by other non-State actors is not practice for the purposes of formation or identification of customary international law.

Draft conclusion 11

Evidence of acceptance as law

….

3. Inaction may also serve as evidence of acceptance as law, provided that the circumstances call for some reaction.

Part five
Particular forms of practice and evidence

Draft conclusion 12

Treaties

A treaty provision may reflect or come to reflect a rule of customary international law if it is established that the provision in question:

(a) **at the time when the treaty was concluded, codifies an existing rule of customary international law;**

(b) **has led to the crystallization of an emerging rule of customary international law; or**

(c) **has generated a new rule of customary international law, by giving rise to a general practice accepted as law.**

Draft conclusion 13

Resolutions of international organizations and conferences

Resolutions adopted by international organizations or at international conferences may, in some circumstances, be evidence of customary international law or contribute to its development; they cannot, in and of themselves, constitute it.

Draft conclusion 14

Judicial decisions and writings

Judicial decisions and writings may serve as subsidiary means for the identification of rules of customary international law.

Part six
Exceptions to the general application of rules of customary international law

Draft conclusion 15

Particular custom

1. A particular custom is a rule of customary international law that may only be invoked by and against certain States.

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

Draft conclusion 16

Persistent objector

A State that has persistently objected to a new rule of customary international law while that rule was in the process of formation is not bound by the rule for so long as it maintains its objection.