INTERNATIONAL COURT OF JUSTICE

THE JADHAV CASE

THE REPUBLIC OF INDIA v. THE ISLAMIC REPUBLIC OF PAKISTAN

REJOINDER OF THE ISLAMIC REPUBLIC OF PAKISTAN

17TH JULY 2018

EXHIBIT

VOLUME 2: ANNEXURES 40 – 69

Jadhav Case (India v Pakistan)

Rejoinder on behalf of the Islamic Republic of Pakistan

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17th July 2018

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
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NORTH SEA CONTINENTAL SHELF CASES

(FEDERAL REPUBLIC OF GERMANY/DENMARK;
FEDERAL REPUBLIC OF GERMANY/NETHERLANDS)

JUDGMENT OF 20 FEBRUARY 1969

1969

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRES DU PLATEAU CONTINENTAL DE LA MER DU NORD

(RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE/DANEMARK;
RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE/PAYS-BAS)

ARRÊT DU 20 FÉVRIER 1969

68. Secondly, it must be observed that no valid conclusions can be drawn from the fact that the faculty of entering reservations to Article 6 has been exercised only sparingly and within certain limits. This is the affair exclusively of those States which have not wished to exercise the faculty, or which have been content to do so only to a limited extent. Their action or inaction cannot affect the right of other States to enter reservations to whatever is the legitimate extent of the right.

*

69. In the light of these various considerations, the Court reaches the conclusion that the Geneva Convention did not embody or crystallize any pre-existing or emergent rule of customary law, according to which the delimitation of continental shelf areas between adjacent States must, unless the Parties otherwise agree, be carried out on an equidistance-special circumstances basis. A rule was of course embodied in Article 6 of the Convention, but as a purely conventional rule. Whether it has since acquired a broader basis remains to be seen: *qua* conventional rule however, as has already been concluded, it is not opposable to the Federal Republic.

* * *

70. The Court must now proceed to the last stage in the argument put forward on behalf of Denmark and the Netherlands. This is to the effect that even if there was at the date of the Geneva Convention no rule of customary international law in favour of the equidistance principle, and no such rule was crystallized in Article 6 of the Convention, nevertheless such a rule has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent State practice,—and that this rule, being now a rule of customary international law binding on all States, including therefore the Federal Republic, should be declared applicable to the delimitation of the boundaries between the Parties' respective continental shelf areas in the North Sea.

71. In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.

72. It would in the first place be necessary that the provision con-

cerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law. Considered *in abstracto* the equidistance principle might be said to fulfil this requirement. Yet in the particular form in which it is embodied in Article 6 of the Geneva Convention, and having regard to the relationship of that Article to other provisions of the Convention, this must be open to some doubt. In the first place, Article 6 is so framed as to put second the obligation to make use of the equidistance method, causing it to come after a primary obligation to effect delimitation by agreement. Such a primary obligation constitutes an unusual preface to what is claimed to be a potential general rule of law. Without attempting to enter into, still less pronounce upon any question of *jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties,—but this is not normally the subject of any express provision, as it is in Article 6 of the Geneva Convention. Secondly the part played by the notion of special circumstances relative to the principle of equidistance as embodied in Article 6, and the very considerable, still unresolved controversies as to the exact meaning and scope of this notion, must raise further doubts as to the potentially norm-creating character of the rule. Finally, the faculty of making reservations to Article 6, while it might not of itself prevent the equidistance principle being eventually received as general law, does add considerably to the difficulty of regarding this result as having been brought about (or being potentially possible) on the basis of the Convention: for so long as this faculty continues to exist, and is not the subject of any revision brought about in consequence of a request made under Article 13 of the Convention—of which there is at present no official indication—it is the Convention itself which would, for the reasons already indicated, seem to deny to the provisions of Article 6 the same norm-creating character as, for instance, Articles 1 and 2 possess.

73. With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected. In the present case however, the Court notes that, even if allowance is made for the existence of a number of States to whom participation in the Geneva Convention is not open, or which, by reason for instance of being land-locked States, would have no interest in becoming parties to it, the number of ratifications and accessions so far secured is, though respectable, hardly sufficient. 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.

74. As regards the time element, the Court notes that it is over ten years since the Convention was signed, but that it is even now less than five since it came into force in June 1964, and that when the present proceedings were brought it was less than three years, while less than one had elapsed at the time when the respective negotiations between the Federal Republic and the other two Parties for a complete delimitation broke down on the question of the application of the equidistance principle. Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

*

75. The Court must now consider whether State practice in the matter of continental shelf delimitation has, subsequent to the Geneva Convention, been of such a kind as to satisfy this requirement. Leaving aside cases which, for various reasons, the Court does not consider to be reliable guides as precedents, such as delimitations effected between the present Parties themselves, or not relating to international boundaries, some fifteen cases have been cited in the course of the present proceedings, occurring mostly since the signature of the 1958 Geneva Convention, in which continental shelf boundaries have been delimited according to the equidistance principle—in the majority of the cases by agreement, in a few others unilaterally—or else the delimitation was foreshadowed but has not yet been carried out. Amongst these fifteen are the four North Sea delimitations United Kingdom/Norway-Denmark-Netherlands, and Norway/Denmark already mentioned in paragraph 4 of this Judgment. But even if these various cases constituted more than a very small proportion of those potentially calling for delimitation in the world as a whole, the Court would not think it necessary to enumerate or evaluate them separately, since there are, *a priori*, several grounds which deprive them of weight as precedents in the present context.

76. To begin with, 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. As regards those States, on the other hand, which were not, and have not become parties to the Convention, the basis of

their action can only be problematical and must remain entirely speculative. Clearly, they were not applying the Convention. But from that no inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law. There is not a shred of evidence that they did and, as has been seen (paragraphs 22 and 23), there is no lack of other reasons for using the equidistance method, so that acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature.

77. The essential point in this connection—and it seems necessary to stress it—is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*;—for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

78. In this respect the Court follows the view adopted by the Permanent Court of International Justice in the *Lotus* case, as stated in the following passage, the principle of which is, by analogy, applicable almost word for word, *mutatis mutandis*, to the present case (*P.C.I.J., Series A, No. 10*, 1927, at p. 28):

> "Even if the rarity of the judicial decisions to be found . . . were sufficient to prove . . . the circumstance alleged . . ., it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand, . . . there are other circumstances calculated to show that the contrary is true."

Applying this dictum to the present case, the position is simply that in certain cases—not a great number—the States concerned agreed to draw or did draw the boundaries concerned according to the principle of equidistance. There is no evidence that they so acted because they felt

legally compelled to draw them in this way by reason of a rule of customary law obliging them to do so—especially considering that they might have been motivated by other obvious factors.

79. Finally, it appears that in almost all of the cases cited, the delimitations concerned were median-line delimitations between opposite States, not lateral delimitations between adjacent States. For reasons which have already been given (paragraph 57) the Court regards the case of median-line delimitations between opposite States as different in various respects, and as being sufficiently distinct not to constitute a precedent for the delimitation of lateral boundaries. In only one situation discussed by the Parties does there appear to have been a geographical configuration which to some extent resembles the present one, in the sense that a number of States on the same coastline are grouped around a sharp curve or bend of it. No complete delimitation in this area has however yet been carried out. But the Court is not concerned to deny to this case, or any other of those cited, all evidential value in favour of the thesis of Denmark and the Netherlands. It simply considers that they are inconclusive, and insufficient to bear the weight sought to be put upon them as evidence of such a settled practice, manifested in such circumstances, as would justify the inference that delimitation according to the principle of equidistance amounts to a mandatory rule of customary international law,—more particularly where lateral delimitations are concerned.

80. There are of course plenty of cases (and a considerable number were cited) of delimitations of waters, as opposed to seabed, being carried out on the basis of equidistance—mostly of internal waters (lakes, rivers, etc.), and mostly median-line cases. The nearest analogy is that of adjacent territorial waters, but as already explained (paragraph 59) the Court does not consider this case to be analogous to that of the continental shelf.

*

81. The Court accordingly concludes that if the Geneva Convention was not in its origins or inception declaratory of a mandatory rule of customary international law enjoining the use of the equidistance principle for the delimitation of continental shelf areas between adjacent States, neither has its subsequent effect been constitutive of such a rule; and that State practice up-to-date has equally been insufficient for the purpose.

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82. The immediately foregoing conclusion, coupled with that reached earlier (paragraph 56) to the effect that the equidistance principle could not be regarded as being a rule of law on any *a priori* basis of logical

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING THE CONTINENTAL SHELF

(LIBYAN ARAB JAMAHIRIYA/MALTA)

JUDGMENT OF 3 JUNE 1985

1985

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DU PLATEAU CONTINENTAL

(JAMAHIRIYA ARABE LIBYENNE/MALTE)

ARRÊT DU 3 JUIN 1985

tended that these also confirmed Malta's submission that "by their conduct, the Parties have indicated that the median line is, to say the least, very relevant to the final determination of the boundary in the present case". Libya disputes the allegation of acquiescence ; it has also contended that Maltese petroleum concessions followed geomorphological features in a manner consistent with the "exploitability criterion", which is denied by Malta. It also contended that Malta, at the time of the enactment of its 1966 Continental Shelf Act, implicitly recognized the significance of an area described as the "rift zone" area, which Libya, as will be explained below, regards as significant for the delimitation ; this contention Malta also rejects.

25. The Court has considered the facts and arguments brought to its attention in this respect, particularly from the standpoint of its duty to "take into account whatever indicia are available of the [delimitation] line or lines which the Parties themselves may have considered equitable or acted upon as such" (*I.C.J. Reports 1982,* p. 84, para. 118). It is however unable to discern any pattern of conduct on either side sufficiently unequivocal to constitute either acquiescence or any helpful indication of any view of either Party as to what would be equitable differing in any way from the view advanced by that Party before the Court. Its decision must accordingly be based upon the application to the submissions made before it of principles and rules of international law.

* *

26. The Parties are broadly in agreement as to the sources of the law applicable in this case. Malta is a party to the 1958 Geneva Convention on the Continental Shelf, while Libya is not ; the Parties agree that the Convention, and in particular the provisions for delimitation in Article 6, is thus not as such applicable in the relations between them. Both Parties have signed the 1982 United Nations Convention on the Law of the Sea, but that Convention has not yet entered into force, and is therefore not operative as treaty-law ; the Special Agreement contains no provisions as to the substantive law applicable. Nor are there any other bilateral or multilateral treaties claimed to be binding on the Parties. The Parties thus agree that the dispute is to be governed by customary international law. This is not at all to say, however, that the 1982 Convention was regarded by the Parties as irrelevant : the Parties are again in accord in considering that some of its provisions constitute, to a certain extent, the expression of customary international law in the matter. The Parties do not however agree in identifying the provisions which have this status, or the extent to which they are so treated.

27. It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in

developing them. There has in fact been much debate between the Parties in the present case as to the significance, for the delimitation of – and indeed entitlement to – the continental shelf, of State practice in the matter, and this will be examined further at a later stage in the present judgment. Nevertheless, 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. In this context particularly, the Parties have laid some emphasis on a distinction between the law applicable to the basis of entitlement to areas of continental shelf – the rules governing the existence, "*ipso jure* and *ab initio*", and the exercise of sovereign rights of the coastal State over areas of continental shelf situate off its coasts – and the law applicable to the delimitation of such areas of shelf between neighbouring States. The first question is dealt with in Article 76 of the 1982 Convention, and the second in Article 83 of the Convention. Paragraph 1 of that Article provides that :

> "The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

Paragraph 10 of Article 76 provides that "The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts". That the questions of entitlement and of definition of continental shelf, on the one hand, and of delimitation of continental shelf on the other, are not only distinct but are also complementary is self-evident. The legal basis of that which is to be delimited, and of entitlement to it, cannot be other than pertinent to that delimitation.

28. At this stage of the present Judgment, the Court would also first recall that, as it noted in its Judgment in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya),*

> "In the new text, any indication of a specific criterion which could give guidance to the interested States in their effort to achieve an equitable solution has been excluded. Emphasis is placed on the equitable solution which has to be achieved. The principles and rules applicable to the delimitation of continental shelf areas are those which are appropriate to bring about an equitable result . . ." (*I.C.J. Reports 1982,* p. 49, para. 50.)

The Convention sets a goal to be achieved, but is silent as to the method to be followed to achieve it. It restricts itself to setting a standard, and it is left to States themselves, or to the courts, to endow this standard with specific

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

IMMUNITÉS JURIDICTIONNELLES DE L'ÉTAT

(ALLEMAGNE c. ITALIE ; GRÈCE (intervenant))

ARRÊT DU 3 FÉVRIER 2012

2012

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

JURISDICTIONAL IMMUNITIES OF THE STATE

(GERMANY *v.* ITALY : GREECE intervening)

JUDGMENT OF 3 FEBRUARY 2012

Kappler (1948), *Annual Digest*, Vol. 15, p. 471). The principles of the Nuremberg Charter were confirmed by the General Assembly of the United Nations in resolution 95 (I) of 11 December 1946.

53. However, the Court is not called upon to decide whether these acts were illegal, a point which is not contested. The question for the Court is whether or not, in proceedings regarding claims for compensation arising out of those acts, the Italian courts were obliged to accord Germany immunity. In that context, the Court notes that there is a considerable measure of agreement between the Parties regarding the applicable law. In particular, both Parties agree that immunity is governed by international law and is not a mere matter of comity.

54. As between Germany and Italy, any entitlement to immunity can be derived only from customary international law, rather than treaty. Although Germany is one of the eight States parties to the European Convention on State Immunity of 16 May 1972 (Council of Europe, *European Treaty Series (ETS)*, No. 74; *UNTS*, Vol. 1495, p. 182) (hereinafter the "European Convention"), Italy is not a party and the Convention is accordingly not binding upon it. Neither State is party to the United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted on 2 December 2004 (hereinafter the "United Nations Convention"), which is not yet in force in any event. As of 1 February 2012, the United Nations Convention had been signed by twenty-eight States and obtained thirteen instruments of ratification, acceptance, approval or accession. Article 30 of the Convention provides that it will enter into force on the thirtieth day after deposit of the thirtieth such instrument. Neither Germany nor Italy has signed the Convention.

55. It follows that the Court must determine, in accordance with Article 38 (1) *(b)* of its Statute, the existence of "international custom, as evidence of a general practice accepted as law" conferring immunity on States and, if so, what is the scope and extent of that immunity. To do so, it must apply the criteria which it has repeatedly laid down for identifying a rule of customary international law. In particular, as the Court made clear in the *North Sea Continental Shelf* cases, the existence of a rule of customary international law requires that there be "a settled practice" together with *opinio juris* (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 44, para. 77). Moreover, as the Court has also observed,

> "[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" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, pp. 29-30, para. 27).

In the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention. *Opinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States. While it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon the issue currently under consideration by the Court.

56. Although there has been much debate regarding the origins of State immunity and the identification of the principles underlying that immunity in the past, the International Law Commission concluded in 1980 that the rule of State immunity had been "adopted as a general rule of customary international law solidly rooted in the current practice of States" (*Yearbook of the International Law Commission*, 1980, Vol. II (2), p. 147, para. 26). That conclusion was based upon an extensive survey of State practice and, in the opinion of the Court, is confirmed by the record of national legislation, judicial decisions, assertions of a right to immunity and the comments of States on what became the United Nations Convention. That practice shows that, whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity.

57. The Court considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sov-

ereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.

58. The Parties are thus in broad agreement regarding the validity and importance of State immunity as a part of customary international law. They differ, however, as to whether (as Germany contends) the law to be applied is that which determined the scope and extent of State immunity in 1943-1945, i.e., at the time that the events giving rise to the proceedings in the Italian courts took place, or (as Italy maintains) that which applied at the time the proceedings themselves occurred. The Court observes that, in accordance with the principle stated in Article 13 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, the compatibility of an act with international law can be determined only by reference to the law in force at the time when the act occurred. In that context, it is important to distinguish between the relevant acts of Germany and those of Italy. The relevant German acts — which are described in paragraph 52 — occurred in 1943-1945, and it is, therefore, the international law of that time which is applicable to them. The relevant Italian acts — the denial of immunity and exercise of jurisdiction by the Italian courts — did not occur until the proceedings in the Italian courts took place. Since the claim before the Court concerns the actions of the Italian courts, it is the international law in force at the time of those proceedings which the Court has to apply. Moreover, as the Court has stated (in the context of the personal immunities accorded by international law to foreign ministers), the law of immunity is essentially procedural in nature (*Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 25, para. 60). It regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful. For these reasons, the Court considers that it must examine and apply the law on State immunity as it existed at the time of the Italian proceedings, rather than that which existed in 1943-1945.

59. The Parties also differ as to the scope and extent of the rule of State immunity. In that context, the Court notes that many States (including both Germany and Italy) now distinguish between *acta jure gestionis*, in respect of which they have limited the immunity which they claim for themselves and which they accord to others, and *acta jure imperii*. That approach has also been followed in the United Nations Convention and the European Convention (see also the draft Inter-American Convention on Jurisdictional Immunity of States drawn up by the Inter-American

Juridical Committee of the Organization of American States in 1983 (*ILM*, Vol. 22, p. 292)).

60. The Court is not called upon to address the question of how international law treats the issue of State immunity in respect of *acta jure gestionis*. The acts of the German armed forces and other State organs which were the subject of the proceedings in the Italian courts clearly constituted *acta jure imperii*. The Court notes that Italy, in response to a question posed by a Member of the Court, recognized that those acts had to be characterized as *acta jure imperii*, notwithstanding that they were unlawful. The Court considers that the terms *"jure imperii"* and *"jure gestionis"* do not imply that the acts in question are lawful but refer rather to whether the acts in question fall to be assessed by reference to the law governing the exercise of sovereign power *(jus imperii)* or the law concerning non-sovereign activities of a State, especially private and commercial activities *(jus gestionis)*. To the extent that this distinction is significant for determining whether or not a State is entitled to immunity from the jurisdiction of another State's courts in respect of a particular act, it has to be applied before that jurisdiction can be exercised, whereas the legality or illegality of the act is something which can be determined only in the exercise of that jurisdiction. Although the present case is unusual in that the illegality of the acts at issue has been admitted by Germany at all stages of the proceedings, the Court considers that this fact does not alter the characterization of those acts as *acta jure imperii*.

61. Both Parties agree that States are generally entitled to immunity in respect of *acta jure imperii*. That is the approach taken in the United Nations, European and draft Inter-American Conventions, the national legislation in those States which have adopted statutes on the subject and the jurisprudence of national courts. It is against that background that the Court must approach the question raised by the present proceedings, namely whether that immunity is applicable to acts committed by the armed forces of a State (and other organs of that State acting in co-operation with the armed forces) in the course of conducting an armed conflict. Germany maintains that immunity is applicable and that there is no relevant limitation on the immunity to which a State is entitled in respect of *acta jure imperii*. Italy, in its pleadings before the Court, maintains that Germany is not entitled to immunity in respect of the cases before the Italian courts for two reasons: first, that immunity as to *acta jure imperii* does not extend to torts or delicts occasioning death, personal injury or damage to property committed on the territory of the forum State, and, secondly, that, irrespective of where the relevant acts took place, Germany was not entitled to immunity because those acts involved the most serious violations of rules of international law of a peremptory character for which no alternative means of redress was available. The Court will consider each of Italy's arguments in turn.

2. Italy's First Argument: The Territorial Tort Principle

62. The essence of the first Italian argument is that customary international law has developed to the point where a State is no longer entitled to immunity in respect of acts occasioning death, personal injury or damage to property on the territory of the forum State, even if the act in question was performed *jure imperii*. Italy recognizes that this argument is applicable only to those of the claims brought before the Italian courts which concern acts that occurred in Italy and not to the cases of Italian military internees taken prisoner outside Italy and transferred to Germany or other territories outside Italy as forced labour. In support of its argument, Italy points to the adoption of Article 11 of the European Convention and Article 12 of the United Nations Convention and to the fact that nine of the ten States it identified which have adopted legislation specifically dealing with State immunity (the exception being Pakistan) have enacted provisions similar to those in the two Conventions. Italy acknowledges that the European Convention contains a provision to the effect that the Convention is not applicable to the acts of foreign armed forces (Art. 31) but maintains that this provision is merely a saving clause aimed primarily at avoiding conflicts between the Convention and instruments regulating the status of visiting forces present with the consent of the territorial sovereign and that it does not show that States are entitled to immunity in respect of the acts of their armed forces in another State. Italy dismisses the significance of certain statements (discussed in paragraph 69 below) made during the process of adoption of the United Nations Convention suggesting that that Convention did not apply to the acts of armed forces. Italy also notes that two of the national statutes (those of the United Kingdom and Singapore) are not applicable to the acts of foreign armed forces but argues that the other seven (those of Argentina, Australia, Canada, Israel, Japan, South Africa and the United States of America) amount to significant State practice asserting jurisdiction over torts occasioned by foreign armed forces.

63. Germany maintains that, in so far as they deny a State immunity in respect of *acta jure imperii*, neither Article 11 of the European Convention, nor Article 12 of the United Nations Convention reflects customary international law. It contends that, in any event, they are irrelevant to the present proceedings, because neither provision was intended to apply to the acts of armed forces. Germany also points to the fact that, with the exception of the Italian cases and the *Distomo* case in Greece, no national court has ever held that a State was not entitled to immunity in respect of acts of its armed forces, in the context of an armed conflict and that, by

contrast, the courts in several States have expressly declined jurisdiction in such cases on the ground that the respondent State was entitled to immunity.

*

64. The Court begins by observing that the notion that State immunity does not extend to civil proceedings in respect of acts committed on the territory of the forum State causing death, personal injury or damage to property originated in cases concerning road traffic accidents and other "insurable risks". The limitation of immunity recognized by some national courts in such cases was treated as confined to *acta jure gestionis* (see, e.g., the judgment of the Supreme Court of Austria in *Holubek* v. *Government of the United States of America* (*Juristische Blätter* (Vienna), Vol. 84, 1962, p. 43; *ILR*, Vol. 40, p. 73)). The Court notes, however, that none of the national legislation which provides for a "territorial tort exception" to immunity expressly distinguishes between *acta jure gestionis* and *acta jure imperii*. The Supreme Court of Canada expressly rejected the suggestion that the exception in the Canadian legislation was subject to such a distinction (*Schreiber* v. *Federal Republic of Germany and the Attorney General of Canada*, [2002] *Supreme Court Reports (SCR)*, Vol. 3, p. 269, paras. 33-36). Nor is such a distinction featured in either Article 11 of the European Convention or Article 12 of the United Nations Convention. The International Law Commission's commentary on the text of what became Article 12 of the United Nations Convention makes clear that this was a deliberate choice and that the provision was not intended to be restricted to *acta jure gestionis* (*Yearbook of the International Law Commission*, 1991, Vol. II (2), p. 45, para. 8). Germany has not, however, been alone in suggesting that, in so far as it was intended to apply to *acta jure imperii*, Article 12 was not representative of customary international law. In criticizing the International Law Commission's draft of what became Article 12, China commented in 1990 that "the article had gone even further than the restrictive doctrine, for it made no distinction between sovereign acts and private law acts" (United Nations doc. A/C.6/45/SR.25, p. 2) and the United States, commenting in 2004 on the draft United Nations Convention, stated that Article 12 "must be interpreted and applied consistently with the time-honoured distinction between acts *jure imperii* and acts *jure gestionis*" since to extend jurisdiction without regard to that distinction "would be contrary to the existing principles of international law" (United Nations doc. A/C.6/59/SR.13, p. 10, para. 63).

65. The Court considers that it is not called upon in the present proceedings to resolve the question whether there is in customary interna-

tional law a "tort exception" to State immunity applicable to *acta jure imperii* in general. The issue before the Court is confined to acts committed on the territory of the forum State by the armed forces of a foreign State, and other organs of State working in co-operation with those armed forces, in the course of conducting an armed conflict.

66. The Court will first consider whether the adoption of Article 11 of the European Convention or Article 12 of the United Nations Convention affords any support to Italy's contention that States are no longer entitled to immunity in respect of the type of acts specified in the preceding paragraph. As the Court has already explained (see paragraph 54 above), neither Convention is in force between the Parties to the present case. The provisions of these Conventions are, therefore, relevant only in so far as their provisions and the process of their adoption and implementation shed light on the content of customary international law.

67. Article 11 of the European Convention states the territorial tort principle in broad terms,

> "A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred."

That provision must, however, be read in the light of Article 31, which provides,

> "Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State."

Although one of the concerns which Article 31 was intended to address was the relationship between the Convention and the various agreements on the status of visiting forces, the language of Article 31 makes clear that it is not confined to that matter and excludes from the scope of the Convention all proceedings relating to acts of foreign armed forces, irrespective of whether those forces are present in the territory of the forum with the consent of the forum State and whether their acts take place in peacetime or in conditions of armed conflict. The Explanatory Report on the Convention, which contains a detailed commentary prepared as part of the negotiating process, states in respect of Article 31,

> "The Convention is not intended to govern situations which may arise in the event of armed conflict; *nor* can it be invoked to resolve

problems which may arise between allied States as a result of the stationing of forces. These problems are generally dealt with by special agreements (cf. Art. 33).

. . . . . .

[Article 31] prevents the Convention being interpreted as having any influence upon these matters." (Para. 116; emphasis added.)

68. The Court agrees with Italy that Article 31 takes effect as a "saving clause", with the result that the immunity of a State for the acts of its armed forces falls entirely outside the Convention and has to be determined by reference to customary international law. The consequence, however, is that the inclusion of the "territorial tort principle" in Article 11 of the Convention cannot be treated as support for the argument that a State is not entitled to immunity for torts committed by its armed forces. As the Explanatory Report states, the effect of Article 31 is that the Convention has no influence upon that question. Courts in Belgium (judgment of the Court of First Instance of Ghent in *Botelberghe* v. *German State*, 18 February 2000), Ireland (judgment of the Supreme Court in *McElhinney* v. *Williams*, 15 December 1995, [1995] 3 *Irish Reports* 382; *ILR*, Vol. 104, p. 691), Slovenia (case No. Up-13/99, Constitutional Court, para. 13), Greece (*Margellos* v. *Federal Republic of Germany*, case No. 6/2002, *ILR*, Vol. 129, p. 529) and Poland (judgment of the Supreme Court of Poland, *Natoniewski* v. *Federal Republic of Germany, Polish Yearbook of International Law*, Vol. XXX, 2010, p. 299) have concluded that Article 31 means that the immunity of a State for torts committed by its armed forces is unaffected by Article 11 of the Convention.

69. Article 12 of the United Nations Convention provides,

"Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission."

Unlike the European Convention, the United Nations Convention contains no express provision excluding the acts of armed forces from its scope. However, the International Law Commission's commentary on the text of Article 12 states that that provision does not apply to "situations involving armed conflicts" (*Yearbook of the International Law Commis-*

sion, 1991, Vol. II (2), p. 46, para. 10). Moreover, in presenting to the Sixth Committee of the General Assembly the Report of the *Ad Hoc* Committee on Jurisdictional Immunities of States and Their Property (United Nations doc. A/59/22), the Chairman of the *Ad Hoc* Committee stated that the draft Convention had been prepared on the basis of a general understanding that military activities were not covered (United Nations doc. A/C.6/59/SR.13, p. 6, para. 36).

No State questioned this interpretation. Moreover, the Court notes that two of the States which have so far ratified the Convention, Norway and Sweden, made declarations in identical terms stating their understanding that "the Convention does not apply to military activities, including the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, and activities undertaken by military forces of a State in the exercise of their official duties" (United Nations doc. C.N.280.2006.TREATIES-2 and United Nations doc. C.N.912.2009.TREATIES-1). In the light of these various statements, the Court concludes that the inclusion in the Convention of Article 12 cannot be taken as affording any support to the contention that customary international law denies State immunity in tort proceedings relating to acts occasioning death, personal injury or damage to property committed in the territory of the forum State by the armed forces and associated organs of another State in the context of an armed conflict.

70. Turning to State practice in the form of national legislation, the Court notes that nine of the ten States referred to by the Parties which have legislated specifically for the subject of State immunity have adopted provisions to the effect that a State is not entitled to immunity in respect of torts occasioning death, personal injury or damage to property occurring on the territory of the forum State (United States of America Foreign Sovereign Immunities Act 1976, 28 *USC*, Sect. 1605 *(a)* (5); United Kingdom State Immunity Act 1978, Sect. 5; South Africa Foreign States Immunities Act 1981, Sect. 6; Canada State Immunity Act 1985, Sect. 6; Australia Foreign States Immunities Act 1985, Sect. 13; Singapore State Immunity Act 1985, Sect. 7; Argentina Law No. 24.488 (Statute on the Immunity of Foreign States before Argentine Tribunals) 1995, Art. 2 *(e)*; Israel Foreign State Immunity Law 2008, Sect. 5; and Japan, Act on the Civil Jurisdiction of Japan with respect to a Foreign State, 2009, Art. 10). Only Pakistan's State Immunity Ordinance 1981 contains no comparable provision.

71. Two of these statutes (the United Kingdom State Immunity Act 1978, Section 16 (2) and the Singapore State Immunity Act 1985, Sec-

tion 19 (2) *(a)*) contain provisions that exclude proceedings relating to the acts of foreign armed forces from their application. The corresponding provisions in the Canadian, Australian and Israeli statutes exclude only the acts of visiting forces present with the consent of the host State or matters covered by legislation regarding such visiting forces (Canada State Immunity Act 1985, Section 16; Australia Foreign States Immunities Act 1985, Section 6; Israel Foreign State Immunity Law 2008, Section 22). The legislation of South Africa, Argentina and Japan contains no exclusion clause. However, the Japanese statute (in Article 3) states that its provisions "shall not affect the privileges or immunities enjoyed by a foreign State . . . based on treaties or the established international law".

The United States Foreign Sovereign Immunities Act 1976 contains no provision specifically addressing claims relating to the acts of foreign armed forces but its provision that there is no immunity in respect of claims "in which money damages are sought against a foreign State for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign State" (Sec. 1605 *(a)* (5)) is subject to an exception for "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused" (Sec. 1605 *(a)* (5) (A)). Interpreting this provision, which has no counterpart in the legislation of other States, a court in the United States has held that a foreign State whose agents committed an assassination in the United States was not entitled to immunity (*Letelier* v. *Republic of Chile* (1980), *Federal Supplement (F. Supp.)*, Vol. 488, p. 665; *ILR*, Vol. 63, p. 378 (United States District Court, District of Columbia)). However, the Court is not aware of any case in the United States where the courts have been called upon to apply this provision to acts performed by the armed forces and associated organs of foreign States in the course of an armed conflict.

Indeed, in none of the seven States in which the legislation contains no general exclusion for the acts of armed forces, have the courts been called upon to apply that legislation in a case involving the armed forces of a foreign State, and associated organs of State, acting in the context of an armed conflict.

72. The Court next turns to State practice in the form of the judgments of national courts regarding State immunity in relation to the acts of armed forces. The question whether a State is entitled to immunity in proceedings concerning torts allegedly committed by its armed forces when stationed on or visiting the territory of another State, with the consent of the latter, has been considered by national courts on a number of occasions. Decisions of the courts of Egypt (*Bassionni Amrane* v. *John*, *Gazette des Tribunaux mixtes d'Egypte*, January 1934, p. 108; *Annual Digest*, Vol. 7, p. 187), Belgium (*S.A. Eau, gaz, électricité et applications* v.

Office d'aide mutuelle, *Cour d'appel*, Brussels, *Pasicrisie belge*, 1957, Vol. 144, 2nd Part, p. 88; *ILR*, Vol. 23, p. 205) and Germany (*Immunity of the United Kingdom*, Court of Appeal of Schleswig, *Jahrbuch für Internationales Recht*, 1957, Vol. 7, p. 400; *ILR*, Vol. 24, p. 207) are earlier examples of national courts according immunity where the acts of foreign armed forces were characterized as *acta jure imperii*. Since then, several national courts have held that a State is immune with respect to damage caused by warships (*United States of America* v. *Eemshaven Port Authority*, Supreme Court of the Netherlands, *Nederlandse Jurisprudentie*, 2001, No. 567; *ILR*, Vol. 127, p. 225; *Allianz Via Insurance* v. *United States of America* (1999), *Cour d'appel*, Aix-en-Provence, 2nd Chamber, judgment of 3 September 1999, *ILR*, Vol. 127, p. 148) or military exercises (*FILT-CGIL Trento* v. *United States of America*, Italian Court of Cassation, *Rivista di diritto internazionale*, Vol. 83, 2000, p. 1155; *ILR*, Vol. 128, p. 644). The United Kingdom courts have held that customary international law required immunity in proceedings for torts committed by foreign armed forces on United Kingdom territory if the acts in question were *acta jure imperii* (*Littrell* v. *United States of America (No. 2)*, Court of Appeal, [1995] 1 *Weekly Law Reports (WLR)* 82; *ILR*, Vol. 100, p. 438; *Holland* v. *Lampen-Wolfe*, House of Lords, [2000] 1 *WLR* 1573; *ILR*, Vol. 119, p. 367).

The Supreme Court of Ireland held that international law required that a foreign State be accorded immunity in respect of acts *jure imperii* carried out by members of its armed forces even when on the territory of the forum State without the forum State's permission (*McElhinney* v. *Williams*, [1995] 3 *Irish Reports* 382; *ILR*, Vol. 104, p. 691). The Grand Chamber of the European Court of Human Rights later held that this decision reflected a widely held view of international law so that the grant of immunity could not be regarded as incompatible with the European Convention on Human Rights (*McElhinney* v. *Ireland* [GC], application No. 31253/96, judgment of 21 November 2001, *ECHR Reports* 2001-XI, p. 39; *ILR*, Vol. 123, p. 73, para. 38).

While not directly concerned with the specific issue which arises in the present case, these judicial decisions, which do not appear to have been contradicted in any other national court judgments, suggest that a State is entitled to immunity in respect of *acta jure imperii* committed by its armed forces on the territory of another State.

73. The Court considers, however, that for the purposes of the present case the most pertinent State practice is to be found in those national judicial decisions which concerned the question whether a State was entitled to immunity in proceedings concerning acts allegedly committed by its armed forces in the course of an armed conflict. All of those cases, the facts of which are often very similar to those of the cases before the

Italian courts, concern the events of the Second World War. In this context, the *Cour de cassation* in France has consistently held that Germany was entitled to immunity in a series of cases brought by claimants who had been deported from occupied French territory during the Second World War (No. 02-45961, 16 December 2003, *Bull. civ.*, 2003, I, No. 258, p. 206 (the *Bucheron* case); No. 03-41851, 2 June 2004, *Bull. civ.*, 2004, I, No. 158, p. 132 (the *X* case) and No. 04-47504, 3 January 2006 (the *Grosz* case)). The Court also notes that the European Court of Human Rights held in *Grosz* v. *France* (application No. 14717/06, decision of 16 June 2009) that France had not contravened the European Convention on Human Rights in the proceedings which were the subject of the 2006 *Cour de cassation* judgment (judgment No. 04-47504), because the *Cour de cassation* had given effect to an immunity required by international law.

74. The highest courts in Slovenia and Poland have also held that Germany was entitled to immunity in respect of unlawful acts perpetrated on their territory by its armed forces during the Second World War. In 2001 the Constitutional Court of Slovenia ruled that Germany was entitled to immunity in an action brought by a claimant who had been deported to Germany during the German occupation and that the Supreme Court of Slovenia had not acted arbitrarily in upholding that immunity (case No. Up-13/99, judgment of 8 March 2001). The Supreme Court of Poland held, in *Natoniewski* v. *Federal Republic of Germany* (judgment of 29 October 2010, *Polish Yearbook of International Law*, Vol. XXX, 2010, p. 299), that Germany was entitled to immunity in an action brought by a claimant who in 1944 had suffered injuries when German forces burned his village in occupied Poland and murdered several hundred of its inhabitants. The Supreme Court, after an extensive review of the decisions in *Ferrini*, *Distomo* and *Margellos*, as well as the provisions of the European Convention and the United Nations Convention and a range of other materials, concluded that States remained entitled to immunity in respect of torts allegedly committed by their armed forces in the course of an armed conflict. Judgments by lower courts in Belgium (judgment of the Court of First Instance of Ghent in 2000 in *Botelberghe* v. *German State*), Serbia (judgment of the Court of First Instance of Leskovac, 1 November 2001) and Brazil (*Barreto* v. *Federal Republic of Germany*, Federal Court, Rio de Janeiro, judgment of 9 July 2008 holding Germany immune in proceedings regarding the sinking of a Brazilian fishing vessel by a German submarine in Brazilian waters) have also held that Germany was immune in actions for acts of war committed on their territory or in their waters.

75. Finally, the Court notes that the German courts have also concluded that the territorial tort principle did not remove a State's entitle-

ment to immunity under international law in respect of acts committed by its armed forces, even where those acts took place on the territory of the forum State (judgment of the Federal Supreme Court of 26 June 2003 (*Greek Citizens* v. *Federal Republic of Germany*, case No. III ZR 245/98, *NJW*, 2003, p. 3488; *ILR*, Vol. 129, p. 556), declining to give effect in Germany to the Greek judgment in the *Distomo* case on the ground that it had been given in breach of Germany's entitlement to immunity).

76. The only State in which there is any judicial practice which appears to support the Italian argument, apart from the judgments of the Italian courts which are the subject of the present proceedings, is Greece. The judgment of the Hellenic Supreme Court in the *Distomo* case in 2000 contains an extensive discussion of the territorial tort principle without any suggestion that it does not extend to the acts of armed forces during an armed conflict. However, the Greek Special Supreme Court, in its judgment in *Margellos* v. *Federal Republic of Germany* (case No. 6/2002, *ILR*, Vol. 129, p. 525), repudiated the reasoning of the Supreme Court in *Distomo* and held that Germany was entitled to immunity. In particular, the Special Supreme Court held that the territorial tort principle was not applicable to the acts of the armed forces of a State in the conduct of armed conflict. While that judgment does not alter the outcome in the *Distomo* case, a matter considered below, Greece has informed the Court that courts and other bodies in Greece faced with the same issue of whether immunity is applicable to torts allegedly committed by foreign armed forces in Greece are required to follow the stance taken by the Special Supreme Court in its decision in *Margellos* unless they consider that customary international law has changed since the *Margellos* judgment. Germany has pointed out that, since the judgment in *Margellos* was given, no Greek court has denied immunity in proceedings brought against Germany in respect of torts allegedly committed by German armed forces during the Second World War and in a 2009 decision (decision No. 853/2009), the Supreme Court, although deciding the case on a different ground, approved the reasoning in *Margellos*. In view of the judgment in *Margellos* and the dictum in the 2009 case, as well as the decision of the Greek Government not to permit enforcement of the *Distomo* judgment in Greece itself and the Government's defence of that decision before the European Court of Human Rights in *Kalogeropoulou and Others* v. *Greece and Germany* (application No. 59021/00, decision of 12 December 2002, *ECHR Reports* 2002-X, p. 417; *ILR*, Vol. 129, p. 537), the Court concludes that Greek State practice taken as a whole actually contradicts, rather than supports, Italy's argument.

77. In the Court's opinion, State practice in the form of judicial decisions supports the proposition that State immunity for *acta jure imperii*

continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum State. That practice is accompanied by *opinio juris*, as demonstrated by the positions taken by States and the jurisprudence of a number of national courts which have made clear that they considered that customary international law required immunity. The almost complete absence of contrary jurisprudence is also significant, as is the absence of any statements by States in connection with the work of the International Law Commission regarding State immunity and the adoption of the United Nations Convention or, so far as the Court has been able to discover, in any other context asserting that customary international law does not require immunity in such cases.

78. In light of the foregoing, the Court considers that customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict. That conclusion is confirmed by the judgments of the European Court of Human Rights to which the Court has referred (see paragraphs 72, 73 and 76).

79. The Court therefore concludes that, contrary to what had been argued by Italy in the present proceedings, the decision of the Italian courts to deny immunity to Germany cannot be justified on the basis of the territorial tort principle.

3. Italy's Second Argument: The Subject-Matter and Circumstances of the Claims in the Italian Courts

80. Italy's second argument, which, unlike its first argument, applies to all of the claims brought before the Italian courts, is that the denial of immunity was justified on account of the particular nature of the acts forming the subject-matter of the claims before the Italian courts and the circumstances in which those claims were made. There are three strands to this argument. First, Italy contends that the acts which gave rise to the claims constituted serious violations of the principles of international law applicable to the conduct of armed conflict, amounting to war crimes and crimes against humanity. Secondly, Italy maintains that the rules of international law thus contravened were peremptory norms *(jus cogens)*. Thirdly, Italy argues that the claimants having been denied all other forms of redress, the exercise of jurisdiction by the Italian courts was necessary as a matter of last resort. The Court will consider each of these strands in turn, while recognizing that, in the oral proceedings, Italy also contended that its courts had been entitled to deny State immunity because of the combined effect of these three strands.

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING RIGHT OF PASSAGE OVER INDIAN TERRITORY

(PORTUGAL *v.* INDIA)

MERITS

JUDGMENT OF 12 APRIL 1960

1960

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DU DROIT DE PASSAGE SUR TERRITOIRE INDIEN

(PORTUGAL c. INDE)

FOND

ARRÊT DU 12 AVRIL 1960

matter is placed, and requests me to state that on the part of this Government injunctions will be given for the strictest observance of the provisions of Article XVIII of the Anglo-Portuguese Treaty."

The Court is not concerned with the question whether any violation of the relevant provision of the Treaty in fact took place. Whether any such violation did or did not take place, the legal position with regard to the passage of armed forces between Daman and the enclaves appears clearly from this correspondence.

The requirement of a formal request before passage of armed forces could take place was repeated in an agreement of 1913.

With regard to armed police, the position was similar to that of armed forces. The Treaty of 1878 regulated the passage of armed police on the basis of reciprocity. Paragraph 2 of Article XVIII of the Treaty made provision for the entry of the police authorities of the parties into the territories of the other party for certain specific purposes, e.g., the pursuit of criminals and persons engaged in smuggling and contraband practices, on a reciprocal basis. An agreement of 1913 established an arrangement providing for a reciprocal concession permitting parties of armed police to cross intervening territory, provided previous intimation was given. An agreement of 1920 provided that armed police below a certain rank should not enter the territory of the other party without consent previously obtained.

An agreement of 1940 concerning passage of Portuguese armed police over the Daman-Silvassa (Nagar-Aveli) road provided that, if the party did not exceed ten in number, intimation of its passage should be given to the British authorities within twenty-four hours after passage had taken place, but that "If any number exceeding ten at a time are required so to travel at any time the existing practice should be followed and concurrence of the British authorities should be obtained by prior notice as heretofore."

Both with regard to armed forces and armed police, no change took place during the post-British period after India became independent.

It would thus appear that, during the British and post-British periods, Portuguese armed forces and armed police did not pass between Daman and the enclaves as of right and that, after 1878, such passage could only take place with previous authorization by the British and later by India, accorded either under a reciprocal arrangement already agreed to, or in individual cases. Having regard to the special circumstances of the case, this necessity for authorization before passage could take place constitutes, in the view of the Court, a negation of passage as of right. The practice predicates that the territorial sovereign had the discretionary power to withdraw or to refuse permission. It is argued that permission was always granted, but this does not, in the opinion of the Court, affect the legal position. There is nothing in the record

to show that grant of permission was incumbent on the British or on India as an obligation.

As regards arms and ammunition, paragraph 4 of Article XVIII of the Treaty of 1878 provided that the exportation of arms, ammunition or military stores from the territories of one party to those of the other "shall not be permitted, except with the consent of, and under rules approved of by, the latter".

Rule 7 A, added in 1880 to the rules framed under the Indian Arms Act of 1878, provided that "nothing in rules 5, 6, or 7 shall be deemed to authorize the grant of licences ... to import any arms, ammunition or military stores from Portuguese India, [or] to export to Portuguese India ... [such objects] ... except ... by a special licence". Subsequent practice shows that this provision applied to transit between Daman and the enclaves.

There was thus established a clear distinction between the practice permitting free passage of private persons, civil officials and goods in general, and the practice requiring previous authorization, as in the case of armed forces, armed police, and arms and ammunition.

The Court is, therefore, of the view that no right of passage in favour of Portugal involving a correlative obligation on India has been established in respect of armed forces, armed police, and arms and ammunition. The course of dealings established between the Portuguese and the British authorities with respect to the passage of these categories excludes the existence of any such right. The practice that was established shows that, with regard to these categories, it was well understood that passage could take place only by permission of the British authorities. This situation continued during the post-British period.

* * *

Portugal also invokes general international custom, as well as the general principles of law recognized by civilized nations, in support of its claim of a right of passage as formulated by it. Having arrived at the conclusion that the course of dealings between the British and Indian authorities on the one hand and the Portuguese on the other established a practice, well understood between the Parties, by virtue of which Portugal had acquired a right of passage in respect of private persons, civil officials and goods in general, the Court does not consider it necessary to examine whether general international custom or the general principles of law recognized by civilized nations may lead to the same result.

As regards armed forces, armed police and arms and ammunition, the finding of the Court that the practice established between the

Parties required for passage in respect of these categories the permission of the British or Indian authorities, renders it unnecessary for the Court to determine whether or not, in the absence of the practice that actually prevailed, general international custom or the general principles of law recognized by civilized nations could have been relied upon by Portugal in support of its claim to a right of passage in respect of these categories.

The Court is here dealing with a concrete case having special features. Historically the case goes back to a period when, and relates to a region in which, the relations between neighbouring States were not regulated by precisely formulated rules but were governed largely by practice. Where therefore the Court finds a practice clearly established between two States which was accepted by the Parties as governing the relations between them, the Court must attribute decisive effect to that practice for the purpose of determining their specific rights and obligations. Such a particular practice must prevail over any general rules.

* * *

Having found that Portugal had in 1954 a right of passage over intervening Indian territory between Daman and the enclaves in respect of private persons, civil officials and goods in general, the Court will proceed to consider whether India has acted contrary to its obligation resulting from Portugal's right of passage in respect of any of these categories.

Portugal complains of the progressive restriction of its right of passage between October 1953 and July 1954. It does not, however, contend that India had, during that period, acted contrary to its obligation resulting from Portugal's right of passage. But Portugal complains that passage was thereafter denied to Portuguese nationals of European origin, whether civil officials or private persons, to native Indian Portuguese in the employ of the Portuguese Government, and to a delegation that the Governor of Daman proposed to send to Nagar-Aveli and Dadra.

It may be observed that the Governor of Daman was granted the necessary visas for a journey to and back from Dadra as late as 21 July 1954.

The events that took place in Dadra on 21-22 July 1954 resulted in the overthrow of Portuguese authority in that enclave. This created tension in the surrounding Indian territory. Thereafter all passage was suspended by India. India contends that this became necessary in view of the abnormal situation which had arisen in Dadra and the tension created in surrounding Indian territory.

On 26 July the Portuguese Government requested that delegates of the Governor of Daman (if necessary limited to three) should be

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS

ADVISORY OPINION OF 8 JULY 1996

1996

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

LICÉITÉ DE LA MENACE OU DE L'EMPLOI D'ARMES NUCLÉAIRES

AVIS CONSULTATIF DU 8 JUILLET 1996

tice the expression of an *opinio juris* on the part of those who possess such weapons.

66. Some other States, which assert the legality of the threat and use of nuclear weapons in certain circumstances, invoked the doctrine and practice of deterrence in support of their argument. They recall that they have always, in concert with certain other States, reserved the right to use those weapons in the exercise of the right to self-defence against an armed attack threatening their vital security interests. In their view, if nuclear weapons have not been used since 1945, it is not on account of an existing or nascent custom but merely because circumstances that might justify their use have fortunately not arisen.

67. The Court does not intend to pronounce here upon the practice known as the "policy of deterrence". It notes that it is a fact that a number of States adhered to that practice during the greater part of the Cold War and continue to adhere to it. Furthermore, the members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constitutes the expression of an *opinio juris*. Under these circumstances the Court does not consider itself able to find that there is such an *opinio juris*.

68. According to certain States, the important series of General Assembly resolutions, beginning with resolution 1653 (XVI) of 24 November 1961, that deal with nuclear weapons and that affirm, with consistent regularity, the illegality of nuclear weapons, signify the existence of a rule of international customary law which prohibits recourse to those weapons. According to other States, however, the resolutions in question have no binding character on their own account and are not declaratory of any customary rule of prohibition of nuclear weapons; some of these States have also pointed out that this series of resolutions not only did not meet with the approval of all of the nuclear-weapon States but of many other States as well.

69. States which consider that the use of nuclear weapons is illegal indicated that those resolutions did not claim to create any new rules, but were confined to a confirmation of customary law relating to the prohibition of means or methods of warfare which, by their use, overstepped the bounds of what is permissible in the conduct of hostilities. In their view, the resolutions in question did no more than apply to nuclear weapons the existing rules of international law applicable in armed conflict; they were no more than the "envelope" or *instrumentum* containing certain pre-existing customary rules of international law. For those States it is accordingly of little importance that the *instrumentum* should have occasioned negative votes, which cannot have the effect of obliterating those customary rules which have been confirmed by treaty law.

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 exist-

ence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it 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.

71. Examined in their totality, the General Assembly resolutions put before the Court declare that the use of nuclear weapons would be "a direct violation of the Charter of the United Nations"; and in certain formulations that such use "should be prohibited". The focus of these resolutions has sometimes shifted to diverse related matters; however, 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.

72. The Court further notes that the first of the resolutions of the General Assembly expressly proclaiming the illegality of the use of nuclear weapons, resolution 1653 (XVI) of 24 November 1961 (mentioned in subsequent resolutions), after referring to certain international declarations and binding agreements, from the Declaration of St. Petersburg of 1868 to the Geneva Protocol of 1925, proceeded to qualify the legal nature of nuclear weapons, determine their effects, and apply general rules of customary international law to nuclear weapons in particular. That application by the General Assembly of general rules of customary law to the particular case of nuclear weapons indicates that, in its view, there was no specific rule of customary law which prohibited the use of nuclear weapons; if such a rule had existed, the General Assembly could simply have referred to it and would not have needed to undertake such an exercise of legal qualification.

73. Having said this, the Court points out that the adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of resolution 1653 (XVI), and requesting the member States to conclude a convention prohibiting the use of nuclear weapons in any circumstance, reveals the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament. The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other.

* *

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DU DROIT D'ASILE

(COLOMBIE / PÉROU)

ARRÊT DU 20 NOVEMBRE 1950

1950

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

ASYLUM CASE

(COLOMBIA / PERU)

JUDGMENT OF NOVEMBER 20th, 1950

international custom "as evidence of a general practice accepted as law".

In support of its contention concerning the existence of such a custom, the Colombian Government has referred to a large number of extradition treaties which, as already explained, can have no bearing on the question now under consideration. It has cited conventions and agreements which do not contain any provision concerning the alleged rule of unilateral and definitive qualification such as the Montevideo Convention of 1889 on international penal law, the Bolivarian Agreement of 1911 and the Havana Convention of 1928. It has invoked conventions which have not been ratified by Peru, such as the Montevideo Conventions of 1933 and 1939. The Convention of 1933 has, in fact, been ratified by not more than eleven States and the Convention of 1939 by two States only.

It is particularly the Montevideo Convention of 1933 which Counsel for the Colombian Government has also relied on in this connexion. It is contended that this Convention has merely codified principles which were already recognized by Latin-American custom, and that it is valid against Peru as a proof of customary law. The limited number of States which have ratified this Convention reveals the weakness of this argument, and furthermore, it is invalidated by the preamble which states that this Convention modifies the Havana Convention.

Finally, the Colombian Government has referred to a large number of particular cases in which diplomatic asylum was in fact granted and respected. But it has not shown that the alleged rule of unilateral and definitive qualification was invoked or—if in some cases it was in fact invoked—that it was, apart from conventional stipulations, exercised by the States granting asylum as a right appertaining to them and respected by the territorial States as a duty incumbent on them and not merely for reasons of political expediency. The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.

The Court cannot therefore 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 a rule concerning the qualification of the offence in matters of diplomatic asylum.

In the written Pleadings and during the oral proceedings, the Government of Colombia relied upon official communiqués published by the Peruvian Ministry of Foreign Affairs on October 13th and 26th, 1948, and the Government of Peru relied upon a Report of the Advisory Committee of the Ministry of Foreign Affairs of Colombia dated September 2nd, 1937; on the question of qualification, these documents state views which are contrary to those now maintained by these Governments. The Court, whose duty it is to apply international law in deciding the present case, cannot attach decisive importance to any of these documents.

For these reasons, the Court has arrived at the conclusion that Colombia, as the State granting asylum, is not competent to qualify the offence by a unilateral and definitive decision, binding on Peru.

* * *

In its second submission, the Colombian Government asks the Court to adjudge and declare:

> "That the Republic of Peru, as the territorial State, is bound in the case now before the Court, to give the guarantees necessary for the departure of M. Víctor Raúl Haya de la Torre from the country, with due regard to the inviolability of his person."

This alleged obligation of the Peruvian Government does not entirely depend on the answer given to the first Colombian submission relating to the unilateral and definitive qualification of the offence. It follows from the first two articles of the Havana Convention that, even if such a right of qualification is not admitted, the Colombian Government is entitled to request a safe-conduct under certain conditions.

The first condition is that asylum has been regularly granted and maintained. It can be granted only to political offenders who are not accused or condemned for common crimes and only in urgent cases and for the time strictly indispensable for the safety of the refugee. These points relate to the Peruvian counterclaim and will be considered later to the extent necessary for the decision of the present case.

The second condition is laid down in Article 2 of the Havana Convention:

"Third: The Government of the State may require that the refugee be sent out of the national territory within the shortest time possible; and the diplomatic agent of the country who has granted asylum may in turn require the guarantees necessary for the departure of the refugee from the country with due regard to the inviolability of his person."

If regard is had, on the one hand, to the structure of this provision which indicates a successive order, and, on the other hand, to the natural and ordinary meaning of the words "in turn", this provision can only mean that the territorial State may require that the refugee be sent out of the country, and that only after such a demand can the State granting asylum require the necessary guarantees as a condition of his being sent out. The provision gives, in other words, the territorial State an option to require the departure of the refugee, and that State becomes bound to grant a safe-conduct only if it has exercised this option.

A contrary interpretation would lead, in the case now before the Court, to the conclusion that Colombia would be entitled to decide alone whether the conditions provided by Articles 1 and 2 of the Convention for the regularity of asylum are fulfilled. Such a consequence obviously would be incompatible with the legal situation created by the Convention.

There exists undoubtedly a practice whereby the diplomatic representative who grants asylum immediately requests a safe-conduct without awaiting a request from the territorial State for the departure of the refugee. This procedure meets certain requirements: the diplomatic agent is naturally desirous that the presence of the refugee on his premises should not be prolonged; and the government of the country, for its part, desires in a great number of cases that its political opponent who has obtained asylum should depart. This concordance of views suffices to explain the practice which has been noted in this connexion, but this practice does not and cannot mean that the State, to whom such a request for a safe-conduct has been addressed, is legally bound to accede to it.

In the present case, the Peruvian Government has not requested that Haya de la Torre should leave Peru. It has contested the legality of the asylum granted to him and has refused to deliver a safe-conduct. In such circumstances the Colombian Government is not entitled to claim that the Peruvian Government should give the guarantees necessary for the departure of Haya de la Torre from the country, with due regard to the inviolability of his person.

* * *

The counter-claim of the Government of Peru was stated in its final form during the oral statement of October 3rd, 1950, in the following terms:

"MAY IT PLEASE THE COURT:

To adjudge and declare as a counter-claim under Article 63 of the Rules of Court, and in the same decision, that the grant of asylum by the Colombian Ambassador at Lima to Víctor Raúl Haya de la Torre was made in violation of Article 1, paragraph 1, and Article 2, paragraph 2, item 1 *(inciso primero)*, of the Convention on Asylum signed in 1928, and that in any case the maintenance of the asylum constitutes at the present time a violation of that treaty."

As has already been pointed out, the last part of this sentence: "and that in any case the maintenance of the asylum constitutes at the present time a violation of that treaty", did not appear in the counter-claim presented by the Government of Peru in the Counter-Memorial. The addition was only made during the oral proceedings. The Court will first consider the counter-claim in its original form.

This counter-claim is intended, in substance, to put an end to the dispute by requesting the Court to declare that asylum was wrongfully given, the grant of asylum being contrary to certain provisions of the Havana Convention. The object of the counter-claim is simply to define for this purpose the legal relations which that Convention has established between Colombia and Peru. The Court observes in this connexion that the question of the possible surrender of the refugee to the territorial authorities is in no way raised in the counter-claim. It points out that the Havana Convention, which provides for the surrender to those authorities of persons accused of or condemned for common crimes, contains no similar provision in respect of political offenders. The Court notes, finally, that this question was not raised either in the diplomatic correspondence submitted by the Parties or at any moment in the proceedings before the Court, and in fact the Government of Peru has not requested that the refugee should be surrendered.

It results from the final submissions of the Government of Colombia, as formulated before the Court on October 6th, 1950, that that Government did not contest the jurisdiction of the Court in respect of the original counter-claim; it did so only in respect of the addition made during the oral proceedings. On the other hand, relying upon Article 63 of the Rules of Court, the Government of Colombia has disputed the admissibility of the counter-claim by arguing that it is not directly connected with the subject-matter of the Application. In its view, this lack of connexion results from the fact that the counter-claim raises new problems and thus tends to shift the grounds of the dispute.

The Court is unable to accept this view. It emerges clearly from the arguments of the Parties that the second submission of the Government of Colombia, which concerns the demand for a safe-conduct, rests largely on the alleged regularity of the asylum, which is precisely what is disputed by the counter-claim. The connexion is so direct that certain conditions which are required to exist before a safe-conduct can be demanded depend precisely on facts

which are raised by the counter-claim. The direct connexion being thus clearly established, the sole objection to the admissibility of the counter-claim in its original form is therefore removed.

Before examining the question whether the counter-claim is well founded, the Court must state in precise terms what meaning it attaches to the words "the grant of asylum" which are used therein. The grant of asylum is not an instantaneous act which terminates with the admission, at a given moment, of a refugee to an embassy or a legation. Any grant of asylum results in, and in consequence logically implies, a state of protection ; the asylum is granted as long as the continued presence of the refugee in the embassy prolongs this protection. This view, which results from the very nature of the institution of asylum, is further confirmed by the attitude of the Parties during this case. The counter-claim, as it appears in the Counter-Memorial of the Government of Peru, refers expressly to Article 2, paragraph 2, of the Havana Convention, which provides that asylum may not be granted except "for the period of time strictly indispensable". Such has also been the view of the Government of Colombia ; its Reply shows that, in its opinion, as in that of the Government of Peru, the reference to the above-mentioned provision of the Havana Convention raises the question of "the duration of the refuge".

The Government of Peru has based its counter-claim on two different grounds which correspond respectively to Article 1, paragraph 1, and Article 2, paragraph 2, of the Havana Convention.

Under Article 1, paragraph 1, "It is not permissible for States to grant asylum .... to persons accused or condemned for common crimes....". The onus of proving that Haya de la Torre had been accused or condemned for common crimes before the grant of asylum rested upon Peru.

The Court has no difficulty in finding, in the present case, that the refugee was an "accused person" within the meaning of the Havana Convention, inasmuch as the evidence presented by the Government of Peru appears conclusive in this connexion. It can hardly be agreed that the term "accused" occurring in a multilateral treaty such as that of Havana has a precise and technical connotation, which would have the effect of subordinating the definition of "accused" to the completion of certain strictly prescribed steps in procedure, which might differ from one legal system to another.

On the other hand, the Court considers that the Government of Peru has not proved that the acts of which the refugee was accused before January 3rd/4th, 1949, constitute common crimes. From the point of view of the application of the Havana Convention, it is the terms of the accusation, as formulated by the legal authorities before the grant of asylum, that must alone be considered. As has been shown in the recital of the facts, the sole accusation contained in all the documents emanating from the Peruvian legal authorities

is that of military rebellion, and the Government of Peru has not established that military rebellion in itself constitutes a common crime. Article 248 of the Peruvian Code of Military Justice of 1939 even tends to prove the contrary, for it makes a distinction between military rebellion and common crimes by providing that : "Common crimes committed during the course of, and in connexion with, a rebellion, shall be punishable in conformity with the laws, irrespective of the rebellion."

These considerations lead to the conclusion that the first objection made by the Government of Peru against the asylum is not justified and that on this point the counter-claim is not well founded and must be dismissed.

The Government of Peru relies, as a second basis for its counter-claim, upon the alleged disregard of Article 2, paragraph 2, of the Havana Convention, which provides as follows : "Asylum may not be granted except in urgent cases and for the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety."

Before proceeding to an examination of this provision, the Court considers it necessary to make the following remark concerning the Havana Convention in general and Article 2 in particular.

The object of the Havana Convention, which is the only agreement relevant to the present case, was, as indicated in its preamble, to fix the rules which the signatory States must observe for the granting of asylum in their mutual relations. The intention was, as has been stated above, to put an end to the abuses which had arisen in the practice of asylum and which were likely to impair its credit and usefulness. This is borne out by the wording of Articles 1 and 2 of the Convention which is at times prohibitive and at times clearly restrictive.

Article 2 refers to asylum granted to political offenders and lays down in precise terms the conditions under which asylum granted to such offenders shall be respected by the territorial State. It is worthy of note that all these conditions are designed to give guarantees to the territorial State and appear, in the final analysis, as the consideration for the obligation which that State assumes to respect asylum, that is, to accept its principle and its consequences as long as it is regularly maintained.

At the head of the list of these conditions appears Article 2, paragraph 2, quoted above. It is certainly the most important of them, the essential justification for asylum being in the imminence or persistence of a danger for the person of the refugee. It was incumbent upon the Government of Colombia to submit proof of facts to show that the above-mentioned condition was fulfilled.

It has not been disputed by the Parties that asylum may be granted on humanitarian grounds in order to protect political offenders against the violent and disorderly action of irresponsible

sections of the population. It has not been contended by the Government of Colombia that Haya de la Torre was in such a situation at the time when he sought refuge in the Colombian Embassy at Lima. At that time, three months had elapsed since the military rebellion. This long interval gives the present case a very special character. During those three months, Haya de la Torre had apparently been in hiding in the country, refusing to obey the summons to appear of the legal authorities which was published on November 16th/18th, 1948, and refraining from seeking asylum in the foreign embassies where several of his co-accused had found refuge before these dates. It was only on January 3rd, 1949, that he sought refuge in the Colombian Embassy. The Court considers that, *prima facie,* such circumstances make it difficult to speak of urgency.

The diplomatic correspondence between the two Governments does not indicate the nature of the danger which was alleged to threaten the refugee. Likewise, the Memorial of the Government of Colombia confines itself to stating that the refugee begged the Ambassador to grant him the diplomatic protection of asylum as his freedom and life were in jeopardy. It is only in the written Reply that the Government of Colombia described in more precise terms the nature of the danger against which the refugee intended to request the protection of the Ambassador. It was then claimed that this danger resulted in particular from the abnormal political situation existing in Peru, following the state of siege proclaimed on October 4th, 1948, and renewed successively on November 2nd, December 2nd, 1948, and January 2nd, 1949; that it further resulted from the declaration of "a state of national crisis" made on October 25th, 1948, containing various statements against the American People's Revolutionary Alliance of which the refugee was the head; from the outlawing of this Party by the decree of October 4th, 1948; from the Order issued by the acting Examining Magistrate for the Navy on November 13th, 1948, requiring the defaulters to be cited by public summons; from the decree of November 4th, 1948, providing for Courts-Martial to judge summarily, with the option of increasing the penalties and without appeal, the authors, accomplices and others responsible for the offences of rebellion, sedition or mutiny.

From these facts regarded as a whole the nature of the danger now becomes clear, and it is upon the urgent character of such a danger that the Government of Colombia seeks to justify the asylum—the danger of political justice by reason of the subordination of the Peruvian judicial authorities to the instructions of the Executive.

It is therefore necessary to examine whether, and, if so, to what extent, a danger of this kind can serve as a basis for asylum.

In principle, it is inconceivable that the Havana Convention could have intended the term "urgent cases" to include the danger of regular prosecution to which the citizens of any country lay themselves open by attacking the institutions of that country ; nor can it be admitted that in referring to "the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety", the Convention envisaged protection from the operation of regular legal proceedings.

It would be useless to seek an argument to the contrary in Article 1 of the Havana Convention which forbids the grant of asylum to persons "accused or condemned for common crimes" and directs that such persons shall be surrendered immediately upon request of the local government. It is not possible to infer from that provision that, because a person is accused of political offences and not of common crimes, he is, by that fact alone, entitled to asylum. It is clear that such an inference would disregard the requirements laid down by Article 2, paragraph 2, for the grant of asylum to political offenders.

In principle, therefore, asylum cannot be opposed to the operation of justice. An exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims. Asylum protects the political offender against any measures of a manifestly extra-legal character which a government might take or attempt to take against its political opponents. The word "safety", which in Article 2, paragraph 2, determines the specific effect of asylum granted to political offenders, means that the refugee is protected against arbitrary action by the government, and that he enjoys the benefits of the law. On the other hand, the safety which arises out of asylum cannot be construed as a protection against the regular application of the laws and against the jurisdiction of legally constituted tribunals. Protection thus understood would authorize the diplomatic agent to obstruct the application of the laws of the country whereas it is his duty to respect them ; it would in fact become the equivalent of an immunity, which was evidently not within the intentions of the draftsmen of the Havana Convention.

It is true that successive decrees promulgated by the Government of Peru proclaimed and prolonged a state of siege in that country ; but it has not been shown that the existence of a state of siege implied the subordination of justice to the executive authority, or that the suspension of certain constitutional guarantees entailed the abolition of judicial guarantees. As for the decree of November 4th, 1948, providing for Courts-Martial, it contained no indication which might be taken to mean that the new provisions would apply retroactively to offences committed prior to the publication of the said decree. In fact, this decree was not applied to the legal proceedings against Haya de la Torre, as appears from the foregoing recital

of the facts. As regards the future, the Court places on record the following declaration made on behalf of the Peruvian Government :

> "The decree in question is dated November 4th, 1948, that is, it was enacted one month after the events which led to the institution of proceedings against Haya de la Torre. This decree was intended to apply to crimes occurring after its publication, and nobody in Peru would ever have dreamed of utilizing it in the case to which the Colombian Government clumsily refers, since the principle that laws have no retroactive effect, especially in penal matters, is broadly admitted in that decree. If the Colombian Government's statement on this point were true, the Peruvian Government would never have referred this case to the International Court of Justice."

This declaration, which appears in the Rejoinder, was confirmed by the Agent for the Government of Peru in his oral statement of October 2nd, 1950.

The Court cannot admit that the States signatory to the Havana Convention intended to substitute for the practice of the Latin-American republics, in which considerations of courtesy, good-neighbourliness and political expediency have always held a prominent place, a legal system which would guarantee to their own nationals accused of political offences the privilege of evading national jurisdiction. Such a conception, moreover, would come into conflict with one of the most firmly established traditions of Latin America, namely, non-intervention. It was at the Sixth Pan-American Conference of 1928, during which the Convention on Asylum was signed, that the States of Latin America declared their resolute opposition to any foreign political intervention. It would be difficult to conceive that these same States had consented, at the very same moment, to submit to intervention in its least acceptable form, one which implies foreign interference in the administration of domestic justice and which could not manifest itself without casting some doubt on the impartiality of that justice.

Indeed the diplomatic correspondence between the two Governments shows the constant anxiety of Colombia to remain, in this field as elsewhere, faithful to the tradition of non-intervention. Colombia did not depart from this attitude, even when she found herself confronted with an emphatic declaration by the Peruvian Minister for Foreign Affairs asserting that the tribunal before which Haya de la Torre had been summoned to appear was in conformity with the general and permanent organization of Peruvian judicial administration and under the control of the Supreme Court. This assertion met with no contradiction or reservation on the part of Colombia. It was only much later, following the presentation of the Peruvian counter-claim, that the Government of Colombia chose,

in the Reply and during the oral proceedings, to transfer the defence of asylum to a plane on which the Havana Convention, interpreted in the light of the most firmly established traditions of Latin America, could provide it with no foundation.

The foregoing considerations lead us to reject the argument that the Havana Convention was intended to afford a quite general protection of asylum to any person prosecuted for political offences, either in the course of revolutionary events, or in the more or less troubled times that follow, for the sole reason that it must be assumed that such events interfere with the administration of justice. It is clear that the adoption of such a criterion would lead to foreign interference of a particularly offensive nature in the domestic affairs of States; besides which, no confirmation of this criterion can be found in Latin-American practice, as this practice has been explained to the Court.

In thus expressing itself, the Court does not lose sight of the numerous cases of asylum which have been cited in the Reply of the Government of Colombia and during the oral statements. In this connexion, the following observations should be made:

In the absence of precise data, it is difficult to assess the value of such cases as precedents tending to establish the existence of a legal obligation upon a territorial State to recognize the validity of asylum which has been granted against proceedings instituted by local judicial authorities. The facts which have been laid before the Court show that in a number of cases the persons who have enjoyed asylum were not, at the moment at which asylum was granted, the object of any accusation on the part of the judicial authorities. In a more general way, considerations of convenience or simple political expediency seem to have led the territorial State to recognize asylum without that decision being dictated by any feeling of legal obligation.

If these remarks tend to reduce considerably the value as precedents of the cases of asylum cited by the Government of Colombia, they show, none the less, that asylum as practised in Latin America is an institution which, to a very great extent, owes its development to extra-legal factors. The good-neighbour relations between the republics, the different political interests of the governments, have favoured the mutual recognition of asylum apart from any clearly defined juridical system. Even if the Havana Convention, in particular, represents an indisputable reaction against certain abuses in practice, it in no way tends to limit the practice of asylum as it may arise from agreements between interested governments inspired by mutual feelings of toleration and goodwill.

DISSENTING OPINION OF JUDGE TANAKA

I

In spite of my great respect for the Court, I am unable, to my deep regret, to share the views of the Court concerning some important points in the operative part as well as in the reasons of the Judgment.

What is requested of the International Court of Justice by virtue of the two Special Agreements (Article 1, paragraph 1) is to give a decision on the question:

> "What principles and rules of international law are applicable to the delimitation as between the Partie of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial [boundaries] determined [in the previous agreements concluded by them namely: the Convention of 9 June 1965 between the Kingdom of Denmark and the Federal Republic of Germany and the Convention of 1 December 1964 between the Federal Republic of Germany and the Kingdom of the Netherlands]?"

From the Special Agreements it is clear that what is requested constitutes the "principles and rules of international law" applicable to the said delimitation of the continental shelf and nothing else.

The cases before the Court are concerned with disputes relative to the delimitation of the continental shelf in the North Sea areas. The fact that such disputes arose and the decision of the Court was asked indicates the following fact. An originally geological and geographical concept, i.e., that of the continental shelf, by reason of its intrinsic economic interests (natural resources, particularly minerals such as oil, gas from the subsoil of the seabed) which have become susceptible of exploration and exploitation as the result of recent technological development, has been vested with legal interest and presents itself as a subject-matter of rights and duties subject to the rule of law and constituting an institution belonging to international law.

It is beyond the slightest doubt that this original field of international maritime law involves many new and difficult questions. The fact that after the "Truman Proclamation" of September 1945 there followed a succession of unilateral declarations, decrees and other acts issued by coastal States declaring their exclusive sovereign rights over the adjacent continental shelves was without the slightest doubt a main motive for starting the legislative work of the Geneva Conference on the Continental

Shelf prepared by the International Law Commission of the United Nations. By the Geneva Convention of 1958, the system of the continental shelf definitively acquired the status of a legal institution.

As to the idea and the fundamental principle which govern the continental shelf as a legal institution, it is evidently the realization of harmony between the two interests: the one the interest of individual coastal States for exploration of their continental shelves and exploitation of natural resources; the other the interest of the international community, particularly the safeguarding of the freedom of the high seas.

In this context one point must be emphasized, namely that the institution of the continental shelf adopts as fundamental principles that the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources, that these rights are exclusive and that these rights do not depend on occupation, effective or notional, or on any express proclamation (Article 2, paragraphs 1-3, of the Geneva Convention). It must be noted that this fundamental concept of the continental shelf, being established as customary international law, exercises an important influence upon the decision of the question of delimitation of the continental shelf, as we shall see below.

The necessity for legal regulation on the matter of delimitation of the continental shelf between coastal States can naturally be understood from the fact that boundary disputes between them as a result of extending their jurisdiction over areas of the continental shelf may involve a serious threat to international peace, as in case of disputes over land boundaries. On the contrary, peaceful co-existence of well-ordered activities of exploration and exploitation of the seabed and subsoil natural resources by the States concerned would enormously contribute to the welfare of mankind.

From the above-mentioned viewpoint it becomes clear that the matter concerning the delimitation of the same continental shelf between two or more opposite States or between two adjacent States plays a very important role—the question which is provided in Article 6, paragraphs 1 and 2, of the said Convention. In the present cases this question is involved. In respect of the delimitation of the continental shelf, as well as of the continental shelf as a whole, rule of law and not anarchy must prevail.

II

On the matter of the delimitation, the opinions of the Parties, one the Federal Republic of Germany and the other the Kingdoms of Denmark and the Netherlands, are radically opposed. The former denies the application of equidistance to the present cases; the latter approves its

application. The core of the present cases constitutes the question of the opposability or non-opposability to the Federal Republic of Article 6, paragraph 2, which provides for the principle of equidistance.

It is evident that the 1958 Convention on the Continental Shelf, particularly its Article 6, is not opposable as such to the Federal Republic for the reason of absence of her consent. It is true that she positively participated in the work of the Convention and became one of the signatory States on 30 October 1958, but she did not ratify the Convention. This lack of ratification is the reason for the denial of her contractual obligation regarding the Convention as a whole or in part, and therefore makes it unopposable to her. Although the Geneva Convention of 1958, as a kind of "law-making" treaty, has a great number of States parties, still it cannot bind outsiders to the Convention, among which the Federal Republic belongs.

The fact that the two Kingdoms on the contrary ratified the Convention does not alter this unopposability vis-à-vis the Federal Republic. This is not contested by the two Governments. Therefore it seems unnecessary to deal with this matter further. Still I consider it to have some significance in relation to other contexts.

The following circumstances, namely in addition to the afore-mentioned German positive participation in the work of the Convention and its signature, are to be noted:

The Government Proclamation of 20 January 1964, the *exposé des motifs* to the Bill for the Provisional Determination of Rights over the Continental Shelf of 15 May 1964, and the conclusion of the two "partial boundary" treaties between the Federal Republic and the Netherlands of 1 December 1964 and between the Federal Republic and Denmark of 9 June 1965; in particular, the Proclamation of 20 January 1964 is extremely significant in the sense that the Federal Republic expressly recognized the Geneva Convention as the basis for the exclusive sovereign rights on her continental shelf. Furthermore, the conclusion of the last two treaties regarding the delimitation of the continental shelf, seems to approve the provision of Article 6, paragraph 2, of the Geneva Convention.

These circumstances, operating as a whole, contribute to justification of the binding power of the equidistance principle provided in Article 6, paragraph 2, vis-à-vis the Federal Republic should she be bound by a ground other than contractual obligation, namely by the customary law character of the Convention.

As to whether a situation of estoppel exists or not, I hesitate to recognize this latter because there is no evidence that Denmark and the Netherlands were caused to change position or suffer some prejudice in

reliance on the conduct of the Federal Republic, as is properly stated by the Court's Judgment.

If, in the first place, the Geneva Convention, including Article 6, paragraph 2, is as such not opposable to the Federal Republic, the Court, in the second place, is confronted with the task of examining the contention put forward by the two Kingdoms as to the existence of the customary law character (Article 38, paragraph 1 *(b)*, of the Statute) of the Convention as a whole or the equidistance principle of Article 6, paragraph 2, of the Convention. If the customary law character of the Geneva Convention and the principle of equidistance is established, the latter principle can be applied to the present cases, and that will be the end of the matter.

The history of the continental shelf as a legal institution indicated by the above-mentioned Truman Proclamation of 28 September 1945, does not appear to be long enough to have enabled more or less complete customary international law to have been formulated on this matter. The practical necessity of regulating a great number of claims of coastal States on their adjacent continental shelf so as to avoid a chaotic situation which may be caused by competition and conflict among them, seemed to be a primary consideration of the international community. In 1949 the International Law Commission, representing the main legal systems of the world, took the initiative by appointing the Committee of Experts for the question relating to the territorial sea including the continental shelf. This Committee of Experts terminated its Report, to which reference has been made above, in 1953.

Parallel with the efforts of the International Law Commission, various governmental and non-governmental, as well as academic organizations and institutions, contributed to promoting the legislative work on the continental shelf by study, examination and preparation of drafts.

The efforts of the International Law Commission were crowned by the birth of the Convention on the Continental Shelf adopted on 26 April 1958 by the Geneva Conference which was attended by 86 delegations.

That 46 States have signed and 39 States ratified or acceded to the Convention is already an important achievement towards the recognition of customary international law on the matter of the continental shelf.

To decide whether the equidistance principle of Article 6, paragraph 2, of the Convention can be recognized as customary international law, it is necessary to observe State practice since the Geneva Convention of 1958. In this respect it may be enough to indicate the following five Agreements as examples of the application of the equidistance principle concerning the North Sea continental shelf:

(a) United Kingdom-Norway of 10 March 1965;
(b) Netherlands-United Kingdom of 6 October 1965;
(c) Denmark-Norway of 8 December 1965;

(d) Denmark-United Kingdom of 3 March 1966;
(e) Netherlands-Denmark of 31 March 1966.

I must also mention the two partial boundary treaties concluded by the Federal Republic already indicated.

It must be noted that Norway, who is a party to two of these Agreements, acted on the basis of the equidistance principle notwithstanding the fact that she has not yet acceded to the Geneva Convention, that the Netherlands adopted the equidistance principle in her Agreement with the United Kingdom at a time when she had not yet ratified the Convention and that Belgium had recently adopted the equidistance principle for the delimitation of her continental shelf boundaries, although she is not a party to the Convention (23 October 1967 "Projet de Loi", Art. 2).

It is not certain that before 1958 the equidistance principle existed as a rule of customary international law, and was as such incorporated in Article 6, paragraph 2, of the Convention, but it is certain that equidistance in its median line form has long been known in international law for drawing the boundary lines in sea, lake or river, that, therefore, it is not the simple invention of the experts of the International Law Commission and that this rule has finally acquired the status of customary international law accelerated by the legislative function of the Geneva Convention.

The formation of a customary law in a given society, be it municipal or international, is a complex psychological and sociological process, and therefore, it is not an easy matter to decide. The first factor of customary law, which can be called its *corpus*, constitutes a usage or a continuous repetition of the same kind of acts; in customary international law State practice is required. It represents a quantitative factor of customary law. The second factor of customary law, which can be called its *animus*, constitutes *opinio juris sive necessitatis* by which a simple usage can be transformed into a custom with the binding power. It represents a qualitative factor of customary law.

To decide whether these two factors in the formative process of a customary law exist or not, is a delicate and difficult matter. The repetition, the number of examples of State practice, the duration of time required for the generation of customary law cannot be mathematically and uniformly decided. Each fact requires to be evaluated relatively according to the different occasions and circumstances. Nor is the situation the same in different fields of law such as family law, property law, commercial law, constitutional law, etc. It cannot be denied that the question of repetition is a matter of quantity; therefore there is no alternative to denying the formation of customary law on the continental shelf in general and the equidistance principle if this requirement of quantity is not fulfilled. What I want to emphasize is that what is impor-

tant in the matter at issue is not the number or figure of ratifications of and accessions to the Convention or of examples of subsequent State practice, but the meaning which they would imply in the particular circumstances. We cannot evaluate the ratification of the Convention by a large maritime country or the State practice represented by its concluding an agreement on the basis of the equidistance principle, as having exactly the same importance as similar acts by a land-locked country which possesses no particular interest in the delimitation of the continental shelf.

Next, so far as the qualitative factor, namely *opinio juris sive necessitatis* is concerned, it is extremely difficult to get evidence of its existence in concrete cases. This factor, relating to internal motivation and being of a psychological nature, cannot be ascertained very easily, particularly when diverse legislative and executive organs of a government participate in an internal process of decision-making in respect of ratification or other State acts. There is no other way than to ascertain the existence of *opinio juris* from the fact of the external existence of a certain custom and its necessity felt in the international community, rather than to seek evidence as to the subjective motives for each example of State practice, which is something which is impossible of achievement.

Therefore, the two factors required for the formation of customary law on matters relating to the delimitation of the continental shelf must not be interpreted too rigidly. The appraisal of factors must be relative to the circumstances and therefore elastic; it requires the teleological approach.

As stated above, the generation of customary law is a sociological process. This process itself develops in a society and does not fail to reflect its characteristic upon the manner of generation of customary law. This is the question of the tempo which has to be considered.

Here can be enumerated some sociological factors which may be deemed to have played a positive role in the speedy formation of customary international law on the subject-matter of the continental shelf, including the principle of equidistance.

First, the existence of the Geneva Convention itself plays an important role in the process of the formation of a customary international law in respect of the principle of equidistance. The Geneva Convention constitutes the terminal point of the first stage in the development of law concerning the continental shelf. It consolidated and systematized principles and rules on this matter although its validity did not extend beyond the States parties to the Convention. Furthermore, the Convention constitutes the starting point of the second stage in the

SEPARATE OPINION OF JUDGE DONOGHUE

Obligation under customary international law to exercise due diligence in preventing significant transboundary environmental harm — Environmental Impact Assessment — Notification — Consultation.

1. In each of these joined cases, the Applicant contends that the Respondent violated general international law by causing significant transboundary harm to the territory of the Applicant, by failing to conduct an environmental impact assessment and by failing to notify and to consult with the Applicant. I write separately to present my views regarding customary international law in respect of transboundary environmental harm. In particular, I emphasize that States have an obligation under customary international law to exercise due diligence in preventing significant transboundary environmental harm. I consider that the question whether a proposed activity calls for specific measures, such as an environmental impact assessment, notification to, or consultation with, a potentially affected State, should be judged against this underlying obligation of due diligence.

2. I begin with two points of terminology. First, the Court today, as in the *Pulp* Mills case (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 14), uses the terms "general international law" and "customary international law", apparently without differentiation. Although some writers have ascribed distinct meanings to these two terms, I consider that the task before the Court today is the examination of "international custom, as evidence of a general practice accepted as law" in accordance with Article 38, paragraph 1 *(b)*, of the Statute of the Court. Secondly, I use the term "State of origin" here to refer to a State that itself plans and engages in an activity that could pose a risk of transboundary harm. Much of what I have to say would also apply to a State that authorizes such an activity. I do not intend here to address the legal consequences of private activities that are not attributable to the territorial State, nor do I take account of ultrahazardous activities, which are not before the Court today.

CUSTOMARY INTERNATIONAL LAW OF THE ENVIRONMENT

3. An assessment of the existence and content of customary international law norms is often challenging. Over the years, some have seized on the 1927 statement of the Permanent Court of International Justice that "[r]estrictions upon the independence of States cannot . . . be presumed" (*"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 18) to support the assertion that, where evidence of State practice and *opinio juris* is incomplete or inconsistent, no norm of customary international law constrains a State's freedom of action. Such an assertion, an aspect of the so-called *"Lotus"* principle, ignores the fact that the identification of customary international law must take account of the fundamental parameters of the international legal order. These include the basic characteristics of inter-State relations, such as territorial sovereignty, and the norms embodied in the Charter of the United Nations, including the sovereign equality of States (Article 2, paragraph 1, of the Charter of the United Nations).

4. In the case concerning *Jurisdictional Immunities of the State* (*(Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 99), the question was whether, under customary international law, Germany was immune from certain lawsuits and measures of constraint in Italy. The Court recognized that it faced a situation in which two basic parameters of the international legal order — sovereign equality and territorial sovereignty — were in tension. It observed that State immunity "derives from the principle of sovereign equality of States" which "has to be viewed together with the principle that each State possesses sovereignty over its own territory"

(pp. 123-124, para. 57). More precisely, "[e]xceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it" (p. 124, para. 57). The Court then evaluated the evidence of State practice and *opinio juris* in light of these competing principles, finding sufficient evidence of State practice and *opinio juris* to define with some precision the rules of customary international law that governed the facts in that case.

5. The Court's approach in *Jurisdictional Immunities of the State*, which grounds the analysis in fundamental background principles, applies with equal force to the consideration of the existence and content of customary international law regarding transboundary environmental harm. If a party asserts a particular environmental norm without evidence of general State practice and *opinio juris*, the *"Lotus"* presumption would lead to a conclusion that customary international law imposes no limitation on the State of origin. As in *Jurisdictional Immunities of the State*, however, the appraisal of the existence and content of customary international law regarding transboundary environmental harm must begin by grappling with the tension between sovereign equality and territorial sovereignty.

6. As a consequence of territorial sovereignty, a State of origin has broad freedom with respect to projects in its own territory (the building of a road, the dredging of a river). However, the equal sovereignty of other States means that the State of origin is not free to ignore the potential environmental impact of the project on its neighbours. At the same time, the rights that follow from the equal sovereignty of a potentially affected State do not give it a veto over every project by the State of origin that has the potential to cause transboundary environmental harm.

7. The 1992 Rio Declaration on Environment and Development (Principle 2) and its predecessor, the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment (Principle 21), offer a widely-cited formulation that balances the interests of the State of origin and potentially affected States:

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." (Rio Principle 2.)

8. The Court in the *Pulp Mills* case took an approach that synthesizes the competing rights and responsibilities of two sovereign equals in respect of transboundary environmental harm, by holding the State of origin to a standard of due diligence in the prevention of significant transboundary environmental harm:

> "The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22). A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation 'is now part of the corpus of international law relating to the environment' (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 242, para. 29)." (*Pulp*

> *Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 55-56, para. 101).

Thus, taking into account the sovereign equality and territorial sovereignty of States, it can be said that, under customary international law, a State of origin has a right to engage in activities within its own territory, as well as an obligation to exercise due diligence in preventing significant transboundary environmental harm.

9. The requirement to exercise due diligence, as the governing primary norm, is an obligation of conduct that applies to all phases of a project (e.g., planning, assessment of impact, decision to proceed, implementation, post-implementation monitoring). In the planning phase, a failure to exercise due diligence to prevent significant transboundary environmental harm can engage the responsibility of the State of origin even in the absence of material damage to potentially affected States. This is why (as in *Nicaragua* v. *Costa Rica*) a failure to conduct an environmental impact assessment can give rise to a finding that a State has breached its obligations under customary international law without any showing of material harm to the territory of the affected State. If, at a subsequent phase, the failure of the State of origin to exercise due diligence in the implementation of a project causes significant transboundary harm, the primary norm that is breached remains one of due diligence, but the reparations due to the affected State must also address the material damage caused to the affected State. (For these reasons, I do not find it useful to draw distinctions between "procedural" and "substantive" obligations, as the Court has done.)

10. This obligation to exercise due diligence is framed in general terms, but that does not detract from its importance. The question whether the State of origin has met its due diligence obligations must be answered in light of the particular facts and circumstances. Of course, it is possible that customary international law also contains specific procedural or substantive rules that give effect to this due diligence obligation. To reach conclusions on the existence and content of such specific rules, however, account must be taken of State practice and *opinio juris*. Absent consideration of such information, the Court is not in a position to articulate specific rules, and the rights and obligations of parties should be assessed with reference to the underlying due diligence obligation.

11. With this framework in mind, I turn next to some observations regarding environmental impact assessment, notification and consultation.

ENVIRONMENTAL IMPACT ASSESSMENT

12. In the *Pulp Mills* case, the Court supported its interpretation of a bilateral treaty between the Parties by observing that:

> "it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works." (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 83, para. 204.)

13. This statement is widely understood as a pronouncement that general (or customary) international law imposes a specific obligation to undertake an environmental impact assessment where there is a risk of significant transboundary environmental harm. I am not confident, however, that State practice and *opinio juris* would support the existence of such a specific rule, in addition to the underlying obligation of due diligence. This does not mean that I am dismissive of the importance of environmental impact assessment in meeting a due diligence obligation. If a proposed activity poses a risk of significant transboundary environmental harm, a State of origin would be hard pressed to explain a decision to undertake that activity without prior assessment of the risk of transboundary environmental harm.

14. In *Pulp Mills*, the Court wisely declined to elaborate specific rules and procedures regarding the assessment of transboundary environmental impacts, stating that

> "it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 83, para. 205).

15. Today's Judgment makes clear that the above-quoted passage from the *Pulp Mills* case does not give rise to a *renvoi* to national law in respect of the content and procedures of environmental impact assessment (as one of the Parties had asserted). Instead, the "[d]etermination of the content of the environmental impact assessment should be made in light of the specific circumstances of each case" (paragraph 104). Thus, the Court does not presume to prescribe details as to the content and procedure of transboundary environmental impact assessment. This leaves scope for variation in the way that States of origin conduct the assessment, so long as the State meets its obligation to exercise due diligence in preventing transboundary environmental harm.

NOTIFICATION AND CONSULTATION

16. Today's Judgment also addresses the asserted obligations of notification and consultation in relation to significant transboundary environmental harm, stating that:

> "If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk." (Paragraph 104.)

17. The Court does not provide reasons for its particular formulation of the obligations of notification and consultation, which does not emerge obviously from the positions of the Parties or from State practice and *opinio juris*. Both Parties assert that general international law requires notification and consultation regarding activities which carry a risk of significant transboundary environmental harm. However, the Parties do not present a shared view of the specific content of such an obligation. For example, Nicaragua maintains that a duty to notify and consult only arises if an environmental impact assessment indicates a likelihood of significant transboundary harm to other States, whereas Costa Rica suggests that notice to the potentially affected State may be required prior to undertaking an environmental impact assessment.

18. Because each Party seeks to hold the other to these asserted requirements, neither has an incentive to call attention to aspects of State practice or *opinio juris* that would point away from the existence of particular obligations to notify or to consult. The Court is also ill-equipped to conduct its own survey of the laws and practices of various States on this topic. (To arrive at an understanding of United States federal law regarding environmental impact assessment in a transboundary context, for example, one would need to study legislation, extensive regulations, judicial decisions and the pronouncements of several components of the executive branch.)

19. The Parties do not offer direct evidence of State practice regarding notification and consultation with respect to transboundary environmental impacts, but instead refer the Court to international instruments and decisions of international courts and tribunals. The Court's formulation of specific obligations regarding notification and consultation bears similarity to Articles 8 and 9 of the International Law Commission's 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (*ILC Yearbook*, 2001, Vol. II, Part Two, pp. 146-147). Although these widely-cited Draft Articles and associated commentaries reflect a valuable contribution by the Commission, their role in the assessment of State practice and *opinio juris* must not be overstated. One must also be cautious about drawing broad conclusions regarding the content of customary international law from the text of a treaty or from judicial decisions that interpret a particular treaty (such as the Judgment in *Pulp Mills*). The 1991 Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention), for example, contains specific provisions on notification and consultation. The treaty was drafted to reflect practices in Europe and North America, and, although it is now open to accession by States from other regions, it remains largely a treaty among European States and Canada. When a broader grouping of States has addressed environmental impact assessment, notification and consultation, as in the 1992 Rio Declaration, the resulting formulation has been more general (see Rio Principle 19, which calls for the provision of "prior and timely notification and relevant information" to potentially affected States and consultations with those States "at an early stage and in good faith").

20. For these reasons, whereas I agree that a State's obligation under customary international law to exercise due diligence in preventing significant transboundary environmental harm can give rise to requirements to notify and to consult with potentially affected States, I do not consider that customary international law imposes the specific obligations formulated by the Court. I note two particular concerns.

21. First, the Judgment could be read to suggest that there is only one circumstance in which the State of origin must notify potentially affected States — when the State of origin's environmental impact assessment confirms that there is a risk of significant transboundary harm. A similar trigger for notification appears in Article 8 of the International Law Commission's 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. However, due diligence may call for notification of a potentially affected State at a different stage in the process. For example, input from a potentially affected State may be necessary in order for the State of origin to make a reliable assessment of the risk of transboundary environmental harm. The Espoo Convention (Article 3) calls for notification of a potentially affected State before the environmental impact assessment takes place, thereby allowing that State to participate in that assessment.

22. The facts in the *Nicaragua* v. *Costa Rica* case illustrate the importance of notification before the environmental impact assessment is complete. Only Nicaragua is in a position to take measurements or samples from the San Juan River, or to authorize such activities by Costa Rica. Consequently, it is difficult to see how Costa Rica could conduct a sufficient assessment of the impact on the River without seeking input from its neighbour.

23. Secondly, there are topics other than measures to prevent or to mitigate the risk of significant transboundary harm as to which consultations could play a role in meeting the State of origin's due diligence obligation, such as the parties' respective views on the sensitivity of the environment in the affected State or the procedural details of an environmental impact assessment process.

24. Because the Court today reaffirms that the fundamental duty of the State of origin is to exercise due diligence in preventing significant transboundary environmental harm, I do not understand the Judgment to mean that a State is obligated to notify a potentially affected State only when an environmental impact assessment finds a risk of significant transboundary environmental harm, nor do I consider that the Court has excluded the possibility that the due diligence obligation of the State of origin would call for notification of different information or consultation regarding topics other than those specified by the Court. The question whether due diligence calls for notification or consultation, as well as the details regarding the timing and content of such notification and consultation, should be evaluated in light of particular circumstances.

(Signed) Joan E. DONOGHUE.

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA

(NICARAGUA *v.* UNITED STATES OF AMERICA)

MERITS

JUDGMENT OF 27 JUNE 1986

1986

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DES ACTIVITÉS MILITAIRES ET PARAMILITAIRES AU NICARAGUA ET CONTRE CELUI-CI

(NICARAGUA c. ÉTATS-UNIS D'AMÉRIQUE)

FOND

ARRÊT DU 27 JUIN 1986

to such an extent that a number of rules contained in the Charter have acquired a status independent of it. The essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations. The differences which may exist between the specific content of each are not, in the Court's view, such as to cause a judgment confined to the field of customary international law to be ineffective or inappropriate, or a judgment not susceptible of compliance or execution.

182. The Court concludes that it should exercise the jurisdiction conferred upon it by the United States declaration of acceptance under Article 36, paragraph 2, of the Statute, to determine the claims of Nicaragua based upon customary international law notwithstanding the exclusion from its jurisdiction of disputes "arising under" the United Nations and Organization of American States Charters.

* * *

183. In view of this conclusion, the Court has next to consider what are the rules of customary international law applicable to the present dispute. For this purpose, it has to direct its attention to the practice and *opinio juris* of States ; as the Court recently observed,

> "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them." (*Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985,* pp. 29-30, para. 27.)

In this respect the Court 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. Although the Court has no jurisdiction to determine whether the conduct of the United States constitutes a breach of those conventions, it can and must take them into account in ascertaining the content of the customary international law which the United States is also alleged to have infringed.

184. The Court notes that there is in fact evidence, to be examined below, of a considerable degree of agreement between the Parties as to the content of the customary international law relating to the non-use of force and non-intervention. This concurrence of their views does not however dispense the Court from having itself to ascertain what rules of customary international law are applicable. 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. 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.

185. In the present dispute, the Court, while exercising its jurisdiction only in respect of the application of the customary rules of non-use of force and non-intervention, cannot disregard the fact that the Parties are bound by these rules as a matter of treaty law and of customary international law. Furthermore, in the present case, apart from the treaty commitments binding the Parties to the rules in question, there are various instances of their having expressed recognition of the validity thereof as customary international law in other ways. It is therefore in the light of this "subjective element" – the expression used by the Court in its 1969 Judgment in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 44) – that the Court has to appraise the relevant practice.

186. It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.

* *

187. The Court must therefore determine, first, the substance of the customary rules relating to the use of force in international relations, applicable to the dispute submitted to it. The United States has argued that, on this crucial question of the lawfulness of the use of force in inter-State relations, the rules of general and customary international law, and those of the United Nations Charter, are in fact identical. In its view this identity is so complete that, as explained above (paragraph 173), it constitutes an argument to prevent the Court from applying this customary law, because it is indistinguishable from the multilateral treaty law which it may not apply. In its Counter-Memorial on jurisdiction and

admissibility the United States asserts that "Article 2 (4) of the Charter *is* customary and general international law". It quotes with approval an observation by the International Law Commission to the effect that

> "the great majority of international lawyers today unhesitatingly hold that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force" (*ILC Yearbook*, 1966, Vol. II, p. 247).

The United States points out that Nicaragua has endorsed this view, since one of its counsel asserted that "indeed it is generally considered by publicists that Article 2, paragraph 4, of the United Nations Charter is in this respect an embodiment of existing general principles of international law". And the United States concludes :

> "In sum, the provisions of Article 2 (4) with respect to the lawfulness of the use of force *are* 'modern customary law' (International Law Commission, *loc. cit.*) and the 'embodiment of general principles of international law' (counsel for Nicaragua, Hearing of 25 April 1984, morning, *loc. cit.*). There is no other 'customary and general international law' on which Nicaragua can rest its claims."

> "It is, in short, inconceivable that this Court could consider the lawfulness of an alleged use of armed force without referring to the principal source of the relevant international law – Article 2 (4) of the United Nations Charter."

As for Nicaragua, the only noteworthy shade of difference in its view lies in Nicaragua's belief that

> "in certain cases the rule of customary law will not necessarily be identical in content and mode of application to the conventional rule".

188. The Court thus finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law. The Parties thus both take the view that the fundamental principle in this area is expressed in the terms employed in Article 2, paragraph 4, of the United Nations Charter. They therefore accept a treaty-law obligation to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. 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. This *opinio juris* may, though with all due caution, be deduced

from, *inter alia,* the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". 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. The principle of non-use of force, for example, may thus be regarded as a principle of customary international law, not as such conditioned by provisions relating to collective security, or to the facilities or armed contingents to be provided under Article 43 of the Charter. It would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such rule (or set of rules), to be thenceforth treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter.

189. As regards the United States in particular, the weight of an expression of *opinio juris* can similarly be attached to its support of the resolution of the Sixth International Conference of American States condemning aggression (18 February 1928) and ratification of the Montevideo Convention on Rights and Duties of States (26 December 1933), Article 11 of which imposes the obligation not to recognize territorial acquisitions or special advantages which have been obtained by force. Also significant is United States acceptance of the principle of the prohibition of the use of force which is contained in the declaration on principles governing the mutual relations of States participating in the Conference on Security and Co-operation in Europe (Helsinki, 1 August 1975), whereby the participating States undertake to "refrain in their mutual relations, *as well as in their international relations in general,*" (emphasis added) from the threat or use of force. Acceptance of a text in these terms confirms the existence of an *opinio juris* of the participating States prohibiting the use of force in international relations.

190. A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*" (paragraph (1) of the commentary of the Commission to Article 50 of its draft Articles on the Law of Treaties, *ILC Yearbook,* 1966-II, p. 247). Nicaragua in its

Memorial on the Merits submitted in the present case states that the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations "has come to be recognized as *jus cogens*". The United States, in its Counter-Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this principle is a "universal norm", a "universal international law", a "universally recognized principle of international law", and a "principle of *jus cogens*".

191. As regards certain particular aspects of the principle in question, it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms. In determining the legal rule which applies to these latter forms, the Court can again draw on the formulations contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), referred to above). As already observed, the adoption by States of this text affords an indication of their *opinio juris* as to customary international law on the question. Alongside certain descriptions which may refer to aggression, this text includes others which refer only to less grave forms of the use of force. In particular, according to this resolution :

> "Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.
>
> . . . . . .
>
> States have a duty to refrain from acts of reprisal involving the use of force.
>
> . . . . . .
>
> Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of that right to self-determination and freedom and independence.
>
> Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.
>
> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force."

192. Moreover, in the part of this same resolution devoted to the principle of non-intervention in matters within the national jurisdiction of States, a very similar rule is found :

> "Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State."

In the context of the inter-American system, this approach can be traced back at least to 1928 (Convention on the Rights and Duties of States in the Event of Civil Strife, Art. 1 (1)) ; it was confirmed by resolution 78 adopted by the General Assembly of the Organization of American States on 21 April 1972. The operative part of this resolution reads as follows :

> *"The General Assembly Resolves :*
>
> 1. To reiterate solemnly the need for the member states of the Organization to observe strictly the principles of nonintervention and self-determination of peoples as a means of ensuring peaceful coexistence among them and to refrain from committing any direct or indirect act that might constitute a violation of those principles.
>
> 2. To reaffirm the obligation of those states to refrain from applying economic, political, or any other type of measures to coerce another state and obtain from it advantages of any kind.
>
> 3. Similarly, to reaffirm the obligation of these states to refrain from organizing, supporting, promoting, financing, instigating, or tolerating subversive, terrorist, or armed activities against another state and from intervening in a civil war in another state or in its internal struggles."

193. The general rule prohibiting force allows for certain exceptions. In view of the arguments advanced by the United States to justify the acts of which it is accused by Nicaragua, the Court must express a view on the content of the right of self-defence, and more particularly the right of collective self-defence. First, with regard to the existence of this right, it notes that in the language of Article 51 of the United Nations Charter, the inherent right (or "droit naturel") which any State possesses in the event of an armed attack, covers both collective and individual self-defence. Thus, the Charter itself testifies to the existence of the right of collective self-defence in customary international law. Moreover, just as the wording of certain General Assembly declarations adopted by States demonstrates their recognition of the principle of the prohibition of force as definitely a matter of customary international law, some of the wording in those declarations operates similarly in respect of the right of self-defence (both collective and individual). Thus, in the declaration quoted above on the

Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the reference to the prohibition of force is followed by a paragraph stating that :

> "nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful".

This resolution demonstrates that the States represented in the General Assembly regard the exception to the prohibition of force constituted by the right of individual or collective self-defence as already a matter of customary international law.

194. With regard to the characteristics governing the right of self-defence, since the Parties consider the existence of this right to be established as a matter of customary international law, they have concentrated on the conditions governing its use. In view of the circumstances in which the dispute has arisen, reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised. Accordingly the Court expresses no view on that issue. The Parties also agree in holding that whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence. Since the existence of the right of collective self-defence is established in customary international law, the Court must define the specific conditions which may have to be met for its exercise, in addition to the conditions of necessity and proportionality to which the Parties have referred.

195. In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this. There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" *(inter alia)* an actual armed attack conducted by regular forces, "or its substantial involvement therein". This description, contained in Article 3, paragraph *(g)*, of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the

Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States. It is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.

196. The question remains whether the lawfulness of the use of collective self-defence by the third State for the benefit of the attacked State also depends on a request addressed by that State to the third State. A provision of the Charter of the Organization of American States is here in point : and while the Court has no jurisdiction to consider that instrument as applicable to the dispute, it may examine it to ascertain what light it throws on the content of customary international law. The Court notes that the Organization of American States Charter includes, in Article 3 *(f)*, the principle that : "an act of aggression against one American State is an act of aggression against all the other American States" and a provision in Article 27 that :

> "Every act of aggression by a State against the territorial integrity or the inviolability of the territory or against the sovereignty or political independence of an American State shall be considered an act of aggression against the other American States."

197. Furthermore, by Article 3, paragraph 1, of the Inter-American Treaty of Reciprocal Assistance, signed at Rio de Janeiro on 2 September 1947, the High-Contracting Parties

> "agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations" ;

and under paragraph 2 of that Article,

> "On the request of the State or States directly attacked and until the decision of the Organ of Consultation of the Inter-American System, each one of the Contracting Parties may determine the immediate

measures which it may individually take in fulfilment of the obligation contained in the preceding paragraph and in accordance with the principle of continental solidarity."

(The 1947 Rio Treaty was modified by the 1975 Protocol of San José, Costa Rica, but that Protocol is not yet in force.)

198. The Court observes that the Treaty of Rio de Janeiro provides that measures of collective self-defence taken by each State are decided "on the request of the State or States directly attacked". It is significant that this requirement of a request on the part of the attacked State appears in the treaty particularly devoted to these matters of mutual assistance ; it is not found in the more general text (the Charter of the Organization of American States), but Article 28 of that Charter provides for the application of the measures and procedures laid down in "the special treaties on the subject".

199. At all events, the Court finds that in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack. The Court concludes that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked.

200. At this point, the Court may consider whether in customary international law there is any requirement corresponding to that found in the treaty law of the United Nations Charter, by which the State claiming to use the right of individual or collective self-defence must report to an international body, empowered to determine the conformity with international law of the measures which the State is seeking to justify on that basis. Thus Article 51 of the United Nations Charter requires that measures taken by States in exercise of this right of self-defence must be "immediately reported" to the Security Council. As the Court has observed above (paragraphs 178 and 188), a principle enshrined in a treaty, if reflected in customary international law, may well be so unencumbered with the conditions and modalities surrounding it in the treaty. Whatever influence the Charter may have had on customary international law in these matters, it is clear that in customary international law it is not a condition of the lawfulness of the use of force in self-defence that a procedure so closely dependent on the content of a treaty commitment and of the institutions established by it, should have been followed. On the other hand, if self-defence is advanced as a justification for measures which would otherwise be in breach both of the principle of customary international law and of that contained in the Charter, it is to be expected that the conditions of the Charter should be respected. Thus for the purpose of enquiry into the customary law position, the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence.

201. To justify certain activities involving the use of force, the United States has relied solely on the exercise of its right of collective self-defence. However the Court, having regard particularly to the non-participation of the United States in the merits phase, considers that it should enquire whether customary international law, applicable to the present dispute, may contain other rules which may exclude the unlawfulness of such activities. It does not, however, see any need to reopen the question of the conditions governing the exercise of the right of individual self-defence, which have already been examined in connection with collective self-defence. On the other hand, the Court must enquire whether there is any justification for the activities in question, to be found not in the right of collective self-defence against an armed attack, but in the right to take counter-measures in response to conduct of Nicaragua which is not alleged to constitute an armed attack. It will examine this point in connection with an analysis of the principle of non-intervention in customary international law.

* *

202. The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference ; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law. As the Court has observed : "Between independent States, respect for territorial sovereignty is an essential foundation of international relations" (*I.C.J. Reports 1949,* p. 35), and international law requires political integrity also to be respected. Expressions of an *opinio juris* regarding the existence of the principle of non-intervention in customary international law are numerous and not difficult to find. Of course, statements whereby States avow their recognition of the principles of international law set forth in the United Nations Charter cannot strictly be interpreted as applying to the principle of non-intervention by States in the internal and external affairs of other States, since this principle is not, as such, spelt out in the Charter. But it was never intended that the Charter should embody written confirmation of every essential principle of international law in force. The existence in the *opinio juris* of States of the principle of non-intervention is backed by established and substantial practice. It has moreover been presented as a corollary of the principle of the sovereign equality of States. A particular instance of this is General Assembly resolution 2625 (XXV), the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States. In the *Corfu Channel* case, when a State claimed a right of intervention in order to secure evidence in the territory of another State for submission to an international tribunal (*I.C.J. Reports 1949,* p. 34), the Court observed that :

"the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here ; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself." (*I.C.J. Reports 1949,* p. 35.)

203. The principle has since been reflected in numerous declarations adopted by international organizations and conferences in which the United States and Nicaragua have participated, e.g., General Assembly resolution 2131 (XX), the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty. It is true that the United States, while it voted in favour of General Assembly resolution 2131 (XX), also declared at the time of its adoption in the First Committee that it considered the declaration in that resolution to be "only a statement of political intention and not a formulation of law" (*Official Records of the General Assembly, Twentieth Session,* First Committee, A/C.1/SR.1423, p. 436). However, the essentials of resolution 2131 (XX) are repeated in the Declaration approved by resolution 2625 (XXV), which set out principles which the General Assembly declared to be "basic principles" of international law, and on the adoption of which no analogous statement was made by the United States representative.

204. As regards inter-American relations, attention may be drawn to, for example, the United States reservation to the Montevideo Convention on Rights and Duties of States (26 December 1933), declaring the opposition of the United States Government to "interference with the freedom, the sovereignty or other internal affairs, or processes of the Governments of other nations" ; or the ratification by the United States of the Additional Protocol relative to Non-Intervention (23 December 1936). Among more recent texts, mention may be made of resolutions AG/RES.78 and AG/RES.128 of the General Assembly of the Organization of American States. In a different context, the United States expressly accepted the principles set forth in the declaration, to which reference has already been made, appearing in the Final Act of the Conference on Security and Co-operation in Europe (Helsinki, 1 August 1975), including an elaborate statement of the principle of non-intervention ; while these principles were presented as applying to the mutual relations among the participating States, it can be inferred that the text testifies to the existence, and the acceptance by the United States, of a customary principle which has universal application.

205. Notwithstanding the multiplicity of declarations by States accepting the principle of non-intervention, there remain two questions : first,

what is the exact content of the principle so accepted, and secondly, is the practice sufficiently in conformity with it for this to be a rule of customary international law ? As regards the first problem – that of the content of the principle of non-intervention – the Court will define only those aspects of the principle which appear to be relevant to the resolution of the dispute. In this respect it notes that, in view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State. As noted above (paragraph 191), General Assembly resolution 2625 (XXV) equates assistance of this kind with the use of force by the assisting State when the acts committed in another State "involve a threat or use of force". These forms of action are therefore wrongful in the light of both the principle of non-use of force, and that of non-intervention. In view of the nature of Nicaragua's complaints against the United States, and those expressed by the United States in regard to Nicaragua's conduct towards El Salvador, it is primarily acts of intervention of this kind with which the Court is concerned in the present case.

206. However, before reaching a conclusion on the nature of prohibited intervention, the Court must be satisfied that State practice justifies it. There have been in recent years a number of instances of foreign intervention for the benefit of forces opposed to the government of another State. The Court is not here concerned with the process of decolonization ; this question is not in issue in the present case. It has to consider whether there might be indications of a practice illustrative of belief in a kind of general right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified. For such a general right to come into existence would involve a fundamental modification of the customary law principle of non-intervention.

207. In considering the instances of the conduct above described, the Court has to emphasize that, as was observed in the *North Sea Continental Shelf* cases, for a new customary rule to be formed, not only must the acts concerned "amount to a settled practice", but they must be accompanied

by the *opinio juris sive necessitatis.* Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is

> "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis.*" (*I.C.J. Reports 1969,* p. 44, para. 77.)

The Court has no jurisdiction to rule upon the conformity with international law of any conduct of States not parties to the present dispute, or of conduct of the Parties unconnected with the dispute ; nor has it authority to ascribe to States legal views which they do not themselves advance. The significance for the Court of cases of State conduct prima facie inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law. In fact however the Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition. The United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign State for reasons connected with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy. But these were statements of international policy, and not an assertion of rules of existing international law.

208. In particular, as regards the conduct towards Nicaragua which is the subject of the present case, the United States has not claimed that its intervention, which it justified in this way on the political level, was also justified on the legal level, alleging the exercise of a new right of intervention regarded by the United States as existing in such circumstances. As mentioned above, the United States has, on the legal plane, justified its intervention expressly and solely by reference to the "classic" rules involved, namely, collective self-defence against an armed attack. Nicaragua, for its part, has often expressed its solidarity and sympathy with the opposition in various States, especially in El Salvador. But Nicaragua too has not argued that this was a legal basis for an intervention, let alone an intervention involving the use of force.

209. The Court therefore finds that no such general right of intervention, in support of an opposition within another State, exists in contemporary international law. The Court concludes that acts constituting a breach of the customary principle of non-intervention will also, if they

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DES PÊCHERIES

(ROYAUME-UNI c. NORVÈGE)

ARRÊT DU 18 DÉCEMBRE 1951

1951

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

FISHERIES CASE

(UNITED KINGDOM *v.* NORWAY)

JUDGMENT OF DECEMBER 18th, 1951

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Norwegian sovereignty over these waters would constitute an exception, historic titles justifying situations which would otherwise be in conflict with international law.

As has been said, the United Kingdom Government concedes that Norway is entitled to claim as internal waters all the waters of fjords and sunds which fall within the conception of a bay as defined in international law whether the closing line of the indentation is more or less than ten sea miles long. But the United Kingdom Government concedes this only on the basis of historic title; it must therefore be taken that that Government has not abandoned its contention that the ten-mile rule is to be regarded as a rule of international law.

In these circumstances the Court deems it necessary to point out that although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law.

In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.

The Court now comes to the question of the length of the base-lines drawn across the waters lying between the various formations of the "skjærgaard". Basing itself on the analogy with the alleged general rule of ten miles relating to bays, the United Kingdom Government still maintains on this point that the length of straight lines must not exceed ten miles.

In this connection, the practice of States does not justify the formulation of any general rule of law. The attempts that have been made to subject groups of islands or coastal archipelagoes to conditions analogous to the limitations concerning bays (distance between the islands not exceeding twice the breadth of the territorial waters, or ten or twelve sea miles), have not got beyond the stage of proposals.

Furthermore, apart from any question of limiting the lines to ten miles, it may be that several lines can be envisaged. In such cases the coastal State would seem to be in the best position to appraise the local conditions dictating the selection.

Consequently, the Court is unable to share the view of the United Kingdom Government, that "Norway, in the matter of base-lines, now claims recognition of an exceptional system". As will be shown later, all that the Court can see therein is the application of general international law to a specific case.

The Conclusions of the United Kingdom, points 5 and 9 to 11, refer to waters situated between the base-lines and the Norwegian mainland. The Court is asked to hold that on historic grounds these waters belong to Norway, but that they are divided into two categories: territorial and internal waters, in accordance with two criteria which the Conclusions regard as well founded in international law, the waters falling within the conception of a bay being deemed to be internal waters, and those having the character of legal straits being deemed to be territorial waters.

As has been conceded by the United Kingdom, the "skjærgaard" constitutes a whole with the Norwegian mainland; the waters between the base-lines of the belt of territorial waters and the mainland are internal waters. However, according to the argument of the United Kingdom a portion of these waters constitutes territorial waters. These are *inter alia* the waters followed by the navigational route known as the Indreleia. It is contended that since these waters have this character, certain consequences arise with regard to the determination of the territorial waters at the end of this water-way considered as a maritime strait.

The Court is bound to observe that the Indreleia is not a strait at all, but rather a navigational route prepared as such by means of artificial aids to navigation provided by Norway. In these circumstances the Court is unable to accept the view that the Indreleia, for the purposes of the present case, has a status different from that of the other waters included in the "skjærgaard".

Thus the Court, confining itself for the moment to the Conclusions of the United Kingdom, finds that the Norwegian Government in fixing the base-lines for the delimitation of the Norwegian fisheries zone by the 1935 Decree has not violated international law.

* * *

It does not at all follow that, in the absence of rules having the technically precise character alleged by the United Kingdom Government, the delimitation undertaken by the Norwegian Government in 1935 is not subject to certain principles which make it possible to judge as to its validity under international law. The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.

In this connection, certain basic considerations inherent in the nature of the territorial sea, bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question.

Among these considerations, some reference must be made to the close dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal State a right to the waters off its coasts. It follows that while such a State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast.

Another fundamental consideration, of particular importance in this case, is the more or less close relationship existing between certain sea areas and the land formations which divide or surround them. The real question raised in the choice of base-lines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters. This idea, which is at the basis of the determination of the rules relating to bays, should be liberally applied in the case of a coast, the geographical configuration of which is as unusual as that of Norway.

Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors : that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage.

Norway puts forward the 1935 Decree as the application of a traditional system of delimitation, a system which she claims to be in complete conformity with international law. The Norwegian Government has referred in this connection to an historic title, the meaning of which was made clear by Counsel for Norway at the sitting on October 12th, 1951 : "The Norwegian Government does not rely upon history to justify exceptional rights, to claim areas of sea which the general law would deny ; it invokes history, together with other factors, to justify the way in which it applies the general law." This conception of an historic title is in consonance with the Norwegian Government's understanding of the general rules of international law. In its view, these rules of international law take into account the diversity of facts and, therefore, concede that the drawing of base-lines must be adapted to the special conditions obtaining in different regions. In its view, the system of delimitation applied in 1935, a system characterized by the use of straight lines, does not therefore infringe the general law ; it is an adaptation rendered necessary by local conditions.

The Court must ascertain precisely what this alleged system of delimitation consists of, what is its effect in law as against the United Kingdom, and whether it was applied by the 1935 Decree in a manner which conformed to international law.

It is common ground between the Parties that on the question of the existence of a Norwegian system, the Royal Decree of February 22nd, 1812, is of cardinal importance. This Decree is in the following terms: "We wish to lay down as a rule that, in all cases when there is a question of determining the limit of our territorial sovereignty at sea, that limit shall be reckoned at the distance of one ordinary sea league from the island or islet farthest from the mainland, not covered by the sea; of which all proper authorities shall be informed by rescript."

This text does not clearly indicate how the base-lines between the islands or islets farthest from the mainland were to be drawn. In particular, it does not say in express terms that the lines must take the form of straight lines drawn between these points. But it may be noted that it was in this way that the 1812 Decree was invariably construed in Norway in the course of the 19th and 20th centuries.

The Decree of October 16th, 1869, relating to the delimitation of Sunnmöre, and the Statement of Reasons for this Decree, are particularly revealing as to the traditional Norwegian conception and the Norwegian construction of the Decree of 1812. It was by reference to the 1812 Decree, and specifically relying upon "the conception" adopted by that Decree, that the Ministry of the Interior justified the drawing of a straight line 26 miles in length between the two outermost points of the "skjærgaard". The Decree of September 9th, 1889, relating to the delimitation of Romsdal and Nordmöre, applied the same method, drawing four straight lines, respectively 14.7 miles, 7 miles, 23.6 miles and 11.6 miles in length.

The 1812 Decree was similarly construed by the Territorial Waters Boundary Commission (Report of February 29th, 1912, pp. 48-49), as it was in the Memorandum of January 3rd, 1929, sent by the Norwegian Government to the Secretary-General of the League of Nations, in which it was said: "The direction laid down by this Decree should be interpreted in the sense that the starting-point for calculating the breadth of the territorial waters should be a line drawn along the 'skjærgaard' between the furthest rocks and, where there is no 'skjærgaard', between the extreme points." The judgment delivered by the Norwegian Supreme Court in 1934, in the *St. Just* case, provided final authority for this interpretation. This conception accords with the geographical characteristics of the Norwegian coast and is not contrary to the principles of international law.

It should, however, be pointed out that whereas the 1812 Decree designated as base-points "the island or islet farthest from the mainland not covered by the sea", Norwegian governmental practice subsequently interpreted this provision as meaning that the limit was to be reckoned from the outermost islands and islets "not continuously covered by the sea".

The 1812 Decree, although quite general in its terms, had as its immediate object the fixing of the limit applicable for the purposes of maritime neutrality. However, as soon as the Norwegian Government found itself impelled by circumstances to delimit its fisheries zone, it regarded that Decree as laying down principles to be applied for purposes other than neutrality. The Statements of Reasons of October 1st, 1869, December 20th, 1880, and May 24th, 1889, are conclusive on this point. They also show that the delimitation effected in 1869 and in 1889 constituted a reasoned application of a definite system applicable to the whole of the Norwegian coast line, and was not merely legislation of local interest called for by any special requirements. The following passage from the Statement of Reasons of the 1869 Decree may in particular be referred to: "My Ministry assumes that the general rule mentioned above [namely, the four-mile rule], which is recognized by international law for the determination of the extent of a country's territorial waters, must be applied here in such a way that the sea area inside a line drawn parallel to a straight line between the two outermost islands or rocks not covered by the sea, Svinöy to the south and Storholmen to the north, and one geographical league north-west of that straight line, should be considered Norwegian maritime territory."

The 1869 Statement of Reasons brings out all the elements which go to make up what the Norwegian Government describes as its traditional system of delimitation : base-points provided by the islands or islets farthest from the mainland, the use of straight lines joining up these points, the lack of any maximum length for such lines. The judgment of the Norwegian Supreme Court in the *St. Just* case upheld this interpretation and added that the 1812 Decree had never been understood or applied "in such a way as to make the boundary follow the sinuosities of the coast or to cause its position to be determined by means of circles drawn round the points of the Skjærgaard or of the mainland furthest out to sea—a method which it would be very difficult to adopt or to enforce in practice, having regard to the special configuration of this coast". Finally, it is established that, according to the Norwegian system, the base-lines must follow the general direction of the coast, which is in conformity with international law.

Equally significant in this connection is the correspondence which passed between Norway and France between 1869-1870. On December 21st, 1869, only two months after the promulgation

of the Decree of October 16th relating to the delimitation of Sunnmöre, the French Government asked the Norwegian Government for an explanation of this enactment. It did so basing itself upon "the principles of international law". In a second Note dated December 30th of the same year, it pointed out that the distance between the base-points was greater than 10 sea miles, and that the line joining up these points should have been a broken line following the configuration of the coast. In a Note of February 8th, 1870, the Ministry for Foreign Affairs, also dealing with the question from the point of view of international law, replied as follows :

> "By the same Note of December 30th, Your Excellency drew my attention to the fixing of the fishery limit in the Sunnmöre Archipelago by a straight line instead of a broken line. According to the view held by your Government, as the distance between the islets of Svinöy and Storholmen is more than 10 sea miles, the fishery limit between these two points should have been a broken line following the configuration of the coast line and nearer to it than the present limit. In spite of the adoption in some treaties of the quite arbitrary distance of 10 sea miles, this distance would not appear to me to have acquired the force of an international law. Still less would it appear to have any foundation in reality : one bay, by reason of the varying formations of the coast and sea-bed, may have an entirely different character from that of another bay of the same width. It seems to me rather that local conditions and considerations of what is practicable and equitable should be decisive in specific cases. The configuration of our coasts in no way resembles that of the coasts of other European countries, and that fact alone makes the adoption of any absolute rule of universal application impossible in this case.
>
> I venture to claim that all these reasons militate in favour of the line laid down by the Decree of October 16th. A broken line, conforming closely to the indentations of the coast line between Svinöy and Storholmen, would have resulted in a boundary so involved and so indistinct that it would have been impossible to exercise any supervision over it...."

Language of this kind can only be construed as the considered expression of a legal conception regarded by the Norwegian Government as compatible with international law. And indeed, the French Government did not pursue the matter. In a Note of July 27th, 1870, it is said that, while maintaining its standpoint with regard to principle, it was prepared to accept the delimitation laid down by the Decree of October 16th, 1869, as resting upon "a practical study of the configuration of the coast line and of the conditions of the inhabitants".

The Court, having thus established the existence and the constituent elements of the Norwegian system of delimitation, further finds that this system was consistently applied by Norwegian

authorities and that it encountered no opposition on the part of other States.

The United Kingdom Government has however sought to show that the Norwegian Government has not consistently followed the principles of delimitation which, it claims, form its system, and that it has admitted by implication that some other method would be necessary to comply with international law. The documents to which the Agent of the Government of the United Kingdom principally referred at the hearing on October 20th, 1951, relate to the period between 1906 and 1908, the period in which British trawlers made their first appearance off the Norwegian coast, and which, therefore, merits particular attention.

The United Kingdom Government pointed out that the law of June 2nd, 1906, which prohibited fishing by foreigners, merely forbade fishing in "Norwegian territorial waters", and it deduced from the very general character of this reference that no definite system existed. The Court is unable to accept this interpretation, as the object of the law was to renew the prohibition against fishing and not to undertake a precise delimitation of the territorial sea.

The second document relied upon by the United Kingdom Government is a letter dated March 24th, 1908, from the Minister for Foreign Affairs to the Minister of National Defence. The United Kingdom Government thought that this letter indicated an adherence by Norway to the low-water mark rule contrary to the present Norwegian position. This interpretation cannot be accepted ; it rests upon a confusion between the low-water mark rule as understood by the United Kingdom, which requires that all the sinuosities of the coast line at low tide should be followed, and the general practice of selecting the low-tide mark rather than that of the high tide for measuring the extent of the territorial sea.

The third document referred to is a Note, dated November 11th, 1908, from the Norwegian Minister for Foreign Affairs to the French Chargé d'Affaires at Christiania, in reply to a request for information as to whether Norway had modified the limits of her territorial waters. In it the Minister said : "Interpreting Norwegian regulations in this matter, whilst at the same time conforming to the general rule of the Law of Nations, this Ministry gave its opinion that the distance from the coast should be measured from the low-water mark and that every islet not continuously covered by the sea should be reckoned as a starting-point." The United Kingdom Government argued that by the reference to "the general rule of the Law of Nations", instead of to its own system of delimitation entailing the use of straight lines, and, furthermore, by its statement that "every islet not continuously covered by the sea should be reckoned as a starting-point", the Norwegian Government had completely departed from what it to-day describes as its system.

It must be remembered that the request for information to which the Norwegian Government was replying related not to the use of straight lines, but to the breadth of Norwegian territorial waters. The point of the Norwegian Government's reply was that there had been no modification in the Norwegian legislation. Moreover, it is impossible to rely upon a few words taken from a single note to draw the conclusion that the Norwegian Government had abandoned a position which its earlier official documents had clearly indicated.

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. They may be easily understood in the light of the variety of the facts and conditions prevailing in the long period which has elapsed since 1812, and are not such as to modify the conclusions reached by the Court.

In the light of these considerations, and in the absence of convincing evidence to the contrary, the Court is bound to hold that the Norwegian authorities applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose.

From the standpoint of international law, it is now necessary to consider whether the application of the Norwegian system encountered any opposition from foreign States.

Norway has been in a position to argue without any contradiction that neither the promulgation of her delimitation Decrees in 1869 and in 1889, nor their application, gave rise to any opposition on the part of foreign States. Since, moreover, these Decrees constitute, as has been shown above, the application of a well-defined and uniform system, it is indeed this system itself which would reap the benefit of general toleration, the basis of an historical consolidation which would make it enforceable as against all States.

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. One cannot indeed consider as raising objections the discussions to which the *Lord Roberts* incident gave rise in 1911, for the controversy which arose in this connection related to two questions, that of the four-mile limit, and that of Norwegian sovereignty over the Varangerfjord, both of which were unconnected with the position of base-lines. It would appear that it was only in its Memorandum of July 27th, 1933, that the United Kingdom made a formal and definite protest on this point.

The United Kingdom Government has argued that the Norwegian system of delimitation was not known to it and that the

system therefore lacked the notoriety essential to provide the basis of an historic title enforceable against it. The Court is unable to accept this view. As a coastal State on the North Sea, greatly interested in the fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the United Kingdom could not have been ignorant of the Decree of 1869 which had at once provoked a request for explanations by the French Government. Nor, knowing of it, could it have been under any misapprehension as to the significance of its terms, which clearly described it as constituting the application of a system. The same observation applies *a fortiori* to the Decree of 1889 relating to the delimitation of Romsdal and Nordmöre which must have appeared to the United Kingdom as a reiterated manifestation of the Norwegian practice.

Norway's attitude with regard to the North Sea Fisheries (Police) Convention of 1882 is a further fact which must at once have attracted the attention of Great Britain. There is scarcely any fisheries convention of greater importance to the coastal States of the North Sea or of greater interest to Great Britain. Norway's refusal to adhere to this Convention clearly raised the question of the delimitation of her maritime domain, especially with regard to bays, the question of their delimitation by means of straight lines of which Norway challenged the maximum length adopted in the Convention. Having regard to the fact that a few years before, the delimitation of Sunnmöre by the 1869 Decree had been presented as an application of the Norwegian system, one cannot avoid the conclusion that, from that time on, all the elements of the problem of Norwegian coastal waters had been clearly stated. The steps subsequently taken by Great Britain to secure Norway's adherence to the Convention clearly show that she was aware of and interested in the question.

The Court notes that in respect of a situation which could only be strengthened with the passage of time, the United Kingdom Government refrained from formulating reservations.

The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.

The Court is thus led to conclude that the method of straight lines, established in the Norwegian system, was imposed by the peculiar geography of the Norwegian coast ; that even before the dispute arose, this method had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law.

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DE LA DÉLIMITATION DE LA FRONTIÈRE MARITIME DANS LA RÉGION DU GOLFE DU MAINE

(CANADA/ÉTATS-UNIS D'AMÉRIQUE)

ARRÊT DU 12 OCTOBRE 1984 RENDU PAR LA CHAMBRE CONSTITUÉE PAR ORDONNANCE DE LA COUR DU 20 JANVIER 1982

1984

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING DELIMITATION OF THE MARITIME BOUNDARY IN THE GULF OF MAINE AREA

(CANADA/UNITED STATES OF AMERICA)

JUDGMENT OF 12 OCTOBER 1984 GIVEN BY THE CHAMBER CONSTITUTED BY THE ORDER MADE BY THE COURT ON 20 JANUARY 1982

whose case the use of the term "principles" may be justified because of their more general and more fundamental character.

80. One preliminary remark is necessary before we come to the essence of the matter, since it seems above all essential to stress the distinction to be drawn between what are principles and rules of international law governing the matter and what could be better described as the various equitable criteria and practical methods that may be used to ensure *in concreto* that a particular situation is dealt with in accordance with the principles and rules in question.

81. In a matter of this kind, international law – and in this respect the Chamber has logically to refer primarily to customary international law – can of its nature only provide a few basic legal principles, which lay down guidelines to be followed with a view to an essential objective. It cannot also be expected to specify the equitable criteria to be applied or the practical, often technical, methods to be used for attaining that objective – which remain simply criteria and methods even where they are also, in a different sense, called "principles". Although the practice is still rather sparse, owing to the relative newness of the question, it too is there to demonstrate that each specific case is, in the final analysis, different from all the others, that it is monotypic and that, more often than not, the most appropriate criteria, and the method or combination of methods most likely to yield a result consonant with what the law indicates, can only be determined in relation to each particular case and its specific characteristics. This precludes the possibility of those conditions arising which are necessary for the formation of principles and rules of customary law giving specific provisions for subjects like those just mentioned.

82. The same may not, however, be true of international treaty law. There is, for instance, nothing to prevent the parties to a convention – whether bilateral or multilateral – from extending the rules contained in that convention to aspects which it is less likely that customary international law might govern. In that event, however, the text of the convention must be read with caution. The first thing to remember in examining the text, and sometimes even a single clause, is the distinction, the importance of which has just been indicated, between principles and rules of international law enunciated in the convention and criteria and methods for whose application it might provide in particular circumstances.

83. With these premises established, a chamber of the Court, in its reasoning on the matter, must obviously begin by referring to Article 38, paragraph 1, of the Statute of the Court. For the purpose of the Chamber at the present stage of its reasoning, which is to ascertain the principles and rules of international law which in general govern the subject of maritime delimitation, reference will be made to conventions (Art. 38, para. 1 *(a)*) and international custom (para. 1 *(b)*), to the definition of which the judicial decisions (para. 1 *(d)*) either of the Court or of arbitration tribunals

PUBLICATIONS DE LA COUR PERMANENTE DE JUSTICE INTERNATIONALE

SÉRIE A — N° 10

Le 7 septembre 1927

RECUEIL DES ARRÊTS

AFFAIRE DU «LOTUS»

PUBLICATIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE.

SERIES A.—No. 10

September 7th, 1927

COLLECTION OF JUDGMENTS

THE CASE OF THE S.S. "LOTUS"

States for the extradition of John Anderson, a British seaman who had committed homicide on board an American vessel, stating that she did not dispute the jurisdiction of the United States but that she was entitled to exercise hers concurrently. This case, to which others might be added, is relevant in spite of Anderson's British nationality, in order to show that the principle of the exclusive jurisdiction of the country whose flag the vessel flies is not universally accepted.

The cases in which the exclusive jurisdiction of the State whose flag was flown has been recognized would seem rather to have been cases in which the foreign State was interested only by reason of the nationality of the victim, and in which, according to the legislation of that State itself or the practice of its courts, that ground was not regarded as sufficient to authorize prosecution for an offence committed abroad by a foreigner.

Finally, as regards conventions expressly reserving jurisdiction exclusively to the State whose flag is flown, it is not absolutely certain that this stipulation is to be regarded as expressing a general principle of law rather than as corresponding to the extraordinary jurisdiction which these conventions confer on the state-owned ships of a particular country in respect of ships of another country on the high seas. Apart from that, it should be observed that these conventions relate to matters of a particular kind, closely connected with the policing of the seas, such as the slave trade, damage to submarine cables, fisheries, etc., and not to common-law offences. Above all it should be pointed out that the offences contemplated by the conventions in question only concern a single ship ; it is impossible therefore to make any deduction from them in regard to matters which concern two ships and consequently the jurisdiction of two different States.

The Court therefore has arrived at the conclusion that the second argument put forward by the French Government does not, any more than the first, establish the existence of a rule of international law prohibiting Turkey from prosecuting Lieutenant Demons.

* * *

It only remains to examine the third argument advanced by the French Government and to ascertain whether a rule specially

applying to collision cases has grown up, according to which criminal proceedings regarding such cases come exclusively within the jurisdiction of the State whose flag is flown.

In this connection, the Agent for the French Government has drawn the Court's attention to the fact that questions of jurisdiction in collision cases, which frequently arise before civil courts, are but rarely encountered in the practice of criminal courts. He deduces from this that, in practice, prosecutions only occur before the courts of the State whose flag is flown and that that circumstance is proof of a tacit consent on the part of States and, consequently, shows what positive international law is in collision cases.

In the Court's opinion, this conclusion is not warranted. Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so ; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty ; on the other hand, as will presently be seen, there are other circumstances calculated to show that the contrary is true.

So far as the Court is aware there are no decisions of international tribunals in this matter ; but some decisions of municipal courts have been cited. Without pausing to consider the value to be attributed to the judgments of municipal courts in connection with the establishment of the existence of a rule of international law, it will suffice to observe that the decisions quoted sometimes support one view and sometimes the other. Whilst the French Government have been able to cite the *Ortigia—Oncle-Joseph* case before the Court of Aix and the *Franconia—Strathclyde* case before the British Court for Crown Cases Reserved, as being in favour of the exclusive jurisdiction of the State whose flag is flown, on the other hand the *Ortigia—Oncle-Joseph* case before the Italian Courts and the *Ekbatana—West-Hinder* case before the Belgian Courts have been cited in support of the opposing contention.

Lengthy discussions have taken place between the Parties as to the importance of each of these decisions as regards the details

of which the Court confines itself to a reference to the Cases and Counter-Cases of the Parties. The Court does not think it necessary to stop to consider them. It will suffice to observe that, as municipal jurisprudence is thus divided, it is hardly possible to see in it an indication of the existence of the restrictive rule of international law which alone could serve as a basis for the contention of the French Government.

On the other hand, the Court feels called upon to lay stress upon the fact that it does not appear that the States concerned have objected to criminal proceedings in respect of collision cases before the courts of a country other than that the flag of which was flown, or that they have made protests : their conduct does not appear to have differed appreciably from that observed by them in all cases of concurrent jurisdiction. This fact is directly opposed to the existence of a tacit consent on the part of States to the exclusive jurisdiction of the State whose flag is flown, such as the Agent for the French Government has thought it possible to deduce from the infrequency of questions of jurisdiction before criminal courts. It seems hardly probable, and it would not be in accordance with international practice, that the French Government in the *Ortigia—Oncle-Joseph* case and the German Government in the *Ekbatana—West-Hinder* case would have omitted to protest against the exercise of criminal jurisdiction by the Italian and Belgian Courts, if they had really thought that this was a violation of international law.

As regards the *Franconia* case (R. v. Keyn 1877, L. R. 2 Ex. Div. 63) upon which the Agent for the French Government has particularly relied, it should be observed that the part of the decision which bears the closest relation to the present case is the part relating to the localization of the offence on the vessel responsible for the collision.

But, whatever the value of the opinion expressed by the majority of the judges on this particular point may be in other respects, there would seem to be no doubt that if, in the minds of these judges, it was based on a rule of international law, their conception of that law, peculiar to English jurisprudence, is far from being generally accepted even in common-law countries. This view seems moreover to be borne out by the fact that the standpoint taken by the majority of the judges in regard to the localization of an offence, the author of which is situated in the territory of one

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING SOVEREIGNTY OVER PEDRA BRANCA/PULAU BATU PUTEH, MIDDLE ROCKS AND SOUTH LEDGE

(MALAYSIA/SINGAPORE)

JUDGMENT OF 23 MAY 2008

2008

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE À LA SOUVERAINETÉ SUR PEDRA BRANCA/PULAU BATU PUTEH, MIDDLE ROCKS ET SOUTH LEDGE

(MALAISIE/SINGAPOUR)

ARRÊT DU 23 MAI 2008

5.4. Legal status of Pedra Branca/Pulau Batu Puteh after the 1840s

5.4.1. Applicable law

118. As the Court has shown in the preceding part of this Judgment, Johor had sovereignty over Pedra Branca/Pulau Batu Puteh at the time the planning for the construction of the lighthouse on the island began. Singapore does not contend that anything had happened before then which could provide any basis for an argument that it or its predecessors had acquired sovereignty. But Singapore does of course contend that it has acquired sovereignty over Pedra Branca/Pulau Batu Puteh since 1844. The Singapore argument is based on the construction and operation of Horsburgh lighthouse and the many other actions it took on, and in relation to Pedra Branca/Pulau Batu Puteh, as well as on the conduct of Johor and its successors. By contrast, Malaysia contends that all of those actions of the United Kingdom were simply actions of the operator of the lighthouse, being carried out precisely in terms of the permission which Johor granted in the circumstances which the Court will soon consider.

119. Whether Malaysia has retained sovereignty over Pedra Branca/Pulau Batu Puteh following 1844 or whether sovereignty has since passed to Singapore can be determined only on the basis of the Court's assessment of the relevant facts as they occurred since 1844 by reference to the governing principles and rules of international law. The relevant facts consist mainly of the conduct of the Parties during that period.

120. Any passing of sovereignty might be by way of agreement between the two States in question. Such an agreement might take the form of a treaty, as with the 1824 Crawfurd Treaty and the 1927 Agreement referred to earlier (paragraphs 22, 28 and 102). The agreement might instead be tacit and arise from the conduct of the Parties. International law does not, in this matter, impose any particular form. Rather it places its emphasis on the parties' intentions (cf. e.g. *Temple of Preah Vihear (Cambodia* v. *Thailand), Preliminary Objections, I.C.J. Reports 1961*, pp. 17, 31).

121. Under certain circumstances, sovereignty over territory might pass as a result of the failure of the State which has sovereignty to respond to conduct *à titre de souverain* of the other State or, as Judge Huber put it in the *Island of Palmas* case, to concrete manifestations of the display of territorial sovereignty by the other State (*Island of Palmas Case (Netherlands/United States of America)*, Award of 4 April 1928, *RIAA*, Vol. II, (1949) p. 839). Such manifestations of the display of sovereignty may call for a response if they are not to be opposable to the State in question. The absence of reaction may well amount to acquiescence. The concept of acquiescence

> "is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent . . ." (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 305, para. 130).

That is to say, silence may also speak, but only if the conduct of the other State calls for a response.

122. Critical for the Court's assessment of the conduct of the Parties is the central importance in international law and relations of State sovereignty over territory and of the stability and certainty of that sovereignty. Because of that, any passing of sovereignty over territory on the basis of the conduct of the Parties, as set out above, must be manifested clearly and without any doubt by that conduct and the relevant facts. That is especially so if what may be involved, in the case of one of the Parties, is in effect the abandonment of sovereignty over part of its territory.

123. One feature of the arguments on the law presented by the Parties should be mentioned at this point. Singapore, as has already been discussed, contended that Pedra Branca/Pulau Batu Puteh was *terra nullius* in 1847 (see paragraph 40 above). Recognizing however that the Court might reject that contention, Singapore submitted that even in that event, that is to say on the basis that "Malaysia could somehow show an historic title over the island, Singapore would still possess sovereignty over Pedra Branca since Singapore has exercised continuous sovereignty over the island while Malaysia has done nothing". It is true that it had shortly before said that "the notion of prescription . . . has no role to play in the present case" but that was said on the basis that, as Singapore saw the case, Malaysia had not made out its historic title.

124. Malaysia, in response to this argument on prescription, recognized that Singapore may have been intending to give the impression that there was "still some way in which the Court can override Johor's title on the basis of Britain's post-1851 conduct". While Malaysia considered that that conduct could not properly be taken into account — Johor had the historic title and Singapore "quite properly acknowledge[d] that 'an argument . . . predicated on the notion of prescription . . . has no role to play in the present case'" — Malaysia in its oral argument, as in its written pleadings, nevertheless addressed that post-1851 conduct at length, as of course did Singapore for which it was an essential part of its case, whatever the outcome of the submissions about historic title and *terra nullius*. And the "acknowledgment" by Singapore, to which Malaysia referred, was stated on the hypothesis that Pedra Branca/Pulau Batu Puteh was *terra nullius*.

125. The Court accordingly will now examine the relevant facts, par-

General Assembly
Official Records
Seventy-first session
Supplement No. 10 (A/71/10)

Report of the International Law Commission

Sixty-eighth session
(2 May-10 June and 4 July-12 August 2016)

United Nations • New York, 2016

Summary of contents

Contents

Chapter V
Identification of customary international law

A. Introduction

50. At its sixty-fourth session (2012), the Commission decided to include the topic "Formation and evidence of customary international law" in its programme of work and appointed Sir Michael Wood as Special Rapporteur.[237] At the same session, the Commission had before it a note by the Special Rapporteur (A/CN.4/653).[238] Also at the same session, the Commission requested the Secretariat to prepare a memorandum identifying elements in the previous work of the Commission that could be particularly relevant to this topic.[239]

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

52. At its sixty-sixth session (2014), the Commission considered the second report of the Special Rapporteur (A/CN.4/672)[241] and decided to refer draft conclusions 1 to 11, as contained in the second report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently considered the interim report of the Drafting Committee on "Identification of customary international law", containing the eight draft conclusions provisionally adopted by the Drafting Committee at the sixty-sixth session.

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

B. Consideration of the topic at the present session

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

[237] At its 3132nd meeting, on 22 May 2012 (*Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 157). The General Assembly, in paragraph 7 of its resolution 67/92 of 14 December 2012, noted with appreciation the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its sixty-third session (2011), on the basis of the proposal contained in annex A to the report of the Commission (*ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), pp. 305-314).

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

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

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

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

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

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

others on the draft conclusions provisionally adopted and contained suggestions for the amendment of several draft conclusions in light of the comments received. It also addressed ways and means to make the evidence of customary international law more readily available, recalling the background of the prior work of the Commission on that matter as a basis for further consideration by the Commission in the context of the topic. In addition, the Commission had before it a memorandum by the Secretariat concerning the role of decisions of national courts in the case-law of international courts and tribunals of a universal character for the purpose of the determination of customary international law (A/CN.4/691).

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

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

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

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

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

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

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

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

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

1. Text of the draft conclusions

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

Identification of customary international law

Part One
Introduction

Conclusion 1
Scope

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

Part Two
Basic approach

Conclusion 2
Two constituent elements

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

Conclusion 3
Assessment of evidence for the two constituent elements

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

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

Part Three
A general practice

Conclusion 4
Requirement of practice

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

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

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

Conclusion 5
Conduct of the State as State practice

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

Conclusion 6
Forms of practice

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

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

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

Conclusion 7
Assessing a State's practice

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

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

Conclusion 8
The practice must be general

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

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

Part Four
Accepted as law (*opinio juris*)

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

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

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

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

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

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

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

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

Conclusion 11
Treaties

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

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

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

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

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

Conclusion 12
Resolutions of international organizations and intergovernmental conferences

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

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

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

Conclusion 13
Decisions of courts and tribunals

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

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

Conclusion 14
Teachings

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

Part Six
Persistent objector

Conclusion 15
Persistent objector

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

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

Part Seven
Particular customary international law

Conclusion 16
Particular customary international law

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

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

2. Text of the draft conclusions and commentaries thereto

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

Identification of customary international law

General commentary

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

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

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

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

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

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

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

Part One
Introduction

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

Conclusion 1
Scope

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

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

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

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

Commentary

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

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

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

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

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

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

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

methodological issue of how rules of customary international law are to be identified.[251] Second, no attempt is made to explain the relationship between customary international law and other sources of international law; the draft conclusions touch on this only in so far as is necessary to explain how rules of customary international law are to be identified, for example the relevance of treaties for such purpose. Third, the draft conclusions are without prejudice to questions of hierarchy among rules of international law, including those concerning peremptory norms of general international law (*jus cogens*), or questions concerning the *erga omnes* nature of certain obligations. Finally, the draft conclusions do not address the position of customary international law within national legal systems.

Part Two
Basic approach

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

Conclusion 2
Two constituent elements

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

Commentary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion 3
Assessment of evidence for the two constituent elements

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

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

Commentary

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

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

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

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

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

262 See draft conclusion 3, below.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Part Three
A general practice

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

Conclusion 4
Requirement of practice

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

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

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

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

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

Commentary

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

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

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

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

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

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

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

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

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

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

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

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

(8) At the same time, caution is required in assessing the relevance and weight of such practice. International organizations vary greatly, not just in their powers, but also in their membership and functions. As a general rule, the more directly a practice of an international organization is carried out on behalf of its member States or endorsed by them, and the larger the number of such member States, the greater weight it may have in relation to the formation, or expression, of rules of customary international law. The reaction of member States to such practice is of importance. Among other factors to be considered in weighing the practice are: the nature of the organization; the nature of the organ whose conduct is under consideration; the subject matter of the rule in question and whether the organization itself would be bound by the rule; whether the conduct is *ultra vires* the organization or the organ; and whether the conduct is consonant with that of the member States of the organization.

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

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

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

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

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

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

Conclusion 5
Conduct of the State as State practice

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

Commentary

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

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

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

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

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

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

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

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

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

Conclusion 6
Forms of practice

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

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

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

Commentary

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

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

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

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

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

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

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

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

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

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

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

Conclusion 7
Assessing a State's practice

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

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

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

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

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

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

Commentary

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

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

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

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

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

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

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

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

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

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

Conclusion 8
The practice must be general

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

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

Commentary

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

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

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

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

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

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

[293] See also draft conclusion 3, above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Part Four
Accepted as law (*opinio juris*)

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

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

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

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

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

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

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

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

Commentary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Commentary

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

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

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

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

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

[311] See draft conclusion 3, above.

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

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

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

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

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

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

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

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

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

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

Commentary

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

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

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

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

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

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

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

Conclusion 11
Treaties

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

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

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

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

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

Commentary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion 12
Resolutions of international organizations and intergovernmental conferences

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

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

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

Commentary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion 13
Decisions of courts and tribunals

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

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

Commentary

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion 14
Teachings

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

Commentary

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

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

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

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

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

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

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

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

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

Part Six
Persistent objector

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

Conclusion 15
Persistent objector

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

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

Commentary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Part Seven
Particular customary international law

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

Conclusion 16
Particular customary international law

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

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

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

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

Commentary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

370 *Ibid*., p. 6.

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

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

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

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

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

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

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Fifth report on identification of customary international law

by Michael Wood, Special Rapporteur*

Contents

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Introduction

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

2. At its sixty-fifth session, the Commission held a general debate on the basis of the Special Rapporteur's first report[2] and a memorandum by the Secretariat entitled "Elements in the previous work of the International Law Commission that could be particularly relevant to the topic".[3] The Commission changed the title of the topic to "Identification of customary international law".[4]

3. At its sixty-sixth session, the Commission considered the Special Rapporteur's second report.[5] Following the debate, the 11 draft conclusions proposed in the report were referred to the Drafting Committee, which provisionally adopted 8 draft conclusions.[6]

4. At its sixty-seventh session, the Commission considered the Special Rapporteur's third report, which sought to complete the set of draft conclusions on the topic.[7] Following the debate, the draft conclusions proposed in the third report were referred to the Drafting Committee, which provisionally adopted eight more draft conclusions as well as additional paragraphs for two of the draft conclusions already adopted. The Commission took note of draft conclusions 1 to 16 as provisionally adopted by the Drafting Committee, in anticipation that the adoption on first reading of the draft conclusions (as well as commentaries thereto) would be considered the following year.

5. At its sixty-eighth session, in 2016, the Commission considered the Special Rapporteur's fourth report, which responded to the main comments and suggestions made by States and others in relation to the 16 draft conclusions provisionally adopted.[8] The report also considered the ways and means for making the evidence of customary international law more readily available, with a view to renewing the Commission's engagement with this subject. The Commission also had before it a preliminary bibliography on the topic,[9] as well as a further memorandum by the Secretariat entitled "The role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law".[10]

6. The Commission debated the Special Rapporteur's fourth report from 19 to 24 May 2016, and referred to the Drafting Committee the proposed amendments to

[1] A/CN.4/653.
[2] First report on formation and evidence of customary international law by Special Rapporteur Michael Wood (A/CN.4/663).
[3] A/CN.4/659.
[4] A/CN.4/SR.3186: provisional summary record of the Commission's 3186th meeting (25 July 2013), pp. 5–6.
[5] Second report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/672).
[6] The Drafting Committee was unable to consider two draft conclusions because of lack of time, and one draft conclusion was omitted.
[7] A/CN.4/682.
[8] Fourth report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/695).
[9] *Ibid.* (A/CN.4/695/Add.1).
[10] A/CN.4/691.

the draft conclusions contained therein. In addition, an open-ended Working Group was established to review a set of informal draft commentaries prepared by the Special Rapporteur. On 2 June 2016, the Commission considered and adopted the report of the Drafting Committee on draft conclusions 1 to 16, thereby adopting on first reading a set of 16 draft conclusions.[11] On 5 and 8 August 2016, the Commission adopted the commentaries.[12] The Commission also requested the Secretariat to prepare a memorandum on ways and means for making the evidence of customary international law more readily available, which would survey the present state of the evidence of customary international law and make suggestions for its improvement.[13]

7. In accordance with articles 16 to 21 of its statute, the Commission decided in 2016 to transmit the draft conclusions adopted on first reading, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2018.[14]

8. In the Sixth Committee debate in 2016, in which some fifty speakers addressed the topic,[15] delegations commended the work done by the Commission on the topic to date. They generally welcomed the draft conclusions, the commentaries and the bibliography as important texts that would greatly facilitate the work of practitioners and academics. Delegations also expressed appreciation to the Secretariat for the memorandum on the role of decisions of national courts in the case law of international courts and tribunals. Many delegations made detailed comments on the text adopted on first reading, providing valuable suggestions as to how specific draft conclusions and the commentary might be refined.[16]

9. As of the date of submission of the present report, the following States have transmitted written comments and observations in response to the Commission's request: Austria; Belarus; China; Czech Republic; El Salvador; Israel; Netherlands; New Zealand; Nordic countries (Denmark, Finland, Iceland, Norway and Sweden); Republic of Korea; Singapore; and United States of America.[17]

10. In accordance with the programme of work set out in 2016,[18] the present report seeks to address the main comments and observations that have been made on the draft conclusions and commentaries adopted on first reading, both in the 2016 debate in the Sixth Committee and in writing in response to the Commission's request. As

[11] See A/71/10, paras. 57 and 62.
[12] *Ibid.*, para. 63.
[13] *Ibid.*, para. 56.
[14] *Ibid.*, para. 15.
[15] Algeria; Argentina; Australia; Austria; Belarus; Brazil; Chile; China; Colombia; Cuba; Cyprus; Czech Republic; Dominican Republic (on behalf of the Community of Latin American and Caribbean States); Ecuador; Egypt; El Salvador; Finland (on behalf of the Nordic countries); France; Germany; Greece; India; Indonesia; Iran (Islamic Republic of); Ireland; Israel; Japan; Malaysia; Mexico; Mongolia; Netherlands; Peru; Poland; Portugal; Republic of Korea; Romania; Russian Federation; Singapore; Slovakia; Slovenia; Spain; Sudan; Thailand; Turkey; United Kingdom of Great Britain and Northern Ireland; United States of America; Viet Nam; Council of Europe; European Union (also on behalf of Serbia and Bosnia and Herzegovina); and International Committee of the Red Cross.
[16] See the topical summary of the discussions held in the Sixth Committee of the General Assembly during its seventy-first session, prepared by the Secretariat (A/CN.4/703).
[17] Reference in this report to "written comments" is to written comments in response to the Commission's request. Any written comments received after the date of submission of the report will also be considered by the Commission during its seventieth session.
[18] Fourth report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/695), paras. 50–53.

noted above and as several States have recognized,[19] comments and suggestions made during earlier stages of work on the topic have already been taken into account.

11. The draft conclusions and commentaries adopted on first reading have also received attention from practitioners and scholars: they have been cited by courts,[20] and been discussed at several academic events[21] and in scholarly writings.[22]

12. Following this introduction, the present report is structured as follows. Chapter I describes the main comments and observations of States on the draft conclusions and commentaries adopted on first reading, and sets out the suggestions of the Special Rapporteur in response. Chapter II considers the memorandum prepared by the Secretariat on "Ways and means for making the evidence of customary international law more readily available", and how the suggestions in the memorandum might be taken forward. Chapter III contains the Special Rapporteur's recommendations for the final form of the Commission's output. Annex I indicates the Special Rapporteur's suggested changes to the draft conclusions adopted on first reading. Annex II, containing an updated bibliography on the topic, will be distributed later in the session.

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[19] See, for example, A/C.6/71/SR.21, para. 75 (Austria) and para. 116 (Germany); A/C.6/71/SR.22, para. 40 (Singapore) and para. 70 (Malaysia); written comments of New Zealand, para. 2; written comments of China, p. 1.

[20] *R (on the application of the Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs*, [2016] All ER (D) 32 (5 August 2016), paras. 77–78; *Mohammed and others v Ministry of Defence*, [2017] UKSC 2 (17 January 2017), para. 151; *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah* [2017] UKSC 62 (18 October 2017), paras. 31–32.

[21] The Special Rapporteur has participated in various events at which the draft conclusions and commentaries were discussed, including at Cambridge University; the European University Institute; the University of Manchester; La Sapienza University, Rome; and the University of Michigan.

[22] See, for example, the special issue on customary international law of *International Community Law Review*, vol. 19 (2017); B.D. Lepard, *Reexamining Customary International Law* (Cambridge, United Kingdom, Cambridge University Press, 2017); N. Blokker, "International organizations and customary international law: is the International Law Commission taking international organizations seriously?", *International Organizations Law Review*, vol. 14 (2017), pp. 1–12; M. Fitzmaurice, "Customary law, general principles, unilateral acts", in *Nicaragua Before the International Court of Justice: Impacts on International Law*, E. Sobenes Obregon and B. Samson, eds. (Cham, Springer, 2017), pp. 247–267; R. Deplano, "Assessing the role of resolutions in the ILC draft conclusions on identification of customary international law: substantive and methodological issues", *International Organizations Law Review*, vol. 14 (2017), pp. 227–253; C.A. Bradley, ed., *Custom's Future: International Law in a Changing World* (Cambridge, United Kingdom, Cambridge University Press, 2016); L. Kirchmair, "What came first: the obligation or the belief? A renaissance of consensus theory to make the normative foundations of customary international law more tangible", *German Yearbook of International Law*, vol. 59 (2016), pp. 289–319; K. Gastorn, "Defining the imprecise contours of *jus cogens* in international law", *Chinese Journal of International Law*, vol. 16 (2018), pp. 1–20; E. Henry, "Alleged acquiescence of the international community to revisionist claims of international customary law (with special reference to the *jus contra bellum* regime)", *Melbourne Journal of International Law*, vol. 18 (2017), pp. 260–297; J. d'Aspremont and S. Droubi, eds., *International Organizations and the Formation of Customary International Law* (Manchester, Manchester University Press, forthcoming 2018); C.A. Bradley and J.L. Goldsmith, "Presidential control over international law", *Harvard Law Review*, vol. 131, No. 5 (2018); G.H. Fox, K.E. Boon and I. Jenkins, "The contributions of United Nations Security Council resolutions to the Law of Non-International Armed Conflict: new evidence of customary international law", *American University Law Review*, vol. 67 (2018); N. Lamp, "The 'practice turn' in international law: insights from the theory of structuration", in *Research Handbook on the Sociology of International Law*, M. Hirsch and A. Lang, eds. (Cheltenham, Edward Elgar, forthcoming 2018).

I. Comments and observations on the draft conclusions adopted on first reading

13. The Special Rapporteur is very grateful to all who commented orally and in writing on the draft conclusions and commentaries adopted on first reading. While, as is to be expected, the comments sometimes pull in opposite directions, they are without exception thoughtful and constructive, and should greatly assist the Commission in improving the Commission's final output.

14. The comments and observations received are considered in two parts below: General comments and observations on the draft conclusions as a whole (section A); and comments and observations on particular draft conclusions (section B). In each case, the comments and observations are briefly described, and then the Special Rapporteur makes his suggestions, mainly for the text of the conclusions but also indicating, at least in general terms, whether changes should be made to the commentaries. For ease of reference, the suggested changes to the conclusions are set out at annex I to the report.

A. General comments and observations

1. Comments and observations received

15. In commenting on the draft conclusions and commentaries adopted by the Commission on first reading in 2016, States suggested that the draft conclusions would "undoubtedly become a useful tool for practitioners in identifying the existence and scope of customary [international] law".[23] Many of the propositions contained in

[23] See A/C.6/71/SR.20, para. 52 (Finland, speaking on behalf of the Nordic countries). See also A/C.6/71/SR.20, para. 56 (United States, saying that the draft conclusions and commentaries thereto were "already an important resource for practitioners and scholars"); A/C.6/71/SR.21, paras. 12 and 16 (Australia, noting that "the draft conclusions provided a flexible and practical methodology for the identification of such rules and their content"); *ibid.*, para. 85 (United Kingdom, noting that "[t]he draft conclusions and commentaries were a valuable, accessible tool for judges and practitioners"); *ibid.*, para. 93 (Portugal, saying that "[t]he topic 'Identification of customary international law' was of high practical value for legal advisers and practitioners around the world" and that "[a] set of practical and simple conclusions to assist in the identification of rules of customary international law would be a useful tool"); A/C.6/71/SR.22, para. 6 (Greece, observing that "[t]he Commission's work provided international lawyers with much needed normative guidance in dealing with the thorny issue of the identification and precise content of customary international law rules"); *ibid.*, para. 22 (Mexico, saying that the draft conclusions "provided useful guidance"); *ibid.*, para. 33 (Ireland, saying that "the draft conclusions, commentaries and bibliography would … serve as a useful resource"); *ibid.*, para. 61 (Japan, saying that the topic "had the potential to make a useful contribution to the development of international law"); A/C.6/71/SR.23, para. 24 (Slovakia, appreciating that the draft conclusions and commentaries "were a tangible and valuable outcome that would help judges and legal practitioners in identifying customary international rules in practice"); *ibid.*, para. 41 (Egypt, saying that the draft conclusions "would be of assistance to courts and practitioners alike"); A/C.6/71/SR.24, para. 13 (Ecuador, submitting that the methodology offered by the Commission "would be of great service to legal practitioners, in particular judges, who were often called upon to determine whether rules of customary international law could be discerned in the cases before them"); A/C.6/71/SR.29, para. 97 (Mongolia, commending the work on the topic and adding that "the draft conclusions would further contribute to the application of customary international law as an important source of public international law"); written comments of Singapore, para. 1 (being "of the view that the Commission's final output will be of valuable practical guidance for States, international courts and tribunals and practitioners"); written comments of New Zealand, para. 1 (saying that "[t]he draft conclusions can be expected to be a helpful reference point for

the draft conclusions and commentaries were explicitly and widely endorsed. The "careful and balanced approach"[24] adopted by the Commission throughout its work on the topic, and the efforts to take into account the practice of different national legal systems and traditions,[25] were commended.

16. While the Commission's efforts to make the draft conclusions concise and accessible (with detail in the commentaries) were appreciated, it was also suggested that in places a better balance could be struck between the texts of the conclusions and that of the accompanying commentary. According to New Zealand, "the desire to keep the Draft Conclusions brief and not overly prescriptive has resulted in general statements that do not always provide clear guidance".[26] A number of specific suggestions were made by States to this effect, which are considered below in relation to individual conclusions.

17. The United States expressed concern that the draft conclusions and commentaries "could give the impression that customary international law was easily formed or identified",[27] and China proposed adding a third paragraph to draft conclusion 3 indicating that "in the identification of customary international law, a rigorous and systematic approach shall be applied".[28] Israel suggested that the commentary should indicate that the identification of customary international law "involves an exhaustive, empirical and objective examination of available evidence".[29] France, however, suggested that "[t]he commentaries to the draft [conclusions] would benefit from the inclusion of examples of cases in which a rule of customary international law had been deemed to exist, as almost all of the examples in the current draft concerned cases in which the existence of a rule had been rejected".[30]

18. It was suggested that in two specific respects the draft conclusions might go beyond current methodology and even be considered as "progressive development", namely, the relevance of practice of international organizations to the formation and identification of customary international law;[31] and the existence of rules of particular

practitioners and others called upon to identify and apply norms of customary international law"); written comments of China, p. 2 (expressing its hope that "the conclusions and commentaries, and the results of the research conducted by the Secretariat, can provide unified and clear guidance on international law and practice"; written comments of the Republic of Korea, para. 2 (observing that "[t]he draft conclusions are expected to provide authoritative guidelines on the identification and confirmation of customary international law to practitioners in various domestic legal forums"). See also A/C.6/71/SR.24, para. 25 (International Committee of the Red Cross, congratulating the Commission on the adoption of the draft conclusions and "greatly appreciat[ing] the Commission's consideration of questions arising in identifying customary international law").

[24] See A/C.6/71/SR.21, para. 116 (Germany).

[25] See A/C.6/71/SR.20, para. 72 (France).

[26] Written comments of New Zealand, para. 5 (adding, while appreciating the Commission's efforts to make the draft conclusions concise and accessible, that "New Zealand understands that the draft conclusions are expected to be read together with their commentaries. But the text of the draft conclusions should still be capable of standing alone. There are a number of occasions in which the Commentaries contain significant qualifications to the general language of the draft conclusions. In New Zealand's view these elements should also be included in the text of the draft conclusions themselves"). See also A/C.6/71/SR.20, para. 45 (European Union, Serbia, and Bosnia and Herzegovina).

[27] See A/C.6/71/SR.20, para. 58.

[28] Written comments of China, p. 2.

[29] Written comments of Israel, para. 32.

[30] See A/C.6/71/SR.20, para. 72.

[31] See written comments of the United States, pp. 1–2, and A/C.6/71/SR.20, paras. 56–57 (United States); A/C.6/71/SR.22, para. 38 (Israel); written comments of New Zealand, para. 4 (noting the "absence of judicial authority in the commentary to this [matter]").

customary international law applying bilaterally and/or among States linked by a common cause, interest or activity other than their geographical position.[32] It was suggested in this context that the Commission's output on the topic should not include recommendations for "progressive development", but that if it did, they should be clearly identified.

2. Suggestions by the Special Rapporteur

19. The Special Rapporteur recalls that the draft conclusions are to be read together with the commentaries.[33] He has previously noted that "the need to achieve a balance between making the draft conclusions clear and concise on the one hand, and comprehensive on the other, needs constantly to be borne in mind".[34] The comments now received suggest that several points currently dealt with in the commentaries should find some reflection in the conclusions themselves. The Special Rapporteur makes a number of suggestions to this effect in the present report.

20. It should also be remembered, however, that the conclusions ought not to be too rigid, for at least three reasons. First, they need to apply in the wide range of possible situations that may arise in practice. Second, customary international law as a source of law inherently defies exact formulations. Thus, as Australia has put it, a measure of flexibility in setting out the methodology for identification of customary international law "was essential to ensure that the dynamism which characterized the formation and development of rules of custom was reflected in the Commission's guidance on the topic".[35] Finally, important nuances may be better captured in the commentaries, the precise role of which is to explain in more detail the conclusions. The commentaries, in the words of Singapore, "should be applied together with the … conclusions as an indissoluble whole".[36] The Special Rapporteur suggests that the general commentary introducing the conclusions should emphasize that the conclusions and commentaries are to be read together.

21. The Special Rapporteur does not understand the Commission as having intended that any of the conclusions or commentaries adopted on first reading should do other than state the existing methodology for identifying rules of customary international law. This is consistent with the view endorsed at the outset of the Commission's work on the topic, namely that "the Commission should aim to describe the current state of international law on the formation and evidence of rules of customary international law, without prejudice to developments that might occur in the future".[37] The purpose of the topic is to offer practical and authoritative guidance on how to identify rules of customary international law, and it is essential that in doing so the Commission seeks

[32] Written comments of the United States, p. 19; written comments of the Czech Republic, p. 3.
[33] See also A/71/10, footnote 245.
[34] See the fourth report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/695), para. 14.
[35] See A/C.6/71/SR.21, para. 12 (noting that the draft conclusions "provided a flexible and practical methodology for the identification of such rules [of customary international law] and their content"). See also written comments of the Republic of Korea, para. 2 ("a proper balance is required between the clarity of rules and the inherent flexibility of customary international law"). There was general agreement among members of the Commission early on, that "in drafting conclusions [on the present topic] the Commission should not be overly prescriptive" (second report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/672), para. 3 (*c*)).
[36] See A/C.6/71/SR.22, para. 40.
[37] See the first report on formation and evidence of customary international law by Special Rapporteur Michael Wood (A/CN.4/663), para. 16.

to reflect a settled methodology. In any event, most States that commented on the matter indicated that they considered that the draft conclusions did accurately reflect the existing position: as the Republic of Korea put it, "the draft conclusions are well organized overall, properly reflecting the current state of international law on the topic".[38] The Special Rapporteur recognizes, however, that there could be greater precision with respect to the relevance of practice of international organizations and with respect to rules of particular customary international law. Suggestions to this effect are made in the present report.

22. The Special Rapporteur fully agrees with those who have observed that rigour is important when identifying rules of customary international law.[39] However, he considers that the present text of the conclusions and commentary adequately addresses this point, including at the very outset of the general commentary.[40]

B. Comments and observations on particular draft conclusions

Part One: Introduction

Conclusion 1: Scope

1. Comments and observations received

23. Several States endorsed the scope of the draft conclusions, "namely that they are limited to identification of customary international law, and without focus on the relationship to other sources of international law or *jus cogens*".[41] Japan considered that the Commission was "justified in arguing that the aim of the topic should be to assist in determining the existence and content of a rule as of a particular time".[42] Australia said that "it was not the purpose of the Commission's work to provide guidance on the inherent difficulty of determining when State practice had reached a critical mass such that customary international law was formed. Instead, the draft conclusions provided guidance to practitioners on how to determine the existence or content of a customary rule at a particular point in time".[43] Poland, on the other hand, considered it "unfortunate that neither the draft conclusions nor the commentary went into the question of how the rules of customary international law evolved".[44]

24. Spain considered that a conclusion "regarding the burden of proof of the existence and content of customary rules" should be added.[45] The Russian Federation expressed its preference that the statement explaining that the relationship between customary international law and other sources of international law falls outside the

[38] Written comments of the Republic of Korea, para. 1.
[39] See also the fourth report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/695), para. 15.
[40] See A/71/10, para. 63, para. (1) of the general commentary ("a structured and careful process of legal analysis and evaluation is required").
[41] Joint Nordic written comments (2017), p. 1; see also, for example, A/C.6/71/SR.21, para. 6 (Czech Republic).
[42] See A/C.6/71/SR.22, para. 63 (explaining that "customary international law could be formed in several ways, depending on the subject of the rule or the circumstances. It was not feasible to identify the manner in which the rule was formed or the precise moment at which it came into being").
[43] See A/C.6/71/SR.21, para. 15.
[44] See A/C.6/71/SR.22, para. 31.
[45] See A/C.6/71/SR.21, para. 111.

scope of the topic, currently placed in the commentary to draft conclusion 1, should become a conclusion of its own.[46]

2. Suggestions by the Special Rapporteur

25. The Special Rapporteur has no changes to suggest to draft conclusion 1, as adopted on first reading. He recalls that the conclusions do not overlook the formation of customary international law. As has been explained, both formation and identification of customary international law may tend, in practice, to coalesce, given that the elements that constitute customary international law also serve to ascertain its existence.[47] Thus the change of the topic's name was made on the understanding that matters relating to the formation of customary international law remained within the scope of the topic;[48] and, as the statement of the Chairperson of the Drafting Committee in 2014 confirmed, the reference in draft conclusion 1 to the determination of the existence and content of rules of customary international law "implied inevitably an investigation into the[ir] formation".[49] This is already reflected in the commentary.[50]

26. The Special Rapporteur notes that the question of a burden of proof when identifying a rule of customary international law has already been raised within the Commission.[51] Whether such a burden of proof exists at the national level (and, if so, upon whom it lies) will depend on the national legal system and, as the Commission has explained in the commentary, the conclusions "do not address the position of customary international law within national legal systems".[52] At the international level, the identification of a rule of customary international law would usually be a matter of legal analysis rather than overcoming a burden proof by one of the parties[53] (at least in the case of general, as opposed to particular, customary international

[46] *Ibid.*, para. 45.

[47] A/CN.4/SR.3254: provisional summary record of the Commission's 3254th meeting (21 May 2015), p. 10.

[48] A/CN.4/SR.3186: provisional summary record of the Commission's 3186th meeting (25 July 2013), p. 6.

[49] Statement of the Chairman of the Drafting Committee (7 August 2014), p. 3 (available at http://legal.un.org/ilc/).

[50] See A/71/10, para. 63, para. (4) of the commentary to draft conclusion 1.

[51] A/CN.4/SR.3227: provisional summary record of the Commission's 3227th meeting (18 July 2014), p. 6.

[52] See A/71/10, para. 63, para. (5) of the commentary to draft conclusion 1.

[53] See, with regard to the International Court of Justice but possibly also beyond, *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. 24–25, para. 29: "For the purpose of deciding whether the claim is well founded in law, the principle *jura novit curia* signifies that the Court is not solely dependent on the argument of the parties before it with respect to the applicable law" (cf. *"Lotus", P.C.I.J., Series A, No. 10*, p. 31) … As the Court observed in the *Fisheries Jurisdiction* cases: "The Court … as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court" (*I.C.J. Reports 1974*, p. 9, para. 17; p. 181, para. 18).

law[54]). For these reasons, a conclusion on burden of proof is unnecessary and could be misleading.

27. It does not seem necessary to include a conclusion on the relationship between customary international law and other sources of international law; the title of the topic makes it clear that the conclusions only concern the identification of customary international law, though in that connection they do of course address the role of treaties, as well as judicial decisions and teachings. The Special Rapporteur had previously suggested a second paragraph for the conclusion on scope, to clarify that the conclusions on the topic are without prejudice to other sources of international law and to questions relating to *jus cogens*,[55] but withdrew this suggestion following the plenary debate.[56] The commentary adopted on first reading already indicates that no attempt is made under the present topic to explain the relationship between customary international law and other sources of international law.[57]

Part Two: Basic approach

Conclusion 2: Two constituent elements

1. Comments and observations received

28. Draft conclusion 2 received wide support from States, thus once more confirming their approval of the two-element approach underpinning the conclusions and its applicability in all fields of international law.[58]

29. A number of changes to the draft commentary were suggested. The United States, while agreeing with the present text that the two-element approach "does not … preclude a measure of deduction", suggested that it be revised "to emphasize that a deductive approach must be used with caution to avoid identifying purported rules as customary international law that do not result from a general and consistent practice of States followed by them out of a sense of legal obligation".[59] Israel considered that any reference to deduction might undermine the requirement for empirical examination of evidence in identifying rules of customary international law, and suggested that it be deleted altogether.[60] The Russian Federation considered that

[54] As the commentary to conclusion 16 explains (by reference to the jurisprudence of the International Court of Justice), "[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" (A/71/10, para. 63, para. (6) of the commentary to conclusion 16).

[55] See the second report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/672), para. 15.

[56] See Statement of the Chairman of the Drafting Committee (7 August 2014), pp. 3–4, available from http://legal.un.org/ilc/ ("The originally proposed paragraph 2 of draft conclusion 1 was a 'without prejudice' clause excluding from the scope of the draft conclusions the question of the methodology pertaining to the identification of other sources of international law or peremptory norms of general international law (*jus cogens*). Further to the debate in Plenary, the Special Rapporteur suggested the deletion of this provision, preferring instead to leave such questions to the commentary. There was a general sense that draft conclusion 1 should be kept as simple as possible and that paragraph 2 could indeed be deleted").

[57] See A/71/10, para. 63, para. (5) of the commentary to conclusion 1.

[58] See, for example A/C.6/71/SR.21, para. 48 (Russian Federation), para. 84 (United Kingdom), para. 99 (Chile), para. 137 (Sudan); A/C.6/71/SR.22, para. 38 (Israel), para. 44 (Thailand), para. 50 (Viet Nam); A/C.6/71/SR.23, para. 24 (Slovakia), written comments of Belarus, p. 2.

[59] Written comments of the United States, p. 9 (also suggesting that the phrase "indivisible regime" should be deleted).

[60] Written comments of Israel, para. 32.

the reference in this context to previously existing rules, such as those forming part of an "indivisible regime", may better be viewed as the overall context that needs to be examined in identifying a rule of customary international law (the subject of draft conclusion 3).[61]

2. Suggestions by the Special Rapporteur

30. The Special Rapporteur does not suggest any changes to draft conclusion 2, as adopted on first reading. Changes to the commentary may be suggested in due course, in order to clarify that the reference to "deduction" is not intended to suggest a substitute for the basic two-element approach, but rather an occasional aid for the application of that approach in cases such as those referred to in the draft commentary.

Conclusion 3: Assessment of evidence for the two constituent elements

1. Comments and observations received

31. States expressed their appreciation of the clarification provided by draft conclusion 3, namely, that any analysis as to the existence of a rule of customary international law ought to take account of the overall context, the nature of the rule, and the particular circumstances in which the evidence is to be found.[62] A number of States also "welcomed the explicit reference in the draft conclusions to the fact that general practice and acceptance as law (*opinio juris*) should be separately ascertained, while admitting that there were circumstances where the same evidence might be used to establish the existence of both elements".[63]

32. The Netherlands considered it unclear "whether the process for identifying the existence of a rule is the same as the process for determining the content of that rule", and suggested that the commentary to conclusion 3 should address this question.[64] Israel considered that the draft commentary's reference to the relevance of the *opinio juris* of those in a position to react to a certain practice should be deleted, explaining that "[g]eneral opinions offered by States who have *no practice* [of their own] with regard to the rule in question are not relevant to the customary international law identification process".[65] It also suggested several amendments to the commentary so as to avoid undue flexibility in identifying customary international law.[66] Israel further suggested that the reference in the conclusion to the need to have regard to "the nature of the rule", while correct, in fact is only relevant to the determination of prohibitive rules of customary international law and that this should be made explicit.[67]

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[61] See A/C.6/71/SR.21, paras. 46–47.

[62] See, for example, A/C.6/71/SR.21, para. 7 (Czech Republic), para. 14 (Australia), para. 137 (Sudan); and the written comments of China, pp. 1–2.

[63] See A/C.6/71/SR.20, para. 51 (Finland, on behalf of the Nordic countries); see also joint Nordic written comments, p. 1; A/C.6/71/SR.21, para. 14 (Australia), para. 48 (Russian Federation), para. 137 (Sudan); A/C.6/71/SR.22, para. 34 (Ireland); A/C.6/71/SR.23, para. 24 (Slovakia); A/C.6/71/SR.24, para. 10 (Indonesia).

[64] Written comments of the Netherlands, para. 5 (adding that "this is not necessarily the case. For example, in the identification of the content of a particular rule, any underlying principles of international law may need to be taken into account in accordance with draft conclusion 3, paragraph 1, whereas this may not be the case when identifying the existence of the rule"). See also written comments of Israel, para. 32(3).

[65] Written comments of Israel, para. 8.

[66] *Ibid.*, at para. 32.

[67] *Ibid.*

2. Suggestions by the Special Rapporteur

33. The Special Rapporteur makes no suggestion to amend draft conclusion 3. It remains to be considered whether changes to the commentary are desirable in the light of the comments noted above. In the opinion of the Special Rapporteur, there is no reason why, in principle, a consideration of all the factors stipulated in the conclusion should not be relevant to the identification of either the existence or the content of a rule of customary international law, even if in particular cases one or more of them may prove more significant than in others. The reference to the "nature of the rule", while indeed particularly relevant to the identification of prohibitory rules (and thus referred to "in particular" in the commentary), may also be applicable to other rules, such as those that represent an exception to a more general rule, or that bind only certain subjects of international law. Here, too, the language of conclusion 3 aims to provide both a signpost for the caution necessary in identifying a rule of customary international law as well as some measure of flexibility, allowing account to be taken of any specific circumstances related to the rule in question.

34. As for the relevance of the legal opinions of States other than those engaged in a certain practice, the Special Rapporteur considers that an inquiry into the *opinio juris* that may accompany instances of the relevant practice should be complemented by a search for the *opinio juris* of other States in order to verify whether States are generally in agreement or are divided as to the binding nature of a certain practice.[68] As the International Court of Justice has explained, "[e]ither the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'".[69] In the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, for example, it was precisely because "the members of the international community [were] profoundly divided on the matter of whether non-recourse [by a certain number of States] to nuclear weapons … constitute[d] the expression of an *opinio juris*", that the Court "[did] not consider itself able to find that there is such an *opinio juris*" and thus a corresponding rule of customary international law.[70]

Part Three: A general practice

Conclusion 4: Requirement of practice

1. Comments and observations received

35. States commenting on draft conclusion 4 all agreed that customary international law was, in principle, created and evidenced by the practice of States. The Russian

[68] See the second report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/672), para. 64 and the references therein.

[69] *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, para. 207 (citation omitted; indicating also that "[r]eliance by a State on a novel right or an unprecedented exception to the principle might, *if shared in principle by other States*, tend towards a modification of customary international law" (emphasis added)).

[70] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 254, para. 67.

Federation suggested that in order to better reflect this established position, the word "primarily" in paragraph 1 of the conclusion should be deleted.[71]

36. Views differed, however, on the possible relevance of practice of international organizations, referred to in paragraph 2 of draft conclusion 4. The majority of States commenting on the draft conclusion expressed support for the proposition that "in certain cases, the practice of international organizations also contributes to the formation, or expression, or rules of customary international law".[72] Romania, for example, explained that States, "by transferring competences to international organizations, had created a role for the latter in the identification of customary international law", and observed in this context that "[g]enerally speaking, the draft conclusions were reflective of the status quo".[73] The Nordic countries similarly remarked that they "share the view, as expressed in draft conclusion 4, that in certain instances the practice of international organizations can contribute to the formation, or be the expression, of rules of customary international law".[74] They added that this "is particularly the case in instances where such organizations have been granted powers by member States to exercise competence on their behalf".[75] Germany observed that the commentary to draft conclusion 4 "rightly noted that, where Member States had transferred exclusive competences to an international organization, the practice of the organization could be equated with the practice of those States".[76] The European Union, for its part, expressed its expectation that the Commission's output would reflect the potential of the organization to contribute to customary international law, including in such areas as fisheries and trade.[77]

37. In the view of several other States, further refinement of paragraph 2 and its commentary was needed. The Netherlands considered that the draft conclusion was too limited, explaining that while "international organizations can and do play … a role in their own right [in the formation and identification of customary international law]", the current text "suggests a view of international organizations as mere agents of States … and calls into question the idea of international legal personality of such organizations".[78] It suggested that the circumstances currently recognized in the commentary as those in which the practice of international organizations may be relevant, should be expanded.[79] Austria similarly found the present text of paragraph 2 to be "very restrictive", and explained that it "does not sufficiently reflect the growing participation of universal as well as regional [international organizations] in the international relations and therefore also in the formation of customary

[71] A/C.6/71/SR.21, para. 49. See also written comments of the United States, p. 5 (suggesting the deletion of the word "primarily" together with deletion of paragraph 2 of the conclusion).
[72] See, in addition to States referred to below, A/C.6/71/SR.20, para. 66 (China); A/C.6/71/SR.21, para. 99 (Chile); A/C.6/71/SR.22, para. 50 (Viet Nam).
[73] See A/C.6/71/SR.21, para. 63.
[74] Joint Nordic written comments, p. 1.
[75] *Ibid.*
[76] See A/C.6/71/SR.21, para. 116 (welcoming the specific reference to the European Union in that context).
[77] See A/C.6/71/SR.20, para. 45.
[78] Written comments of the Netherlands, paras. 2 and 4 (suggesting also, at para. 7, that the commentary should provide guidance as to "how to distinguish practice of the organization from practice of States within the organization").
[79] *Ibid.*

international law".[80] It suggested that the words "in certain cases" should be further elaborated so as to provide clearer guidance as to the situations in which the practice of international organizations "has an impact on the formation of customary international law".[81] Belarus considered that the only practice of international organizations that may be of relevance is "acts that relate to the practice of States acting within those organizations, mainly within their representative organs, not their secretariats, treaty bodies and the like".[82] It also suggested that including a definition of the term "international organization" may be useful.[83]

38. Other States, however, submitted that the text of paragraph 2 and the commentary was too broad. Australia, being "open to the possibility that the practice of international organizations might contribute to the formation of custom 'in certain cases'" as provided for in the draft conclusion, suggested that "[c]onsideration should be given to whether further caveats should be inserted".[84] Singapore suggested that the words "in certain cases" should be replaced by "in limited cases", in order to "more accurately reflect" the circumstances referred to in the commentary.[85] It further considered that the commentary should emphasize that "the reason the practice of [international organizations] can contribute to customary international law in such limited cases is that, in these cases, the practice of international organisations reflects the practice of States".[86] An amendment to the text of the conclusion was also proposed by Turkey, which suggested that "bearing in mind the need to set a high threshold [for] the evidentiary value of the practice of international organizations, a more cautious wording would be desirable, with the word 'contributes' being replaced by 'may contribute'".[87] Israel, too, considered that while the draft commentary "properly explains" the primary role of States and the more limited role of international organizations in the creation and expression of customary international law, the text of the draft conclusion itself does not adequately do so.[88] In particular, it

[80] Written comments of Austria, p. 1 (explaining that "[t]he activities of international organizations performed within their powers and attributable to them may be considered as practice having an impact on the formation of customary international law. They are carried out not only in areas of international law which only concern IOs, but also in relation to rules applicable to both international organizations and States where the activities of both have common features. Rules developed on the basis of such practice of IOs are not only applicable to international organizations but also to States. This applies for instance to operations of a military character").

[81] *Ibid.*

[82] Written comments of Belarus, p. 2 (adding, at p. 3, that "[r]egarding the practice of international organizations in the formation of customary international law, it would be more productive to take account of the activities of the States members of those organizations rather than the practice of the international organizations themselves, which are secondary subjects of international law"); see also A/C.6/71/SR.23, para. 3 (saying that "[t]he wording in [the commentary] concerning the functional equivalence of the acts of international organizations to the acts of States was appropriate, because acts of international organizations could be construed very broadly in the identification of 'practice' for the purposes of draft conclusion 4. [The delegation of Belarus] therefore proposed that the possibility of including that wording directly in the text of the draft conclusion should be considered").

[83] Written comments of Belarus, p. 2.

[84] See A/C.6/71/SR.21, para. 16 (also stressing that the role of international organizations in the formation of custom, including any assessment of the weight and relevance of their practice, "must be approached with caution").

[85] Written comments of Singapore, para. 6.

[86] *Ibid.*, at para. 7 (adding that such emphasis "would be consistent with the statement in draft conclusion 4, paragraph 1").

[87] See A/C.6/71/SR.29, para. 66 (adding that "that would also be more consistent with paragraphs 2 and 3 of draft conclusion 12").

[88] Written comments of Israel, para. 5 (referring in this context to draft conclusion 4 in particular, but also to the draft conclusions more generally).

suggested that the conclusion should make clearer those certain circumstances in which the practice of international organizations may be of relevance, namely, where exclusive competences were delegated to them by their member States and when the relevant rules relate to their internal operation or their relations with States.[89] Argentina thought that it would be useful to clarify whether the internal acts of international organizations could also be deemed relevant to the formation and identification of customary international law, opining that "they could not, as they were not international in character".[90] The Russian Federation had several reservations about paragraph 2, noting that the commentary "did not cite any practice or other sources as evidence that such practice could form rules of international law" and that "the authority of practice differed from one international organization to another".[91] It suggested that the draft conclusion "should be more limited to indicate that the practice of international organizations could contribute to the formation of rules of customary international law that applied to the organizations themselves and could under certain circumstances embody rules of customary international law".[92]

39. On the other hand, some States considered that to acknowledge any direct contribution of practice of international organizations to the formation and identification of customary international law was, in the words of the United States, "not supported by the practice or *opinio juris* of States or relevant case law", and was thus out of place in an instrument seeking to provide guidance as to the established rules regarding the identification of customary international law.[93] Considering that recognition of such a role for international organizations would be a "novel interpretation of international law that would implicitly and retroactively expand the [carefully negotiated] mandates of international organizations in [an] unclear way",[94] the United States further opined that even as a proposal for development of the law, paragraph 2 of draft conclusion 4 was couched in too broad a language and implied, erroneously, that any analysis of the existence of a rule of customary international law must involve examining the practice of international organizations.[95] The better approach, it was suggested, "is to recognize that it is the practice of States within

[89] *Ibid.*, at para. 6.

[90] See A/C.6/71/SR.22, para. 75.

[91] See A/C.6/71/SR.21, para. 49 (explaining that "United Nations practice, for example, could not be put on a par with the practice of regional organizations").

[92] *Ibid.*, at para. 50.

[93] See A/C.6/71/SR.20, paras. 56–57. In its written comments the United States was even more explicit: "The United States believes that draft conclusion 4 (Requirement of practice) is an inaccurate statement of the current state of the law to the extent that it suggests that the practice of entities other than States contributes to the formation of customary international law" (written comments of the United States, p. 2).

[94] Written comments of the United States, p. 4.

[95] See A/C.6/71/SR.20, para. 57. More specifically, the United States suggested that (a) "neither the Draft Conclusion nor the commentary fully defines what those cases [in which the practice of international organization may also contribute to the formation or expression of rules of customary international law] are"; (b) they fail to address the "crucial question" of how one would determine the *opinio juris* of an international organization; (c) they fail to articulate the type of conduct that may be of relevance (given that "the forms of State practice discussed in Draft Conclusion 6 do not all have clear analogues in the activities of international organizations"; (d) they may erroneously lead to an interpretation according to which rules of customary international law may not be identified on the account of State practice alone or in the face of contradictory practice of international organizations; and (e) they fail specify the precise range of practice of international organizations that may be relevant to identifying a rule of customary international law, and erroneously imply that it is always necessary to analyse "not just State practice, but the practice of hundreds if not thousands of international organizations with widely varying competences and mandates" (written comments of the United States, pp. 3–5).

international organizations" that may be relevant, not the practice of the international organization as such.[96] Several suggestions for amending the conclusions and commentaries were made to reflect this position, including the deletion of paragraph 2 and specifying in paragraph 3 of the conclusion that international organizations are among those actors whose practice does not contribute to the formation or expression of customary international law.[97] It was also suggested that the words "of States" should be added to qualify the term "a general practice" in conclusion 2.[98] Mexico similarly suggested that the Commission should "[spell] out that the practice of international organizations contributed to the identification of the practice of their member States and not, as was currently the case, to the formation or expression of custom".[99] The Islamic Republic of Iran suggested that "the practice of States members of an international organization and that of the organization itself needed to be considered separately, and only the proven practice of States could be considered as evidence".[100] New Zealand, in considering that the current text of paragraph 2 of draft conclusion 4 goes "beyond the codification of settled law",[101] suggested that it "should be retained only if the 'certain circumstances' in which the practice of an international organization may contribute to the formation of customary international law are articulated more clearly in the text of the draft conclusion itself".[102] It suggested in this context that "the practice of an international organization cannot contribute to the formation of a rule of customary international law unless it is authorized by that organization's legal functions and powers; has been generally accepted over time by the organization's member States; and the rule of customary international law is one to which the international organization itself would be bound".[103] While recognizing "the particular situation of the European Union", New Zealand urged caution in "attempts to identify general conclusions from that limited experience" and advocated for a better articulation of the conceptual basis underpinning the draft conclusion.[104] It also highlighted the need clearly to align the text of paragraph 2, and its commentary, with the text and commentary of conclusion 12.[105]

40. While paragraph 3 of the draft conclusion, concerning the conduct of other actors, was generally endorsed,[106] Argentina suggested that it would be helpful to define the circumstances in which such conduct could be taken into consideration when assessing relevant practice.[107] China agreed that "[t]he conduct of entities that were not States or international organizations did not meet the requirement of practice and as such could not contribute to the formation or expression of customary international law", but considered it "doubtful whether an ambiguous phrase such as 'may be relevant' should be retained".[108] The Russian Federation was concerned that "[i]t was not entirely clear why, in addition to non-governmental organizations

[96] Written comments of the United States, p. 5.
[97] *Ibid.*, at pp. 5–6.
[98] *Ibid.*, at p. 5.
[99] See A/C.6/71/SR.22, para. 22 (adding that the "evidentiary value" of practice of international organizations was for identification of State practice and "lay solely in the performance of functions transferred by States or functionally equivalent to their own").
[100] See A/C.6/71/SR.23, para. 15.
[101] Written comments of New Zealand, para. 4.
[102] *Ibid.*, at para. 12.
[103] *Ibid.*
[104] *Ibid.*, at para. 9.
[105] *Ibid.*, at para. 11.
[106] See, for example, A/C.6/71/SR.21, para. 99 (Chile); A/C.6/71/SR.24, para. 16 (India); written comments of New Zealand, para. 13; written comments of Singapore, para. 5.
[107] See A/C.6/71/SR.22, para. 75.
[108] See A/C.6/71/SR.20, para. 66.

(NGOs) and private individuals playing an important … role in the identification of rules of customary international law, reference was also made [in the commentary to paragraph 3] to non-State armed groups and transnational corporations".[109] It suggested, moreover, that a clarification should be added to the effect that "only the reaction of States to the behaviour of such actors was important".[110] Egypt expressed its "reservations about taking into account other sources, such as texts from academic institutions or non-State entities".[111]

2. Suggestions by the Special Rapporteur

41. The Special Rapporteur recognizes that the relevance of practice of international organizations to the identification of customary international law continues to be the subject of a range of strongly held views among States (and, it is believed, within the Commission). The Special Rapporteur also agrees with the view that several formulations presently found in draft conclusion 4 and its commentary could be improved. A great effort will be needed to achieve a text that meets the concerns of all sides.

42. Bearing in mind that all agree that it is the practice of States that has the paramount role in the creation and expression of rules of customary international law,[112] it would be useful to try and identify more clearly the scope of disagreement concerning the possible role of the practice of international organizations. First, it has not been disputed that when States direct an international organization to execute in their place actions falling within their own competences, such practice well may be of relevance to the creation, or expression, of customary international law. Thus the relevance of practice of the European Union (or other international organization) when exercising exclusive competences transferred to it by its member States was not denied,[113] as it seems clear that excluding such practice would preclude the member States themselves from contributing to the creation or expression of customary international law.[114] Conclusion 4 (and the conclusions more broadly) should not have this effect.

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[109] See A/C.6/71/SR.21, para. 51.

[110] *Ibid.*

[111] See A/C.6/71/SR.23, para. 41.

[112] The draft conclusions have indeed been viewed by commentators as enshrining a "State-centric approach" and as "reserving a residual role to IOs practice": see, respectively, J. Odermatt, "The development of customary international law by international organizations", *International and Comparative Law Quarterly*, vol. 66 (2017), pp. 491–511 (in particular, pp. 493–497); and R. Deplano, "Assessing the role of resolutions in the ILC draft conclusions on identification of customary international law: substantive and methodological issues", *International Organizations Law Review*, vol. 14 (2017), pp. 227 and 233. It has also been thoughtfully argued that while the practice of international organizations may not be as important as that of States, the draft conclusions, both in substance and form, do not take international organizations "sufficiently seriously": Blokker, "International organizations and customary international law" (see footnote 22 above), at pp. 1–12.

[113] See, for example, written comments of New Zealand, para. 9 ("recogniz[ing] the particular situation of the European Union"); S.D. Murphy, "Identification of customary international law and other topics: the sixty-seventh session of the International Law Commission", *American Journal of International Law*, vol. 109 (2015), pp. 822 and 828 (suggesting that the reference to the European Union "may well be valid" (but adding that the organization "may not be exemplary of international organizations generally").

[114] See also the third report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/682), para. 77; and the fourth report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/695), para. 20.

43. Second, no opposition was expressed as regards the proposition that the practice of international organizations among themselves and in their relations with States could give rise or attest to rules of customary international law binding in such relations. This position may be said to be reflected in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which refers in its preamble to the "codification and progressive development of the rules relating to treaties between States and international organizations or between international organizations", and which affirms (also in the preamble) that "rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention".[115] It will be recalled in this context that the Secretariat memorandum of 2013 included the observation that "[u]nder 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".[116]

44. Third, and more generally, there does not seem to be disagreement as to the notion that a wide array of acts carried out by international organizations may in fact be relevant and helpful in seeking to identify rules of customary international law. For example, in identifying the existence and content of an alleged rules of customary international law applicable in relation to peacekeeping operations, the experience of forces deployed by the United Nations or by organizations such as the Economic Community of West African States may need to be taken into account. Similarly, an exercise to determine whether customary international law recognizes an exception to governmental succession to debts in cases of so-called "odious debt" should not overlook the practice of international financial institutions such as the World Bank or the International Monetary Fund. A divergence of views appears to exist, however, on whether such practice merely shows what the member States do in or through the relevant organization, or whether it is practice of the organization as such. While the matter may at the end of the day seem largely theoretical, the separate international legal personality of international organizations suggests that the latter classification ought to prevail. Even where the member States are those who may ultimately authorize and direct such practice as deployment of peacekeepers or the conditions for repayment of loans, it is the organization that acts. In other words, international organizations do act on the behalf of their members States; but in so doing they are actors in their own right. The example of the European Bank for Reconstruction and Development's Standard Terms and Conditions for a loan, guarantee or other financing agreement may be recalled: these recognize that the sources of public international law that may be applicable in the event of dispute between the Bank and a party to a financing agreement include, *inter alia*, "forms of international custom,

[115] See also article 38 of the Convention. The Commission was indeed conscious not to close the door on such a possibility: see summary record of the Commission's 1442nd meeting (16 June 1977), *Yearbook ... 1977*, vol. I, pp. 145–146; *Yearbook ... 1978*, vol. II (Part Two), p. 137, para. (5); *Yearbook ... 1982*, vol. II (Part Two), p. 48, para. (5).

[116] A/CN.4/659: "Formation and evidence of customary international law: elements in the previous work of the International Law Commission that could be particularly relevant to the topic" (2013), observation 13.

including the practice of states *and international financial institutions* of such generality, consistency and duration as to create legal obligations".[117]

45. The question of how to establish acceptance as law (*opinio juris*) on the part of international organizations does not seem to raise special difficulties. The forms of evidence referred to in conclusion 10 may well apply, *mutatis mutandis*, to international organizations.[118] Statements of senior officials of the organization, legal opinions by the general counsel of the organization, correspondence of the organization with its member States (or others), acceptance by the organization of treaty provisions explicitly incorporating rules of customary international law, or official publications of an organization, may attest to the *opinio juris* of the organization. A recent example may be found in the Joint Statement submitted to the United Nations Legal Counsel on 31 January 2017 by some 24 international organizations, in which the signatories expressed their view, *inter alia*, on the legal status of the rules contained in the Commission's draft articles on the responsibility of international organizations.[119]

46. At the same time, the Special Rapporteur accepts that several improvements could be made to the text of draft conclusion 4 in order better to reflect the actual position and address the concerns raised. In order to highlight the primacy of State practice in the present context while also recognizing that there may be cases where the practice of international organizations may be of relevance, several amendments to paragraphs 1 and 2 are suggested. In particular, the words "primarily" and "contributes to" could be omitted from paragraph 1, to strengthen the general proposition contained therein.[120] In paragraph 2, the word "may" should be added to emphasize that caution is needed. For clarity, the reference therein to "rules of customary international law" should be made in the singular, to better indicate that the practice of international organization would not always be relevant. It is also suggested to replace (in both paragraphs) the words "formation, or expression" with the words "expressive, or creative", which were employed by the International Court of Justice in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case.[121] Referring first to expression and then to creation would also serve to focus the paragraph on the task of identification of a rule, which better corresponds to the aim of the topic as a whole.

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[117] European Bank for Reconstruction and Development, Standard Terms and Conditions (1 December 2012), sect. 8.04(b)(vi)(C) (emphasis added). See also the fourth report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/695), footnote 19.

[118] See also Odermatt, "The development of customary international law by international organizations" (footnote 112 above), at p. 493.

[119] "Response to the request of the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel of February 8, 2016, for comments and information relating to the draft articles on the responsibility of international organizations pursuant to UN General Assembly resolution 69/126 (2014)", available online at http://opil.ouplaw.com/view/10.1093/law-oxio/e204.013.1/law-oxio-e204-regGroup-1-law-oxio-e204-source.pdf.

[120] It would not seem advisable to add to conclusion 2 the words "of States" to the now century-old formula of "a general practice accepted as law", also as this would stray unnecessarily from the widely accepted and usefully flexible language of the Statute of the International Court of Justice.

[121] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 46, para. 43 ("… it should be borne in mind that, as the Court itself made clear in that [1969] Judgment, it was engaged in an analysis of the concepts and principles which in its view underlay the actual practice of States which is expressive, or creative, of customary rules").

47. Paragraphs 1 and 2 could thus read:

> 1. *The requirement of a general practice, as a constituent element of customary international law, refers to the practice of States as expressive, or creative, of rules of customary international law.*
>
> 2. *In certain cases, the practice of international organizations may also contribute to the expression, or creation, of a rule of customary international law.*

48. The commentary would need to be revised accordingly. In referring to the practice of international organizations, it could begin by explaining briefly that international organizations are different from States and that, in the words of the International Court of Justice, "they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them".[122] The commentary could then explain that while international organizations often serve as arenas, or catalysts, for State practice, at times it is their own practice, in fulfilment of their mandates from States, which could be of relevance. This may be the case when they exercise on the international plane exclusive competences or other powers conferred upon them. It would be clarified that the conclusion does not suggest that every analysis of the existence of a rule of customary international law necessitates an examination of the practice of international organizations; it is only where the practice of particular organizations may be directly relevant, mostly by virtue of their mandate and constituent instrument, that it should be considered. It would also be explained that the weight to be given to the practice on an international organization should depend on a number of factors, including the extent of the organization's membership and the input and reaction of the member States to that practice. The commentary may further explain that the practice of international organizations may be of particular relevance when determining the existence and content of customary rules applying to the organizations themselves. It should also include a general sentence, similar to the one found in the draft commentary at present,[123] explaining that references in the conclusions and commentaries to the practice (and *opinio juris*) of States should be read as including, in those cases where it is relevant, the practice (and *opinio juris*) of international organizations. In this way, the conclusions themselves, by referring mostly to States, will reflect the predominance of State practice in the present context, but at the same time leave room for consideration of practice of international organizations in those fields and cases where it may be relevant.

49. As for paragraph 3 of the conclusion, it is suggested that, for the sake of consistency, the word "formation" would be substituted with "creation" (and relocated within the sentence) as well. The commentary would need to address the concerns raised, in particular by clarifying further that "other actors" have no direct role in the creation or expression of rules of customary international law, and the circumstances in which their conduct could be taken into consideration when assessing relevant practice. Any reference to non-State armed groups and transnational corporations would need to be considered as well.

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[122] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 78, para. 25 (referring to the "principle of speciality" that governs international organizations). The Special Rapporteur recalls that his proposal to include in the conclusions a definition of "international organization" (see the second report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/672), para. 20) was not favoured by the Commission; the commentary does include such a definition (A/71/10, para. 63, para. (3) of the commentary to conclusion 4).

[123] See A/71/10, para. 63, para. (3) of the commentary to conclusion 4.

Conclusion 5: Conduct of the State as State practice

1. Comments and observations received

50. Draft conclusion 5 elicited few comments. In endorsing the wording of the conclusion, Chile expressed agreement with the commentary's clarification that "to qualify, the practice must be publicly available or at least known to other States".[124] Spain similarly suggested that the commentary should indeed "make it clear that practice must be publicly available or at least known to other States in order to give them the opportunity to object".[125] The United States, however, considered that "[t]he fact that the practice might not otherwise be "publicly available" or known to some would not … preclude its relevance to the formation and identification of customary international law", and suggested that the relevant sentence in the commentary be deleted or revised.[126] Belarus suggested that the commentary could perhaps incorporate the approach to attribution of conduct to the State employed in the Commission's articles on State responsibility.[127]

2. Suggestions by the Special Rapporteur

51. The Special Rapporteur does not suggest any changes to draft conclusion 5, as adopted on first reading. A revision to the commentary may be suggested to capture more accurately the significance of the availability of practice for the formation and (perhaps more importantly) identification of customary international law. It may be recalled that reference to the concept of attribution as set out in the Commission's articles on responsibility of States for internationally wrongful acts was found (following a debate on the matter in the Drafting Committee) to be inappropriate in the present context.[128]

Conclusion 6: Forms of practice

1. Comments and observations received

52. Draft conclusion 6, while generally welcomed, attracted a number of comments concerning both drafting and substance. The Russian Federation, accepting that the practice of different State bodies and branches of Government may all be considered as State practice for purposes of customary international law, "was not convinced that there was no predetermined hierarchy" among such various forms of practice.[129] Recognizing that the commentary did point out that such a hierarchy could in fact exist in certain cases, it suggested a more general statement to the effect that "a hierarchy existed in the vertical power structure (the higher body had more importance than the lower one) and as a function of the role of the body concerned: the practice on the international scene of representatives of executive bodies was more important than the practice of bodies having responsibility primarily in the area of a State's internal affairs".[130] Slovakia, by contrast, considered that "there should be no hierarchy between the different forms of evidence of the two elements".[131] It also

[124] See A/C.6/71/SR.21, para. 99.
[125] *Ibid*., para. 106.
[126] Written comments of the United States, p. 9.
[127] See A/C.6/71/SR.23, para. 4.
[128] Statement of the Chairman of the Drafting Committee (7 August 2014), p. 10 (available at http://legal.un.org/ilc/); see also the second report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/672), footnote 74 and the references therein.
[129] See A/C.6/71/SR.21, para. 52.
[130] *Ibid*.
[131] See A/C.6/71/SR.23, para. 24.

"welcomed the fact that the enumeration of different forms of practice and *opinio juris* was not exhaustive, but demonstrative, leaving space for the analysis of new forms in the future".[132] The United States agreed that "State practice comes in a … variety of forms as stated in draft conclusion 6", but considered that the examples of forms of State practice in paragraph 2 of the conclusion should be reordered so as "to start with more action-oriented practice as it is frequently the most probative form of practice".[133] It made specific suggestions to this effect, adding that such reordering "may also help the reader distinguish between practice and *opinio juris*, as statements are more likely to embody the latter".[134] The United States also suggested that the word "may" be added to the second sentence of paragraph 1, "both for consistency with the first and third sentences (both of which use "may") and to underscore that each State act must be assessed to determine whether it is relevant practice for the purposes of a given customary international law analysis".[135] Israel considered that the reference to verbal acts as a form of practice should be qualified by the words "at times"; and suggested that the commentary should make clear that "casual" or "spontaneous" statements made by State officials "are insufficient for the purposes of identification of customary international law and should not be given any weight in this regard".[136] Austria suggested that conclusion 6 (as well as conclusions 7 and 8) should also cover the practice of international organizations.[137]

53. All States commenting on the issue of inaction as a form of State practice emphasized that inaction may only be considered as practice when it is deliberate.[138] Chile suggested in this context that draft conclusion 6 "must be read in conjunction with the commentary so as to ensure a proper understanding" that "[f]or the inaction of a State to constitute a practice, i.e. an element of custom, it must be a deliberate act of the State, conducted in full awareness and intentionally for that sole purpose".[139] Ireland, too, welcomed the "note of caution sounded in the commentary" to this effect,[140] and the United States proposed several amendments to its text to further "underscore the limited circumstances in which inaction constitutes relevant State practice".[141] A number of other States, however, suggested that the text of conclusion 6 itself should explicitly refer to deliberate inaction.[142]

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[132] *Ibid*.

[133] Written comments of the United States, pp. 11–12 (suggesting the following order: "executive conduct, including operational conduct 'on the ground'; legislative and administrative acts; decisions of national courts; diplomatic acts and correspondence; conduct in connection with treaties; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference").

[134] *Ibid*., at p. 11.

[135] *Ibid*.

[136] Written comments of Israel, para. 34 (explaining that "customary international law overwhelmingly regulates physical acts, whereas customary regulation of verbal conduct is rare"); and paras. 26–27.

[137] Written comments of Austria, p. 1.

[138] See, for example, in addition to States referred to in the present paragraph, A/C.6/71/SR.22, para. 7 (Greece) and para. 24 (Mexico).

[139] See A/C.6/71/SR.21, para. 100.

[140] See A/C.6/71/SR.22, para. 34.

[141] Written comments of the United States, p. 10.

[142] See A/C.6/71/SR.21, para. 27 (El Salvador, suggesting also that this should be done in a "specific paragraph on inaction"); A/C.6/71/SR.22, para. 24 (Mexico) and para. 75 (Argentina); written comments of Singapore, para. 10 (adding that the Commission "may wish to consider replacing the expression 'inaction' with 'deliberate abstention from acting'"); written comments of New Zealand, para. 16; written comments of Israel, para. 11; written comments of the Netherlands, para. 9.

54. With regard to the draft conclusion's reference to decisions of national courts, New Zealand considered that in general "only decisions of higher courts would be sufficient to be considered to be State practice for the purposes of the formation or identification of rules of customary international law", adding that "it is very difficult to imagine a situation in which a decision that has been overruled by a higher court could still be relied upon as State practice in this context".[143] Israel similarly suggested that the conclusion and commentary should clarify that "acts (laws, judgments, etc.) must be final and conclusive in order to qualify" as relevant, so as not to imply "that non-definitive acts (such as bills and provisional measures) could possibly point to the existence of customary international law".[144] More specifically, it considered that "only higher courts' final and definitive decisions … should be taken into account", and that "statements of States' representatives should be attributed to the State only if they were properly authorized and made in an official capacity".[145] Australia, on the other hand, considered that "[t]he Commission's approach of regarding national court decisions as a form of State practice, a form of evidence of acceptance as law and potentially as a 'subsidiary means' for determining the existence of a customary rule was appropriately reflected in draft conclusions 6, 10, and 13".[146] Greece suggested that the commentary should clarify further the distinction between national court decisions as a form of State practice and their possible role as subsidiary means for determining the law, as such distinction was "not obvious and was difficult to implement in practice".[147] Viet Nam made a similar suggestion.[148]

2. Suggestions by the Special Rapporteur

55. The Commission may wish to take account of the concerns of many States that there should be greater clarity about the circumstances in which inaction amounts to practice. This could be done by omitting from paragraph 1 the words "in certain circumstances" and specifying instead that the inaction must be "deliberate". That would be consistent with the present commentary, which states expressly that "[t]he words 'under certain circumstances' seek to caution, however, that only deliberate abstention from acting may [count as practice]".[149] It is also proposed that paragraph 1 could be improved by joining the second and third sentences. In light of the various suggestions made, the paragraph might read:

> *Practice may take a wide range of forms. It may include both physical and verbal acts, as well as deliberate inaction.*

56. The Special Rapporteur does not consider that only decisions of higher courts may be State practice. Such an approach would overlook how a State (and its judiciary) may operate.[150] For example, the parties (which will not necessarily include

[143] Written comments of New Zealand, para. 18.
[144] Written comments of Israel, para. 20.
[145] *Ibid*., at paras. 24 and 27.
[146] See A/C.6/71/SR.21, para. 19.
[147] See A/C.6/71/SR.22, para. 9.
[148] *Ibid*., para. 51.
[149] See A/71/10, para. 63, para. (3) of the commentary to conclusion 6.
[150] In the *Jurisdictional Immunities of the State* case, the International Court of Justice took note of judgments by lower courts in Belgium as part of its inquiry into State practice in the form of national judicial decisions which concerned the question whether a State was entitled to immunity in proceedings concerning acts allegedly committed by its armed forces in the course of an armed conflict: *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 133, para. 74.

the State) may decide not to appeal a lower court decision for any number of reasons, even when they disagree with it, while a higher court might have the discretionary authority to decline hearing an appeal when the higher court agrees with the lower court ruling. At the same time, it seems clear that decisions of higher courts should in general be accorded greater weight; and where a lower court decision has been overruled by a higher court on the relevant point, the evidentiary value of the former is likely to be nullified. Such circumstances pertaining to the question of whether a certain practice reflects the position of a State may well be taken into account, as recognized — indeed required — by conclusions 3 and 7. The text of the commentary to conclusion 6, which currently specifies that "it is likely that greater weight will be given to the higher courts" and that "decisions that have been overruled on the particular point are unlikely to be considered relevant", could be sharpened. In addition, while the commentary already refers to the possible dual role of decisions of national courts,[151] further guidance on this matter could be included.

57. As for the order in which possible forms of practice are listed in paragraph 2, the present text reflects a deliberate choice by the Drafting Committee, which debated the matter and elected to amend the text originally proposed by the Special Rapporteur in order to enumerate "first, common forms of practice at the international level and then forms of practice at the domestic level".[152] The Commission may wish to reconsider this, in order to list first the most classic forms of practice. In any event, the forms of practice listed could well apply, *mutatis mutandis*, to international organizations.

58. Paragraph 3 of the conclusion states that there is no predetermined hierarchy among the various forms of practice. The paragraph is intended to explain that in the abstract, no form of practice has a higher probative value than any other and all may be of relevance. It was included by the Drafting Committee to indicate, *inter alia*, that the order in which forms of practice are listed in paragraph 2 "does not imply that a specific form of practice is *a priori* more important than the other".[153] As the Chairperson of the Drafting Committee noted, paragraph 3 "does not imply, however, that all forms of State practice necessarily carry the same weight. The word "predetermined" indicates that if such a hierarchy exists, it needs to be assessed on a case-by-case basis".[154] The question of which forms of practice should be awarded greater weight in a particular case is a matter addressed by conclusion 3 (as well as by conclusion 7), the commentary to which recognizes that "the practice of the executive branch is often the most relevant on the international plane".[155] The Commission may wish to consider whether paragraph 3 should be retained, or whether the clarification would fit better in the commentary.

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[151] See A/71/10, para. 63, para. (6) of the commentary to conclusion 6.

[152] See Statement of the Chairman of the Drafting Committee (7 August 2014), pp. 13–14, available at http://legal.un.org/ilc/ (adding that "[t]he order in which the forms are listed is not significant … [it] was chosen only as a matter of drafting and does not imply that a specific form of practice is a priori more important than the other"); for the Special Rapporteur's proposal see the second report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/672), para. 48.

[153] Statement of the Chairman of the Drafting Committee (7 August 2014), p. 14 (available at http://legal.un.org/ilc/).

[154] *Ibid*. The commentary to conclusion 6 specifies in connection with paragraph 3 that "[i]n particular cases, however, as explained in the commentaries to draft conclusions 3 and 7, it may be that different forms (or instances) of practice ought to be given different weight when they are assessed in context" (A/71/10, para. 63, para. (7) of the commentary to conclusion 6).

[155] *Ibid*., para. (5) of the commentary to conclusion 7.

Conclusion 7: Assessing a State's practice

1. Comments and observations received

59. Draft conclusion 7 did not attract many comments. The United States expressed concern that paragraph 2 "could be misread to suggest that States with varying practice are afforded less weight relative to the practice of other States under customary international law" and could therefore be at odds with the principle of sovereign equality of States.[156] It suggested that it would be more accurate to consider that "[a] State with varying practice might not support an asserted rule to the same degree as a State whose practice consistently supports the rule", and that the text of the draft conclusion should be amended accordingly.[157] Israel remarked that draft conclusion 7 failed to capture the fact that "variations in practice often [simply] indicated that the State did not see itself bound to act in any particular way".[158] It suggested that paragraph 2 either be deleted, or amended to say that in case of inconsistent practice by a State, the weight to be given to the practice would depend on the circumstances.[159] The Russian Federation suggested that the practice of State organs had different weight for the purpose of the identification of customary international law (the practice of the executive branch taking precedence on the international plane), and thus, in principle, not all variations in the practice of a State weakened its importance.[160] The Netherlands noted the importance of taking into account materials in languages other than the "mainstream" ones when assessing the practice of a State.[161]

2. Suggestions by the Special Rapporteur

60. Conclusion 7 sets out important guidance for the assessment of the practice of a particular State.[162] Paragraph 1 states that account is to be taken of all available practice of a State, which is then to be assessed as a whole in order to determine the actual position of the State with regard to an alleged rule of customary international law. This proposition, which finds support in the jurisprudence of the International Court of Justice,[163] did not meet with opposition. Paragraph 2 provides that where the practice of a State varies, "the weight to be given to that practice may be reduced". This is meant to offer guidance in situations in which the evidence reveals ambivalence on the part of a particular State in that different organs of that State, or the same organ over time, display differing positions with regard to the alleged rule.

61. As the Chairperson of the Drafting Committee explained in 2014, "[t]he use of the word "may" [in paragraph 2 of conclusion 7] means that this issue … needs to be approached with caution, since such a consequence [of the weight given to a State's practice being reduced] is not necessarily to be drawn in all cases".[164] The word

[156] Written comments of the United States, p. 12.
[157] *Ibid*., at pp. 12–13.
[158] See A/C.6/71/SR.22, para. 39.
[159] Written comments of Israel (2018), para. 36 (suggesting also a corresponding change to the commentary).
[160] See A/C.6/71/SR.21, para. 52.
[161] *Ibid*., para. 130.
[162] See also the statement of the Chairman of the Drafting Committee (7 August 2014), p. 14 (available at http://legal.un.org/ilc/).
[163] See the second report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/672), para. 50.
[164] Statement of the Chairman of the Drafting Committee (7 August 2014), p. 15 (available at http://legal.un.org/ilc/).

"may", which was not included in the Special Rapporteur's original proposal for this draft conclusion, was indeed introduced precisely to meet the comments of members of the Commission concerning a possible hierarchy of forms of practice and conflicting practice within the same State. The draft commentary, too, indicates that the "assessment needs to be approached with caution, and the same conclusion would not necessarily be drawn in all cases … for example, a difference in the practice of lower and higher organs of the same State is unlikely to result in less weight being given to the practice of the higher organ … practice of organs of a central government will often be more significant than that of constituent units of a federal State or political subdivisions of the State; and the practice of the executive branch is often the most relevant on the international plane, though account may need to be taken of the constitutional position of the various organs in question".[165] The commentary also refers to the *Fisheries case*, the specific circumstances of which led the International Court of Justice to find that "too much importance need not be attached to the few uncertainties or contradictions, real or apparent … in Norwegian practice".[166] This explanation provided in the commentary was welcomed by Germany, since it clarified that not all observed inconsistencies in the practice of a State's organs ought to result in reducing the weight given to that State's practice.[167]

62. The Special Rapporteur accepts that the text of paragraph 2 could be improved to convey more clearly the need for caution in those situations that it is meant to cover, and thus to meet the concerns raised. He suggests that conclusion 7, paragraph 2 be amended to read:

> *Where the practice of a particular State varies, the weight to be given to that practice may, depending on the circumstances, be reduced.*

Corresponding changes to the commentary will be suggested in due course.

Conclusion 8: The practice must be general

1. Comments and observations received

63. Draft conclusion 8 received general approval, though a number of amendments to its text and commentary were suggested. The Russian Federation considered that the term "'[g]eneral practice' might be too lightweight", and expressed its preference for the term "settled practice" that was employed in the *North Sea Continental Shelf* judgment.[168] It also indicated a preference for the phrase "both extensive and virtually uniform" in place of the words "sufficiently widespread and representative".[169] The United States also suggested that conclusion 8 should incorporate the "extensive and virtually uniform" standard, "as it is widely recognized by States as the threshold that generally must be met to demonstrate the existence of a customary rule".[170] The United States considered that the word "sufficiently" in paragraph 1 of the draft conclusion was inadequate as it failed to define clearly "the quantum and quality of State practice that is required to identify a rule of customary international law".[171] Israel suggested that the commentary should refer to the requirement that the practice

[165] See A/71/10, para. 63, para. (5) of the commentary to conclusion 7.
[166] *Ibid.* (including also the observation of the Court that such uncertainties or contradictions "may be easily understood in the light of the variety of facts and conditions prevailing in the long period").
[167] See A/C.6/71/SR.21, para. 117.
[168] *Ibid*., para. 48.
[169] *Ibid*., para. 53.
[170] Written comments of the United States, p. 13.
[171] *Ibid*. (adding that "indeed, it begs the question of what degree of widespread and representative practice is 'sufficient' to meet the standard").

be "virtually uniform" and make clear that "States taking part in the practice … must be significantly and decisively greater than those not engaging in such practice".[172]

64. The absence of an explicit reference to "specially affected States" was criticized by a number of States. China considered it appropriate that the commentaries to draft conclusions 8 and 9 be expanded so as to "emphasize that the practice and *opinio juris* of 'specially affected States' should be given fuller consideration".[173] It pointed to the jurisprudence of the International Court of Justice in this regard, and explained that "[t]he practice of any country, whether it be big or small, rich or poor, or strong or weak, should receive full consideration, provided that that country has a concrete interest in and actual influence over the formation of rules in a specific arena. As 'specially affected States', such countries can play a role in the formulation of rules of customary international law".[174] The Netherlands considered that reference to specially affected States should be included in conclusions 8 and 9 themselves, and not only in the commentary (where the term should nevertheless be "further elucidated").[175] Referring to the *North Sea Continental Shelf* judgment, it proposed that the draft conclusions should make clear "that practice and *opinio juris* of such States is an indispensable element in identifying the existence of a rule of customary international law" and "must be given greater weight than that of other States".[176] The United States similarly considered that "the important role of specially affected States should be addressed in [conclusion 8] itself", explaining that "[a] requirement that the practice of specially affected States be considered is an integral part of the *North Sea Continental Shelf* standard".[177] It further noted its concern that as currently worded, the conclusions and commentary may lead to confusion in this respect.[178] Israel likewise suggested that specially affected States "are crucial to the formation and, accordingly, the identification of customary rules",[179] and that their practice (and *opinio juris*) is not only "an indispensable element of identifying the existence of a customary international rule, but … must be given significantly greater weight than the practice of other States".[180] It proposed that the text and commentary of draft conclusion 8 (as well as draft conclusion 9) should be amended to emphasize this.[181]

65. The United States further suggested that conclusion 8 should "explicitly acknowledge that the practice of States that does not support a purported rule is to be considered in assessing whether that rule is customary international law", noting that it is critical that such practice be given sufficient weight.[182]

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[172] Written comments of Israel, para. 29.
[173] Written comments of China, p. 2.
[174] *Ibid*.
[175] Written comments of the Netherlands, paras. 10–11.
[176] *Ibid*.
[177] Written comments of the United States, p. 13.
[178] *Ibid*. (suggesting that "the draft conclusions and commentary may lead to confusion by defining what it means for practice to be 'general' in the draft conclusion with no reference to specially affected States, but then suggesting their practice is 'an important factor' in paragraph (4) of the commentary and only using the term 'specially affected' in a footnote").
[179] Written comments of Israel, para. 29 (adding that "[i]n cases in which the accumulation of practice and *opinio juris* of specially affected States is not in line with the proposed rule, or does not exists *vis-à-vis* such a rule … this should serve as evidence that no such rule exists. This approach is also reflected in paragraph 74 of the International Court of Justice judgment on the *North Sea Continental Shelf* case").
[180] *Ibid*.
[181] *Ibid*., at para. 30.
[182] Written comments of the United States, pp. 13–14.

2. Suggestions by the Special Rapporteur

66. The term "general practice" is found in Article 38, paragraph 1 (*b*) of the Statute of the International Court of Justice, and is commonly used to refer to the "material" (or "objective") element of customary international law. It is also used elsewhere in the draft conclusions,[183] and throughout the commentary adopted on first reading. The Special Rapporteur considers that it should be retained in conclusion 8.

67. As for explaining more clearly what is meant in this context by "general" — that "fundamental adjective qualifying practice in the context of the determination of the existence and content of a rule of customary international law"[184] — as conclusion 8 seeks to do, the Special Rapporteur would recall that the current language of the conclusion was "inspired by the jurisprudence of the International Court of Justice [and] reflects the flexibility of customary international law and the situations in which it arises".[185] The phrase "extensive and virtually uniform", employed in the *North Sea Continental Shelf* judgment,[186] is only one of the ways in which the Court has referred to the requirement of a general practice; in that same case it also used the term "a settled practice"[187] as well as the words "very widespread and representative".[188] In other cases it has applied the requirement of a general practice to mean practice that is "in general … consistent";[189] "established and substantial";[190] "uniform and widespread";[191] or "constant and uniform".[192]

68. None of these expressions define the exact quantum and quality of practice that is required for the identification of any specific rule of customary international law. They cannot and, indeed, do not attempt to do so. The qualification afforded by the word "sufficiently" may thus play an important role in providing further guidance as to how generality of practice should be assessed in a particular case.[193] It has featured in the judgments of the International Court of Justice and other courts in this precise

[183] The term "general practice" also appears in conclusions 2, 3, 4, 9, 11, 12 and 16.

[184] Statement of the Chairman of the Drafting Committee (7 August 2014), p. 16 (available at http://legal.un.org/ilc/).

[185] *Ibid*.

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

[187] *Ibid*., at p. 44, para. 77 and p. 45, para. 79. See also *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 122, para. 55.

[188] *Ibid*., at p. 42, para. 73 (referring specifically to "the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law").

[189] *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. 186.

[190] *Ibid*., at p. 106, para. 202.

[191] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 40, at p. 102, para. 205.

[192] *Colombian-Peruvian asylum case, Judgment of November 20th, 1950*: *I.C.J. Reports 1950*, p. 266, at p. 277; *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 40.

[193] The Chairman of the Drafting Committee explained in 2014 that "[t]he number of States whose practice is required may vary from case to case, a reality that is encapsulated by the word 'sufficiently'. Practice also needs to be followed by a sufficiently representative group of States, usually in different regions. The precise representativeness required also depends on the rule in question and this condition is also to be examined with some flexibility": statement of the Chairman of the Drafting Committee (7 August 2014), p. 16 (available at http://legal.un.org/ilc/).

context.[194] It may be particularly helpful in highlighting that a certain practice must be general enough to give rise to or express a rule of customary international law, and also in providing for some measure of flexibility reflecting the inherent nature of this source of international law.

69. The Commission may wish to consider whether the expression "virtually uniform" may capture that aspect of generality more accurately than the word "consistent". The Special Rapporteur suggests that conclusion 8, paragraph 1 be amended to read:

> *The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as virtually uniform.*

70. As for "specially affected States", the Special Rapporteur recalls that his second report suggested that "[d]ue regard should be given to the practice of 'States whose interests [are] specially affected', where such States may be identified".[195] It also contained a draft paragraph to that effect.[196] This was well received by several members of the Commission in the plenary debate in 2014, but attracted criticism from others. As the Special Rapporteur explained that year, some of that criticism "had not been entirely warranted. Some members had apparently misunderstood what was intended by that [proposed] provision, which reflected the case law of the International Court of Justice. He had certainly not intended to suggest that the practice of certain 'Great Powers', or of the permanent members of the Security Council, should be deemed essential for the formation of a rule of customary international law. He had thought that the explanation supplied in [the report] would be sufficient to clarify the meaning of that provision, especially as it was not couched in peremptory language … and as the category of States, those 'whose interests are specially affected', varied from rule to rule and by no means included any particular State".[197] In other words, the importance of the notion of "specially affected states" for the identification of customary international law should not be overstated. It does not imply that one *only* looks at the practice of specially affected states, as some seemed to fear; it simply means that their practice had to be taken into account. Given that the present language of conclusion 8 is understood to include this element, the Special Rapporteur suggests that the Commission seek to take account of the concerns expressed by adjusting the commentary.

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[194] See, for example, *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 42, para. 73 and p. 45, para. 79; *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at p. 299, para. 111; *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. 186 and p. 108, para. 205; *2 BvR 1506/03* (German Federal Constitutional Court), Order of the Second Senate of 5 November 2003, para. 59 ("Such practice, however, is not sufficiently widespread as to be regarded as consolidated practice that creates customary international law"). See also the second report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/672), paras. 52–53, in particular footnote 154.

[195] *Ibid*., para. 54 (adding that "[i]n other words, any assessment of international practice ought to take into account the practice of those States that are 'affected or interested to a higher degree than other [S]tates' with regard to the rule in question, and such practice should weigh heavily (to the extent that, in appropriate circumstances, it may prevent a rule from emerging)".

[196] *Ibid*., para. 59 (it was suggested that a conclusion dealing with generality of practice should include a paragraph stating that "[i]n assessing practice, due regard is to be given to the practice of States whose interests are specially affected").

[197] A/CN.4/SR.3227: provisional summary record of the Commission's 3227th meeting (18 July 2014), p. 5 (summarizing the plenary debate).

71. It also seems clear to the Special Rapporteur that any inquiry into whether a general practice exists needs to take into account and examine contradictory or inconsistent practice, "particularly emanating from these very States which are said to be following or establishing the [alleged] custom".[198] A clarification to this effect could be made in the commentary.

Part Four: Accepted as law (*opinio juris*)

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

1. Comments and observations received

72. A number of States expressed their appreciation for "the elaborated comments on the nature … of the second constituent element", acceptance as law, including the clear distinction between the latter and "extralegal motives for action or inaction, such as comity, political expedience or convenience, by means of a thorough analysis of context".[199] Austria, on the other hand, suggested that the commentary should address "the significance of the second aspect of the subjective constitutive element of customary international law, the *opinio necessitatis*", noting that "[d]octrine has shown that certain, otherwise unlawful conduct of states was considered to be politically, economically or morally necessary".[200] Sudan wished to emphasize that "the principle of *opinio juris* must take into consideration all parts of the world and all the legal systems in force".[201] Several other States thought that the significance of acceptance as law by specially affected States should be explicitly referred to. See para. 64 above.[202]

73. The United States suggested that the word "with" in the definition of acceptance as law provided in paragraph 1 ("the practice in question must be undertaken with a sense of legal right or obligation") be replaced by the words "out of".[203] This amendment, it was explained, would "more clearly [convey] that the entirety of the practice must be out of a sense of legal obligation".[204] In addition, while agreeing "in principle, that international law recognizes that States have certain rights", the United States suggested that the express reference to the concept of a legal right in the definition of acceptance as law should be omitted.[205] It explained that referring to "legal right" was unnecessary because "States have generally understood the phrase undertaken out of 'a sense of legal obligation' to encompass, where appropriate, State practice undertaken out of a sense of legal right or obligation";[206] and that it was also potentially confusing, "by suggesting that the same inquiry into State practice and *opinio juris* to identify whether States *must* act in a certain way is also needed to

[198] To borrow the words of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda in their Separate Opinion in *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 50, para. 16.

[199] See, respectively, joint Nordic written comments, p. 1, and A/C.6/71/SR.20, para. 51 (Finland on behalf of the Nordic countries).

[200] Written comments of Austria, p. 2.

[201] See A/C.6/71/SR.21, para. 138.

[202] See para. 64 above.

[203] Written comments of the United States, p. 7.

[204] *Ibid*.

[205] *Ibid*., at pp. 7–8.

[206] *Ibid*., at p. 7 (further explaining that "[a]dding 'right or' to the draft conclusion risks creating the misimpression that the concept of legal rights is not already contemplated in the phrase 'a sense of legal obligation'").

ascertain whether States *may* act".[207] It was thus suggested that conclusion 9 should retain only the "common formulation" referring to legal obligation alone, and that the commentary should provide the above-mentioned clarifications.[208] Other States, however, expressed no reservations with regard to the definition provided in draft conclusion 9, and India, for example, "agreed with the Commission that practice that was accepted as law (*opinio juris*) must be undertaken with a sense of legal right or obligation".[209]

2. Suggestions by the Special Rapporteur

74. As the second report on the topic explained, a large variety of expressions has been used in international practice and in the literature to refer to the element of acceptance as law and its relationship with the other constituent element of customary international law.[210] The Special Rapporteur would recall that prior to the adoption of the text currently contained in paragraph 1 of draft conclusion 9, "[s]everal drafting suggestions were made by members of the Drafting Committee in that respect as well".[211] As the statement made in 2015 by the Chairperson of the Drafting Committee records, "[t]he Committee concluded that the phrase 'undertaken with' allowed for a better understanding of the close link between the two elements than the previous proposal 'accompanied by'".[212] This formulation was favoured, *inter alia*, for its ability to indicate "that the practice in question does not have to be motivated solely by legal considerations to be relevant for the identification of rules of customary international law".[213]

75. As regards the expression "*opinio necessitatis*", it is widely accepted that the Latin phrase "*opinio juris sive necessitatis*" refers to a single test, as is shown by the fact that it is usually shortened to "*opinio juris*" (including in the case law of the International Court of Justice[214]). This may well have "its own significance. What is

[207] *Ibid*. (recalling also, at p. 8, the *Lotus* principle when observing that "States are not required to establish *opinio juris* or that a general and consistent practice of States supports an action as lawful before they can lawfully engage in a practice that is not otherwise legally restricted").

[208] *Ibid*., at p. 8.

[209] See A/C.6/71/SR.24, para. 17.

[210] See also the second report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/672), pp. 54–55, para. 67.

[211] Statement of the Chairman of the Drafting Committee (29 July 2015), p. 7 (available at http://legal.un.org/ilc/).

[212] *Ibid*. The Special Rapporteur's original suggestion was for the term "accompanied by" (second report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/672), p. 56, para. 69).

[213] Statement of the Chairman of the Drafting Committee (29 July 2015), p. 7 (available at http://legal.un.org/ilc/).

[214] See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at pp. 122–123, para. 55 and p. 135, para. 77; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 254, paras. 65 and 67 and p. 255, paras. 70, 71 and 73; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at p. 29, para. 27; *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at p. 299, para. 111. Where the Court did employ (also) the longer phrase, it explicitly referred to a sense of legal obligation: *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77; *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, para. 207 (referring to the *North Sea Continental Shelf* cases). In the *Right of Passage* case the Court did not use the longer Latin phrase although it was recorded in the judgment as having been put forward by Portugal; the Court referred instead to acceptance as law (see *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960*: *I.C.J. Reports 1960*, p. 6, at pp. 11 and 40).

generally regarded as required is the existence of an *opinio* as to the law, that the law is, or is becoming, such as to require or authorize a given action".[215] Practice motivated solely by considerations of political, economic or moral necessity can hardly contribute to customary international law, certainly so far as its identification (as opposed, possibly, to its early development) is concerned.[216] That is not to say that such considerations may not be present in addition to acceptance as law.

76. The Special Rapporteur's original proposal for a definition of the requirement of acceptance as law referred to a "sense of legal obligation";[217] it was "[f]ollowing the debate in Plenary [that] the Special Rapporteur amended his original proposal to clarify that not only a sense of legal obligation, but also a sense of a legal right, could underlie the relevant practice".[218] Indeed, as the United States has also noted, States exercising their rights under customary international law "may do so with the legal view that they are legally entitled to do so".[219] The International Court of Justice, too, has referred to practice "hav[ing] occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved";[220] and to "a practice illustrative of belief in a kind of general right for States".[221]

77. It follows that the Special Rapporteur considers that the text of conclusion 9, as adopted on first reading, should be retained. A change to the commentary may be suggested in due course to clarify that representative (and not merely broad[222]) acceptance as law, including by States whose interests are specially affected, is required (along with a general practice) to identify a rule of customary international law.

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

1. Comments and observations received

78. States commenting on draft conclusion 10 sought primarily to highlight the need for particular caution with regard to inaction as evidence of acceptance as law.[223] Thailand thus appreciated the use of the "more precise words 'failure to react over time to a practice'".[224] Ireland welcomed the "clear statement" in the commentary as to the specific circumstances in which inaction may have probative value as evidence of acceptance as law.[225] China agreed that by itself, "[i]naction could not be treated as implied consent; the State's knowledge of the relevant rules and its ability to react should be taken into account in determining whether a State's inaction was intentional

[215] See the second report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/672), para. 65 (quoting H. Thirlway, *The Sources of International Law* (Oxford, Oxford University Press, 2014), p. 78).
[216] See also the second report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/672), at pp. 46–47, para. 61.
[217] *Ibid*., at p. 56, para. 69.
[218] Statement of the Chairman of the Drafting Committee (29 July 2015), p. 7 (available at http://legal.un.org/ilc/).
[219] Written comments of the United States, p. 7.
[220] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 43, para. 74.
[221] *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. 108, para. 206.
[222] See A/71/10, para. 63, para. (5) of the commentary to conclusion 9.
[223] See, in addition to the States referred to below, A/C.6/71/SR.21, para. 55 (Russian Federation); A/C.6/71/SR.24, para. 11 (Indonesia).
[224] See A/C.6/71/SR.22, para. 44.
[225] *Ibid*., para. 34.

and, thus, could serve as evidence of *opinio juris*".[226] Australia stressed that "States could not be expected to react to everything, and the attribution of legal significance to inaction must depend on the circumstances of the case".[227] The Netherlands also suggested that the commentary should take account of the possibility that a State may react in a confidential manner, as well the "the role of explanations that States may at a later stage give for certain positions and their possible silence".[228] New Zealand observed that a failure to react may imply acceptance as law but only in some circumstances and cannot be presumed, also because States may choose to react on a confidential basis.[229] While agreeing with the formulation offered in paragraph 3, New Zealand suggested that the "additional elements identified" in the commentary should take their place in the text of the draft conclusion itself.[230] The Czech Republic expressed a similar concern that the current wording of draft conclusion 10, paragraph 3, might not "adequately [protect] States that did not openly object to a practice of other States from the incorrect assumption that they accepted a developing customary rule".[231] It explained that "[f]ailure to react had a different significance depending on the extent and degree to which the rights and obligations of a State were affected", and that "the failure to react must be seen in the overall context of the situation, in particular when the State not reacting to the other State's conduct consistently pursued a different practice in its own conduct vis-à-vis other States".[232] In addition, the Czech Republic suggested that the Commission should "analyse the differences between the failure to react to relevant practice in cases where a new rule of customary international law might be potentially created in areas which have not yet been regulated by any rule of customary international law on the one hand, and, on the other hand, in cases when a potential new rule would deviate from an already established customary rule".[233]

79. Other States suggested a stricter approach. The United States agreed that failure to react over time may serve as evidence of acceptance as law only when the State was in a position to react and the circumstances called for some reaction, but proposed as an additional requirement that the decision not to react "was made out of a sense

[226] See A/C.6/71/SR.20, para. 67.

[227] See A/C.6/71/SR.21, para. 17 (adding that "inaction should not be assumed to be evidence of acceptance of law. A State would first need to know of a certain practice and have had a reasonable amount of time to respond").

[228] Written comments of the Netherlands, para. 13.

[229] Written comments of New Zealand, para. 19.

[230] *Ibid*., at para. 20 (referring, in particular, to the requirement that the State choosing not to react be "directly affected by the practice in question; [had] known of that practice; and had sufficient time and the ability to respond").

[231] See A/C.6/71/SR.21, para. 8.

[232] *Ibid*. (explaining also that "States usually formulated open objections or protests when a practice directly or significantly affected their interests, whereas in situations in which a practice affected many or all States, the assessment of whether and how to react was more varied"). In its written comments, the Czech Republic added that the Commission should pay more attention "to the differentiation between, on the one hand, failure to react by States which are particularly (specially, directly) interested, concerned and affected by relevant practice of other States and are aware of the legal significance of their reaction or failure to react, and, on the other hand, inaction or failure to react by other states, which may be based on political, practical or other non-legal considerations and which does not stem from the sense of customary legal obligation": written comments of the Czech Republic, p. 2.

[233] Written comments of the Czech Republic, p. 2 (explaining that "[t]he fact that [a] certain customary rule already exists serves as a stabilizing factor and, in general, reduces the need to react to practice of other States which deviates from such a rule (the principle being that a deviation from [an] already established rule is regarded as the breach of that rule and not as the beginning of creation of a new rule)").

of legal obligation".[234] Israel, too, submitted that "evidence that the failure to react itself stemmed from a sense of customary legal obligation" was required, suggesting also that the commentary address the practical difficulty of ascertaining evidence of acceptance as law from mere inaction.[235]

80. As for other forms of evidence of acceptance as law, India agreed that government legal opinions may be valuable as evidence of acceptance as law, but said that "it might be difficult to identify such opinions, as many countries did not publish the legal opinions of their law officers".[236] The Netherlands considered that the reference to decisions of national courts in draft conclusion 10 should be qualified because these "can only form evidence of *opinio juris* when such decisions are not rejected by the State's executive".[237] Belarus considered that "[a]ny conduct by a State that indicates that the State is applying a rule of customary international law despite having to forego some advantages and benefits is one form of evidence of acceptance of the rule as law".[238] The United States, however, noted that caution must be exercised in assessing any evidence of the *opinio juris* of a State "to determine whether it in fact reflects a State's views on the current state of customary international law".[239]

81. Viet Nam pointed to the "divergence between the forms of State practice set out in draft conclusion 6 and the forms of evidence of *opinio juris* set out in draft conclusion 10", and suggested that clarification should be provided in this respect.[240] The Republic of Korea similarly suggested that while "[i]t is only natural that the forms of state practice listed in paragraph 2 of conclusion 6 and the evidence of acceptance as law listed in paragraph 2 of conclusion 10 overlap to a considerable degree", it may be useful "to seek consistency in the use of terms as well as the order in which they are listed in both conclusions" in order to prevent confusion.[241] It also considered that "[a]n explanation may also be needed to clarify discrepancies, where they exist".[242] The Netherlands suggested that a reference to the *opinio juris* of international organizations should be included in the commentary,[243] and, like Austria, considered that it would be useful to clarify how to identify or establish *opinio juris* of international organizations.[244]

[234] Written comments of the United States, pp. 10–11 (suggesting changes to the text of the conclusion and commentary to that effect).
[235] Written comments of Israel, paras. 14–15.
[236] See A/C.6/SR.24, para. 18.
[237] Written comments of the Netherlands, para. 12 (adding that "[s]uch rejection can be said to exist when the executive considers and externally presents such decisions as not representing the State's position on the issue. This qualification follows from the proposition that *opinio juris* requires consistency of the different branches of government").
[238] Written comments of Belarus, p. 3.
[239] Written comments of the United States, p. 15.
[240] See A/C.6/71/SR.22, para. 50.
[241] Written comments of the Republic of Korea, para. 3.
[242] *Ibid*.
[243] Written comments of the Netherlands, para. 14 (adding that the possibility of *opinio juris* of international organizations "follows from the international legal personality of such organizations").
[244] Written comments of Austria, p. 2; written comments of the Netherlands, para. 7.

2. Suggestions by the Special Rapporteur

82. The Special Rapporteur agrees that acceptance as law must not lightly be inferred from inaction.[245] This is reflected in the drafting of conclusion 10, paragraph 3,[246] and is further explained in the commentary. The Special Rapporteur accepts, however, that the commentary could further emphasize the particular caution that is required and recognize explicitly that States, if pressed, may give other explanations for their silence. This may also reassure those who suggested an additional requirement, namely, that the inaction should also be shown to be motivated by acceptance as law, which may be thought to be somewhat circular.

83. The Special Rapporteur agrees with the suggestion that the commentary to conclusion 10 should include a general statement to the effect that evidence of acceptance as law must be carefully assessed in order to determine whether it reflects the State's legal view as to its rights or obligations under customary international law. Such an assessment may doubtless take into account any difference of opinion that may be shown to exist among the different organs of the State, consistent with the guidance offered by conclusion 7. The commentary may also clarify that conclusion 10 applies, *mutatis mutandis*, to international organizations, as they may give rise to the forms of evidence listed.[247]

84. The Special Rapporteur considers that there is good reason for the differences between the list of forms of practice contained in draft conclusion 6 and the list of forms of evidence of acceptance as law in draft conclusion 10: each list is intended to refer to the principal examples connected with each constituent element. If the Commission agrees with this assessment, it may wish to consider explaining it in the commentary.

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[245] See also the position recently expressed by Judge de Brichambaut of the International Criminal Court in his minority opinion in the case concerning *Prosecutor v. Omar Hassan Ahmad Al-Bashir*: "While silence or inaction may amount to acquiescence with the existing rule of customary international law regarding immunities in certain circumstances, such silence may also simply reflect the sensitive nature of immunity and the unwillingness of State officials to commit themselves to a definite position on the matter" (No. ICC-02/05-01/09, Decision under article 87 (7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir (6 July 2017), para. 91); and see F. Vismara, "Rilievi in tema di inaction e consuetudine internazionale alla luce dei recenti lavori della Commissione del diritto internazionale", *Rivista di diritto internazionale*, vol. 99, No. 4 (2016), pp. 1026–1041.

[246] See also the statement of the Chairman of the Drafting Committee (29 July 2015), p. 10, available at http://legal.un.org/ilc/ ("The Drafting Committee shared the view that States could not be expected to react to each instance of practice by other States. Attention is drawn to the circumstances surrounding the failure to react in order to establish that these circumstances indicate that the State choosing not to act considers such practice to be consistent with customary international law").

[247] See also para. 45 above, and footnote 119 above; Odermatt, "The development of customary international law by international organizations" (footnote 112 above), at p. 493.

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

Conclusion 11: Treaties

1. Comments and observations received

85. Draft conclusion 11 was widely endorsed by States, which considered it to be "helpful and [to] accurately capture the role that treaties … play in this context".[248] Singapore, however, considered that the "distinction in treatment between the ways in which a treaty rule can reflect customary international law is not apparent from the text of draft conclusion 11, paragraph 1" and proposed that the text be revised "so that this distinction is clearly reflected in the text of the draft conclusion itself".[249]

86. The Russian Federation suggested that it would be preferable to clarify that reference was being made to multilateral agreements, and to bring into the draft conclusion, from the commentary, the sentence that clarifies that "in and of themselves, treaties could not create customary international law".[250] Belarus similarly highlighted the relevance of "universal multilateral international treaties" and their possible "'spilling over' into international custom", proposing that this possibility should be studied further.[251] The United States suggested some changes to the commentary, including that the reference to widely ratified treaties as particularly indicative be deleted because this is "likely to be misunderstood to suggest that widely ratified treaties most likely reflect customary international law norms, when that is not the case".[252] Israel expressed a similar concern, also with regard to any reference to the possible value of treaties that are not yet in force or which have not yet attained widespread participation.[253]

87. New Zealand appreciated the caution mandated by paragraph 2 of the draft conclusion with regard to reliance on bilateral treaties for purposes of identifying customary international law.[254] India considered that "only treaty provisions that created fundamental norms could generate [rules of customary international law]", and that "[s]trong opposition to a particular treaty, even if only from a few countries, could be a factor that should be taken into account when identifying customary international law".[255] Singapore submitted that a rule of customary international law "should not be assumed to be reflected in a treaty rule only because another similarly worded treaty rule in a separate other treaty has been found to be reflective of customary international law".[256]

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[248] Written comments of New Zealand, para. 22 (referring specifically to the three categories identified in paragraph 1); see also, for example, A/C.6/71/SR.21, para. 56 (Russian Federation) and para. 101 (Chile); A/C.6/71/SR.22, para. 62 (Japan); A/C.6/71/SR.24, para. 10 (Indonesia); A/C.6/71/SR.29, para. 66 (Turkey); written comments of the United States, p. 16; written comments of Israel, para. 38.

[249] Written comments of Singapore, para. 16.

[250] See A/C.6/71/SR.21, para. 56; see also para. 109 (Spain).

[251] Written comments of Belarus, p. 3.

[252] Written comments of the United States, p. 16.

[253] Written comments of Israel, para. 38.

[254] Written comments of New Zealand, para. 23.

[255] See A/C.6/71/SR.24, para. 18.

[256] Written comments of Singapore, para. 17.

2. Suggestions by the Special Rapporteur

88. The Special Rapporteur considers that no change is required in the text of draft conclusion 11, including in paragraph 1 that sets out the recognized circumstances in which a rule set forth in a treaty may be found to reflect customary international law. As with the other conclusions, the explanations in the commentary should not be overlooked.

89. The commentary highlights the particular relevance of multilateral treaties by referring to "treaties that have obtained near-universal acceptance" or those adopted "by an overwhelming majority of States".[257] Depending always on the particular circumstances, this is hard to deny, at least in respect of certain rules set forth therein. The United Nations Convention on the Law of the Sea, the Vienna Convention on the Law of Treaties, the four Geneva Conventions of 1949, and the Vienna Convention on Diplomatic Relations, are but a few examples. Pointing to the extent of participation in a treaty as a possible important factor is not intended to detract in any way from the strict requirements stipulated in the conclusion for establishing that a rule set forth in such treaties (or others) reflects a rule of customary international law. The Special Rapporteur suggests that the Commission review the commentary with this in mind. The clarification that treaties are anyway binding only on the parties thereto fits well in the commentary in this regard.[258] It may also be useful to refer explicitly in the commentary to the relevance of the attitude of States towards a treaty, both at the time of its conclusion and subsequently.

Conclusion 12: Resolutions of international organizations and intergovernmental conferences

1. Comments and observations received

90. Draft conclusion 12 met with widespread approval from States which commented on it.[259] Argentina, observing that draft conclusion 12 "reflected generally-accepted doctrine", nevertheless considered that it "would benefit from greater precision … [i]n particular, the wording should clarify whether soft law could crystallize pre-existing rules of customary international law".[260] Chile similarly suggested that it ought to be explained why draft conclusion 12 did not mention "the generating or crystallizing effects referred to in draft conclusion 11".[261] Spain also referred to the differences between draft conclusions 12 and 11, and suggested that resolutions were no less important than treaties in the present context and that the wording used in draft conclusion 11 could well be employed in conclusion 12, being "sufficiently flexible to adapt to the circumstances of each resolution and each organization".[262] Spain considered, more generally, that the "lack of parallels between draft conclusions 11 and 12 might be a problem".[263] Poland considered draft conclusion 12 to be "too restrictive with regard to the role of international organizations in creating

[257] A/71/10, para. 63, para. (3) of the commentary to conclusion 11.
[258] *Ibid*., para. (2).
[259] See, in addition to States referred to below, A/C.6/71/SR.20, para. 52 (Nordic countries) and joint Nordic written comments, p. 1; A/C.6/71/SR.21, para. 9 (Czech Republic) and para. 18 (Australia); A/C.6/71/SR.22, para. 62 (Japan); A/C.6/71/SR.24, para. 10 (Indonesia) and para. 18 (India); A/C.6/71/SR.29, para. 66 (Turkey); written comments of Singapore, para. 18; written comments of the United States, p. 17; written comments of Belarus, p. 3.
[260] See A/C.6/71/SR.22, para. 75.
[261] See A/C.6/71/SR.21, para. 101.
[262] *Ibid*., at para. 108.
[263] *Ibid*., at para. 109.

customary rules", and suggested, moreover, that the conclusion should distinguish between "custom that was binding only within an international organization and custom as part of general customary rules".[264] The Russian Federation endorsed the approach taken in draft conclusion 12, but doubted whether a resolution adopted by an international organization "could be regarded as an act of that organization, which was a rather broad term that could include not only decisions of bodies composed of States".[265] New Zealand, on the other hand, considered that a clearer explanation of why resolutions are not considered as "practice" of the relevant organization would be useful within a broader examination of the relationship between conclusion 12 and conclusion 4, paragraph 2.[266]

91. Singapore proposed the addition of the words "in certain circumstances" to paragraph 2 of the conclusion, to mirror the language of the International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion and clarify further that "not *all* … resolutions can provide evidence of or contribute to the development of customary international law".[267] The United States, observing that the draft conclusion and commentary accurately reflected that "resolutions must be approached with a great deal of caution", made the same suggestion.[268] Singapore further suggested that in assessing whether the States concerned intended to acknowledge the existence of a rule of customary international law by the adoption of a resolution, "a consideration of the particular powers, membership and functions of the [international organization] or intergovernmental conference" would be relevant, and these factors should thus be incorporated into the commentary to the conclusion.[269] Belarus considered that the commentary should also refer to "situations when there was a lack of clear support by States for such resolutions".[270] Sudan observed that "[w]hen assessing the decisions of international organizations, it was important to focus on the organ within the organization that had the broadest membership. Only intergovernmental organizations should be considered, and the context and means of adoption of the decision should be taken into account".[271] The Islamic Republic of Iran suggested that the evidentiary basis of resolutions of international organizations "remained open to question, since such resolutions were at times adopted by political organs and did not reflect *opinio juris*".[272] Viet Nam considered that it may be useful to refer to the necessary caution in other conclusions that refer to resolutions.[273]

92. Several States suggested that the particular relevance of General Assembly resolutions should be highlighted. Algeria considered that "the resolutions of the General Assembly, a plenary organ of near universal participation which provided a legitimate and authoritative source of international law, should not only be given special attention, as indicated in the commentary to draft conclusion 12, but should

[264] See A/C.6/71/SR.22, para. 31.
[265] See A/C.6/71/SR.21, para. 57 (referring to conclusions 6 and 10).
[266] Written comments of New Zealand, para. 25.
[267] Written comments of Singapore, para. 19.
[268] Written comments of the United States, p. 17.
[269] Written comments of Singapore, para. 20.
[270] See A/C.6/71/SR.23, para. 4; see also written comments of Belarus, p. 4 (explaining that "[e]ven resolutions that are adopted by consensus may be evidence not of the existence of *opinio juris* but rather of the lack of interest among the majority of States in the issues being addressed by the resolution or of the very general nature of its provisions, which therefore make them, ipso facto, of little legal consequence").
[271] See A/C.6/71/SR.21, para. 141.
[272] See A/C.6/71/SR.23, para. 15.
[273] See A/C.6/71/SR.22, para. 50.

be treated as a distinct category in the context of resolutions of international organizations and intergovernmental conferences".[274] The Russian Federation, considering that the draft conclusion "should reflect the fact that the authority of the act of the organization depended on its universality and its status in international relations", similarly suggested that its text could perhaps include a direct reference to the United Nations.[275] Egypt, too, sought to emphasize the "special importance of the resolutions of the General Assembly, which had worldwide membership".[276] The Nordic counties felt that "the unique characteristics of the [United Nations] General Assembly and what sets it apart from other international organizations" as well as "the importance of [its] resolutions' content and conditions of their adoption" could be further developed in the commentary.[277]

2. Suggestions by the Special Rapporteur

93. The lack of parallelism between draft conclusions 11 and 12 in terms of structure and language was a deliberate choice by the Commission on first reading. The Commission considered it important to emphasize at the outset that resolutions cannot create rules of customary international law, both to address such misconceptions as have sometimes been aired and more clearly to introduce, in paragraph 2, their actual significance.[278] In paragraph 2, the possible generating or crystallizing effects of resolutions in connection with customary international law are covered by the term "development". The commentary indeed makes clear that, "as with treaty provisions", resolutions may provide impetus for the growth of, or crystallize, customary international law.[279] It further provides, more broadly, that "[m]uch of what has been said of treaties in draft conclusion 11 applies to resolutions".[280] The conclusion's focus on the possible utility of resolutions as evidence for the identification of customary international law also means that it does not deal (at least not directly) with the direct role of international organizations in the creation or expression of such rules.[281] In that sense it is consistent with draft conclusion 4, or, perhaps more accurately, not inconsistent with it.

94. The commentary already refers to the "[s]pecial attention [that] is paid in the present context to resolutions of the General Assembly, a plenary organ of near universal participation that may afford a convenient means to examine the collective opinions of its members".[282] Nevertheless, the Special Rapporteur accepts that it

[274] See A/C.6/71/SR.23, para. 30.
[275] See A/C.6/71/SR.21, para. 57.
[276] See A/C.6/71/SR.23, para. 41.
[277] See A/C.6/71/SR.20, para. 52; joint Nordic written comments, p. 1 (noting also that "[a]s was also stated by Special Rapporteur … in his third report, General Assembly resolutions may be particularly relevant as evidence of or impetus for customary international law. However, as the report also notes, caution is required when determining the normative value of such resolutions, since 'the General Assembly is a political organ in which it is often far from clear that their acts carry juridical significance'").
[278] See also the statement of the Chairman of the Drafting Committee (29 July 2015), p. 13 ("This statement was originally made, in a slightly different form, in the second sentence of the proposal made by the Special Rapporteur in his third report. In view of its importance for the present topic, the Drafting Committee considered that it should be the object of a specific paragraph and be placed at the beginning of the draft conclusion").
[279] See A/71/10, para. 63, para. (7) of the commentary to conclusion 12.
[280] *Ibid.*, para. (3).
[281] This is further made clear by the inclusion of conclusion 12 in part five of the conclusions, entitled "Significance of certain materials for the identification of customary international law".
[282] See A/71/10, para. 63, para. (2) of the commentary to conclusion 12.

could further highlight the potential importance of General Assembly resolutions. The commentary could also distinguish more clearly between resolutions of international organizations and those of ad hoc international conferences.[283] It could also specify that the conclusions are not dealing directly with the internal law of international organizations.

95. The Special Rapporteur also agrees that conclusion 12 would better reflect the potential role of resolutions if some qualifying words were reintroduced, for example, "in certain circumstances".[284] Such circumstances, to which several States referred, are already mentioned in the commentary. It would also be preferable to replace the word "establishing" by "determining", for greater consistency within the conclusions as a whole.[285] Conclusion 12, paragraph 2, would thus read as follows:

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

Conclusion 13: Decisions of courts and tribunals

1. Comments and observations received

96. While general support was expressed for draft conclusion 13,[286] the distinction made between decisions of national and international courts drew several comments. Austria expressed doubt that such a distinction should be made, explaining that "Article 38 of the Statute of the International Court of Justice did not do so, and a distinction would also fail to give sufficient attention to important decisions of national courts which, as draft conclusion 6 confirmed, were a form of State practice of relevance for the formation of customary international law".[287] It added that "[p]ossible differences between decisions, whether of international courts and tribunals or of national courts, [as subsidiary means for the determination of a rule of law] resulted only from their different persuasive force".[288] Austria also suggested that maintaining a strict distinction between international and national courts was difficult in practice, pointing to "regional courts, such as the European Court of Human Rights and the Court of Justice of the European Union, which exercised functions both as international courts and, at the same time, as quasi-national or even constitutional courts".[289]

97. Viet Nam, on the other hand, considered that it was difficult to maintain that decisions of national courts had the same value as those of international courts, and that the latter (in particular those of the International Court of Justice) should weigh more than the former.[290] China considered that decisions of national courts "simply

[283] See also written comments of the United States, p. 19; Blokker, "International organizations and customary international law" (footnote 22 above), at p. 9.

[284] See also the third report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/682), para. 54 (the Special Rapporteur's suggested text for the conclusion including the words "in some circumstances").

[285] The verb "determine" is used in a comparable context in conclusions 1, 2, 13, 14 and 16.

[286] See, for example, A/C.6/71/SR.21, para. 9 (Czech Republic); written comments of Singapore, para. 21; written comments of Belarus, p. 3.

[287] See A/C.6/71/SR.21, para. 72.

[288] *Ibid.*, para. 73.

[289] *Ibid.*, para. 74.

[290] See A/C.6/71/SR.22, para. 51 (explaining that "[n]ational courts varied in their country-specific constraints and the doctrine of precedent in domestic law").

reflected the legal system of the State in question and therefore had limited relevance to international law".[291] New Zealand suggested that "the judgments of international courts and tribunals should be accorded greater weight" as subsidiary means, and proposed that "this could be reflected more directly in the language of draft conclusion 13 itself".[292] Sudan observed that "the decisions of the International Court of Justice were of pivotal importance and could not be seen as having the same weight as the decisions of other international courts",[293] a view that the Russian Federation appears to share.[294] Mexico suggested that it would be useful to clarify "whether the evidentiary value of the decisions of international courts [as subsidiary means for the determination of rules of customary international law] should carry greater weight than those of national courts".[295] Indonesia emphasized that the real significance of judicial decisions depended on the way they were received.[296]

98. The Russian Federation considered that the commentary to conclusion 13 should make it clear that the decisions of international courts and tribunals were binding only on the States parties to the case, and that they could not serve as conclusive evidence for the identification of customary international law.[297] It further suggested that the conclusion itself should contain the proposition, already made in similar terms in the commentary, that "the weight of the court's decision depended on the reception of the decision by States and on the status of the court in the system of international relations".[298] The United States recommended that the limitations on the value of judicial decisions as subsidiary means be further clarified in the commentary (and made several suggestions to this effect), explaining that this "could usefully assist readers to assess more critically" the pronouncements by courts and tribunals on customary international law.[299] Spain suggested that the word "subsidiary" be deleted from both paragraphs of the conclusion, explaining that the fact that judicial decisions (and teachings) "were not independent sources of international law, but were subsidiary to independent sources, did not mean that, in relation to [the] determination of law, they played a secondary role to treaties and resolutions of international organizations".[300]

2. *Suggestions by the Special Rapporteur*

99. The Special Rapporteur considers that the present wording of draft conclusion 13 represents a satisfactory balance and should be maintained. In particular, it seems difficult to deny that greater caution is called for when seeking to rely on decisions of national courts, which may reflect a particular national perspective and may not have international law expertise available to them. This is captured in the text of the conclusion, both in the distinction made between the two types of decisions and by the different wording used for each (in particular the explicit reference to the International Court of Justice in paragraph 1, and the use of the words "[r]egard may be had, as appropriate" in paragraph 2). As the Chairperson of the Drafting Committee said in 2015, "during the debate in the Plenary, several members cautioned against

[291] See A/C.6/71/SR.20, para. 68.
[292] Written comments of New Zealand, para. 26.
[293] See A/C.6/71/SR.21, para. 140.
[294] *Ibid.*, at para. 58 (saying that "a decision of the International Court of Justice could hardly be placed on a par with the decisions of an ad hoc tribunal or a court of arbitration established under a bilateral agreement").
[295] See A/C.6/71/SR.22, para. 25.
[296] See A/C.6/71/SR.24, para. 11.
[297] See A/C.6/71/SR.21, para. 58.
[298] *Ibid*.
[299] Written comments of the United States, p. 18.
[300] See A/C.6/71/SR.21, para. 110.

elevating decisions of national courts, in terms of their value for identifying rules of customary international law, to the same level of those of international courts and tribunals, which in practice play a greater role in this context. Accordingly, the Drafting Committee decided to deal with decisions of international and national courts in two separate paragraphs".[301] At the same time, the commentary makes clear that the value of *all* decisions may vary, "depending both on the quality of the reasoning … and on the reception of the decision by States and by other courts".[302] The commentary also explains that "[t]he distinction between international and national courts is not always clear-cut", and provides some guidance on this matter.[303]

100. It will also be recalled that in employing the term "subsidiary means" to refer to decisions of courts and tribunals, "[t]he intention [was] not to downplay the practical importance of such decisions as the word 'subsidiary' might be thought to imply, but rather to situate them in relation to the sources of law as referred to in Article 38 (1) (a), (b) and (c) of the Statute [of the International Court of Justice]. The term 'subsidiary' is thus to be understood in opposition to the primary sources".[304] The commentary clarifies this,[305] and the Commission may wish to review it to confirm that it adequately does so. Other small changes to the commentary may be considered in view of the suggestions noted above, including the addition of a statement clarifying that decisions of international courts and tribunals are binding on the parties alone.

Conclusion 14: Teachings

1. Comments and observations received

101. Support was expressed by several States for draft conclusion 14 as adopted on first reading.[306] At the same time, Spain suggested that the word "subsidiary" be deleted from the text, to better reflect the role of teachings in the determination of rules of customary international law.[307] China, on the other hand, made the point that "[w]hile the views of public law scholars had historically served as an important basis for international law", that is no longer the case.[308] Israel considered that the commentary to the conclusion should clarify that the writings consulted should be "exhaustive, empirical and objective in nature".[309] The United States suggested that the commentary should "recommend that those using these subsidiary means seek out conflicting or divergent views to allow for the most accurate assessment of the law", so that the pronouncements of publicists on customary international law would be assessed more critically.[310]

102. Belarus suggested that the commentary "should state that the work of the Commission was among the most important subsidiary means for the determination

[301] Statement of the Chairman of the Drafting Committee (29 July 2015), p. 15 (available at http://legal.un.org/ilc/).
[302] See A/71/10, para. 63, para. (3) of the commentary to conclusion 13, which mentions other possible considerations as well.
[303] *Ibid.*, para. (6).
[304] Statement of the Chairman of the Drafting Committee (29 July 2015), pp. 15–16 (available at http://legal.un.org/ilc/).
[305] See A/71/10, para. 63, para. (2) of the commentary to conclusion 13.
[306] See, for example, A/C.6/71/SR.21, para. 9 (Czech Republic) and para. 101 (Chile); written comments of Belarus, p. 3.
[307] See A/C.6/71/SR.21, para. 110.
[308] See A/C.6/71/SR.20, para. 68.
[309] Written comments of Israel, para. 32.
[310] Written comments of the United States, p. 18.

of rules of customary international law".[311] Chile, on the other hand, suggested that conclusion 12 might be a place to mention the work of the Commission, "since, generally speaking, once the Commission had completed its work on a draft, the General Assembly took steps to adopt it as an annex to a resolution".[312]

2. Suggestions by the Special Rapporteur

103. The Special Rapporteur considers it important to retain the reference to teachings as "a subsidiary means", thereby following the widely accepted language of the Statute of the International Court of Justice (as the Commission deliberately elected to do).[313] The expression encapsulates the limited role of such materials in the identification of customary international law. At the same time, a change to the commentary could be considered to explain more clearly that the term "subsidiary means" is not intended to suggest that teachings are not important in practice (as is already done with regard to decisions of courts and tribunals in the commentary to draft conclusion 13).[314]

104. The commentary already makes clear that particular caution is required when drawing upon writings, including because they "may reflect the national or other individual positions of their authors" and "differ greatly in quality".[315] The importance of "having regard, so far as possible, to writings representative of the principal legal systems and regions of the world and in various languages" is also highlighted.[316] The Special Rapporteur does not consider that further guidance on the need to assess the authority of any given work is necessary, also bearing in mind the language ("may") of the conclusion.

105. The Special Rapporteur recalls that an extensive debate has already taken place within the Commission on the most appropriate way to reflect the particular significance that the Commission's output plays in the identification of customary international law.[317] The Special Rapporteur's original suggestion had been to cover the Commission's output under "Teachings",[318] but it was felt preferable to acknowledge that the Commission's output is different in important respects from the teachings of scholars, and to explain this separately from draft conclusion 14. The Special Rapporteur considers that the most appropriate place to do so is in the general commentary introducing Part Five of the conclusions, and notes the general support by States for this approach. That being said, the Commission may find it helpful for the commentary to conclusion 14 to include a cross reference to what is said in the general commentary.

[311] See A/C.6/71/SR.23, para. 3; see also written comments of Belarus, p. 4.
[312] See A/C.6/71/SR.21, para. 101 (adding that "[i]n any case, one of the draft conclusions should contain a specific reference to the Commission").
[313] See also the statement of the Chairman of the Drafting Committee (29 July 2015), p. 17 (available at http://legal.un.org/ilc/).
[314] See A/71/10, para. 63, para. (2) of the commentary to conclusion 13.
[315] *Ibid.*, para. (3) of the commentary to conclusion 14.
[316] *Ibid.*, para. (4).
[317] See also A/CN.4/SR.3303: provisional summary record of the Commission's 3303rd meeting (24 May 2016), p. 9.
[318] A/CN.4/682: third report on identification of customary international law (2015), p. 45, para. 65.

Part Six: Persistent objector

Conclusion 15: Persistent objector

1. Comments and observations received

106. The inclusion of the persistent objector rule in the draft conclusions was endorsed by almost all States which addressed the matter.[319] Singapore "affirm[ed] the existence of the 'persistent objector' principle as stated in draft conclusion 15, paragraph 1, and considers its existence to be *lex lata*".[320] Indonesia "shared the view that both judicial decisions and State practice had confirmed" the existence of the rule,[321] and Turkey noted its appreciation "for the many practical examples cited in the commentary".[322] On the other hand, Cyprus and the Republic of Korea, while not necessarily opposing the inclusion of the rule, maintained that it remained controversial.[323]

107. Several States indicated that the risk of the persistent objector rule being abused should be more explicitly addressed. Some expressed the opinion that the rule could not apply in the case of rules having the character of *jus cogens*, and proposed that the conclusion or commentary should say so.[324] Other States welcomed the "without prejudice" paragraph in the draft commentary.[325] Greece doubted that the rule could be applicable "in relation not only to the rules of *jus cogens* but also to the broader category of the general principles of international law", and suggested that the commentary should address the matter.[326] A similar thought was expressed by the Nordic countries, who commented that "[p]articular attention must in this context be paid to the category of a rule to which a State objects, and consideration must be given to universal respect for fundamental rules, particularly those for the protection of individuals".[327] Belarus, supporting the persistent objector rule, also considered that it should not apply to the detriment of the international community or "the integrity of the international legal system as a whole".[328] A view was also expressed

[319] See, for example, A/C.6/71/SR.20, para. 52 (Nordic countries) and joint Nordic written comments, p. 2; A/C.6/71/SR.21, para. 9 (Czech Republic), para. 28 (El Salvador), para. 59 (Russian Federation), para. 75 (Austria), para. 102 (Chile); written comments of New Zealand, para. 27; written comments of Belarus, p. 4.

[320] Written comments of Singapore, para. 23.

[321] See A/C.6/71/SR.24, para. 11 (adding that "[t]he role of the persistent objector was indeed important for preserving the consensual nature of customary international law").

[322] See A/C.6/71/SR.21, para. 23.

[323] See A/C.6/71/SR.22, paras. 53–54 (Cyprus considering it "premature to develop a draft conclusion on the question" for the reason that "[i]nternational jurisprudence had largely dealt with the matter in obiter dicta and in cases where the rule had not, at the time in question, acquired the status of customary international law", adding that "the issue required further elaboration, as [the differing views] had implications for the authority of the rule", but also expressing support for some of the clarifications provided in the conclusion); A/C.6/71/SR.23, para. 12 (Republic of Korea) and written comments of the Republic of Korea, para. 5 (considering that "this doctrine has substantial implications for the norm-creating process in international law, therefore requiring further review with great caution").

[324] See A/C.6/71/SR.21, paras. 28–29 (El Salvador) and written comments of El Salvador, p. 3; A/C.6/71/SR.21, para. 102 (Chile) and para. 111 (Spain); written comments of New Zealand, para. 28.

[325] See A/C.6/71/SR.22, para. 18 (Brazil); joint Nordic written comments, p. 2; written comments of Singapore, para. 25; written comments of Belarus, p. 2.

[326] See A/C.6/71/SR.22, para. 10; see also *ibid.*, para. 54 (Cyprus).

[327] Joint Nordic written comments, p. 2; see also A/C.6/71/SR.20, para. 52 (Nordic countries).

[328] Written comments of Belarus, p. 4.

that the persistent objector rule must not be available for purposes of avoiding treaty obligations.[329] El Salvador proposed that the conclusion should "make it clear that States could not avail themselves of that rule when an established rule of customary law already existed".[330]

108. The question of the extent to which an objection to a rule needed to be reiterated received particular attention. China, considering that the commentary was generally "consistent with international practice" in clarifying that States are not expected to react on every occasion, nevertheless expressed the view that "if the country concerned has previously expressed its unequivocal opposition at an appropriate time, it need not do so again".[331] Israel suggested that it should be clarified that "an objection clearly expressed by a sovereign State during the process of the formation of a customary rule is sufficient to establish that objection, and does not generally need to be repeated to remain in effect".[332] The Netherlands, too, submitted that "[t]here cannot be an obligation to repeat the desire not to be bound, if the State has made its wish not to be bound sufficiently clear during the formative period of the rule", adding that it cannot "theoretically or logically" be otherwise.[333] The Nordic countries, on the other hand, agreed with the text of the draft conclusion that objection must be maintained,[334] and Chile likewise asserted that "[t]he objector was responsible for ensuring that its objection was not considered to have been abandoned".[335] The United States also accepted the draft commentary's reference to the pragmatic assessment required in determining whether an objection has been maintained persistently (but suggested that the example provided, of "a conference attended by the objecting State at which the rule is reaffirmed", may be misleading and would be better deleted).[336] The Russian Federation, while endorsing draft

[329] See A/C.6/71/SR.20, para. 69 (China); see also A/C.6/71/SR.21, para. 28 (El Salvador).

[330] See A/C.6/71/SR.21, para. 28.

[331] Written comments of China, p. 3 (submitting also that "the determination that a country is a 'persistent objector' should be context-specific, and comprehensive consideration should be given to various factors, including whether in a given case the country concerned is in a position to express its opposition"). In the Sixth Committee debate, China said that "the failure of a State to object to an emerging rule of customary international law could not be considered to constitute acceptance of the rule, unless it had been determined that the State had been aware of the rule and that it had been under an obligation to object explicitly and persistently in order not to accept it" (A/C.6/71/SR.20, para. 69).

[332] Written comments of Israel, para. 17 (also recommending, at para. 18, that the conclusion and commentary "include clear criteria for the retraction of an objection, whereby it must be clearly expressed as a change in the State's *opinio juris* and made known to other States and not merely inferred").

[333] Written comments of the Netherlands, para. 15 (explaining that "once the position of persistent objector has been acquired through the required steps, and the customary rule has been established — this position does not require any further maintenance in the form of continuing objections … the rule is in fact the opposite: only when there is subsequent practice, or expressions of legal opinion by the persistent objector in support of the 'new' rule, and in deviation from its original position as persistent objector, will it lose that position").

[334] Joint Nordic written comments, p. 2.

[335] See A/C.6/71/SR.21, para. 102.

[336] Written comments of the United States, pp. 18–19 (explaining that "it would rarely, if ever, be necessary for a State to object at a particular conference to maintain its status as a persistent objector to a rule of customary international law accepted by other States. For example, a State might decline to make a statement at a diplomatic conference for a variety of political or practical reasons that do not evince a legal view, and it seems strange that a statement after the conference would not have the same effect under customary international law as a statement at the conference. More generally, the example could misleadingly suggest that there is a particular significance to international conferences as forums for practice relevant to the formation of customary international law, which we do not believe to be the case").

conclusion 15, added that the need for the objection to the maintained persistently was not free from difficulty, as "[i]t was important to take into consideration the functioning of government bodies not only in well-organized developed States, but also in States with small ministries of foreign affairs and without the resources to maintain their objection persistently, even in situations in which their interests were directly concerned".[337] Belarus suggested that paragraph 2 "should be reworded, along the lines of draft conclusion 10, paragraph 3, to refer to situations when States were in a position to react and to the circumstances calling for such a reaction".[338] Cyprus asked to clarify whether an objection "could be maintained in the long run, or, in particular, after an emerging rule had come to be part of the corpus of international law",[339] and Greece, too, said it would welcome such a clarification.[340]

2. Suggestions by the Special Rapporteur

109. Draft conclusion 15 and its commentary were adopted while especially bearing in mind the need to prevent abusive reliance on the persistent objector rule.[341] Paragraph 1, by requiring an objection while a rule of customary international law "was in the process of formation", clearly conveys that timeliness is critical and that, once a rule has come into being, a subsequent objection will not avail a State wishing to exempt itself.[342] Paragraph 2 stipulates additional "stringent requirements".[343] It is also clear that an obligation undertaken by treaty cannot be excluded by recourse to the persistent objector rule. As for the inapplicability of the rule in relation to *jus cogens*, the Special Rapporteur would recall that the Commission had accepted early on that *jus cogens* would not be covered under the present topic. It is now considering a separate topic on "Peremptory norms of general international law (*jus cogens*)".[344] The Commission may, nevertheless, wish to consider including in the conclusion the point already in paragraph (10) of the commentary, by adding a paragraph 3 on the following lines:

> *The present conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).*

110. While the suggestion that a single objection clearly expressed should be sufficient to secure persistent objector status has its appeal from a strict voluntarist perspective of international law, it runs counter not only to the common understanding

[337] See A/C.6/71/SR.21, para. 59.
[338] See A/C.6/71/SR.23, para. 4; see also written comments of Belarus, pp. 4–5.
[339] See A/C.6/71/SR.22, para. 54.
[340] Ibid., para. 11.
[341] See also the fourth report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/695), para. 27.
[342] This is further made clear by the commentary: A/71/10, para. 63, para. (5) of the commentary to conclusion 15.
[343] *Ibid*., para. (2). See also A/C.6/71/22, para. 54 (Cyprus saying that "as the draft conclusions made clear, a State invoking the persistent objector rule should be under a duty to present solid evidence of its longstanding and consistent opposition to the rule in question in any given case before its crystallization").
[344] See the statement of the Chairman of the Drafting Committee (29 July 2015), p. 20, available at http://legal.un.org/ilc/ ("The Drafting Committee also had a brief discussion on whether there should be an additional paragraph to reflect the impossibility of having a persistent objector status with respect to a rule of *jus cogens*. This was a matter that was also raised in Plenary. It would be recalled that the Commission decided not to deal with *jus cogens* in the context of the present topic; indeed, the separate topic '*Jus cogens*' is now on the Commission's programme of work. It was therefore considered that the matter would be best dealt with in the framework of that other topic").

of the persistent objector rule (as well as its very name) but also to the way in which custom may operate as a source of international law. In particular, such a view "seems to disregard the legal force that may sometimes attach to silence (when it amounts to acquiescence), and to downplay the importance of inaction in both the development and the identification of rules of customary international law".[345] That *persistent* objection is required has indeed been recognized in international practice,[346] by doctrine,[347] and by the Commission itself, in its 2011 Guide to Practice on Reservations to Treaties.[348] As the commentary specifies, persistent objection means that the customary rule in question is inapplicable against the relevant State so long as it maintains the objection.[349]

111. At the same time, as some States have noted with appreciation,[350] the commentary adopted on first reading makes clear that assessing the persistency requirement "needs to be done in a pragmatic manner, bearing in mind the

[345] See the fourth report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/695), para. 28.

[346] See, for example, *Entscheidungen des Bundesverfassungsgerichts* (German Federal Constitutional Court), vol. 46, Beschluss vom 13. Dezember 1977 (2 BvM 1/76), Nr. 32 (Tübingen, 1978), pp. 388–389, para. 6 ("This concerns not merely action that a State can successfully uphold from the outset against application of an existing general rule of international law by way of perseverant protestation of rights (in the sense of the ruling of the International Court of Justice in the *Norwegian Fisheries Case*, ICJ Reports 1951, p. 131)"; *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"); *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"); *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"). See also the third report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/682), footnote 211.

[347] See, for example, G. Gaja, *Collected Courses of the Hague Academy of International Law*, vol. 364 (2012), 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"); J. Crawford, *ibid*., vol. 365 (2013), p. 247 ("Persistent objection … must be consistent and clear"); M.H. Mendelson, *ibid*., vol. 272 (1998), p. 241 ("the protests 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"); O. Elias, "Persistent objector", in *Max Planck Encyclopedia of Public International Law* (2006), para. 16 ("If a State does not maintain its objection, it may be considered to have acquiesced"). For a recent articulation of the practical and policy considerations served by the requirement for a degree of repetition, see J.A. Green, *The Persistent Objector Rule in International Law* (Oxford, Oxford University Press, 2016), pp. 96–98.

[348] Guide to Practice on Reservations to Treaties, commentary (7) to guideline 3.1.5.3: *Yearbook of the International Law Commission 2011*, vol. II (Part II) ("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").

[349] See A/71/10, para. 63, para. (6) of the commentary to conclusion 15.

[350] See, for example, written comments of Singapore, para. 24; written comments of the United States, p. 18.

circumstances of each case".[351] It is also stipulated that "States cannot … be expected to react on every occasion, especially where their position is already well known".[352]

Part Seven: Particular customary international law

Conclusion 16: Particular customary international law

1. Comments and observations received

112. The great majority of States commenting on draft conclusion 16 expressed general approval, while making various suggestions as to how the text and commentary might be improved. New Zealand suggested that the text of the conclusion should include the clarification, currently in the commentary, that the States concerned are those among which the rule of particular customary international law in question applies.[353] The United States similarly suggested that the conclusion should clarify that the *opinio juris* to be sought among the States concerned is one in which they accept a certain practice as law among themselves (as opposed to "mistakenly believ[ing] the rule is a rule of general customary international law").[354] The Netherlands considered that the word "applies" in paragraph 1 should be avoided, so as to prevent confusion.[355] The Czech Republic observed that the conclusion should "make it clear that any rule of particular customary international law which operated only in a particular group of States could not create obligations or rights for a third State without its consent".[356] Greece concurred with the commentary's clarification that the application of the two-element approach is stricter in the case of rules of particular customary international law, and added that "it might be useful in the context to distinguish between novel particular customs and derogatory particular customs, which required a stricter standard of proof".[357] The Russian Federation, explicitly endorsing the wording of the draft conclusion, suggested that the matter of "rules applicable to the constituent elements" of particular rules of customary international law should perhaps be examined further, "including the question of whether a particular custom could be formed in the presence of an objecting State".[358]

113. Two States took issue with the definition of particular customary international law provided in paragraph 1, suggesting that certain elements did not represent the current position. The United States noted that "[t]he commentary does not provide any evidence that State practice has generally recognized the existence of bilateral customary international law or particular customary law involving States that do not have some regional relationship", and suggested that these are "theoretical concepts only and are not yet recognized parts of international law".[359] If such a possibility was retained in the draft conclusion, it was added, the commentary "should make clear that the concepts … constitute examples of progressive development".[360] The Czech

[351] See A/71/10, para. 63, para. (9) of the commentary to conclusion 15.
[352] Ibid.
[353] Written comments of New Zealand, para. 30 (stressing in particular that "practice must be consistent among all of the[se] States").
[354] Written comments of the United States, p. 19.
[355] Written comments of the Netherlands, para. 16 (suggesting instead the words "that binds only a limited number of States").
[356] See A/C.6/71/SR.21, para. 9.
[357] See A/C.6/71/SR.22, para. 12.
[358] See A/C.6/71/SR.21, para. 60.
[359] Written comments of the United States, p. 19.
[360] *Ibid*., at p. 20.

Republic expressed similar reservations only with regard to particular rules of customary international law that may operate among States linked by a common cause, interest or activity other than their geographical position, observing that no concrete examples have been offered and pointing to the lack of clarity as to how the criterion of "common cause, interest or activity … [or] community of interest" might be applied in practice.[361] It suggested that either the commentary be expanded to that effect or the reference to such rules be deleted.[362]

114. Most States commenting on the matter, however, accepted that rules of particular customary international law may operate among States linked by a common cause, interest or activity other than their geographical position. The Nordic countries agreed that while "a measure of geographical affinity usually exists between States among which a rule of particular customary international law applies … in principle particular customary international law can develop among States linked by other common causes, interests or activities".[363] They sought to stress, at the same time, that "such common denominators should be very clearly identifiable among the States concerned".[364] Chile considered it "only natural that different geographical regions and peoples, even those sharing similar interests, should have customary rules that were not general in nature".[365] Belarus similarly noted that "the practice giving rise to a rule of customary international law could depend on technological, scientific, geographical or other State strengths or characteristics," including historical, military and political.[366] Austria, in specifically appreciating that the draft conclusion acknowledged the possibility of a rule of particular customary international law developing among States linked by a common cause, interest or activity other than their geographical position, considered it useful to include examples of such rules in the commentary, and pointed to two possible ones.[367] Slovakia likewise indicated that "there was no reason why a rule of particular customary international law should not also develop among States linked by a common cause, interest or activity or constituting a community of interest", but similarly suggested that the commentary should provide more clarity with regard to such rules.[368] New Zealand concurred that rules of particular customary international law may exist "in a particular common geographic or other context", but considered that "they cannot replace or derogate from fundamental principles of international law" and suggested that this should be reflected in the commentary.[369]

2. *Suggestions by the Special Rapporteur*

115. That a rule of particular customary international law may apply between as few as two States seems difficult to deny. The International Court of Justice has held — in response to a claim that that no rule of customary international law could be

[361] Written comments of the Czech Republic, p. 3.
[362] *Ibid*.; see also A/C.6/71/SR.21, para. 9.
[363] Joint Nordic written comments, p. 2.
[364] *Ibid*.
[365] See A/C.6/71/SR.21, para. 103.
[366] Written comments of Belarus, p. 5 (adding that "it is widely accepted that there are certain customs that are followed by the 'space-faring nations' or by other nations in a high-tech field"; and noting the possible relevance of the term "specially-affected States" in this context, as representing the relevant States); see also A/C.6/71/SR.23, para. 4.
[367] See A/C.6/71/SR.21, para. 76 ("It would be useful to include a few examples in the commentary, such as the development of an understanding that the death penalty and the use of nuclear weapons were already prohibited by particular customary international law").
[368] See A/C.6/71/SR.23, para. 24.
[369] Written comments of New Zealand, para. 29.

established between only two States — that "[i]t is difficult to see why the number of States between which a local custom may be established … must necessarily be larger than two".[370] The commentary adopted on first reading lists several examples.[371] Virtually all States commenting on draft conclusion 16 took no issue with this matter.[372] In these circumstances, the Special Rapporteur considers that that the reference to bilateral customary international law should be retained.

116. As for rules of particular customary international law applying among States that do not have some geographical relationship, it will first be recalled that the present commentary states that "there is no reason *in principle* why [such] a rule of particular customary international law should not also develop".[373] The commentary also recognizes that "particular customary international law is mostly regional, sub-regional or local".[374] It will also be recalled that the expression "whether regional, local or other" did not exist in the Special Rapporteur's original proposal for the conclusion,[375] but was included because members of the Commission preferred a more detailed text.

117. In addition, the comments from States confirm that the possibility of rules of particular customary international law operating among States linked by a common cause, interest or activity other than their geographical position is not purely theoretical, and mentioned some possible examples which might be included in addition to the *Case concerning rights of nationals of the United States of America*.[376] Including such examples in the commentary does not seem necessary in the present context, also bearing in mind that the conclusions do not aim to address the content of customary international law and are concerned only with the methodological issue of how rules of customary international law are to be identified.[377]

118. The Special Rapporteur thus considers that the present text of paragraph 1 is satisfactory. If the Commission were nevertheless minded to redraft the text to take account of the concerns raised, a possible formulation could indicate that rules of particular customary international law "include those that are regional or local", and the commentary could then explain that these are the principal manifestations, but

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[370] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 39 (the Court adding that it "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").

[371] See A/71/10, para. 63, para. (4) of the commentary to conclusion 16.

[372] It may be recalled in this context that the United States has itself sought to rely on customary international law of this kind before the International Court of Justice: *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 pp. 199–200; Counter-Memorial submitted by the Government of the United States of America (20 December 1951), pp. 385–388; Record of the oral proceedings of 23 July 1952, p. 284.

[373] See A/71/10, para. 63, para. (5) of the commentary to conclusion 16 (emphasis added).

[374] Ibid.

[375] See the third report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/682), para. 84.

[376] See footnote 372 above. It may also be noted that the *Restatement of the Law Third of the Foreign Relations Law of the United States* refers to particular customary international law by stipulating that "[t]he practice of states in a regional *or other special grouping* may create 'regional,' 'special,' or 'particular' customary law for those states inter se" (emphasis added): Restatement of the Law, Third, Foreign Relations Law of the United States (1987), §102, comment (e).

[377] As is made clear in the commentary to draft conclusion 1: A/71/10, para. 63, para. (5) of the commentary to conclusion 1.

that it is not excluded that there could be "other" ones. In any event, the Special Rapporteur accepts that the commentary should clarify further how the two-element approach enshrined by the conclusions applies in the case of rules of particular customary international law, and that such rules create no obligations for third States. It will be recalled that the Drafting Committee deliberately "elected to use the term 'apply' [in paragraph 1] rather than employ the notion of 'invocability' by or against a State or to introduce an element of 'bindingness'".[378]

119. As for other suggestions concerning paragraph 2, the Special Rapporteur agrees that the words "among themselves", which are already included in the commentary,[379] could with advantage be added in order to clarify the acceptance as law that is to be sought in the present context. Paragraph 2 would then read:

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

II. Making the evidence of customary international law more readily available

120. The Commission's renewed engagement with the question of ways and means for making the evidence of customary international law more readily available was welcomed by States.[380] Several referred specifically to the importance of the accessibility of evidence of customary international law in the various languages.[381] The Special Rapporteur agrees.

121. Following its consideration of the Special Rapporteur's fourth report in 2016, the Commission requested the Secretariat to prepare a memorandum on ways and means for making the evidence of customary international law more readily available, which would survey the present state of the evidence of customary international law and make suggestions for its improvement.[382] Such a survey had been undertaken by the Secretariat in 1949, on the occasion of the first session of the Commission, in preparation for the Commission's consideration of the matter pursuant to article 24 of its statute.[383] The new memorandum prepared by the Secretariat for consideration at the present session reflects the fact that since 1949 both the scope of customary

[378] Statement of the Chairman of the Drafting Committee (29 July 2015), pp. 21–22, available at http://legal.un.org/ilc/ (The Chairman of the Committee further explaining that "[t]o the extent that latter considerations seem to invite questions of possible 'effects', it was considered that they raised more questions than answers, while 'applies' has the simplicity of being prima facie factual and easily understood by the intended user").

[379] See A/71/10, para. 63, para. (7) of the commentary to conclusion 16.

[380] See A/C.6/71/SR.21, para. 20 (Australia), para. 38 (Peru), para. 87 (United Kingdom), para. 95 (Portugal), para. 118 (Germany); A/C.6/71/SR.22, para. 18 (Brazil), para. 33 (Ireland), para. 61 (Japan); A/C.6/71/SR.23, para. 12 (Republic of Korea) and para. 34 (Slovenia).

[381] See A/C.6/71/SR.21, paras. 129–130 (the Netherlands) and para. 139 (Sudan); and A/C.6/71/SR.22, para. 61 (Japan).

[382] See A/71/10, para. 56.

[383] A/CN.4/6 and Corr.1: "Ways and means of making the evidence of customary international law more readily available: preparatory work within the purview of article 24 of the statute of the International Law Commission" (1949).

international law and the availability of evidence for its identification have changed strikingly.[384]

122. In assembling the data analysed in the memorandum, the Secretariat sought the cooperation of States in order to identify the resources that they deemed most relevant for ascertaining their own practice and *opinio juris*.[385] Information was also requested from all entities in the United Nations system and all entities and organizations which, as of 2016, had received a standing invitation to participate as observers in the sessions and the work of the General Assembly.[386] A number of learned societies, academic research centres and libraries specializing in international and comparative law were contacted.[387] The input received was complemented by a survey, conducted by the Secretariat, of the "most readily available primary sources of evidence from States and international organizations".[388]

123. The memorandum itself sets out in some detail the available materials, and the Secretariat's methodology in preparing the document. It has seven annexes setting out the information collected: (I) Resources by State; (II) Resources by organization; (III) Resources by field of international law; (IV) Collections of treaties and depositary information; (V) International courts and tribunals, hybrid courts, and treaty monitoring bodies; (VI) Bodies engaged in the examination, codification, progressive development, or harmonization of international law; and (VII) Languages of the resources collected.

124. On the basis of the information collected, and as requested by the Commission, the Secretariat has made a number of suggestions for improving the availability of the evidence of customary international law, which are set out in chapter II of the memorandum. These suggestions fall into four categories: (a) suggestions concerning ways and means for States to make the evidence of their practice and acceptance as law (*opinio juris*) more readily available;[389] (b)suggestions concerning ways and means for the United Nations to maintain and develop its legal publications relevant to international law and ensure their widest dissemination; [390] (c) suggestions concerning ways and means for enhancing the availability of evidence of customary international law in the context of the progressive development and codification of international law;[391] and (d) there are suggestions concerning a periodically updated online database for the systematic and comprehensive dissemination of bibliographic information concerning the evidence of customary international law.[392]

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[384] A/CN.4/710: "Ways and means for making the evidence of customary international law more readily available: memorandum by the Secretariat", para. 6.
[385] *Ibid*., at para. 7.
[386] *Ibid*., at para. 8.
[387] *Ibid*., at para. 9.
[388] *Ibid*., at para. 10.
[389] *Ibid*., at paras. 103–107.
[390] *Ibid*., at paras. 108–115. The publications include the following: *I.C.J. Pleadings*; *I.C.J. Reports*; *Law of the Sea Bulletin*; *Diplomatic Conferences*; *Repertoire of the Practice of the Security Council*; *Repertory of Practice of United Nations Organs*; *Reports of International Arbitral Awards*; *Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice*; *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*; *The Work of the International Law Commission*; *United Nations Commission on International Trade Law Yearbook*; *United Nations Juridical Yearbook*; *United Nations Legislative Series*; *United Nations Treaty Series*; *and Yearbook of the International Law Commission.*
[391] Ibid., at paras. 116–119.
[392] Ibid., at paras. 120–122.

125. The Special Rapporteur wishes to draw attention to one point in particular that is emphasized in the memorandum, the critical importance of the "continuous development of libraries specializing in international law and the guarantee of their general access by the public".[393] The Special Rapporteur is grateful to the Library of the United Nations Office at Geneva and its excellent staff for all their assistance with the present topic.

126. The Special Rapporteur recommends that the Commission endorse the Secretariat's suggestions, and forward them to the General Assembly for its consideration. A recommendation to that effect is included in the draft recommendation to the General Assembly in paragraph 129 below. The Special Rapporteur also recommends that the memorandum be reissued in due course to reflect the text of the conclusions and commentaries adopted on second reading.

III. Final form of the Commission's output

127. As suggested in the Special Rapporteur's fourth report[394] and supported in the written and oral comments of States, it is proposed that the final outcome under the present topic consist of three components: (*a*) a set of conclusions with commentaries adopted by the Commission; (*b*) the Secretariat memorandum on ways and means for making the evidence of customary international law more readily available; and (*c*) a bibliography.

128. A question left pending from the first reading stage concerns the use of the term "conclusions" to describe the Commission's output on the present topic; some asked whether the term "guidelines" would not be more appropriate, given the objective of providing practical guidance on the way in which the existence or otherwise of rules of customary international law, and their content, are to be determined.[395] Having considered the matter carefully, the Special Rapporteur is of the view that the term "conclusions" is appropriate in the present context and consistent with providing guidance. He suggests that it be retained.

129. The Special Rapporteur proposes that the Commission recommend that the General Assembly:

a. *Take note* of the conclusions of the International Law Commission on the identification of customary international law in a resolution, annex the conclusions to the resolution, and ensure their widest dissemination;

b. *Commend* the conclusions, together with the commentaries thereto, to the attention of States and all who may be called upon to identify rules of customary international law;

c. *Welcome* the Secretariat memorandum on ways and means for making the evidence of customary international law more readily available (A/CN.4/710), which surveys the present state of evidence of customary international law and makes suggestions for its improvement;

d. *Decide* to follow up the suggestions in the Secretariat memorandum by:

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[393] Ibid., at para. 107.

[394] Fourth report on identification of customary international law by Special Rapporteur Michael Wood (A/CN.4/695), paras. 50–53.

[395] Ibid., at para. 12. See also A/CN.4/SR.3303: provisional summary record of the Commission's 3303rd meeting (24 May 2016), p. 8.

(i) *calling* to the attention of States and international organizations the desirability of publishing digests and surveys of their practice relating to international law, of continuing to make the legislative, executive and judicial practice of States widely available, and of making every effort to support existing publications and libraries specialized in international law;

(ii) *requesting* the Secretariat to continue to develop and enhance United Nations publications providing evidence of customary international law; and

(iii) *also requesting* the Secretariat to make available the information contained in the annexes to the memorandum on ways and means for making the evidence of customary international law more readily available (A/CN.4/710) through an online database to be updated periodically based on information received from States, international organizations and other entities.

130. The Special Rapporteur is currently updating the bibliography that was annexed to the fourth report. A revised version will be circulated to Commission members informally in advance of the session, and then (amended in light of suggestions received) issued as annex II to the present report.

Annex

Draft conclusions adopted on first reading, with the Special Rapporteur's suggested changes

Identification of customary international law

Part One
Introduction

Conclusion 1
Scope

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

Part Two
Basic approach

Conclusion 2
Two constituent elements

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

Conclusion 3
Assessment of evidence for the two constituent elements

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

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

Part Three
A general practice

Conclusion 4
Requirement of practice

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

2. In certain cases, the practice of international organizations may also contributes to the ~~formation, or~~ expression, or creation, of a rule~~s~~ of customary international law.

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

Conclusion 5
Conduct of the State as State practice

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

Conclusion 6
Forms of practice

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

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

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

Conclusion 7
Assessing a State's practice

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

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

Conclusion 8
The practice must be general

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

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

Part Four
Accepted as law (*opinio juris*)

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

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

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

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

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

2. Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications;

government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.

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

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

Conclusion 11
Treaties

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

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

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

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

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

Conclusion 12
Resolutions of international organizations and intergovernmental conferences

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

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

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

Conclusion 13
Decisions of courts and tribunals

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

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

Conclusion 14
Teachings

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

Part Six
Persistent objector

Conclusion 15
Persistent objector

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

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

3. The present conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).

Part Seven
Particular customary international law

Conclusion 16
Particular customary international law

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

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

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Identification of Customary International Law

Text of the draft conclusions as adopted by the Drafting Committee on second reading

Identification of customary international law

Part One
Introduction

Conclusion 1
Scope

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

Part Two
Basic approach

Conclusion 2
Two constituent elements

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

Conclusion 3
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* Reissued for technical reasons on 23 May 2018.

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INTERNATIONAL LAW COMMISSION
Seventieth session
New York, 30 April–1 June 2018, and
Geneva, 2 July–10 August 2018

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Identification of customary international law

Statement of the Chair of the Drafting Committee

Mr. Charles Chernor Jalloh

25 May 2018

Mr. Chair,

This morning, it is my pleasure to introduce the third report of the Drafting Committee for the seventieth session of the International Law Commission, which concerns the topic "Identification of customary international law". The report, which is to be found in document A/CN.4/L.908 issued on 17 May 2018, contains the texts and titles of the draft conclusions on identification of customary international law provisionally adopted by the Drafting Committee, and which the Drafting Committee recommends for adoption by the Commission on second reading.

Before commencing, allow me to pay tribute to the Special Rapporteur, Sir Michael Wood, whose mastery of the subject, guidance and cooperation once again greatly facilitated the work of the Drafting Committee. I also thank the other members of the Committee for their active participation and significant contributions. Furthermore, I wish to thank the Secretariat for its invaluable assistance. As always, and on behalf of the Drafting Committee, I am pleased to extend my appreciation to the interpreters.

Mr. Chair,

The Drafting Committee held five meetings on the topic, from 14 to 16 May 2018. It examined the 16 draft conclusions as adopted on first reading, which were referred to it by the Commission at the conclusion of the plenary debate.

Part One - Introduction

I shall begin with Part One, entitled "Introduction", which comprises a single draft conclusion.

Draft conclusion 1

Mr. Chair,

The title of draft conclusion 1 is "Scope", which was the title adopted on first reading. This draft conclusion deals with the scope of the draft conclusions, outlining what they seek to cover and apply to, and what matters fall outside their scope.

The Drafting Committee adopted this draft conclusion with no changes to the text adopted on first reading. In so doing, members of the Committee considered that clarifying that the draft conclusions do not deal with any possible burden of proof of rules of customary international law – a question raised by some members of the Commission – could be done in the general commentary. The Drafting Committee also noted that the commentary could clarify that no attempt is made to explain in general terms the question of the relationship between customary international law and other sources of international law; and that the topic did not address questions of hierarchy among rules of international law, including those concerning peremptory norms of general international law (*jus cogens*) and *erga omnes* obligations. A discussion took place regarding the apparent discrepancy, in English, between the term "determined" in draft conclusion 1 and the term "identification" in the title of the topic. The Special Rapporteur explained that the two terms were used interchangeably throughout the draft conclusions, with the word "determine" relating more to the identification of a particular rule (as opposed to customary international law more broadly), in the sense that it is used in Article 38, paragraph 1, of the Statute of the International Court of Justice. The Drafting Committee found that to be appropriate.

Part Two

Let me now turn to Part Two - "Basic approach" - which sets out the basic approach to the identification of customary international law. It comprises two draft conclusions.

Draft conclusion 2

Mr. Chair,

The title of draft conclusion 2 is "Two constituent elements". The Drafting Committee adopted the draft conclusion with no changes to the text adopted on first reading.

Draft conclusion 2 sets out the basic approach, according to which the identification of rules of customary international law requires an inquiry into two distinct, yet related, questions: whether there is a general practice and whether such general practice is accepted as law (that is, accompanied by *opinio juris*). The Drafting Committee acknowledged the strong support expressed by States for this two-element approach over the years of the Commission's consideration of the topic. The proposal by some States to add the words "of States", after the word "practice" was considered. In view of the unqualified formulation "a general practice" employed in the Statutes of both the Permanent Court of International Justice and the International Court of Justice, and given the possible relevance of practice of international organizations, it was deemed preferable to maintain the text adopted on first reading. The Drafting Committee also considered that Part Three of the draft conclusions was devoted to the question of explaining the meaning of "general practice", so that a qualifier in draft conclusion 2 was anyhow unnecessary.

The Drafting Committee also considered whether an additional paragraph should be added to draft conclusion 2 in order to clarify that a rigorous and systematic approach ought to be employed in the identification of customary international law. It was considered, however, that the draft conclusions as a whole require just that, and that the commentary will highlight that. The commentary would also clarify that a measure of deduction, as an occasional aid in the application of the two-element approach, may only be resorted to with great caution, and not as an alternative to the standard, inductive approach.

Draft conclusion 3

Let me turn to draft conclusion 3, which is entitled "Assessment of evidence for the two constituent elements". The Drafting Committee adopted the draft conclusion with no changes to the text adopted on first reading.

The purpose of draft conclusion 3 is to provide guidance as to the assessment of evidence for the two constituent elements of customary international law in ascertaining whether there is indeed a general practice accepted as law. The Special Rapporteur highlighted the importance of the draft conclusion in setting out clear yet flexible requirements, and the Drafting Committee noted that the text had met with general approval both among States and among members of the Commission.

Draft conclusion 3 comprises two paragraphs.

Paragraph 1 sets out an overarching principle that underlies all of the draft conclusions, namely that the assessment of any and all available evidence must be careful and contextual. Whether a general practice that is accepted as law exists must be carefully investigated in each case, in the light of all the relevant circumstances. The Drafting Committee considered that no amendment was required for this paragraph.

According to paragraph 2: "Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element." In light of comments received by some States in relation to the need for a rigorous analysis, the suggestion was made to add a qualifier such as "rigorous", "careful", or "systematic", before the word "assessment" in the second sentence of paragraph 2. The Drafting Committee considered this suggestion, and members generally agreed that the assessment of evidence for the two constituent elements must indeed be careful in nature. However, the Drafting Committee noted that the focus of paragraph 2 was limited to emphasising that the existence of one of the two constituent elements may not be deduced merely from the existence of the other, and that a separate inquiry needs to be carried out for each. In order not to detract from that, the Drafting Committee decided to maintain the language adopted on first reading unchanged, with the understanding that the commentary would indeed clarify that the assessment of evidence for the two constituent elements must be rigorous and systematic.

Part Three

Mr. Chair,

Let me now address Part Three, which offers more detailed guidance on the first of the two constituent elements of customary international law, "a general practice", and comprises five draft conclusions. Its title is "A general practice", as was adopted on first reading.

Draft conclusion 4

The title of draft conclusion 4 is "Requirement of practice". It comprises three paragraphs. The Drafting Committee adopted this draft conclusion with some stylistic changes to paragraph 1. No changes were made to paragraphs 2 and 3 as adopted on first reading.

Mr. Chair,

The purpose of draft conclusion 4 is to specify whose practice is to be taken into account when ascertaining the existence of a general practice for purposes of determining whether a rule of customary international law exists, as well as the role of such practice. Its three paragraphs refer, in sequence, to States, to international organizations, and to actors other than States and international organizations, recognizing that only practice of States and international organizations may be creative, or expressive, of customary international law. The Drafting Committee considered that it was important to preserve the careful balance between these three paragraphs that had been reached during the adoption of the draft conclusions on first reading, with some necessary clarifications to be made in the commentary.

In relation to all three paragraphs, further to a suggestion by the Special Rapporteur in light of the debate in the plenary, the terminology "formation, or expression, of rules of customary international law" was maintained, as it was understood to indicate clearly the two different aspects of the contribution of practice to the identification of customary international law.

Paragraph 1 of draft conclusion 4 reads as follows: "The requirement of a general practice, as a constituent element of customary international law, refers primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law". This paragraph indicates that it is primarily the practice of States that is to be looked to in determining

the existence and content of rules of customary international law. The Drafting Committee considered several possible modifications to the text for purposes of greater clarity, and eventually introduced two stylistic changes to this paragraph: the term "of a general practice" was repositioned immediately after "the requirement", and the term "refers" was employed instead of "means that it is".

The Drafting Committee also considered whether to maintain the word "primarily" before "the practice of States", as the concern was expressed that removing it, instead of highlighting the primary role of the practice of States in the formation, or expression, of rules of customary international law, might be interpreted to imply the opposite. It was thus decided to maintain the word "primarily" in light of its dual purpose. First, this term reflects the primacy of States as subjects of international law possessing a general competence, emphasizing the preeminent role that their conduct has for the formation and identification of customary international law. At the same time, it indicates that it is not exclusively State practice that may be relevant, thus linking this paragraph with the practice of international organizations, which is addressed in paragraph 2.

Paragraph 2 concerns the practice of international organizations and indicates that "in certain cases" such practice also contributes to the identification of rules of customary international law. The paragraph deals with practice attributed to international organizations as such, not that of their member States acting within them (which is attributed to the States in question).

This paragraph attracted much interest on the part of States and members of the Commission, as well as a range of opinions as to the appropriate way in which the relevance of practice of international organizations should be captured. A lengthy discussion took place in the Committee as to whether the word "may" should be added to paragraph 2 before "also contributes", and as to whether the word "rules" should be changed with the singular "a rule". The proposed changes aimed at emphasizing that caution was needed in assessing the relevance of the practice of international organizations, as well as better indicating that the practice of international organizations would not be relevant in all cases. Members of the Committee were generally of the view that the text adopted on first reading was clear enough in this respect, and that the delicate balance achieved on first reading with regard to the wording of this paragraph would be altered by the proposed changes. More specifically, the addition of the word "may" as an additional qualifier was considered by some to be excessive, and also unnecessary in light of the presence of the term

"in certain cases" at the beginning of the paragraph. The proposed modification of "rules" to "a rule" was deemed too restrictive as well.

The Drafting Committee also discussed the concern raised by some members of the Commission that the wording of paragraph 2 did not make it sufficiently clear that the practice of international organizations should only be relevant when contributing to the "general practice" that is a constitutive element of customary international law. A proposal was considered to make the relationship between paragraph 2 and paragraph 1 more explicit in this regard. The Committee concluded, however, that the word "primarily" in paragraph 1, and the word "also" in paragraph 2, provide a sufficiently clear link between the two paragraphs.

The Drafting Committee thus decided to maintain the language of paragraph 2 unchanged from the text adopted on first reading, with the understanding that the commentary would clarify the reference to the practice of international organizations, including when such practice may be of relevance; what kind of practice may be relevant; and what considerations should guide an assessment of the weight to be given to it.

Paragraph 3 of draft conclusion 4 clarifies that the conduct of actors other than States and international organizations is neither creative nor expressive of customary international law. As such, their conduct does not serve as primary evidence of the existence and content of rules of customary international law. The paragraph recognizes, however, that such conduct may have a limited and indirect role in the identification of customary international law, by stimulating or recording practice and acceptance as law (*opinio juris*) of States and/or international organizations. The Drafting Committee discussed the view that, as currently drafted, paragraph 3 may be considered as too restrictive in relation to the conduct of non-State actors, for example in relation to self-determination and non-international armed conflicts. It was decided to retain the language adopted on first reading, not least given the positive consideration thereof by States, on the understanding that the commentary would clarify the possible relevance of the conduct of actors other than States and international organizations.

Draft conclusion 5

Mr. Chair,

Let me now turn to draft conclusion 5, entitled "Conduct of the State as State practice", as adopted on first reading. This draft conclusion indicates that "State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions." The formulation adopted on first reading is familiar to States, having been used in the Articles on Responsibility of States for internationally wrongful acts. The Drafting Committee adopted the text of the draft conclusion without making any changes to it.

Draft conclusion 6

The title of draft conclusion 6 is "Forms of practice". The draft conclusion comprises three paragraphs. It was adopted with no changes to the text adopted on first reading.

The purpose of this draft conclusion is to clarify the types of conduct that are covered under the term "practice", providing examples thereof and stating that no type of practice has *a priori* primacy over another.

Paragraph 1 provides that practice may take a wide range of forms, including inaction. An extensive debate took place with regard to the proposal by the Special Rapporteur to qualify "inaction" with the term "deliberate". The proposal reflected the concerns of a number of States that there should be greater clarity about the circumstances, already recognized by the Commission in the draft commentary adopted as part of the first reading text, in which inaction would amount to practice.

Some members of the Drafting Committee considered that the term "deliberate" might hinder the necessary flexibility in the identification of customary international law, as it might constitute too stringent a threshold for the identification of practice in relation to certain categories of rules. Given this insistence, the Committee considered that the words "may, under certain circumstances", could sufficiently point to the necessity that the State in question be conscious about refraining from acting in a given situation, as explained in the commentary adopted on first reading.

Paragraph 2 provides a non-exhaustive list of forms of practice that are commonly found useful for the identification of customary international law. The Committee considered the issue of the absence from this draft conclusion of any reference to the practice of international organizations. It was noted that the commentary to draft conclusion 4 included reference to the

fact that "references in the draft conclusions and commentaries to the practice of States should … be read as including, in those cases where it is relevant, the practice of international organizations". The Drafting Committee decided to maintain the language adopted on first reading, with the understanding that this general *mutatis mutandis* clause be given more prominence in the commentaries.

Paragraph 3 of draft conclusion 6 indicates that there is no predetermined hierarchy among the various forms of practice. No proposals for textual changes were considered by the Drafting Committee, which adopted it without change from the text adopted on first reading.

Draft conclusion 7

Mr. Chair,

I will now proceed to draft conclusion 7 - "Assessing a State's practice". This draft conclusion concerns the assessment of the practice of a particular State in order to determine the position of that State as part of assessing the existence of a general practice. It comprises two paragraphs.

Paragraph 1 states that in seeking to determine the position of a particular State on the matter in question, account is to be taken of all available practice of that State, which is to be assessed as a whole. The Drafting Committee adopted this paragraph without change from the text adopted on first reading.

Paragraph 2 reads as follows: "Where the practice of a particular State varies, the weight to be given to that practice may, depending on the circumstances, be reduced". This provision refers explicitly to situations where there is or appears to be inconsistent practice of a particular State. Taking into consideration comments by States, and further to a proposal by the Special Rapporteur, the Drafting Committee added the term "depending on the circumstances" to convey more clearly the need for caution in such situations, given that not all cases of inconsistency would point to the same outcome. The commentary will explain this.

Draft conclusion 8

Mr. Chair,

The title of draft conclusion 8 is "The practice must be general". The Drafting Committee adopted draft conclusion 8 with no changes to the formulation adopted on first reading. It comprises two paragraphs.

The purpose of paragraph 1 is to clarify the notion of generality of practice; it embodies two requirements. First, the practice must be followed by a sufficiently large and representative number of States. Second, such instances must exhibit consistency. As to the first aspect, the Committee considered, following a debate on the matter, that the word "sufficiently" before the expression "widespread and representative" was necessary, as it implied and provided the necessary flexibility in the assessment of the generality of the practice, especially in circumstances where only a small number of States was involved in a given type of practice. As to the second element of generality, the requirement of consistency, the Drafting Committee considered the proposal by the Special Rapporteur that the term "consistent" be replaced by "virtually uniform", thus addressing a proposal made by some States in light of the terminology employed by the International Court of Justice in the *North Sea Continental Shelf* cases.

In this regard, members of the Drafting Committee considered that "virtually uniform" was only one of the terms used in the case-law, which all referred to a similar standard; and that it might be read to imply not only a stricter threshold of consistency, but also of participation by States in the relevant practice. It was accepted that complete consistency was not required.

The Drafting Committee also considered the question of "specially affected States", which had been raised by the Special Rapporteur and by a number of States and members of the Commission. As suggested by the Special Rapporteur, it was agreed that given the balance achieved on first reading, the term will be discussed in the commentary to the conclusion, including by explaining that is does not refer to powerful States but rather to those States whose interests may be particularly affected by a certain rule of customary international law.

Paragraph 2 of draft conclusion 8 refers to the temporal element, making clear that a relatively short period in which a general practice is followed is not, in and of itself, an obstacle to determining that a corresponding rule of customary international law exists. The Drafting Committee adopted this paragraph without change from the text adopted on first reading. It was agreed that some time must however elapse, as there was no such thing as "instant custom".

Part Four

Mr. Chair,

Let me now turn to Part Four - entitled "Accepted as law (*opinio juris*)" - which offers more detailed guidance on the second of the two constituent elements of customary international law. It comprises two draft conclusions.

Draft conclusion 9

The title of draft conclusion 9 is "Requirement of acceptance as law (*opinio juris*)". The Drafting Committee adopted the draft conclusion with no changes to the text adopted in 2016.

The purpose of this draft conclusion, which comprises two paragraphs, is to encapsulate the nature and function of the second constituent element of customary international law, acceptance as law (*opinio juris*). Paragraph 1 indicates that acceptance as law (*opinio juris*), as a constituent element of customary international law, refers to the requirement that the relevant practice must be undertaken with a sense of legal right or obligation. Paragraph 2 distinguishes a general practice accepted as law from mere usage or habit.

Draft conclusion 10

Let me now address draft conclusion 10, entitled "Forms of evidence of acceptance as law (*opinio juris*)". It comprises three paragraphs concerning the forms of evidence of the second constitutive element of rules of customary international law. The Drafting Committee once again retained the wording adopted on first reading.

Paragraph 1 states the general proposition that acceptance as law (*opinio juris*) may take a wide range of forms.

Paragraph 2 provides a non-exhaustive list of forms of evidence of acceptance as law (*opinio juris*), including those most commonly resorted to for such purpose, which also explains why there are some differences between this list and the one provided by draft conclusion 6, paragraph 2, as each intends to refer to the principal examples connected with each of the constituent elements. A debate took place as to whether the list in paragraph 2 should be expanded to include two additional potential forms of evidence: legislative acts; and resolutions adopted by international organizations or at intergovernmental conferences. As for legislative acts, it was

considered that these would be covered in the commentary since it is only rarely specified in laws (as opposed perhaps to acts in connection with their adoption) that they are mandated under or give effect to customary international law. As for resolutions, these were considered to be covered under the existing wording of "conduct in connection with resolutions", and it was recalled that a particular draft conclusion was dedicated to exploring their role. It was also noted that the list in paragraph 2 is not meant to be exhaustive. The Committee also understood that the commentary will indicate that the forms of practice listed in paragraph 2 may apply, *mutatis mutandis*, to international organizations.

Paragraph 3 addresses the failure by States to react, within a reasonable time, to a practice as possible evidence of their *opinio juris*. The Drafting Committee noted that the reference to inaction in this conclusion served a different purpose from that in draft conclusion 6. This justified the differences between the reference to inaction in the two draft conclusions. Furthermore, the Drafting Committee considered a proposal to delete the words "over time", as they might suggest the necessity of a particular duration of a State's inaction, which may not always be required. The view of the Drafting Committee was that the text adopted on first reading captured well the fact that, where a State did not or could not have been expected to know of a certain practice, or had not yet had a reasonable time to respond, inaction could not be attributed to an acknowledgment that such practice was mandated (or permitted) under customary international law.

Part Five

Mr. Chair,

Let me now turn to Part Five, which is entitled "Significance of certain materials for the identification of customary international law". This part comprises four draft conclusions.

Draft conclusion 11

The title of draft conclusion 11 is "Treaties". The Drafting Committee made no change to the text adopted on first reading.

The purpose of this draft conclusion, which comprises two paragraphs, is to address the potential significance of treaties for the identification of customary international law.

Paragraph 1 sets out three distinct circumstances in which rules set forth in a treaty may be relevant to the identification of customary international law, distinguished by the time when the

rule of customary international law was (or began to be) formed. Subparagraph (a) concerns the situation where it is established that a rule set forth in a treaty is declaratory of a pre-existing rule of customary international law. Subparagraph (b) deals with the case where it is established that a general practice that is accepted as law (accompanied by *opinio juris*) has crystallized around a treaty rule elaborated on the basis of only a limited amount of State practice. Subparagraph (c) concerns the case where it is established that a rule set forth in a treaty has generated a new rule of customary international law. This paragraph reflects the terminology used by the International Court of Justice.

Paragraph 2 seeks to caution that the existence of similar provisions in a number of bilateral or other treaties, establishing similar rights and obligations for a broad array of States, does not necessarily indicate that a rule of customary international law is reflected in such provisions. Indeed, it may suggest that no rule exists and thus the need for treaties. This question was addressed by the International Court of Justice in the *Diallo* case.

Draft conclusion 12

Let me now turn to draft conclusion 12, entitled "Resolutions of international organizations and intergovernmental conferences". It comprises three paragraphs. The Drafting Committee adopted paragraphs 1 and 3 without changes to the first reading text, and amended paragraph 2.

The purpose of this draft conclusion is to address the potential role that resolutions adopted by international organizations or at intergovernmental conferences may play in the identification of rules of customary international law and their content. The lack of parallelism between this draft conclusion and draft conclusion 11, on treaties, was found to be justified given the different guidance and clarifications that were sought to be made with respect to each of these materials.

Paragraph 1 clarifies that "a resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law". It thus makes clear that the adoption of a resolution does not create such law. The Drafting Committee adopted it without changes to the formulation on first reading.

Paragraph 2, as reformulated, reads as follows: "A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development." Taking into account the plenary debate, the Drafting Committee decided not to add the words "in

certain circumstances" to this paragraph as the Special Rapporteur had originally proposed, as the word "may" was considered sufficient in conveying that. In order to maintain consistency throughout the text of the draft conclusions, the Drafting Committee replaced the word "establishing" with the term "determining".

Paragraph 3 clarifies that a provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law. This paragraph was adopted with no change to the first reading text.

Draft conclusion 13

The title of draft conclusion 13 is "Decisions of courts and tribunals", as adopted on first reading. The Drafting Committee adopted the draft conclusion without making any change to the first reading text. It comprises two paragraphs.

The purpose of this draft conclusion is to address the potential role of decisions of courts and tribunals, both international and national, as subsidiary means in the identification of rules of customary international law. Paragraph 1 refers to "international courts and tribunals", a term intended to cover any international body exercising judicial powers that is called upon to consider rules of customary international law. Express reference is made to the International Court of Justice in view of the significance of its jurisprudence for the identification of customary international law. Paragraph 2 concerns decisions of national courts.

The Drafting Committee considered a suggestion made by some members of the Commission to address together decisions of national and international courts as subsidiary means for determining rules of customary international law. The Drafting Committee considered that the distinction between international and national courts and tribunals was important to maintain, in practical terms and also in view of the dual nature of decisions of national courts, which could be a form of State practice or acceptance as law as well as a subsidiary means for the determination of rules of customary international law. Furthermore, in view of the positive reception of this draft conclusion by States, the Drafting Committee considered that no change to the text adopted on first reading was warranted. The commentary will highlight that in any case, that is, as regards decisions of both national and international courts, their value would primarily depend on the quality of reasoning and on how they were received by States and future case-law.

Draft conclusion 14

Let me now address draft conclusion 14, "Teachings". The Drafting Committee adopted it with no changes to the formulation adopted on first reading.

The purpose of this draft conclusion is to address the role of teachings (in French, *doctrine*) as subsidiary means for the identification of customary international law. In following closely the language of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice, it provides that such works may be resorted to as a subsidiary means for determining a rule of customary international law. The term "teachings" is to be understood in a broad sense, including for instance audiovisual materials. Furthermore, as indicated in the commentary adopted on first reading, the term "publicist" covers all those whose scholarly work may elucidate questions of international law. The importance of having regard, so far as possible, to writings representative of the principal legal systems and regions of the world and in various languages, was emphasized.

Part Six

Mr. Chair,

Let me now turn to Part Six, which comprises a single draft conclusion on the persistent objector. Its title is "Persistent objector".

Draft conclusion 15

The title of draft conclusion 15 is also "Persistent objector". It comprises three paragraphs. The Drafting Committee adopted paragraphs 1 and 2 without change from the first reading text, and introduced an additional paragraph 3.

Paragraph 1 indicates that "[w]here a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection". The timing of objection is critical: it must have been made while the rule in question was in the process of formation. If a State establishes itself as a persistent objector, the rule is not opposable to it for so long as it maintains the objection. Paragraph 2 elaborates further on the stringent requirements for the application of the rule, providing that "[t]he objection must be clearly expressed, made known to other States, and

maintained persistently". Although different views were expressed by members of the Commission as to place of this draft conclusion within the set of conclusions on the topic of 'Identification of customary international law', the Drafting Committee considered it appropriate to retain the text of these two paragraphs as adopted on first reading, also in view of the wide support expressed by States for this draft conclusion.

Further to a proposal made by the Special Rapporteur, the Drafting Committee introduced an additional paragraph 3, which reads as follows: "The present draft conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*)." While the general commentary to the draft conclusions would clarify that they are all without prejudice to questions of hierarchy among rules of international law, including those concerning peremptory norms of general international law (*jus cogens*), the Drafting Committee agreed to clarify that in the particular context of draft conclusion 15. It was understood that the commentary will recall that this 'without prejudice' clause applies to the other conclusions as well.

The Drafting Committee considered whether the text of paragraph 3 should more explicitly reflect the view that persistent objection was not permissible in relation to peremptory norms of general international law (*jus cogens*) as well as, possibly, *erga omnes* obligations. The Drafting Committee considered these issues were not studied under the topic, and were in fact now examined by the Commission under a different topic. The new paragraph 3 is thus to clarify that the Commission was not prejudging any such questions.

Part Seven

Mr. Chair,

Let me now turn to the final Part Seven, which also consists of a single draft conclusion. Its title is "Particular customary international law".

Draft conclusion 16

The title of draft conclusion 16 is also "Particular customary international law". It comprises two paragraphs.

The purpose of this draft conclusion is to address the particular situation of rules of customary international law applying only among a limited number of States.

Paragraph 1 defines a rule of particular customary international law as a rule applying only among a limited number of States. It is to be distinguished from general customary international law, which in principle applies to all States. Importantly, a rule of particular customary international law as such creates neither obligations nor rights for third States.

Paragraph 2 reads as follows: "To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves". This paragraph addresses the substantive requirements for identifying a rule of particular customary international law. Determining whether such a rule exists consists of a search for a general practice prevailing among the States concerned that is accepted by them as law governing their relations. The Drafting Committee inserted the term "among themselves" at the end of this paragraph, upon suggestion by the Special Rapporteur, to clarify the necessary inquiry and to underline that the two-element approach is stricter in the case of rules of particular customary international law.

Finally, as to the final form of the provisions, the Drafting Committee decided to maintain the term "conclusions". This was considered appropriate since the objective of the topic is to offer some reasonably authoritative guidance to those called upon to identify the existence and content of rules of customary international law. It was also consistent with the decisions taken by the Commission in connection with other related topics, without prejudice to the substantive consideration of the final forms of other topics presently under discussion.

Mr. Chair,

This concludes my introduction of the third report of the Drafting Committee for this session. As I stated at the beginning of my statement, the Drafting Committee recommends that the Commission adopt the draft conclusions on identification of customary international law on second reading.

Thank you.

Annex

Identification of customary international law

Part One
Introduction

Conclusion 1
Scope

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

Part Two
Basic approach

Conclusion 2
Two constituent elements

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

Conclusion 3
Assessment of evidence for the two constituent elements

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

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

Part Three
A general practice

Conclusion 4

Requirement of practice

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

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

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

Conclusion 5
Conduct of the State as State practice

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

Conclusion 6
Forms of practice

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

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

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

Conclusion 7
Assessing a State's practice

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

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

Conclusion 8
The practice must be general

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

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

Part Four
Accepted as law (*opinio juris*)

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

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

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

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

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

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

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

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

Conclusion 11
Treaties

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

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

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

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

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

Conclusion 12
Resolutions of international organizations and intergovernmental conferences

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

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

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

Conclusion 13
Decisions of courts and tribunals

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

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

Conclusion 14
Teachings

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

Part Six
Persistent objector

Conclusion 15
Persistent objector

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

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

3. The present draft conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).

Part Seven
Particular customary international law

Conclusion 16
Particular customary international law

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

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

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Espionage and the Doctrine of Non-Intervention in Internal Affairs

QUINCY WRIGHT *

THE BASIC PRINCIPLE of international law is that of respect by each sovereign state for the territorial integrity and political independence of others. This principle was generally accepted in Europe after the inexpediency of religious war had been demonstrated by the devastations of the Thirty Years War, and the axiom "Cuius Regio Eius Religio" had been accepted as the basis of the Peace of Westphalia in 1648.[1] In spite of renewed efforts to put ideology ahead of territorial sovereignty at the time of the French Revolution and the Russian Revolution, this principle is still accepted in the United Nations Charter based on the "sovereign equality of all its members," requiring abstention from "the threat or use of force against the territorial in-

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tegrity or political independence of any state," and prohibiting "intervention in matters which are essentially within the domestic jurisdiction of any state" (Article 2). The Latin American states have always accepted this principle, and the United States joined them in asserting it in the Montevideo Convention of 1933 on the rights and duties of states. All the American states emphasized, in this and other inter-American Treaties, the duty of non-intervention—direct or indirect—in either the internal or external affairs of other states.[2] President Eisenhower proclaimed it when he said in April, 1953: "Any nation's right to a form of government and an economic system of its own choosing is inalienable. Any nation's attempt to dictate to other nations their form of government is indefensible." [3] Prime Minister Khrushchev accepted this principle when he proclaimed the doctrine of peaceful coexistence for all sovereign states.[4] Prime Ministers Nehru and Chou En-lai and the representatives of other Asian and African states accepted the Panch Shila at the Bandung Conference of 1955 calling for mutual respect, nonaggression, non-intervention, equality, and peaceful coexistence.[5]

It is clear that intervention, defined as *dictatorial interference* in the internal or external affairs of another state, cannot be reconciled with the basic principles of international law. Intervention invades the territorial integrity and denies the political independence of another state. However, states that are in continuous and continually increasing contact with one another, as means of communication, transportation, and pressure

develop with the march of science and technology, find their interests affected by the acts of others and attempt to influence those acts. They do so by internal development of culture, economy, and power; by achievements in technology, science, literature, and the arts; by international communication utilizing radio, press, popular periodicals and technical journals; by the travel and trade of their citizens; and by official utterances, legislative action, and diplomatic correspondence. International law is faced with the issue: When does proper influence become illegal intervention?

In the definition of intervention, stress has been laid on the words *dictatorial* and *interference*. Persuasion is said to be legitimate; coercion, dictatorial and illegitimate; but the line between the two may be vague. Military invasion is certainly coercive, but what of economic embargo, secret infiltration, peremptory diplomatic notes, or incitement to subversion by radio? Public statements of policy or purpose by a government are said to be legitimate; subversive or inciting actions by, or with complicity of, a government within another state's territory or affecting another state's officials are considered interference and illegitimate. But here again the line is not easy to draw. Officially supported hostilities, assassinations, or incitements; infiltration of government agencies; bribery of officials; espionage into official secrets; and other acts within a state's territory forbidden by its laws—these are doubtless interference; but what of expressed or implied threats in public pronouncements of policy by a government? What of the publications, speeches, and conversations

of an inciting character by foreign travelers? What of observations and reports by diplomatic attachés and citizens instructed by another government? The Supreme Court of the United States has found it difficult to distinguish legitimate uses of the freedom of speech and press from seditious, subversive, libelous, or inciting utterances or expositions.[6]

While it is difficult to distinguish dictatorial interferences from proper influence and exposition, it is even more difficult to distinguish the internal affairs and foreign policy of a state from its acts or utterances which so affect the rights and interests of another state that they can be regarded as of international concern, and as justifying interference, even dictatorial interference, by the state affected.

A state can undoubtedly protest acts which it deems in violation of its rights and can make representations or even resort to economic retorsions against acts it deems adverse to its interests. It can go further and conduct reprisals not involving the use of armed force to rectify injuries arising from violation of its rights, if the available peaceful means of adjustment or reparation have been exhausted without results, and the means of reprisal are no more serious than the injury complained of. Finally, a state can use armed force to defend its territory or armed forces against armed attack, to assist others that are victims of such attack, or to assist the United Nations "to maintain or restore international peace and security" in case of "threat to the peace, breach of the peace, or acts of aggression" or to enforce a judgment of the International Court of

Justice. But difficulties of precise definitions again rise. Can a state initiate reprisals on the basis of its own judgment that it has suffered from a breach of international law? How can it be determined that reprisal measures are, in fact, designed to rectify wrongs? Who determines when peaceful remedies have been exhausted? By what criteria can the relative seriousness of the initial injury and the reprisal measures be determined? Can defensive measures be taken preventively in case of immediate threat of invasion? Can they be taken to protect citizens abroad in danger of their lives? How does the United Nations determine when civil strife threatens international peace? Under what circumstances can the United Nations intervene to protect the "human rights" of the nationals of a state or secure the "self-determination" of a colony? May states intervene for such humanitarian purposes if another state in its internal administration is guilty of atrocities which "shock the conscience of mankind"?

These questions raise issues requiring careful analysis if the broad principles of international law are to be applicable in practice.[7]

Some writers have been so impressed by the circumstances which seem to justify intervention that they have elevated "intervention" into a normal procedure of international law to rectify wrongdoing. Thus Stowell, in a comprehensive study of the question, concludes that "intervention in the relations between states is the rightful use of force, or the reliance thereon, to constrain obedience to international law." Though recognizing the serious effect of intervention, in that "it

leaves the weak without the means to bring the strong transgressor to justice," he is convinced that international law must depend mainly upon "the action of the separate states to secure redress for their own injuries." [8] While this point of view may have had some justification in an earlier stage of international law, it is clearly contrary to the United Nations Charter, which seeks to abolish forcible self-help in international relations except in individual or collective self-defense against armed attack, and relegates other law enforcement activities to collective action through the United Nations.[9]

Others, instead of attempting to justify intervention under international law, conclude that international law is not applicable at all in time of cold war. Cold war, they say, is more like hot war than like peace, and traditional international law has permitted each belligerent during a state of war to invade and occupy the territory of its enemy, to destroy its armies, to subvert its government, to incite its population, to establish blockades and other economic coercions, to carry on propaganda and intimidation, and, in general, to pay no respect to the territorial integrity or political independence of its enemy.[10]

Others go further and say that law has no applicability to international affairs under any circumstances. International law they consider an illusion, declaring that international relations are relations of power in which expediency is the only guide.

If such positions are taken, the question posed by the title of this paper is irrelevant. We shall, therefore, as-

sume that there is a "doctrine of non-intervention," that it is a legal doctrine, that a state of war does not exist between the United States and the Soviet Union, and that the subject under discussion is the lawfulness of espionage on these assumptions.

We must first be clear about the sources of international law. Attitudes toward that law may be divided according as people consider themselves "realists" asserting that the immediate material state of affairs cannot be changed by ideas but only by force, or as "idealists" asserting that ideas and values can, in time, greatly influence present material conditions, that men and governments act from beliefs, not from capabilities, and that wars are made in the minds of men, not in technological equipment.[11]

A balance between these two positions has been maintained by most international lawyers. Law differs from sociology in that it formulates the values, not the behavior, of the community. The two are related because behavior provides some evidence of values, and values influence behavior; but the two are not identical. The behavior of some members of a community at most times, and of most at some times, may be contrary to the generally accepted values of the community. Jural law, therefore, differs from sociological law in that it may be violated. Practice gives evidence of law only when it manifests custom, reflecting a subjective sense of right or obligation. In conformity with this general conception, international law reflects not the values of one nation, but the consensus of values which all nations profess. Because of the decentralized character

of the society of nations, the consequent imperfection of the sanctions of international law, and the absence of an international legislative authority, international law is closer to behavior than are most systems of municipal law. Nevertheless, we must assume that it is law and that, to discover its rules, we must seek the values which states generally accept, and give weight to their practices only insofar as they provide evidence of that acceptance.

The statute of the International Court of Justice declares that the court, to decide cases in accordance with international law, shall apply:

> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) . . . 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 (Article 38).

The use of the words *recognized* and *accepted* in this formulation emphasizes the importance of the subjective factor in appraising the value of material evidences of the law in conventions, practices, principles, precedents, and commentaries.

What is the status of peacetime espionage in accord with these sources? Very little has been said about it in the books. Espionage is a term of art in the law of war. The Hague Convention of 1907 on the laws and customs of war on land says:

An individual can only be considered a spy when, acting clandestinely, or on false pretenses, he obtains, or endeavors to obtain, information in the zone of operations of a belligerent with the intention of communicating it to the hostile party.

Thus, soldiers not wearing a disguise, who have penetrated into the zone of operations of a hostile army for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: soldiers and civilians, carrying out their mission openly, intrusted with the delivery of dispatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of delivering dispatches, and, generally, of maintaining communications between the different parts of an army or a territory.

A spy, taken in the act, shall not be punished without previous trial.

A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage (Articles 29–31).

Text writers generally recognize that while a spy, if captured in the act, can be executed after trial, his activities are not dishonorable, his government is not violating law in sending him, and his act is not, therefore, a war crime. Espionage is a legitimate belligerent operation peculiar in that it involves considerable risk to the spy, but the same is true to a somewhat lesser degree of soldiers who engage in normal belligerent operations.

Espionage, the essence of which is the clandestine character of the activity and the false pretenses or dis-

guise of the individual who engages in it, is to be distinguished from observation by a scout in uniform or from reconnaissance by an aviator, under cover of darkness or distance, but not in secret, under false pretenses, or in disguise. The scout or the aviator, if captured, are entitled to the normal treatment of prisoners of war.

The legitimacy of espionage in time of war arises from the absence of any general obligation of belligerents to respect the territory or government of the enemy state, and from the lack of any specific convention against it. The deception involved resembles that in stratagems or *ruses de guerre* and differs from violations of specific conventions like those of the flag of truce, red cross emblems, and armistices, all of which constitute "perfidy" and are forbidden by the law of war.

In time of peace, however, espionage and, in fact, any penetration of the territory of a state by agents of another state in violation of the local law, is also a violation of the rule of international law imposing a duty upon states to respect the territorial integrity and political independence of other states. Each state has the right to make and enforce law within its territory, except insofar as it is under positive obligations of international law, such as those to respect the immunities of diplomatic officers, foreign warships, foreign forces, and other foreign agencies which it has permitted in its territory; to permit innocent passage of foreign vessels in its territorial waters; not to deny justice to aliens whom it has admitted to its territory; and to observe treaties which it has ratified. There is no rule of interna-

tional law which forbids a state to punish individuals who seek to obtain classified documents, who penetrate forbidden areas, who fly over its territory without permission, or who engage in seditious or other activities which it has made illegal. It belongs to each state to define peacetime espionage, sedition, subversion, sabotage, incitement, and conspiracy as it sees fit, and it is the duty of other states to respect such exercise of domestic jurisdiction. Thus any act by an agent of one state committed in another state's territory, contrary to the laws of the latter, constitutes intervention, provided those laws are not contrary to the state's international obligations. Intervention by unlawful acts in another state's territory may be divided into direct or open intervention, such as armed invasion, and indirect or subversive intervention involving secret activity. Since the government responsible for the latter type of action seldom acknowledges its responsibility but allows the agent, if caught, to be punished without protest, such incidents are not usually the subject of international discussion. Numerous communist spies, saboteurs, or other agents have been detected and punished in Western countries, but the communist government responsible for sending them has never interfered unless the individual was a diplomatic personage. In this case it has claimed diplomatic immunity for the individual, and if that claim is acknowledged, the individual is not punished but declared *persona non grata* and required to leave the country. In such cases the official character of the individual is known, and the incident usually results in an official protest to the send-

ing state by the receiving state. The peculiarity of the U-2 incident of May 1, 1960, was the acknowledgment of responsibility by President Eisenhower, which clearly gave the Soviet Union grounds for official protest. There can be no doubt of the competence of the Soviet Union to deal with the aviator, Francis Powers, in accord with its own laws. Although Powers was an agent of the United States government, he was not lawfully within Soviet territory, and so was not entitled to any immunity under international law.[12] The immunity claimed by Great Britain for Alexander McLeod in the Caroline incident of 1838 arose from the fact that McLeod was not only a soldier acting under British orders, but also lawfully within American territory, because the invasion was justified by the necessity for self-defense.[13]

Intervention, however, goes beyond action by one state in the territory of another. Governments are obliged to refrain from inciting propaganda, libelous utterances, or other acts intended to upset the government of another state. It would appear that the proclamation by the President of the United States of "Captive Nations Week," under authority of an act of Congress, was of this character,[14] as was the President's statement of sympathy for rebels seeking to upset the government of President Castro in Cuba.[15] It is within the domestic jurisdiction of each state to establish its government by its own internal processes and to change that government, whether by peaceful or violent means. Each state enjoys the "right of revolution" so long as the exercise of that right by its people does not threaten the peace and security of other states. Consequently, official acts

of other governments assisting rebels, or interfering in behalf of either a recognized government or the insurgents in time of civil strife, constitutes forbidden intervention. This is expressly recognized by the inter-American convention of 1928 on Civil Strife.[16]

Free governments have held that, while official acts of the kind described constitute illegal intervention, this is not true of private acts within their territory. They consider themselves under no obligation to prevent propaganda hostile to foreign governments by private individuals in their territory. Such activities they consider within the proper guarantees of freedom of speech and press. Autocratic governments, on the other hand, have often censored such activities within their territory and have attempted to gain recognition of an international duty of other governments to do likewise. There have indeed been international conventions requiring censorship of radio communications of subversive character, and punishment of acts of terrorism against foreign governments. It is also true that governments are obliged to exercise due diligence to prevent military expeditions from leaving their territory to operate against other governments. Failure in this regard, as well as launching of official military expeditions, constitutes aggression, which is explicitly forbidden by the United Nations Charter. The United States may have been guilty of such want of due diligence in the Cuban incident of April, 1961. In general, however, there appears to be a distinction between hostile acts by a government and hostile acts by a private individual. The latter do not constitute interven-

tion unless there has been government complicity or, in the case of military action, government negligence.

The problem of negligence is closely related to the *sic utere tuo* rule, which imposes liability upon a state for incidents in its territory injurious to another state, such as the use of river waters by an upper riparian in such a way as to deprive the lower riparian of a fair share of the stream, the operation of a factory which sends noxious fumes across the border, or the launching of a satellite or missile which falls in another state and causes serious damage to the latter. In such cases liability may go beyond that for willful act or even negligence and exist without fault. The responsibility arises from the inherently dangerous character of the activity.

In view of these general rules of international law, are there any special conditions justifying peacetime espionage? Efforts have been made to justify such action by the United States in the Soviet Union because of: (1) a general practice of espionage by all states, (2) the necessity for self-defense, (3) the necessity to maintain the balance of power, (4) the unreasonableness of Soviet objection in view of its own espionage activities, and (5) the virtue of espionage or other types of intervention against communism. Consideration will be given to each of these alleged justifications.

1. Although very few writers on international law have discussed peacetime espionage, the well-known British jurist, Lassa Oppenheim, writes as follows:

> Spies are secret agents of a state sent abroad for the purpose of obtaining clandestinely information

> in regard to military or political secrets. Although all states constantly or occasionally send spies abroad, and although it is not considered wrong morally, politically, or legally to do so, such agents have, of course, no recognized position whatever according to international law, since they are not agents of states for their international relations. Every state punishes them severely when they are caught committing an act which is a crime by the law of the land, or expels them if they cannot be punished. A spy cannot be legally excused by pleading that he only executed the orders of his government and the latter will never interfere, since it cannot officially confess to having commissioned a spy.[17]

The suggestion that, because of the frequency of the practice, sending spies is not "legally" wrong seems to be contradicted by the last part of this quotation. Why cannot a government "officially confess to having commissioned a spy," unless it is legally wrong? This would appear to be a case in which frequent practice has not established a rule of law because the practice is accompanied not by a sense of right but by a sense of wrong.

2. After the U-2 incident, the United States sought to defend itself by asserting that such activity was necessary for self-defense. The United States, as an open society, presents every opportunity to the Soviet Union to detect any preparations for surprise attack, but in the closed society of the Soviet Union, the United States had to utilize aerial espionage for this purpose, especially after the Soviet Union had refused to accept the "open skies" proposal made by President Eisenhower

in the Summit Conference of 1955. President Eisenhower said in reference to the U-2: "No one wants another Pearl Harbor," and Secretary of State Herter said:

> It is unacceptable that the Soviet political system should be given the opportunity to make secret preparations to face the free world with the choice of abject surrender or nuclear destruction. The Government of the United States would be derelict to its responsibility, not only to the American people, but to free peoples everywhere if it did not, in the absence of Soviet cooperation, take such measures as are possible unilaterally to lessen and to overcome this danger of surprise attack.[18]

International law, however, permits military self-defense only in case of armed attack or at least immediate threat of armed attack. The danger apprehended by the United States flowed from an interpretation of Soviet policy and intent, not from an immediate threat of attack. Furthermore, if the United States planned no first strike with nuclear weapons, as it has repeatedly asserted, it is difficult to see what direct defense value there would be in aerial observations. Although they might add to the effectiveness of a second strike, the information so gained, if it remained secret, would not have deterrent value.

American courts have held that a single individual with a military purpose, such as espionage or observation from aircraft, may constitute a "military expedition or enterprise" punishable under United States criminal law, if he proceeds from American territory

with the intent to enter foreign territory.[19] While a reconnaissance plane may carry a bomb of great destructive power, and its overflight may therefore be regarded as an armed attack by the state overflown, it seems doubtful whether the dispatch of such a plane, when not actually armed but intended merely for reconnaissance, can be regarded as an act of aggression. It is, however, an act of intervention, and cannot be justified on grounds of self-defense except in response to an actual attack or immediate threat of armed attack.[20]

3. George Schwarzenberger writes in an article entitled "Hegemonial Intervention":

> While the nuclear stalemate between the world-camps lasts, each side may claim with a greater or lesser degree of justice that, by keeping its own strength unimpaired, it makes its own indispensable contribution to the maintenance of world peace. Thus, in the minds of the world-camp directors and their publicity departments, intervention for the purpose of maintaining the *status quo* in the relative strength of the two camps is easily equated with serving the interests of world peace.[21]

However, he regards this argument as political rather than legal, recognizing that justification cannot be found in international law or the United Nations Charter, and that "however circumspectly handled, hegemonial intervention is always an instrument of international politics that involves taking calculated risks." He thus appears to endorse the well-known position of Sir Vernon Harcourt that "intervention is a high and sum-

mary procedure which may sometimes snatch a remedy beyond the reach of law. . . . Its essence is illegality, its justification is its success." [22]

4. Ambassador Lodge and Secretary Herter sought to justify the U-2 flight on the ground that the Soviet government was engaged in espionage on an even larger scale than the United States. Ambassador Lodge cited eleven cases in which Soviet spies had been unmasked in the United States since the death of Stalin, and said that there had been 360 convictions of Russian espionage agents in courts of free-world countries, and that these represented only a minor proportion of the cases in which Soviet espionage activities had been actually involved.[23] This *tu quoque* argument has had a certain recognition in the equitable principle of "clean hands," "he who seeks equity must do equity." Judge Manley O. Hudson invoked this principle in his opinion in the River Meuse Case in the International Court of Justice, defining it as follows:

> Where two parties have assumed an identical reciprocal obligation, one party which is engaged in a continuous non-performance of the obligation should not be permitted to take advantage of a similar non-performance of the obligation by the other party.[24]

While this equitable principle is not normally applicable in criminal law, the Nuremburg Tribunal refused to proceed with indictments against Admirals Raeder and Doenitz, accused of ordering the sinking of merchant vessels by submarines at sight, after evidence had

indicated that British and American Naval authorities had done the same thing during World War II. In the particular incident of the U-2, the Soviet representative, Gromyko, sought to refute this argument by implying that ordinary espionage and aerial reconnaissance are so different that this "clean hands" principle did not apply. It is clear that the nature and gravity of delinquencies must be similar, if not identical, to justify invocation of this principle. An over-flying plane is more capable of carrying a bomb of great destructiveness than is an ordinary secret agent. The United States, while calling attention to reconnaissance by Russian ships and espionage by agents, did not assert any cases of Soviet aerial reconnaissance, although it subsequently disclosed that a Soviet diplomatic officer had hired an American aviator to photograph strategic bases in the United States. In principle, all peacetime espionage in foreign territory is illegal; but when all are engaging in it, it seems unreasonable to single out one state for utilizing a particular form of espionage, even though that form carries possibilities of hostile action going beyond espionage. The difference should not be exaggerated. Although a reconnaissance airplane may carry bombs, a secret agent may plant a bomb and engage in various forms of sabotage. Therefore, while this argument is of somewhat doubtful legal value, it undoubtedly has much moral cogency.

The value of the argument may be even greater when third states are involved. Richard Falk, referring to the Spanish Civil War, proposes a rule "that interventionary contacts, once established, invite other

states to counter-intervene, at least to an offsetting degree." [25] If, as illustrated in the Spanish Civil War, states favorable to one side observe the rule of non-intervention in civil strife, and those favorable to the other side do not, the latter is likely to win. It should be noticed, however, that such counter-intervention tends to develop the civil strife into general international war. For this reason, the Charter permits intervention only by the United Nations in such circumstances and the United Nations has called upon all states not to intervene, as illustrated in the Security Council's Resolution of February, 1961, in the Congo situation. This situation suggests the value of the rule of international law forbidding intervention in civil strife by states individually. As Falk points out, "considerations influencing action by an international organization are quite different from those that should be available to a single state." [26]

Under present circumstances, it does not appear that a general rule justifying counter-intervention is expedient. Rather, action should be taken through the United Nations to terminate the original intervention.

5. Richard Falk further points out that "the official United States view is to regard the Caracas Resolution as a revival of the Monroe Doctrine, shifted from a unilateral to a multilateral axis, and directed against Communism rather than Colonialism." [27] After noting policies in sections of the world other than Latin America, he concludes: "The United States' recognition practice tends to be as interventionary as possible whenever Cold War issues are involved." [28] There can be no doubt

that these statements are borne out by the Caracas and other Latin American declarations against communism, the Truman and Eisenhower Doctrines, the fact that the United States limits SEATO interventions to those against communism, and the non-recognition of mainland China, North Korea, North Vietnam, and East Germany. They are, however, statements of American policy and not of international law. The United Nations Charter recognizes the sovereign equality of all members, whatever their ideologies. Thus it does not appear that espionage or any other form of intervention can be legally justified on the ground that it is carried on as part of a crusade against communism.

Even as a policy, the suggestion that communism, which now governs over one-third of the human population, is a doctrine so wicked that illegal means can be used against it is difficult to support. Such a policy resembles those which supported continuous hostility between Christendom and Islam in the Middle Ages, between Catholicism and Protestantism for a century before the Peace of Westphalia, and between absolute monarchs and the principles of the American and French Revolutions in the late eighteenth century. Modern international law and the United Nations Charter have attempted to prevent exactly such policies, which could be in the future as they have been in the past, a major cause of universal war.

It therefore seems that in the modern world, even more than in the earlier periods mentioned, ideological war ought to be avoided. The question of which ideology is the best for a given people cannot be settled by

outside intervention but only by the people involved, through revolutionary action or, preferably, by discussion in a free forum of public opinion. For the world as a whole, such a free forum may be difficult to achieve, but to achieve it should be the object of states, as it is of the United Nations. To this end, the rule of international law, requiring mutual respect by states for the territorial integrity and political independence of other states, should be observed. Illegal intervention should be condemned, and, where it occurs, collective action through the United Nations, or, in the Americas, through the Organization of American States, should be sought.

Such a policy is particularly important for democracies because both experience and analysis show that in a competition for power, particularly in using subversive methods, dictatorships have great advantages. They can act rapidly, secretly, and effectively. They can divert resources away from the production of consumer goods to the building of power. They can respond to requests for assistance by underdeveloped countries immediately, without congressional debate and without apparent political strings. In the present world, the communist powers have the advantage of interior lines and can threaten, mobilize or attack successively at different points on their long periphery. Because of these advantages, manifested in the continuous increase of the relative power of the communist states since World War II, these states are not eager to accept the rule of law.[29] Yet Khrushchev's demand for peaceful coexistence and competition may be genuine. He probably

does not want nuclear war, which would destroy the fruits of Soviet economic development. His people clearly do not want the suffering of another world war. He may believe that his model will eventually prove acceptable to the poor people of Asia, Africa, and Latin America, and even to the West, without the support of military aggression or subversive intervention. If he believes, as Walter Lippmann says he does, in the inevitable triumph of communism in the deterministic march of history, he may not want to run the risk that such methods will eventuate in war. Finally, he may fear that in a general war, whatever might happen to the Western world, China, rather than Russia, would emerge as the leader of the communist world.

It would appear, therefore, that, difficult as may be the task, maintenance of the rule of international law against intervention of any kind may not be impossible. The West would certainly gain by a world in which states competed in a forum of opinion stabilized by law and in which each could present the values of its model of social, economic, and political organization for others to imitate. In such a world, democracy would have a fair chance to survive. Its survival is doubtful in a jungle world which places a premium on skills in subversion, infiltration, espionage, guerrilla warfare, nibbling aggression, and other forms of intervention in which totalitarian dictatorships have so great an advantage. Deciding what steps can be taken to "make the world safe for democracy" requires study, less in the technology of deterrence than in the psychology of tension reduction. By avoiding interventions themselves and

utilizing international organizations to frustrate interventions by others, by pursuing policies of defense without provocation, and conciliation without appeasement, democracies may win confidence in their peaceful intentions in the uncommitted and even in the communist world. An atmosphere favorable to armament negotiation may emerge and the peace of mutual terror may in time give way to a peace of mutual confidence that law will be respected.

There can be no guarantee that this will happen. The hope that it may rests on the belief that people individually, in the long run, prefer survival and freedom to ideological allegiance, and that peoples collectively prefer self-determination and prosperity to domination. The alternative of continual competition in arms, propaganda, subversion, and espionage between free democracies and totalitarian autocracies seems almost certain, in the atomic age, to spell the end of democracy, if not of humanity.

1. Wright, *International Law and Ideologies,* 48 AM. J. INT'L L. 616 ff. (Oct. 1954).

2. INTERNATIONAL LEGISLATION (Hudson ed.), Vol. 4, p. 2418, Vol. 6, pp. 450, 623, 628, Vol. 7, p. 578; AM. J. INT'L L., Vol. 46, p. 46 (Supp. 1952), Vol. 48, p. 123 (Supp. July 1954); Wright, *Intervention and Cuba in 1961,* in PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW (1961) p. 2.

3. 28 Dep't State Bull. 599 (1953).

4. 38 FOREIGN AFFAIRS 3 ff. (1959).

5. Wright, *Asian Experience and International Law,* in 1 INTERNATIONAL STUDIES 85 (Indian School of International Studies, July 1959).

6. Dennis v. United States, 341 U.S. 494 (1951); PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT 71 ff. (University of Chicago Press, 1954).

7. Wright, *The Prevention of Aggression,* 50 AM. J. INT'L L. 526 (July 1956).

8. STOWELL, INTERVENTION IN INTERNATIONAL LAW vi, 46 (Washington, D.C., John Byrne, 1921); INTERNATIONAL LAW 72 (N. Y., Henry Holt, 1931).

9. Julius Stone attempts to interpret the United Nations Charter so as to permit military reprisals, such as those undertaken by Great Britain and France at Suez in 1956 and condemned by the United Nations. See AGGRESSION AND WORLD ORDER (New York, 1958).

10. George Sokolsky, in a column in the Washington Post, May 10, 1961, writes: "The time is rapidly coming when the United States will weary of such semantic expressions as Cold War and will recognize that war has many different devices and that World War II never ended but has continued in different forms." He overlooks the fact that in World War II the Soviet Union was an ally, not an enemy of the United States.

11. The meanings of the terms "realism" and "idealism" are highly controversial. See Wright, *Realism and Idealism in International Politics,* 5 WORLD POLITICS 116 ff.

12. Wright, *Legal Aspects of the U-2 Incident,* 54 AM. J. INT'L L. 836 ff. (Oct. 1960).

13. Moore, INTERNATIONAL LAW DIGEST, Vol. 2, p. 409 ff., Vol. 6, pp. 261, 1014.

14. Wright, *Subversive Intervention,* 54 AM. J. INT'L L. 521 ff. (July 1960).

15. Wright, *Intervention and Cuba in 1961,* PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW (1961) p. 2.

16. 4 INTERNATIONAL LEGISLATION 2418 (Hudson ed.).

17. Oppenheim, 1 INTERNATIONAL LAW, § 455 (London, Longmans, 3d ed. 1920).

18. 42 Dep't State Bull. 816 (1960).

19. United States v. Sander, 241 Fed. 417, 419 (1917); Hackworth, 7 INTERNATIONAL LAW DIGEST 399.

20. Wright, *Legal Aspects of the U-2 Incident,* 54 AM. J. INT'L L. 846.

21. Schwarzenberger, *Hegemonial Intervention,* 12 YEAR BOOK OF WORLD AFFAIRS 261 (London Institute, 1959).

22. "HISTORICUS," LETTERS ON SOME QUESTIONS OF INTERNATIONAL LAW 41 (London, 1863).

23. Ambassador Henry Cabot Lodge, Jr., in United Nations Security Council. See Wright, *Legal Aspects of the U-2 Incident,* 54 AM. J. INT'L L. 847, 851.

24. P.C.I.J., ser A/B No. 70, p. 77; 4 WORLD COURT REPORTS 232 (Hudson ed.).

25. Falk, *The United States and the Doctrine of Nonintervention in the Internal Affairs of Independent States,* 5 How. L. J. 169 (June 1959).

26. *Id.* at 170.

27. *Id.* at 182.

28. *Id.* at 185.

29. A. Ravenholt, an experienced reporter in southeast Asia, after pointing out some "obvious disasters" of United States "covert operations" in that area and the likelihood of further mistakes because they are "built into the system," concludes: "While many of these difficulties may be the United States' growing pains in a new dimension of the world struggle, still unanswered is the question of the role and management of such secret activity by a democracy." Washington Post, May 10, 1961.

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Vienna Convention on the Law of Treaties

A Commentary

Springer

Article 78

Notifications and communications

Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State under the present Convention shall:

(a) if there is no depositary, be transmitted direct to the States for which it is intended, or if there is a depositary, to the latter;
(b) be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;
(c) if transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary in accordance with article 77, paragraph 1 (e).

Contents

A. Purpose and Function

States may make or have to make various **notifications** or **communications** relating to the life of a treaty. The transmission of notifications and communications – either directly or through a depositary – inevitably takes a certain amount of time. This fact raises the questions as to *when* such a notification or communication has been **validly made** by the sending State, and *when* it becomes **legally effective** for the State for which it was intended. Art 78 was designed as a general rule for the exact determination of these two dates and is therefore important for the **calculation of time limits**. It applies only if the treaty concerned or other provisions of the VCLT do not provide for specific rules. A general article on the temporal aspect of notifications and communications allowed the ILC to simplify other articles as far as these aspects were concerned.[1] 1

[1] Final Draft, Commentary to Art 73, 270 para 1.

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2 Art 78 sets out rules for **two different procedures**: (1) for treaties without a depositary, and (2) for treaties with a depositary. Both procedures are based on the principle that a notification or communication is considered as having been made by the sending State **upon receipt** by the State for which it was intended or by the depositary, if any, and can only become legally effective for a State upon receipt either of the direct notification or of the depositary information, *ie* as of the moment the State formally has knowledge of it. The main problem in the latter case is the inevitable time lag between receipt by the depositary and the information of the State for which the notification was intended.

B. Historical Background and Negotiating History

3 The temporal aspect of notifications and communications was not raised in international practice before the *Right of Passage* case.[2] In that case, Portugal instituted proceedings against India only a few days after it had declared the acceptance of the compulsory jurisdiction of the ICJ according to Art 36 para 2 ICJ Statute and thus before the depositary had informed the States concerned, including India, about the acceptance of jurisdiction. India, therefore, had no knowledge of the Portuguese declaration at the time when proceedings were instituted and, for this reason, contended that the Court lacked jurisdiction. It argued that the declaration of acceptance did not become effective upon its deposit with the UN Secretary-General, but only upon information of the States Parties by the Secretary-General. The key issue before the Court was thus the determination of the exact point in time when a notification transmitted to a depositary becomes legally effective in relation to the other parties. In its decision, the Court concluded that a declaration of acceptance becomes **effective upon its deposit** with the depositary, as Art 36 ICJ Statute does not provide for any additional requirement, such as a certain lapse of time or the information by the UN Secretary-General.[3] The Court thus dismissed the preliminary objection on the basis of a strict interpretation of the treaty provision.[4]

4 The ILC first dealt with the temporal aspect of notifications and communications in the context of various articles, *eg* the articles on reservations and objections.[5] However, it did not enter into a general discussion before 1965, when the suggestion was made to concentrate all the rules governing notifications and their taking effect into one single article.[6] At the same time, a provision was proposed that

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[2]ICJ *Right of Passage over Indian Territory (Portugal v India)* (Preliminary Objections) [1957] ICJ Rep 125. For the lack of international practice prior to that case, see *R Daoudi* in *Corten/Klein* Art 78 MN 8.

[3]ICJ *Right of Passage* (n 2) 145–147.

[4]*S Rosenne* The Depositary of International Treaties (1967) 61 AJIL 923, 940.

[5]*Rosenne* (n 4) 939; see the set of draft articles adopted in 1962, in particular Arts 18–22, ILC Report 14th Session [1962-II] YbILC 175–182.

[6][1966-I/2] YbILC 176, 200.

sought to limit the consequences of the *Right of Passage* case by stipulating that a notification will become legally effective 90 days after receipt by the depositary, which would allow the depositary to inform the parties.[7] However, in its debate in 1966, the Commission soon abandoned the idea of an arbitrary time lag.[8] It also discussed whether a notification becomes effective for the State for which it was intended already upon receipt by the depositary or only upon receipt of the respective depositary information by the State for which it was intended. This led to a question of principle as to the role of the depositary, since the depositary was to be considered either the **agent of each party** so that the receipt of a notification by the depositary must be treated as being equivalent to receipt by the State for which it was intended or no more than a **convenient mechanism for the administration of the treaty**, in this particular case for the transmission of notifications. The majority of ILC members favoured the second option and rejected the view of the depositary as a general agent of the parties.[9] The Commission concluded that, if the contrary view had been adopted, a lack of diligence on the part of the depositary could lead to a situation where the intended recipient, still unaware of the notification, might in all innocence commit an act, which infringed the legal right of the State making the notification.[10] As neither the arbitrary time lag nor the concept of the depositary as a general agent of the parties was incorporated in the final draft article, the problem of an **interval** between **transmission** by the sending State to the depositary and **receipt** of the information by the intended addressee from the depositary remained unsolved. In its Commentary, the ILC admitted the existence of this problem, but did not think that it should attempt to solve all such questions in advance by a general rule and confined itself to stating the rules regarding the making of a notification or communication by the sending State, and its receipt by the State for which it was intended.[11]

The States participating in the Vienna Conference did not enter into a discussion on the draft article as proposed by the ILC and accepted it with minor drafting amendments.[12] The article was also incorporated into the VCLT II without any change in substance.[13] Except for lit a, Art 78 is not a codification of existing customary law, but a **progressive development**.[14] 5

[7]Addition to Draft Art 29 or new Draft Art 29 *bis*, proposed by *Rosenne* [1965-II] YbILC 73.
[8][1966-I/2] YbILC 274.
[9][1966-I/2] YbILC 134–139, 275–278; Final Draft, Commentary to Art 73, 271 para 4.
[10]Final Draft, Commentary to Art 73, 271 para 4.
[11]Final Draft, Commentary to Art 73, 271 para 5.
[12]UNCLOT I 468, 487, as well as *ibid* 130–131.
[13]See Art 79 VCLT II.
[14]See in particular [1966-I/2] YbILC 338. Today, the entire article may be seen as a customary rule (*M Villiger* Art 78 MN 14).

C. Elements of Article 78

I. Notification

6 Generally, notification may be understood as "a formal, unilateral act in international law, by a State informing other States or organizations of legally relevant facts."[15] However, Art 78 is limited to notifications "to be made by any State under the present Convention", *ie* to **notifications relating to the life of a treaty**. This limitation of scope is the result of a longer discussion within the ILC.[16] It was correctly pointed out that several multilateral treaties required the States Parties to make certain notifications not to the depositary, but directly to other States Parties. For instance, Art 10 Vienna Convention on Diplomatic Relations[17] obliges a State to notify the members of its mission to the receiving State. It would not be practicable to make such notifications via the depositary.[18] The ILC thus clearly distinguished between notifications relating to the life of the treaty and notifications relating to substantive matters as defined in the treaty, and decided to limit the scope of Art 78 to the first category of notifications.[19] However, Art 78 does in fact not apply to all notifications relating to the life of a treaty. Notifications establishing the **consent to be bound** and concerning the **entry into force** are governed by other articles (→ MN 8). Art 78 is mainly relevant for objections to reservations, suspension and termination.[20]

II. Communication

7 The VCLT contains no indication that there is a difference between the terms "notification" and "communication".[21] In the context of the VCLT, they have thus to be understood as synonyms. In practice, however, the term "communication" is sometimes used by depositaries to indicate a certain difference or deviation from a standard procedure. For instance, the UN Secretary-General

[15] *MF Dominick* Notification (1992) 3 EPIL 695.

[16] [1966-I/2] YbILC 275–276, 288–291.

[17] 500 UNTS 95.

[18] See in particular the intervention by *Tsurouka* [1966-I/2] YbILC 288–289.

[19] Final Draft, Commentary to Art 73, 270 para 2, 271 para 8. Earlier drafts had also applied to notifications relating to substantive matters; see [1966-I/2] YbILC 134, 274, 288.

[20] *R Daoudi* in *Corten/Klein* Art 78 MN 17.

[21] *R Daoudi* in *Corten/Klein* Art 78 MN 3–4. Besides Art 78, only Art 23 and Art 67 refer to a communication. *M Villiger* Art 78 MN 2 understands communication as "the process of exchanging information" and notification as the "formality through which a State undertakes the communication".

characterizes late objections to reservations as "communications" instead of "objections".[22]

III. Except as the Treaty or the Present Convention Otherwise Provide

The introductory phrase of Art 78 clarifies that this article has **residuary character** and does not apply if the treaty or the VCLT contains specific rules. The precedence of treaty provisions preserves the autonomy of the parties, as they remain entirely free to form their treaty relations according to their needs. As for the **specific rules of the VCLT**, the ILC had two particular cases in mind: first, Art 16 on the **exchange or deposit of instruments**, which stipulates that the deposit of an instrument is sufficient to establish a legal nexus between the depositing State and any other State that has expressed its consent to be bound. The depositary has to inform the other States of the deposit, but the notification through which the depositary informs the other States is not an integral part of the transaction establishing the legal nexus between the depositing State and the other States Parties. The view of the ICJ in the *Right of Passage* case is thus reflected in this article.[23] The second is Art 24 on the **entry into force**, under which the notification by the depositary of the date of entry into force is equally not decisive for the actual entry into force of the treaty. In order to allow previous information of the contracting States, many treaties provide for a certain lapse of time, *eg* 90 days, between the establishment of consent to be bound and the entry into force.[24] Notifications relating to the expression of consent to be bound and the entry into force are thus governed by Art 16 and Art 24 and do not fall within the scope of Art 78, except if the treaty provides otherwise. 8

The exceptions formulated in the introductory phrase bring Art 78 into line with the *Right of Passage* case, in which the ICJ gave precedence to treaty provisions (→ MN 3).[25] This was challenged in the *Cameroon v Nigeria* case,[26] but the Court concluded that the rules of the VCLT, *ie* in particular Arts 16, 24 and 78, correspond to the solution adopted in the *Right of Passage* case and maintained the latter decision. 9

[22] *P Kohona* Reservations: Discussion of Recent Developments in the Practice of the Secretary-General of the United Nations as Depositary of Multilateral Treaties (2005) 33 Georgia JICL 415, 429; UN Office of Legal Affairs, Treaty Section, Treaty Handbook (2002) 14.

[23] Final Draft, Commentary to Art 13, 201 para 3; Final Draft, Commentary to Art 73, 271 para 7.

[24] Final Draft, Commentary to Art 73, 271 para 7.

[25] *Rosenne* (n 4) 944.

[26] ICJ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria, Equatorial Guinea intervening)* (Preliminary Objections) [1998] ICJ Rep 275, para 31.

IV. If There Is No Depositary

10 If there is no depositary, a notification has to be transmitted **directly to the State** for which it is intended (lit a). The notification is considered as having been made by the sending State **upon receipt** by the State to which it was transmitted (lit b). At the same point in time, *ie* upon receipt, the notification becomes **legally effective** for the receiving State. In this case, no temporal problem arises, as there is no time lag between the date on which the sending State has validly made the notification and the date when it becomes legally effective for the receiving State.

V. If There Is a Depositary

11 If there is a depositary, a notification has to be transmitted **to the depositary** (lit a). The notification is considered as having been made by the sending State **upon receipt** by the depositary (lit b). However, at this moment the notification is **not yet legally effective** for the State for which it was intended, since the latter has no knowledge of the notification yet. Only upon receipt of the information by the depositary in accordance with Art 77 para 1 lit e does the notification become legally effective for the State for which it was intended (lit c). The 12 months time limit for objections to reservations according to Art 20 para 5 *eg* starts to run upon receipt of the depositary information, and not upon receipt of the reservation by the depositary.[27]

12 The moment when a notification is validly made and the moment when it becomes legally effective for the State for which it was intended are thus **two different dates**. Art 78 does not solve the problems that might arise out of this time lag (→ MN 4), leaving it to States to find a solution for each particular case in accordance with the principle of good faith.[28] Any problems arising out of an omission of the depositary to inform the parties of a notification have to be solved in accordance with the general rules on State responsibility.[29]

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[27] In the UN Secretary-General's practice, however, the date of the depositary notification to the States Parties is considered relevant and not the date of receipt, as the latter may vary from State to State; see Treaty Handbook (n 22) 14.

[28] Final Draft, Commentary to Art 73, 271 para 5.

[29] See, in particular, the intervention by SR *Waldock* [1966-I/2] YbILC 276–277.

The Vienna Conventions on the Law of Treaties

A Commentary

VOLUME II

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1969 Vienna Convention

Article 78
Notifications and communications

Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State under the present Convention shall:

(*a*) if there is no depositary, be transmitted direct to the States for which it is intended, or if there is a depositary, to the latter;

(*b*) be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(*c*) if transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary in accordance with Article 77, paragraph 1(*e*).

A. General characteristics

Object and purpose

1. The procedure of conclusion of international treaties gives rise to the dispatch and receipt of numerous notifications and communications by States signatories of a treaty or parties to a treaty. These are destined to inform parties of the various operations related to a treaty. They may therefore be intended to inform others of acts establishing the consent to be bound by a treaty; to announce the withdrawal of a reservation, the provisional application of a treaty, or the end of a temporary application of a treaty. The determination of the moment a State has fulfilled its obligation to make the notification or disclosure of information relating to the treaty is important. But it is equally important to determine when this information was brought to the attention of the State to whom it was addressed. These two moments are crucial for the creation of rights and obligations under the treaty.

2. The *Dictionnaire de la terminologie du droit international* defines notification as the 'action to officially inform a third party of a fact, a situation, an action, a document in order to ensure that the object of the notification becomes henceforward legally known

by the State to which it is addressed'.[1] For this reason, any notification is subject to formal requirements. It is made in writing and must be signed by an authority empowered to express the consent of the State to be bound by a treaty as per Article 7 of the Vienna Convention of 1969. Otherwise full powers are required from the person signing the notification.[2]

3. The communication also involves information to the attention of State signatories or parties to a treaty. If the *Dictionnaire de la terminologie du droit international*[3] and the *Dictionnaire de droit international public*[4] do not define the term 'communication', the *Dictionnaire du vocabulaire juridique* defines it as:

> an act bringing an event or a piece of information to the knowledge of a specific person (opponent, organ), a group of people or stakeholders, designates by extension the obligation to inform the recipient of the communication or the right of the latter to be informed of the information set at its disposal.[5]

4. The Vienna Convention of 1969 contains two specific references to communications. On the one hand, Article 23 states that 'a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and *communicated* to the Contracting States and other States entitled to become parties to the treaty'. On the other hand, Article 67 provides in paragraph 2 that:

> any act of declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or paragraphs 2 or 3 of Article 65 shall be carried out through an instrument *communicated* to the other Parties.[6]

But it does not seem that one can infer from these references a specific difference between notifications and communications, as the evolution of Article 23 of the Convention in the preparatory work tends to demonstrate that the verb 'notify' was used in the initial drafts of this Article and that in the latter drafting, the verb 'communicate' replaced the verb 'notify'.[7]

5. Generally, the Secretary-General of the United Nations, as depositary of treaties, uses the term 'depositary notification' to communicate to other contracting parties acts related to a treaty.[8] In some cases, the practice of the Secretary-General shows the use of communication for other purposes than notification: this is the case when the Secretariat uses the word 'communication' to refer to a notification containing an objection to the correction of an error received after the time limit is over.[9] The fact remains that the two words 'notification' and 'communication' are used interchangeably in Article 78 of the Vienna Convention of 1969.

[1] J. Basdevant, *Dictionnaire de la terminologie du droit international* (Paris: Sirey, 1960), p 422.
[2] *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, ST/LEG/7/Rev.1 (New York: United Nations, 1999), paras 153 and 216.
[3] J. Basdevant, *supra* n 1.
[4] J. Salmon, *Dictionnaire de droit international pulic* (Brussels: Bruylant/AUF, 2001).
[5] G. Cornu, *Vocabulaire juridique* (Paris: PUF, 1996), p 166.
[6] Emphasis added.
[7] R. G. Wetzel, *The Vienna Convention on the Law of Treaties* (Frankfurt am Main: Alfred Metzner, 1978), pp 184–7.
[8] CN.147.1981.TREATIES-1, Depositary notification of 24 June 1981 of Vietnam's accession to the Convention for the Prevention and Punishment of Genocide of 9 December 1948.
[9] Ibid, paras 149 and 56. See also *Treaty Handbook United Nations*, p 11, para. 2.5.6. (Time for making objections to reservations).

6. The objective of Article 78 is to express some principles to overcome the disadvantage resulting from the delay between the time of dispatch of a notification or communication and the time of its receipt by the addressee. So when a notification or communication is made by a State directly to another, which is the rule in bilateral treaties, but also in a number of multilateral treaties, it is not considered to be done by the State party to a treaty until it is received by the other State party to the treaty. The time of dispatch and receipt will then merge. These two moments are necessarily different when States parties to a multilateral treaty are making notifications or communications through a depositary. In this case, a notification or a communication shall be considered done by a State when it is received by the depositary. It is not considered received by the State to which it is addressed as long as the latter has not received it from the depositary. These principles constitute the common rule in the matter of dispatching and receiving notifications and communications relating to the treaty.

7. It is worth mentioning that the principles contained in Article 78 apply only to notifications and communications related to the treaty, that is to say to acts establishing consent, reservations, objections to reservations, notifications relating to the invalidity, and the intention to terminate a treaty. The ILC was careful to state in its 1966 report to the General Assembly that when a multilateral treaty provides in its substantive provisions that the parties are obliged to make notifications, these must be made by the parties directly to other parties even if there is a depositary.[10]

Customary status

8. The principles contained in Article 78, and especially that relating to the effects of a notification or communication, are not derived from international custom. Indeed, apart from the case that came before the International Court of Justice (ICJ) in the *Right of Passage over Indian Territory*, where India, in a preliminary exception, disputed the fact that the notification by Portugal to the Secretary-General of United Nations had produced any effect on it,[11] the international practice related to the law of treaties reveals no cases where problems relating to the effects of notifications and communications with respect to their recipients have occurred.

9. Therefore, during the debates at the ILC on draft Article 78, some members considered that proposing a rule on the effects of notification would be 'too much creative work in international law',[12] or would result in 'a little innovation in the matter'.[13] The Special Rapporteur was more explicit in considering the provision of Article 78 as 'a progressive development given the uncertainty about the stance of the depositary on the issue of notifications and communications'.[14] Article 78 thus appears to constitute the result of a progressive development rather than a codification of an international customary rule. The Vienna Conference in 1969 endorsed draft Article 78 as it had been submitted by the ILC in its 1966 report and it was adopted unanimously without any modification.[15]

[10] *YILC*, 1966, vol. II, p 271. An example of notification of this kind can be found in Art. 5, para. 1 of the 1961 Vienna Convention on Diplomatic Relations.

[11] Judgment of 26 November 1957, *ICJ Reports 1957*, p 132.

[12] Intervention of Mr Amado at the 862nd meeting on June 1966, *YILC*, 1966, vol. I, p 153, para. 63.

[13] Intervention of Mr Tsuruoka, ibid, p 139, para. 73.

[14] Intervention of Sir Humphrey Waldock, Special Rapporteur, at the 894th meeting, *YILC*, 1966, vol. I, Part Two, p 338, para. 43.

[15] Official Records, Summary Records, 2nd session, 25th meeting, p 140.

10. As the introductory paragraph of Article 78 indicates, the principles it contains have a complementary nature, in that they apply only with two reservations.

Complementary nature

11. First, States parties to the treaty must not have provided for a different outcome as to when a notification is considered to be done or as to when it produces its effects vis-à-vis its addressee(s), which is an aspect of the principle of autonomy of the will of States with respect to the conclusions of treaties. Indeed, the drafters of international treaties have full freedom to provide in the treaty that a notification or communication made by a State party to the depositary has effect in respect of the recipient upon receipt by the depositary and not by the State to whom it is addressed. Thus, Article 25 of the Convention on the Protection of the Architectural Heritage of Europe of 3 October 1985 states in paragraph 2 that:

> any State which has made a reservation under the preceding paragraph may withdraw it by notifying the Secretary General of the Council of Europe. The withdrawal shall take effect from the date of receipt of the notification by the Secretary General.[16]

12. Second, to prevent any error regarding the relationship between the rules established in Article 78 and those which provide a different outcome for the effects of notifications through the depositary provided in other Articles of the Convention, the application of the rules of the introductory paragraph of Article 78 is suspended when the Vienna Convention of 1969 stipulates otherwise.

13. Indeed, Article 16 of the Convention stipulates that, unless the treaty concerned otherwise provides, instruments of ratification, acceptance, approval, or accession establish the consent of a State to be bound by a treaty upon their deposit with the depositary or their notification to the contracting States or the depositary, if so agreed. The ILC specified that:

> the act of deposit with the Depositary is sufficient by itself to establish a legal relationship between the State making the deposit and any other State which expresses its consent to be bound by the treaty…The notification, according to current practice, is not an essential element of the act by which the State which made the deposit, establishes legal relations with the other parties under the treaty.[17]

Thus, a State party to a treaty finds itself legally bound with an acceding State from the moment the latter deposits its act of accession with the depositary and not from the moment it receives the notification of the accession act from the depositary, which represents an exception to the rules established in Article 78 of the Convention.

14. In the case of the *Right of Passage over Indian Territory*, Portugal's notification of acceptance contained its acceptance of the Court jurisdiction on the basis of Article 36 of the Statute of the ICJ. India disputed the fact that this act of notification could produce any legal effects before the expiry of the deadline, which allowed the Secretary-General, acting under Article 36(4) of the Statute, to forward copies of the Portuguese declaration to other States parties to the Statute.[18] The Court rejected the contention of India, considering

[16] ETS, vol. II, p 411.
[17] *YILC*, 1966, vol. II, pp 270–2.
[18] *ICJ Reports 1957*, p 132.

that by depositing its declaration with the Secretary-General, the accepting state becomes party to the system of the optional provision towards all other declaring States, with all rights and obligations under Article 36. The contractual relations between the parties and the compulsory jurisdiction of the Court which is resulting therefrom are established 'ipso facto and without special convention because of the depositing of the declaration'.[19]

15. The same situation arose in the case of the *Land and Maritime Boundary between Cameroon and Nigeria*. In this case, Nigeria disputed that the Cameroonian declaration accepting the ICJ's jurisdiction under Article 36 of its Statute could produce its effects from the moment it was deposited with the Secretary-General of the United Nations. The defendant State challenged the application of the precedent established in this regard in the case of the *Right of Passage over Indian Territory* and invoked in support of its position paragraph (c) of Article 78 of the Vienna Convention of 1969. The Court held that the declaration of acceptance of its compulsory jurisdiction made under Article 36 of the Statute was akin to the expression of consent of a State to be bound by a treaty governed by Article 16 of the Vienna Convention. It noted that:

> the subject of Article 78 of the Convention is in fact limited to dealing with the modalities according to which notifications and communications should be done. It governs neither the conditions under which the consent of a State to be bound by a treaty is expressed nor the conditions by which a treaty enters into force. These issues are addressed in Articles 16 and 24 of the Convention.[20]

16. Another exception to the application of the rule established by paragraph (c) of Article 78 is related to the entry into force of a treaty. Under Article 24 of the 1969 Vienna Convention, failing any provisions or agreement provided for in the treaty itself, the treaty enters into force as soon as consent to be bound by this treaty has been established for all negotiating States. The treaty enters into force when the depositary receives from the last contracting State the instrument expressing its consent to be bound by the treaty regardless of when the other contracting States received notification from the depositary informing them of the fact. In this case, 'the notification is not an element which is an integral part of the process of entry into force of a treaty'.[21] Clearly, the notification produces effect upon its receipt by the depositary. The delay or omission in transmission of the notification is therefore without prejudice to the entry into force of the treaty when the number of instruments of ratification required by the treaty for this purpose is reached.

B. Scope of the Article

17. In its original form, Article 78 was submitted by the Special Rapporteur as an Article the only function of which was to specify when a State party may be deemed to have performed its duty to notify an act relating to the treaty in case there is a depositary.[22] The fear expressed by some members about the nature of the role of the depositary led to the

[19] Ibid, p 149.
[20] *ICJ Reports 1998*, p 293.
[21] *YILC*, 1966, vol. II, Part Two, p 271, para. 7.
[22] Ibid, vol. I, p 134, para. 3.

introduction of a paragraph on the effects of notifications and communications.[23] As it currently appears in the 1969 Vienna Convention, Article 78 is used for the computation of the time limit in which other States parties to a treaty may make an objection to a reservation to the will of another State party to terminate the treaty or suspend its application.

Nature of the role of the depositary

18. Debates which were held in the ILC on the different versions of Article 78 submitted by the Special Rapporteur evidenced the divergence of views among members of the Commission on the depositaries' functions.

19. At the 862nd meeting of the Commission, the Drafting Committee submitted to the Commission a draft relating to Article 29*bis* which states that:

> ...Any notification or communication required to be made to any state under the terms of the treaty or the present Articles shall:
> (a) Be transmitted to the depository, or in the absence of the depository directly to the State in question;
> (b) Be considered as having been made to a Sate upon its receipt by the depository, or, in the absence of a depository, upon its receipt by that State.[24]

20. According to paragraph (b) of this draft, the notification or the communication produces legal effects for the State to whom it is addressed upon its receipt by the depositary and before this State is aware of its existence, and in spite of a sometimes long time lapse before the notice of this notification is served to the receiving State by the depositary. This suggests that the depositary is the agent of each State party to the treaty in the sense that when they select it in that capacity, all States parties mandate it to act on behalf of each of them towards the others so that the acts it performs or receives are considered to be performed or received by these States.[25]

21. Some members supported such a point of view,[26] but the majority refused to see in the depositary an agent or a representative.[27] They merely saw in it a convenient vehicle for carrying out certain acts relating to a treaty and for the transmission of notifications and communications to States parties to a treaty or to other States that may become parties. The Commission gave, in its 1966 report to the General Assembly, a practical explanation for its refusal to consider the depositary as an agent in the following terms:

> If the contrary view were to be adopted, the operation of various forms of time-limits provided for in the present Articles or specified in treaties might be materially affected by any lack of diligence on the part of a depositary, to the serious prejudice of the intended recipient of a notification or communication, for example, under Article 17, paragraphs 4 and 5, relating to objections to reservations, and Article 62, paragraphs 1 and 2, relating to notification of a claim to invalidate, terminate, etc. a treaty. Equally, the intended recipient, still unaware of a notification or communication, might in all innocence commit an act which infringed the legal rights of the State making it.[28]

[23] Ibid, p 319, para. 9.
[24] Ibid, vol. I, Part Two, p 134, para. 2.
[25] R. Daoudi, *La représentation en droit international public* (Paris: LGDJ, 1980).
[26] Intervention of Mr de Luna, *YILC*, 1966, vol. I, p 136, para. 26.
[27] Intervention of Mr Yasseen, ibid, para. 27. In the same sense, see also J. Dehaussy, 'Le dépositaire des traités', *RGDIP*, 1952, p 489; S. Rosenne, 'The Depositary of International Treaties', *AJIL*, 1967, p 939.
[28] *YILC*, vol. II, 1966, p 271. See also R. G. Wetzel, *supra* n 7, p 497.

Article 73 indeed deprived the depositary of the power to receive notifications or communications on behalf of States parties to a treaty, except in the case where the parties intended to confer upon the depositary such powers, thereby strengthening the administrative nature of its functions.[29] However, in terms of notifications and communications, Article 78 gives the depositaries the role of notary for States signatories or parties to the treaty. The depositary's receipt of the notifications and communications constitutes the evidence that those States have effectively carried them out.

Scope of application of Article 78

22. The importance of the rules established by Article 78 appears in the computation of time limits set in various Articles of the Vienna Convention.[30]

23. Thus, regarding reservation, Article 20(5) of the Convention provides a clear deadline for accepting reservations or for making objections to these reservations. The deadline, set at 12 months, starts when each of the States parties—or a State party, depending on the case—receives notification of the reservation by the depositary and not when it receives notification from the State author of the reservation in the form prescribed by Article 23 of the Convention. The lack of acceptance of the reservation or the lack of objection to the reservation on the expiry of the deadline constitutes acceptance of the reservation.[31] Given the fact that there is always some time lapse between the moment the State making the reservation notifies it to the depositary and the moment the recipient State receives the notification from the depositary, States parties receiving the notification of the reservation may receive it on different dates. This could lead, if there is no objection to the reservation on their part, to the application of the treaty between the State author of the reservation and other States parties on different dates. To avoid variation in the calculation of the expiry of that period, the Secretary-General of the United Nations, as depositary of treaties, considers the date specified on its depositary notification[32] as the date from which the period of 12 months begins to run.[33]

24. States can modify their reservations. This is considered as a partial withdrawal of a reservation, the creation of new exceptions to the provisions of a treaty, or their amendment. The practice of the Secretary-General of the United Nations, as depositary of treaties, is to consider these changes as new reservations. Until recently, this practice diverged from the 1969 Vienna Convention provisions. In a *note verbale* addressed to the Legal Counsel of the United Nations on 22 February 2000, the Permanent Representative of Portugal to the United Nations as President of the European Communities, asked for reconsideration of the practice of the Secretariat as to the date from which the period for States to make an objection begins and as to its duration. The Legal Counsel replied on the first point that the Secretariat's practice was to circulate the communication containing the notification of a reservation to the concerned States, and inform them that it will

[29] S. Rosenne, *supra* n 27, p 944.

[30] A. Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge: Cambridge University Press, 2007), p 333.

[31] See the commentary on Art. 23 in this work.

[32] All notifications relating to the depositary function of the Secretary-General of the United Nations producing legal effects are named 'depositary notification'. These are dated and signed by the Secretary-General or on his behalf by the Legal Counsel: *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, ST/LEG.7, p 67, para. 155.

[33] *Treaty Handbook Prepared by the Treaty Section of the Office of Legal Affairs*, United Nations, p 11, para. 2.5.6.

accept the objection up to the expiry of a delay of 90 days starting from the date fixed on the Secretariat's circulated letter containing the notification of the communication; and Legal Counsel concluded that the Secretariat did not intend to change this practice. Concerning the duration of the period, the Legal Counsel agreed that it should be increased to 12 months in accordance with paragraph 5 of Article 20 of the 1969 Vienna Convention.[34]

25. The withdrawal of a reservation notified to the depositary does not take effect until the State party concerned has received the notification by the depositary. Similarly, the withdrawal of an objection to a reservation takes effect only when the State which formulated the reservation has received notification of the withdrawal. These rules are established in the interest of the security of conventional relations as States continue to act according to existing reservations and objections. The latter's withdrawal may produce legal effects only when the States concerned are notified of their withdrawal. The date of the depositary notification notifying the withdrawal should not be taken into consideration. However, the practice of the Secretary-General of the United Nations as depositary of treaties does not appear to follow in this regard the stipulations of Article 78 of the Vienna Convention.[35]

26. If in terms of reservations the 1969 Vienna Convention clearly states that the effect of notifications is only produced upon receipt by the receiving States, it remains silent on this point in other Articles where the question of the obligation to notify incumbent on a State signatory of a treaty or party to a treaty. This is the case of the obligation arising from Article 25 on the provisional end of the application of a treaty by a State signatory which has to notify other States signatories of its intention not to become permanently party to the treaty so that the provisional application of the treaty comes to an end. The notification under paragraph (c) of Article 78 shall not produce its effects until it is sent to all other signatories through the depositary pursuant to sub-paragraph (e) of the first paragraph of Article 77.

27. The intent of a State party to a treaty to denounce it when the provisions of the treaty in question do not provide such a possibility must be notified to the other States parties 12 months in advance, in accordance with Article 56 of the Convention.[36] When a notification is made to the depositary, the period begins to run from the moment it is received by each State party. However, the treaties providing for the possibility of their denunciation sometimes stipulate that the delay prescribed does not start to run except from the date of receipt of the notification by the depositary.[37] Similarly, the intention of

[34] Letter of the Assistant Secretary-General in charge of legal affairs to the Permanent Representative of Portugal to the United Nations dated 4 April 2000; unpublished, however its content appears in the *Treaty Handbook*, *supra* n 33, p 13, para. 2.5.8.

[35] The difficulties raised by the date of the effect of the withdrawal of a reservation in practice did not escape the attention of the Special Rapporteur of the ILC on reservations to treaties. While confirming the rules of Art. 78, he proposed solutions aiming at overcoming those difficulties. See A. Pellet, Seventh Report on the reservations to treaties, A/CN.4/526/Add.2, pp 33–40.

[36] For more details see the commentary on this Article *supra*.

[37] See the first paragraph of Art. 12 of the optional protocol to the International Convenant on Civil and Political Rights which provides that the denunciation takes effect three months after the date the notification is received by the Secretary-General of the United Nations; see also Art. 18 of the Convention against doping concluded in Strasbourg on 6 November 1989 according to which the denunciation produces its effects the first day of the month following the expiry of a period of six months starting from the date of the receipt of the notification by the Secretary General of the Council of Europe (UNTS, vol. 1605, p 20).

certain parties to a multilateral treaty to suspend its application must be notified to the other parties to the treaty, specifying the provisions of the treaty that they intend to suspend. The treaty is suspended from the time other parties receive notification from the depositary.

28. In the event of invalidity or termination of a treaty, suspension of its operation, or withdrawal of a party, Articles 65 to 68 of the Convention provide the required notification form, their effects, and the modality of their withdrawal. The notification must be in writing, contained in an instrument communicated to other parties, and signed by the head of State, the head of government, or the minister of foreign affairs; otherwise the State representative author of the communication will be invited to produce full powers. In substance, the notification must indicate the measure proposed regarding the treaty and its motivation; whether it is a defect in its consent to be bound by the treaty, a challenge to the validity of the treaty, an intent to terminate it, or to withdraw therefrom, or to suspend its operation. Given the seriousness of these acts, the Convention provides elaborated conditions, as regards both the form and the substance of the notification. Paragraph 2 of Article 65 sets, except in cases of special urgency, a period of not less than three months after the receipt of the notification. If no party to the treaty has raised any objection against the proposed measure within this period, the party making the notification may carry out the proposed measure.

29. In all these procedures, it is clear that the notification shall have effect only when received by other States parties, but the exact time and the proof of its receipt may raise problems in its operation.

C. Difficulties of implementation

30. The notifications and communications relating to the life of a treaty pose various practical problems. The most significant arises from the period of time between their dispatch and their receipt by those to whom they are finally destined. To avoid problems, the States parties to a treaty—whether bilateral or multilateral—are usually very precise when drafting the wording of the clauses in question.[38]

The security of conventional relations

31. The debates held in the ILC on the draft provision which later became Article 78 of the 1969 Convention reflected the concern of the ILC's members to ensure stability and security of legal relations between States parties to a treaty. This was to be ensured by determining with the greatest precision possible the moment when a State fulfils its obligation to make a notification or communication and the moment when such notification or communication produces its effect vis-à-vis the addressee. Although formulated with clarity, the rules contained in Article 78 raise certain practical difficulties.

32. The depositary functions are fulfilled by both international organizations and States. The procedures followed by the former and the latter are not identical and these different types of depositaries do not carry out their tasks in the same way. But whoever is the depositary, there is always a period of time between the receipt of a notification and its dispatch to those States to whom it is addressed. Considering the different means of

[38] P. Reuter, *Introduction au droit des traits* (Paris: PUF, 1985), p 64, para. 115.

transmission, the notification will certainly be received on different dates by the States signatories of a treaty or party thereto. The question which arises is whether a notification the subject of which is the denunciation of a treaty by virtue of Article 56 of the Vienna Convention, produces its legal effects regarding the other contracting parties within 12 months starting from the date of receipt of notification by the first State party or from the date of receipt by the last State party.

33. Even if the Vienna Convention provides that a treaty enters into force upon receipt by the depositary of the last instrument expressing the consent of the State—thus reaching the threshold required by the treaty—the treaty produces its legal effects between State parties before that fact is known to them. To overcome this drawback, the treaties often provide that they will enter into force at the moment following the date of the deposition before the depositary of the last instrument of ratification or accession required.[39]

Good faith in the application of a treaty

34. The purpose of the notification or communication is to inform the contracting States of a fact implying that they adapt their behaviour in a manner consistent with their rights and obligations under the treaty. If a treaty or the Vienna Convention provides that the notification is not an integral part of the process by which the legal relationship between the State author of the notification to the depositary and the other contracting States[40] is established, a State not yet having received notification from the depositary might act in violation of its obligation as it is not aware that the treaty is already in force.[41] The same applies if a State party has not received, for any reason, a notification or a communication from another contracting State or by the depositary under sub-paragraph (e) of Article 77(1) of the Vienna Convention. The question then arises whether to hold the State responsible for this violation of its conventional obligations. Some members of the ILC addressed the question.[42] If the treaty provides that the notification produces its effect when it is received by the depositary, as is the case for example with regard to its entry into force at the time of filing with the depositary the twentieth instrument of ratification, the uninformed State which acts in violation of the treaty is protected by the theory of international responsibility. Ignorance of the notification—and thus of the entry into force of a treaty—can constitute a circumstance precluding any responsibility on the part of the State concerned.[43] It seems incongruous indeed to hold responsible a government which completely ignores that it is bound by the obligation to apply a treaty because of the action of another State.[44] But it is obvious that the State claiming not to have received notification must prove its good faith to avoid responsibility.

[39] Article 51, para. 1 of the Vienna Convention on Consular Relations of 1963 provides also that the Convention enters into force on the 30th day after the deposit with the Secretary-General of the United Nations of the 22nd instrument of ratification or accession. Paragraph 2 of the same provision provides that the Convention enters into force for any State ratifying or acceding to the Convention after its entry into force within 30 days from depositing its instrument of ratification or accession (UNTS, vol. 596, p 267).

[40] As in the example cited *supra* concerning the entry into force of a treaty following the deposit of a sufficient number of instruments of ratification or accession.

[41] R. G. Wetzel, *supra* n 7, p 497.

[42] Intervention of Mr Lachs, *YILC*, 1966, vol. I, p 137, para. 44.

[43] Intervention of Mr Ago, *YILC*, 1966, vol. I, p 139, para. 60.

[44] See S. Rosenne, *supra* n 27, p 945.

D. Conclusion

35. The notifications and communications that seem to be apparently simple notions of the law of treaties are complex in their practical application. They are related to procedural as much as to substantive law. Their importance stems from the fact that they determine when the rights and obligations of States parties or signatories to treaties come into existence. They also serve in the computation of the various time limits set out in the provisions of the 1969 Vienna Convention on the Law of Treaties.

36. Drafters of international treaties should provide solutions in the provisions of the treaties when the strict application of the rule relating to the effect of a notification or a communication to the depositary on the recipient State party entails that the act that was the object of the notification or communication produces its effect vis-à-vis the States parties at different dates corresponding to different moments of its receipt.

37. Nowadays, it is certain that the use of email significantly reduces the time between dispatching a notification and its reception. The practice of the UN Secretariat indicates that, for now, this usage is still a temporary step as the Secretariat dispatches the notification to the permanent missions of States both by mail and by electronic mail. The question then arises whether, in the future, the routine use of email alone will not risk rendering obsolete the principles of Article 78.

RIAD DAOUDI*

* Member of the International Law Commission of the United Nations; Legal Adviser of the Syrian Foreign Ministry.

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The Show Trial of U-2 Pilot Francis Gary Powers

by Admin CoolBen

17-22 minutes

On May 1, 1960, an American U-2 spy plane was shot down over the Soviet Union and its pilot, Francis Gary Powers, was captured. The Eisenhower administration initially attempted to cover up the incident but was soon forced to admit that the U.S. had been conducting reconnaissance flights over the Soviet Union for several years. The ensuing diplomatic crisis ended a period of warmer relations between the two superpowers and heightened Cold War tensions.

During the course of his captivity, Powers was interrogated at length and found guilty of espionage after a show trial. On February 10, 1962, Powers was exchanged in a well-publicized spy swap in Berlin for Soviet KGB Colonel Vilyam Fisher (aka Rudolf Abel), who had been arrested in Brooklyn by the FBI in 1957, as depicted in

the 2015 Steven Spielberg movie Bridge of Spies. At right, an AP photo showing Powers during the trial.

Powers received a cold reception on his return home. Initially, he was criticized for having failed to activate his aircraft's self-destruct charge to destroy classified parts of his aircraft before his capture. He was also criticized for not using an optional CIA-issued "suicide pill" to kill himself. Powers appeared before a Senate Armed Services Select Committee hearing, where it was determined that Powers had followed orders, had not divulged any critical information to the Soviets, and had conducted himself "as a fine young man under dangerous circumstances." Lee Majors (the "Six Million Dollar Man") played the role of Powers in the 1976 movie based on his life. Powers died in a helicopter crash while covering brush fires for a TV station in Los Angeles in 1977.

In 2010, CIA documents were released indicating that "top U.S. officials never believed Powers' account of his fateful flight because it appeared to be directly contradicted by a report from the National Security Agency. He was posthumously awarded medals for fidelity and courage in the line of duty, including the Silver Star.

Vladimir I. Toumanoff was serving as a political counselor in Moscow at the time. He was interviewed by William D. Morgan in 1999. The following are his firsthand accounts of the U-2 affair and Powers' show trial.

You can also read about the CIA's efforts to convince Pakistan to allow the U-2 program on its territory (without completely revealing just what it was.) Go here to listen to the podcast with Toumanoff's account. Read other Moments on the Cold War.

Khrushchev looked at the ambassador and announced the shoot-down

TOUMANOFF: The first we came to know of the U-2 was that the Ambassador was invited to attend a session of the Supreme Soviet at which Khrushchev, of course, was going to give a speech and, for whatever reason, Llewellyn Thompson took me along with him, the first and only time I've ever been to a Supreme Soviet session, because they're not open to American diplomats. They certainly were not in those days….

Once a year, as I recall, at which the Supreme Soviet enthusiastically rubber-stamped whatever the Party presented. It was held in the Kremlin, the Great Hall, and Thompson and I were seated prominently in a balcony. It was a gloomy, cloudy, drizzly day, and the Hall had a large skylight. Well, Khrushchev made a long report and toward the end, looking directly at Thompson, he revealed the fact that an American spy plane had been shot down.

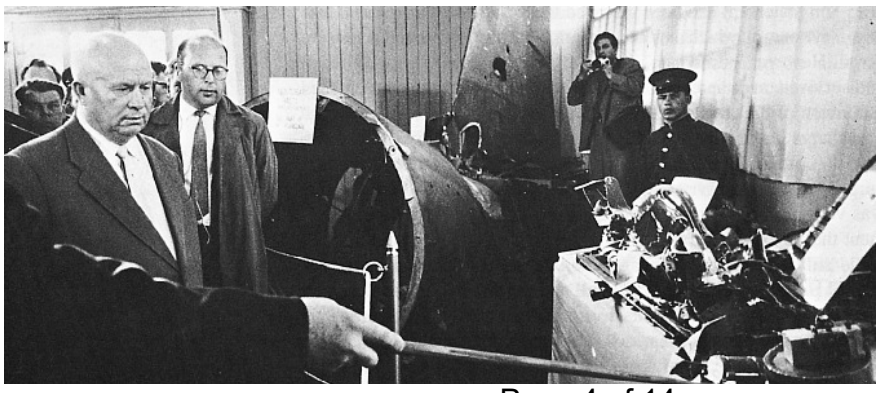
This was the first announcement. It was a very long speech by Khrushchev, a kind of state-of-the-nation report, which was of course in wonderful condition and even better than it was the last wonderful time. There were the usual interruptions by applause and exclamations of approval and praise. It went on and on and carried

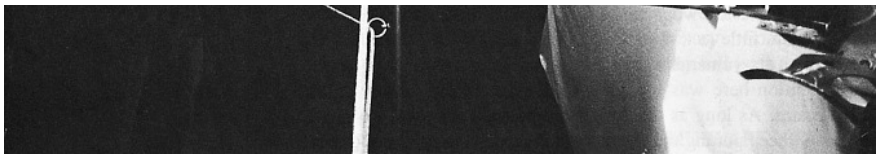
nothing of particular interest for the Ambassador, and I began to wonder why he had been invited. We could have heard it on the radio, or waited to read it the next day when the full text would be in the newspapers, and then report with commentary to the Department.

Toward the end of this speech, Khrushchev paused. He stood on stage at an elevated podium in a theatrical position, with all the audience of the Supreme Soviet below him, and Politburo, high Party and government officials behind. He looked up at Thompson, and announced the shoot-down. At that moment the sun broke through the clouds and a bright ray of sunlight beamed down upon him through the skylight. It was very dramatic, and after a pause the audience went wild in applause and shouts of acclamation. Khrushchev was in his element and launched into his denunciation of America's perfidy. As he went on and on piling accusation upon accusation it seemed clear that the Spirit of Camp David, and the era of Peace and Friendship were over. Meanwhile, the cameras had swiveled and, following Khrushchev's gaze, every eye was on Llewellyn Thompson, the American Ambassador.

Q: Where at the point of the speech did this come?

TOUMANOFF: Oh, at the end, Khrushchev had saved it for the climax. As he went on and on about how appallingly nefarious and dangerous was





this action by the United States, he did not accuse the President of ordering or perhaps even of knowing about the flight but pointed out that, if not, any American general could start World War III. He also said nothing about the pilot. The rhetoric and theatrics were full scale, and the audience applauded often and mightily.

It was a trying, not to say traumatic, time for Thompson, but he showed no sign of any kind. He was, by the way, a masterful poker player. When it was all over, we left quietly and back at the embassy he immediately prepared a telegram to the Department in which, my recollection is, he pointed out Khrushchev's silence on the fate of the pilot, which suggested that he may have survived and be in Soviet hands. If so, we should assume the pilot might be forced to tell the Soviets everything he knew….

Exaggerated accounts of his "crime" were more than enough to warrant execution

Later, they invited the Ambassador to attend the trial of Francis Gary Powers, the U-2 pilot. Obviously, he did not go, but he sent two of his junior officers, Vice Consul Lewis Bowden, and myself….

That trial has been written up at vast length, but there's one part of it which I have never seen in print, and that was about a part of Francis Gary Powers' behavior in the course of that trial. There he was, on trial for his life so far as he could tell. He had been held for something like three months with no access to anyone except Soviet authorities, interrogators, and a "planted" cellmate. No Americans nor any foreigners. He'd been held completely isolated

from information except what the Soviet authorities provided, and that seems to have been exaggerated accounts of the staggering consequences of his “crime,” more than enough to warrant execution….He was being interrogated for intelligence and being prepared to be put on show at the trial….

They wanted to have total control of what he knew, no surprises or conflicting information at the trial. It was to be as nearly totally scripted as they could manage. He was isolated from the world except as they wished him to think it. Outside, the Soviet propaganda machine was, of course, grinding full speed and at very high volume. Besides, Powers knew no Russian.

So there was Powers, on stage, for a Moscow theatrical, called a trial; the full panoply of press from all the world in the balconies, provided with every technical facility; and a packed and picked Soviet audience below, largely KGB and military, plus some carefully selected foreigners, Lew Bowden and myself. The Powers family was there, with their lawyers. I don’t know about others except for the press corps, which was international and included a large American contingent. The more press, the more cameras, the more microphones, the better. Anybody that would serve their propaganda purposes….

Remember, this trial was staged for world-wide propaganda. Otherwise they could easily have tried Power in a closed, secret court, as they did with many dissidents.

I believe what follows has never been published. After introductory remarks by the Judge/Prosecutor the trial moved to presentation of evidence, and that is my topic. One bit of evidence presented was Powers' flight map, with commentary stressing that the routing over Soviet cities was for bombing run practice to wreak future havoc and slaughter.

At the end of the official presentation the judge asked Powers if he had anything to say. To his surprise Powers rose and asked to see the map. It was the size of a newspaper page. Holding it up with his left hand, he examined it carefully, tracing his flight path with the index finger of his right. The map never shook. It was absolutely still and steady. Satisfied, he confirmed that it was his flight map, and handed it back.

Two things struck me: on trial for his life he was suggesting by his request and action that he, at least, thought this court capable of presenting false or tampered evidence; and that he must have nerves of steel not to show the slightest tremor while doing so.

The Court then called a series of learned, scientific commissions, each of which had been tasked to examine other pieces of evidence. Each Commission, in turn, was introduced with elaborate recitations of the members' impressive credentials. Most were members of the Soviet National Academy of Sciences. To support the weight of their testimony and findings. The first commission had

been asked to examine his pistol, and they concluded that Powers had been given the pistol to murder innocent Soviet citizens.

The judge, having set the precedent, again turned to Powers and asked “Is that your pistol?” The pistol was brought to him, Powers rose, looked at it and replied “Yes, that’s my 22-calibre pistol.” He then went on to explain that it was part of his survival gear, if down in the some wilderness, to be able to shoot small game such as birds, rabbits or squirrels, for food. The 22-caliber was well known in the Soviet Union. Common in most of the world, it is a plinking gun. One that’s not much good for anything larger than a woodchuck, or porcupine, if that….

If your purpose were really to go murder people, which includes innocent Soviet citizens, you wouldn’t take a .22 — in the 1950s, more like a standard army Colt .45, as the Moros taught us in the Philippine War. So here’s Powers, on trial for his life, discrediting the learned commission and its testimony, and undermining the validity of the court….But risking his life by undermining the credibility of the Court.

“Here’s this extraordinary person, doing his quiet, dignified best”

The next learned commission dealt with the poison pin. And they, too, concluded and testified that it was given to Powers for him to murder innocent Soviet citizens, this time in a surreptitious fashion, so they might not even know that they had been poisoned with a deadly poison. Having set the pattern, the Judge felt obliged to turn again to Powers. He explained that this, too, was part of his accident gear. In case he was very badly injured, helpless, in agony, or attacked by wild beasts, with no prospect of survival, the

pin would end his life quickly and painlessly.

Q: Or to silence himself under duress which, of course, was the big story.

TOUMANOFF: That aspect never came up in court, and couldn't. It would imply that Soviet interrogation might be savage. But once again, you see, he's attempting, and probably effectively, to discredit these learned commissions and undermine the process. The next learned commission was given what the commission described as "an incendiary device" designed to burn down "our homes, our factories, and our people's economy."

I'm not quoting exactly, but the general tenor was that this was to destroy the fabric of the society by flames. Again the Judge turns to Francis Gary Powers and again he rises to address the court, asks to see the device, and they hand him an object, the size of a small box of matches. He looked at it, and explained, "It is also a part of my survival equipment, a form of matches with which, if I'm down in a wilderness, to light a campfire, even with wet wood." Then Powers asked that the object be given to the interpreter so he could read and translate into Russian the instructions on the box. They turned out to be directions on how to build a campfire with wet wood. Powers then asked the interpreter to please turn the box over and describe the picture on the back. The interpreter turned the box, hesitated and looked at the judge. The judge ordered, "Do it!" And he said, "It's a picture of a campfire." Powers sat down.

And here's this extraordinary person, doing his quiet, dignified best, and succeeding, in revealing the court for the propaganda theatrical it was; in demonstrating before the journalists of the world the clumsy and cynical corruption of the Soviet judicial system along with its scholars; in defending his own nation as best he could; and deeply risking his own life in the process.

So far as I can tell, the Western press missed it. Not one word of his astounding courage, integrity, and loyalty under the most fearful conditions was ever printed or broadcast. By that time the Western news media, as an entire institution, was in some sort of mass hysteria to condemn and sacrifice Francis Gary Powers for betrayal of America by "failure" to commit suicide. Scapegoating, I call it.

I would ask whom and what our media was itself betraying by being blind or silent on his actions in court. Was it betrayal of him alone, or of our nation? Would we be better off if we felt betrayed, or if we recognized a heroic act by one of us? If he had used the pin on the ground, unhurt, would the flight not have been flown, the U-2 not crashed, the poison gone undetected, or Soviet response been different? Would we, as a nation, prefer suicide as our model, or Powers' acts in court had they been reported?

Q: Well, you remember, I'm sure, what was being reported in the press, that it was all aimed that way. It was the story.

TOUMANOFF: Oh, yes, of course I remember. It's one of the reasons I'm skeptical about press coverage of large political events.

Q: First of all, it involved an intelligence agency. Secondly, it involved a person who was doing something so secret, so sensitive, and thirdly, our worst enemy. It had to be that way. This was the only story.

TOUMANOFF: Powers couldn't use the pin when falling by parachute. He'd have to have used it on the ground after landing, and with no fatal injuries there would have been an autopsy to determine cause of death and the poison discovered. To my way of thinking, he used his head, and did not betray either his nation or his faith. On the contrary, what he did at that trial was truly heroic, and should have been reported as such. Actually, I suppose the fact that it was never reported probably saved his life. I doubt the Soviets would have forgiven him for so discrediting, before the eyes of the world, the regime and its great show trial.

Q: The prosecutor didn't have to be so stupid, either. They could have read the box of matches first.

TOUMANOFF: Yes, or just adhered strictly to the truth, especially with their commissions and phony conclusions. They had the plane, they had the pilot, they had all the equipment and all the documentation. They even had the President's confirmation of responsibility. Our action, its danger, and its consequences were more than enough to capture the attention of the world. They didn't need the theatricals.

They held Powers for a couple of months or more before the trial. They had already blown away Ike's visit and the Paris multilateral summit. They also wanted time to interrogate, to get all the information they could out of Powers, and to prepare him for the trial. The fascinating thing is the psychology of that period.… I

mean, for all their interrogation and observation, they had failed to see what kind of a human being he was. They had put him up on trial convinced that, faced with the possibility of a death verdict, he would be perfectly compliant and, when asked if he had anything to say, would confirm the preceding “evidence” by having nothing to say, or by acknowledging, “Yes, that’s my route map. Yes, that’s my pistol, of course, of course. Yes, that’s my incendiary device. Yes, that’s my poison pin.” The last thing in the world they expected was a challenge of the findings of their learned commissions.

Q: And they’d come to all the conclusions from their experience with earlier Moscow show trials of purged Communist leaders.

TOUMANOFF: Who admitted to all the false accusations and confirmed those massive propaganda exercises, in the hope of saving their lives and possibly others’. And I was taken aback. At first I couldn’t believe my eyes and ears as I watched and heard him, quietly, with respect and dignity, do what he did. And there was a strength and integrity to him that came through. So when he said to the court, “I could never think of shooting a person,” it rang true.

Q: Yes, and while he had received his training, he had been well briefed, should this ever happen, and so on. There was just plain self-integrity and intelligence. Maybe they picked him for that reason.

TOUMANOFF: Well, they recruited the right guy….

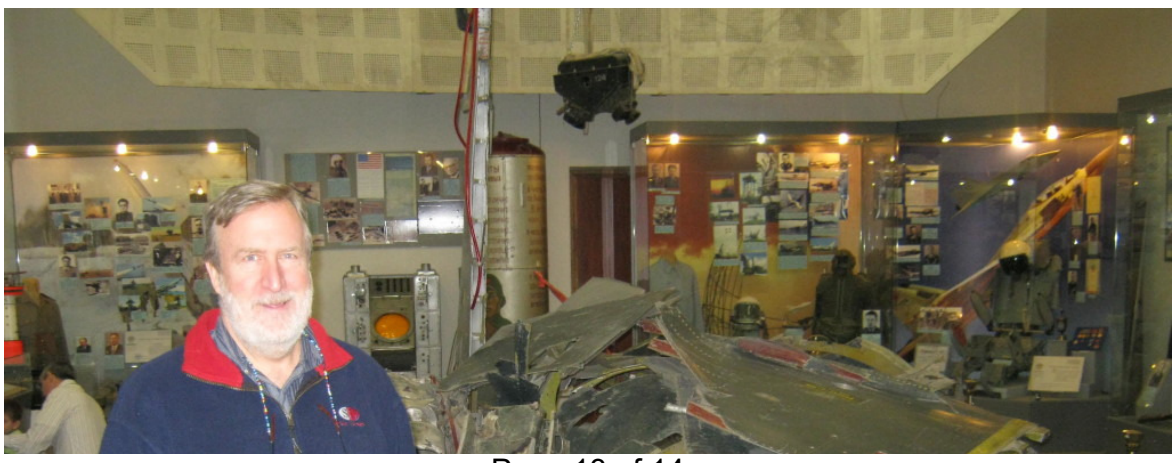
Q: I'm asking this not only for more facts, but also because I was left with the impression that his reputation had not survived the U-2 episode, that he went out of government without a good reputation.

TOUMANOFF: That's right. Yes. And I think totally unfairly. He really should have been a hero. I'm sure there were those who defended him. He must have been defended by part of the press, but he was forever tarnished with that "betrayal" brush.

Q: And the trial was thought of by many as a typical Soviet setup.

TOUMANOFF: Well, it was fascinating for me because you don't often get to see a Moscow show trial. They don't have them all that often. It was fascinating to see how they staged it. This wasn't law or due process or anything like it. It was theater, very heavy handed theater at that.

Below, wreckage of Francis Gary Powers' U-2 plane on display at Central Armed Forces Museum in Moscow.



Return to Moments in U.S. Diplomatic History

I.C. SMITH

I.C. SMITH

I.C. Smith

"In sunshine and in shadow," a line from Edgar Allan Poe's poem, El Dorado is also the name of I.C. Smith's website. This line aptly describes his more than twenty-five year career with the FBI, for he was one of the few agents who was equally comfortable being in the public spotlight, the "sunshine" if you will, while heading investigations of public corruption in Arkansas during Whitewater, as well as the shadowy world of spies and counterintelligence, especially that involving China.

Under no circumstances should anyone conclude the FBI has endorsed any part of this website.

I.C. Smith was born in Memphis, Tennessee and grew up in rural north Louisiana. He served in the U.S. Navy during the Vietnam era. While working as a police officer, he graduated from the University of Louisiana--Monroe with a liberal arts degree. In 1973 he joined the FBI, and over the next quarter century, he completed assignments in St. Louis, Missouri; Washington, D.C. (twice); Miami, Florida; and Little Rock, Arkansas where he retired as the Special Agent-in-Charge. I.C. retired in 1998, and he and his wife Carla moved to Essex County, Virginia the following year. In November 2004, his book, ***INSIDE, A Top G Man Exposes Spies, Lies and Bureaucratic Bungling Inside the FBI*** was published, resulting in appearances on *C-SPAN's "Washington Journal"* and *"Book-TV."* He contributed an article to *The American Spectator* that involved a review of former FBI Director Louie Freeh's book, *MY FBI.* In May 2010, I.C. co-authored, ***Historical Dictionary of Chinese Intelligence***, with British author Nigel West. Frequently, he is called upon to comment on national security issues and has been quoted in such magazines as *US News & World Report, Newsweek, Time,* and *The New Yorker* and in newspapers such as *The Washington Post, Los Angeles Times, The Washington Times,* and *The New York Times.* In addition, he has appeared on *CBS Evening News, ABC News, the Public Broadcasting System,* and others. He continues to live in Essex County where the renovation of an old farm house continues, but his main avocation is being a grandfather to four grandsons. Since retirement, he has lectured at the Smithsonian Institution (three times), the Third and Sixth Raleigh Spy Conferences, at the International Spy Museum, and various agencies in the U.S. intelligence community. On April 4, 2006, he lectured on national security at a university in Arkansas as part of a guest lecture series, was interviewed by a Japanese film crew for a documentary about the normalization of relations with China by President Richard Nixon, testified before the U.S.-China Commission in April, 2009 and was interviewed by the Romanian Internet news service, *HotNews*.

CAREER HIGHLIGHTS

- **In St Louis, he was assigned general criminal investigations which included his obtaining the information that led to the solving of the murder of a police officer in St. Charles, Missouri--a murder committed by an individual in the Witness Protection Program.**

- **In Washington, D.C, he was first assigned public corruption investigations involving various congressmen, such as Congressmen Daniel Flood and Otto Passman.**

- **He then requested a transfer to a Chinese counterintelligence squad where he was promoted to the squad supervisor position and led the investigation of Larry Wu-tai Chin, the CIA employee who spied for the Chinese for three decades.**

- **He transferred to FBI Headquarters where he made the first applications for wiretaps of Chin before the highly secretive Foreign Intelligence Surveillance Court and handled the information from the source inside China who provided the information that led to Chin's identity.**

- **After spending a year as an Inspector's Aide traveling about the U.S., Hong Kong and Tokyo inspecting FBI offices, he was named the Unit Chief for the East German counterintelligence squad. There, he spent a month in West Germany as a guest of the *Bundesamt fur Verfassungsshutz* (the West German internal security service) that included a trip to Berlin and a rooftop visit to the Reichstaag, overlooking East Germany.**

- **Upon his return, he was transferred to Miami as the Assistant Special Agent in Charge where he handled a myriad of duties, including white collar crime, terrorism and Cuban counterintelligence. While there, he handled the defection of Cuban Air Force General Rafael del Pino, then and now, the highest ranking official ever to defect from Cuba.**

- **In 1988, he was transferred to Canberra, Australia as the FBI's Legal Attache with responsibility for the independent nations of the South Pacific, i.e. New Zealand, Papau New Guinea, Cook Islands, Vanahuata, Kiribati, etc.**

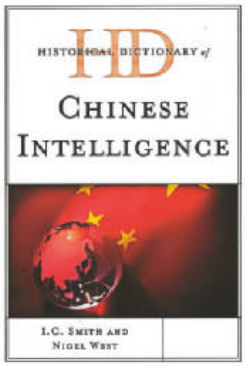
- **In 1990, he was promoted to the FBI's Senior Executive Service and transferred to the Department of State as Chief of Investigations, Counterintelligence Programs, Diplomatic Security where he traveled to the Soviet Union, Nicaragua and China. He was followed in both the Soviet Union and China, (he has a photograph in his book of one person who was following him in China), and it was later learned that Katrina Leung, the subject of the infamous Parlor Maid case in California (with whom two FBI agents had sexual relationships) had tipped off the Chinese of his visit.**

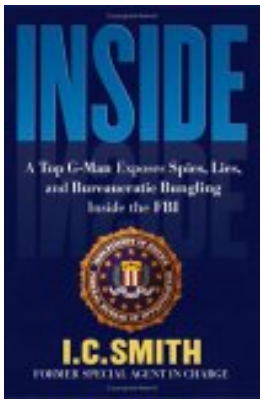
- **In 1991, he was promoted to FBI Headquarters as the Section Chief for Analysis, Budget and Training in the Natioal Security Division. There he was the primary liaison contact with foreign intelligence and security agencies and was the principal FBI representative for the U.S. Intelligence Community. His duties included representing the FBI on the National Foreign Intelligence Board, chaired by the Directors of Central Intelligence (James Woolsey and John Deutch) where the super-secret National Intelligence Estimates were produced. While there he lectured at the National War College, Eastern Michigan University and various other such forums involving national security issues.**

- **In 1995 he was transferred to Little Rock, Arkansas as Special Agent in Charge for the state. There he made public corruption the highest priority for the FBI and became intimately involved in high profile investigations of public officials in Arkansas, as well as the campaign finance investigations involving such characters as Charlie Trie and John Huang.**

I.C may be contacted at the following email address:

iviansmith@aol.com





NIGEL WEST

About the Author

Nigel West is an author specialising in security, intelligence, secret service and espionage issues. He is the European Editor of the World Intelligence Review, published in Washington DC, and the editorial director of The St Ermin's Press. In 1989 he was voted 'The Experts' Expert' by the Observer.

He writes regularly for SpearsWealth Management Survey and works with:

The Centre for Counterintelligence and Security Studies

Amazon has a Nigel West Author Page dedicated to the author.

Nigel West has contributed introductions to the following titles:

The Double Cross System of the War of 1939-45 by J.C. Masterman (ISBN: 1585741302). The former chairman of the MI5 committee that coordinated the activities of double agents writes an account of his work. This 1995 Pimlico Books edition includes the material omitted on security grounds from the first 1972 version, and discloses the true identity of the individual agents.

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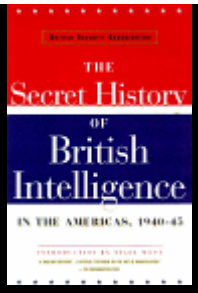
The Penkovsky Papers by Oleg Penkovsky. As controversy surrounded the original, CIA-sponsored book which purported to be all the author's own work, Wheatsheaf released an edition in 1988 which explains the historical backdrop to the espionage debacle that occurred as the superpowers came close to the brink of nuclear war in October 1962.

This title is out of print. Please click here for out of print book finding resources.

British Security Coordination (ISBN: 088064236X). The semi-official history of BSC, the umbrella organisation in wartime New York thataccommodated MI5, SIS, SOE and the Political Warfare Executive. Sponsored by the BSC's Director, Sir William Stephenson, and written by his staff as the war ended in 1945, the document was not released until 1998.



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False Flag by Zeev Avni (ISBN: 0316848360). Having been recruited as a Soviet spy in Switzerland during World War II, Zeev Avni subsequently joined the Israeli Foreign Ministry and used his diplomatic cover in Brussels and Belgrade to run Mossad operations. He specialised in 'false flag' recruitments but was arrested and imprisoned in Tel Aviv.

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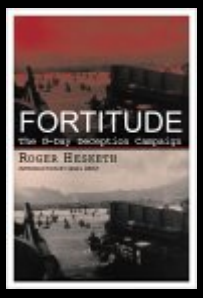

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8. Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes

Vienna, 24 April 1963

ENTRY INTO FORCE 19 March 1967 by the exchange of the said letters, in accordance with VIII.
REGISTRATION: 8 June 1967, No. 8640.
STATUS: Signatories: 38. Parties: 51.[1]
TEXT: United Nations, *Treaty Series* , vol. 596, p. 487.

Note: See *"Note:"* in chapter III.6.

Participant[2,3]	*Signature, Succession to signature(d)*	*Ratification, Accession(a)*
Argentina	24 Apr 1963	
Australia		12 Feb 1973 a
Austria	24 Apr 1963	12 Jun 1969
Belgium	31 Mar 1964	9 Sep 1970
Benin	24 Apr 1963	
Bosnia and Herzegovina[4]	12 Jan 1994 d	
Botswana		12 May 2008 a
Bulgaria		11 Jul 1989 a
Burkina Faso	24 Apr 1963	11 Aug 1964
Cameroon	21 Aug 1963	
Central African Republic	24 Apr 1963	
Chile	24 Apr 1963	
Colombia	24 Apr 1963	
Congo	24 Apr 1963	
Côte d'Ivoire	24 Apr 1963	
Democratic Republic of the Congo	24 Apr 1963	
Denmark	24 Apr 1963	15 Nov 1972
Dominican Republic	24 Apr 1963	4 Mar 1964
Estonia		21 Oct 1991 a
Finland	28 Oct 1963	2 Jul 1980
France	24 Apr 1963	31 Dec 1970
Gabon	24 Apr 1963	23 Feb 1965
Germany[5,6]	31 Oct 1963	7 Sep 1971
Ghana	24 Apr 1963	
Hungary		8 Dec 1989 a
Iceland		1 Jun 1978 a
India		28 Nov 1977 a
Iran (Islamic Republic of)		5 Jun 1975 a
Ireland	24 Apr 1963	
Italy	22 Nov 1963	25 Jun 1969
Japan		3 Oct 1983 a
Kenya		1 Jul 1965 a
Kuwait	10 Jan 1964	
Lao People's Democratic Republic		9 Aug 1973 a
Lebanon	24 Apr 1963	
Liberia	24 Apr 1963	
Liechtenstein	24 Apr 1963	18 May 1966
Lithuania		26 Sep 2012 a
Luxembourg	24 Mar 1964	8 Mar 1972
Madagascar		17 Feb 1967 a
Malawi		23 Feb 1981 a
Mauritius		13 May 1970 a
Mexico		15 Mar 2002 a
Montenegro[7]	23 Oct 2006 d	
Nepal		28 Sep 1965 a
Netherlands[8]		17 Dec 1985 a
New Zealand[9]		10 Sep 1974 a
Nicaragua		9 Jan 1990 a
Niger	24 Apr 1963	21 Jun 1978
Norway	24 Apr 1963	13 Feb 1980
Oman		31 May 1974 a
Pakistan		29 Mar 1976 a
Panama	4 Dec 1963	28 Aug 1967
Paraguay		23 Dec 1969 a
Peru	24 Apr 1963	23 Mar 2007
Philippines	24 Apr 1963	15 Nov 1965
Republic of Korea		7 Mar 1977 a
Romania		19 Sep 2007 a
Senegal		29 Apr 1966 a
Serbia[4]	12 Mar 2001 d	
Seychelles		29 May 1979 a
Slovakia		27 Apr 1999 a
Spain		21 Sep 2011 a
Suriname		11 Sep 1980 a

Participant[2,3]	*Signature, Succession to signature(d)*	*Ratification, Accession(a)*
Sweden	8 Oct 1963	19 Mar 1974
Switzerland	23 Oct 1963	3 May 1965
United Kingdom of Great Britain and Northern Ireland[10]	27 Mar 1964	9 May 1972
United States of America[1]	[24 Apr 1963]	[24 Nov 1969]
Uruguay	24 Apr 1963	
Viet Nam		10 May 1973 a

Notes:

[1] On 7 March 2005, the Secretary-General received from the Government of the United States of America, a communication notifying its withdrawal from the Optional Protocol. The communication reads as follows:

"... the Government of the United States of America [refers] to the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, done at Vienna April 24, 1963.

This letter constitutes notification by the United States of America that it hereby withdraws from the aforesaid Protocol. As a consequence of this withdrawal, the United States will no longer recognize the jurisdiction of the International Court of Justice reflected in that Protocol."

[2] The Republic of Viet-Nam had acceded to the Protocol on 10 May 1973. See also note 1 under "Viet Nam" in the "Historical Information" section in the front matter of this volume.

[3] Signed on behalf of the Republic of China on 24 April 1963. See also note 1 under "China" in the "Historical Information" section in the front matter of this volume.

[4] The former Yugoslavia had signed the Optional Protocol on 24 April 1963. See also note 1 under "Bosnia and Herzegovina", "Croatia", "former Yugoslavia", "Slovenia", "The Former Yugoslav Republic of Macedonia" and "Yugoslavia" in the "Historical Information" section in the front matter of this volume.

[5] See note 2 under "Germany" in the "Historical Information" section in the front matter of this volume.

[6] In a communication deposited on 24 January 1972 with the Registrar of the International Court of Justice, who transmitted it to the Secretary-General pursuant to operative paragraph 3 of Security Council resolution 9 (1946) of 15 October 1946, the Government of the Federal Republic of Germany stated as follows:

"In respect of any dispute between the Federal Republic of Germany and any Party to the Vienna Convention on Consular Relations of 24 April 1963 and to the Optional Protocol thereto concerning the Coompulsory Settlement of disputes that may arise within the scope of that Protocol, the Federal Republic of Germany accepts the jurisdiction of the International Court of Justice. This declaration also applies to such disputes as may arise, within the scope of article IV of the Optional Protocol concerning the Compulsory Settlement of Disputes, in connexion with the Optional Protocol concnerning the Acquisition of antionality.

"It is in accordance with the Charter of the United Nations and with the terms and subject to theconditions of the Statute and Rules of the Internaitonal Court of Justice that the jurisdiction of the Court is hereby recognized.

"The Federal Republic of Germany undertakes to comply in good faith with the decisions of the Court and to accpet all the obligations of a Member of the United Nations under article 94 of the Charter."

See also note 1 under "Germany" regarding Berlin (West) in the "Historical Information" section in the front matter of this volume.

[7] See note 1 under "Montenegro" in the "Historical Information" section in the front matter of this volume.

[8] For the Kingdom in Europe and the Netherlands Antilles. See also notes 1 and 2 under "Netherlands" regarding Aruba/Netherlands Antilles in the "Historical Information" section in the front matter of this volume.

[9] See note 1 under "New Zealand" regarding Tokelau in the "Historical Information" section in the front matter of this volume.

[10] In respect of the United Kingdom of Great Britain and Northern Ireland, the Associated States (Antigua, Dominica, Grenada, St. Chrisopher-Nevis-Anguilla, St. Lucia and St. Vincent) and territories under the territorial sovereignty of the United Kingdom, as well as the British Solomon Islands Protectorate.

United Nations Conference on Consular Relations

Vienna, Austria
4 March – 22 April 1963

Document:-
A/CONF.25/L.11 and Add.1-8

Text prepared by the Drafting Committee in accordance with the decisions of the First and Second Committees

Extract from Volume II of the *Official Records of the United Nations Conference on Consular Relations (Annexes,Vienna Convention on Consular Relations, Final Act, Optional Protocols, Resolutions)*

3. In the exercise of consular functions a diplomatic mission may address :

(*a*) The local authorities of the consular district ;

(*b*) The central authorities of the receiving State if this is allowed by the laws, regulations and usages of the receiving State or by relevant international agreements.

4. The privileges and immunities of the members of a diplomatic mission referred to in paragraph 2 of this article shall continue to be governed by the rules of international law concerning diplomatic relations.

Article 69

Nationals or permanent residents of the receiving State

1. Except in so far as additional privileges and immunities may be granted by the receiving State, consular officers who are nationals of or permanently resident in the receiving State shall enjoy only immunity from jurisdiction and personal inviolability in respect of official acts performed in the exercise of their functions, and the privilege provided in paragraph 3 of article 44. So far as these consular officers are concerned, the receiving State shall likewise be bound by the obligation laid down in article 42. If criminal proceedings are instituted against such a consular officer, the proceedings shall, except when he is under arrest or detention, be conducted in a manner which will hamper the exercise of consular functions as little as possible.

2. Other members of the consular post who are nationals of or permanently resident in the receiving State and members of their families, as well as members of the families of consular officers referred to in paragraph 1 of this article shall enjoy privileges and immunities only in so far as these are granted to them by the receiving State. Those members of the families of members of the consular post and those members of the private staff who are themselves nationals of or permanently resident in the receiving State shall likewise enjoy privileges and immunities only in so far as these are granted to them by the receiving State. The receiving State shall, however, exercise its jurisdiction over these persons in such a way as not to hinder unduly the performance of the functions of the consular post.

Article 70

Non-discrimination

1. In the application of the provisions of the present Convention, the receiving State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place :

(*a*) Where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its consular post in the sending State.

(*b*) Where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.

Article 71

Relationship between the present Convention and other international agreements

1. The provisions of the present Convention shall not affect other international agreements in force as between States parties to them.

2. Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof.

Article 72 [16]

Settlement of disputes

1. Any dispute arising from the interpretation or application of the present Convention shall be submitted at the request of either of the Parties to the International Court of Justice unless an alternative method of settlement is agreed upon.

2. Any Contracting Party may, at the time of signing or ratifying the present Convention or of acceding thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other Contracting Parties shall not be bound by the said paragraph with respect to any Contracting Party which has made such a declaration.

Chapter V. — Final Provisions

Article 73

Signature

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or Parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention, as follows : until 31 October 1963 at the Federal Ministry for Foreign Affairs of Austria and subsequently, until 31 March 1964, at the United Nations Headquarters in New York.

Article 74

Ratification

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 75

Accession

The present Convention shall remain open for accession by any State belonging to any of the four categories

[16] Some members of the Drafting Committee suggested that the Conference might wish to consider the inclusion in this article of an additional paragraph reading as follows :

"3. Any Contracting Party which has made a declaration under paragraph 2 of this article may at any time withdraw such a declaration by a notification addressed to the Secretary-General of the United Nations."

United Nations Conference on Consular Relations

Vienna, Austria
4 March – 22 April 1963

Document:-
A/CONF.25/SR.21

21st meeting of the Plenary

Extract from the
Official Records of the United Nations Conference on Consular Relations, vol. I
(Summary records of plenary meetings and of meetings of
the First and Second Committees)

Abstaining: Morocco, Philippines, San Marino, Saudi Arabia, South Africa, Spain, Tunisia, Cuba, Czechoslovakia, Ethiopia, Indonesia, Japan, Libya.

The United Kingdom amendment (A/CONF.25/L.50) was adopted by 65 votes to 2, with 13 abstentions.

109. The PRESIDENT invited the Conference to vote on the joint amendment (A/CONF.25/L.49).

At the request of the representative of Mali, a vote was taken by roll-call.

Lebanon, having been drawn by lot by the President, was called upon to vote first.

In favour: Liberia, Liechtenstein, Luxembourg, Mali, Mexico, Morocco, Netherlands, New Zealand, Pakistan, Panama, Peru, Philippines, San Marino, Sierra Leone, South Africa, Sweden, Switzerland, Syria, Thailand, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America, Upper Volta, Uruguay, Venezuela, Republic of Viet-Nam, Argentina, Australia, Austria, Brazil, Cambodia, Canada, Ceylon, Chile, China, Colombia, Congo (Brazzaville), Congo (Leopoldville), Costa Rica, Denmark, Dominican Republic, El Salvador, Ethiopia, Federation of Malaya, France, Federal Republic of Germany, Ghana, Guinea, Holy See, India, Indonesia, Iran, Ireland, Japan, Republic of Korea.

Against: Lebanon, Mongolia, Norway, Poland, Portugal, Romania, Spain, Tunisia, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Yugoslavia, Albania, Algeria, Bulgaria, Byelorussian Soviet Socialist Republic, Cuba, Czechoslovakia, Finland, Hungary, Italy.

Abstaining: Libya, Saudi Arabia, Turkey, Belgium, Greece.

The joint amendment (A/CONF.25/L.49) was adopted by 55 votes to 20, with 5 abstentions.

110. Mr. PETRŽELKA (Czechoslovakia) moved that a separate vote be taken on the last sentence of paragraph 1 (*c*) of the seventeen-power proposal.

111. Mr. CAMERON (United States of America) opposed the Czechoslovak motion.

112. Mr. USTOR (Hungary) supported the motion.

The Czechoslovak motion was defeated by 58 votes to 12, with 9 abstentions.

The seventeen-power proposal (A/CONF.25/L.41), as amended, was adopted by 64 votes to 13, with 3 abstentions.

113. Mr. DEJANY (Saudi Arabia) said he had abstained from voting on all the proposals. His delegation accepted the principle in article 36 as adopted, but reserved its position with regard to paragraph 1 (*b*). His country would conform to that provision, but in the time which was practicable in the particular circumstances.

114. Mr. AVILOV (Union of Soviet Socialist Republics) said he had voted against the seventeen-power proposal, since article 36 in that form was absolutely unacceptable to his delegation for reasons which he had explained in the course of the discussion.

115. Mr. PETRŽELKA (Czechoslovakia) said he had voted against the revised text of article 36 because it did not provide a sound basis for the development of customary international law. He had abstained from voting on the United Kingdom amendment — although it proposed a perfectly reasonable provision — because the priority given to the vote on that amendment was contrary to rule 41 of the rules of procedure.

116. Mr. CRISTESCU (Romania), Mr. NESHO (Albania), Mr. KONSTANTINOV (Bulgaria), Mr. AVAKOV (Byelorussian Soviet Socialist Republic) and Mr. ZABIGAILO (Ukrainian Soviet Socialist Republic) said that they had voted against the article as revised because it was totally unacceptable to their delegations.

The meeting rose at 7.45 p.m.

TWENTY-FIRST PLENARY MEETING

Monday, 22 April 1963, at 10.45 a.m.

President: Mr. VEROSTA (Austria)

Consideration of the question of consular relations in accordance with resolution 1685 (XVI) adopted by the General Assembly on 18 December 1961 (*continued*)

[Agenda item 10]

DRAFT CONVENTION

Article 72 (Settlement of disputes)

Proposal for an Optional Protocol concerning the Compulsory Settlement of Disputes

1. The PRESIDENT invited the Conference to consider article 72 (Settlement of disputes). No amendments had been proposed to that article but the Conference had before it a joint proposal (A/CONF.25/L.46) put forward by twenty delegations for an optional protocol concerning the compulsory settlement of disputes, as an alternative to the inclusion of article 72.

2. Mr. KRISHNA RAO (India), introducing the joint proposal on behalf of its sponsors, said that in the First Committee a sort of public opinion poll had been conducted by means of a roll-call vote on article 72.[1] The result of that vote had been described by some as a victory of the ideals of justice. The vote in question had placed in an awkward and embarrassing position many countries which had accepted the jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Court's statute.

3. The impression had been created that the Court was a perfect instrument for the purpose of deciding all legal disputes and that any criticism of the Court should not be tolerated. He could fully understand the attitude of some European countries which genuinely placed their faith in the Court. However, he could not accept

[1] For the discussion of this question in the First Committee, see the summary records of the twenty-ninth, thirtieth, and thirty-first meetings of that committee.

that great concern for the Court should be expressed by States which, in their declarations under article 36, paragraph 2, of the Statute, denied the Court the right to decide its own jurisdiction, as set forth in paragraph 6 of the same article 36. The record of India in that respect was much better than that of the latter group of countries. In that connexion, it was not inappropriate to cite the dictum of English law that " those who come to equity should come with clean hands ". He agreed that every endeavour should be made to encourage as many States as possible to accept the jurisdiction of the Court. At the same time, however, an effort should be made to ascertain the reasons why so many States did not accept that jurisdiction and to remedy any defects which might thus be revealed.

4. While he agreed that the subject of the discussion came within the scope of paragraphs 1 and 2 of Article 36 of the Court's statute, he thought it essential to face the problem of the reasons for the reluctance of States to submit their disputes to the Court. Some of those reasons were apparent and some were concealed. He would not attempt an exhaustive analysis of those reasons but would confine his remarks to some of the more important ones.

5. The first reason was a general fear arising from the insufficiency and uncertainty of the rules of international law for the purpose of dealing with all the situations arising between States. Owing to the recent origin of many rules of international law, to the fact that they were few in number and uncertain in character, and to the constitutional difficulty of creating new rules and of amending obsolete ones, international law, more than any other system of law, suffered from considerable gaps and deficiencies. As a result, a decision in accordance with the law was frequently impossible to obtain.

6. Secondly, it had been stressed by many leading authorities that, in order to make reference to a court compulsory, the law of nations first had to be defined with greater precision. The late Mr. John Foster Dulles had pointed out that resort to alleged custom and to the teachings of publicists in order to fill the gaps in international law would inevitably lead the International Court into the path of judicial legislation and political expediency.

7. Another fundamental objection was that not all conflicts of interest were capable of being terminated by judicial techniques within the existing legal framework. The absence of any effective machinery for the execution of the Court's judgements was another important point to be borne in mind.

8. But perhaps the most important reason for the rejection by some States of the jurisdiction of the Court was a lack of confidence in the impartiality of its judgements. The composition of the Court did not, as the Statute desired, represent equally the different legal systems of the world. The American continent was represented by five members, whereas there were only two judges from Asia and one from Africa. In the circumstances, a new country of Asia of Africa could hardly be criticized for hesitating to accept the jurisdiction of the Court in any matter. The General Assembly had been endeavouring to remedy the defects of the Court for a number of years but had met with no success whatsoever.

9. The element of confidence had been and remained the most important factor in determining the extent to which States were prepared to accept the jurisdiction of the Court. It was therefore the duty of all lawyers to strengthen that confidence and to remedy the deficiencies of the Court, while at the same time encouraging States to accept its jurisdiction.

10. Article 72 as drafted would create political and also legal difficulties. It would mean that reservations to other articles would be formulated. In any case, it made illogical reading because what was contained in paragraph 1 was, in fact, taken away by paragraph 2. Accordingly, the sponsors of the joint proposal (A/CONF.25/L.46) considered that article 72 should be replaced by an optional protocol on the compulsory settlement of disputes. He recalled, in that connexion, that the United States representative at the San Francisco Conference in 1945 had stressed the advantages of an optional provision which would enable States favouring compulsory jurisdiction to remain consistent with their principles while permitting other States to maintain their views.

11. The sponsors of the joint proposal would, at the appropriate stage, request that it should be voted upon before article 72.

12. Mr. RUEGGER (Switzerland) said that article 72 should be adopted as it stood. Paragraph 1 of the article set forth in clear and simple terms the principle of the compulsory jurisdiction of the International Court of Justice, in accordance with the practice of a large number of States in connexion with the settlement of disputes concerning the interpretation or application of bilateral and multilateral treaties.

13. He had noted with great satisfaction that many States, including a number of newly independent States, had shown by their votes that they favoured the principle of compulsory jurisdiction, at least with respect to a technical convention like that on consular relations and with respect to disputes which were legal and not political in character. He hoped that the number of such States would increase when the next codification conferences were held and that still more States would realize, as Switzerland had done as the result of its long and fruitful experience, that the principle of the judicial settlement of legal disputes at the request of any of the parties constituted a most valuable safeguard, especially for small States. That form of settlement of legal disputes removed them from the realm of political pressures and ensured that they would be settled in accordance with law.

14. He pointed out that in at least one other sphere — one that was undoubtedly more important than that which formed the subject of the Conference — a provision similar to article 72 had already been universally accepted. That provision was contained in the Constitution of the International Labour Organisation. Nearly all the States represented at the Conference were members of that Organisation and, in order to become members,

they had had to subscribe to its Constitution, which contained an absolute jurisdiction clause.

15. Nevertheless, it had to be recognized that not all of the States which wished to codify consular law were ready at the moment to subscribe to an absolute jurisdiction clause. It had been for that reason that the Swiss delegation had proposed the escape clause which had become paragraph 2 of article 72. That formula represented a definite advance by comparison with an optional protocol, which should remain in the background as a solution to be adopted in the last resort. He recalled that it had been his own delegation which had proposed the latter formula at the first Conference on the Law of the Sea, held at Geneva in 1958.

16. He did not believe that reservations under paragraph 2 would weaken the convention on consular relations in any way. Many treaties admitted reservations regarding the application of those treaties to certain territories or regarding certain special clauses. Above all, article 72 in its existing form established an effective link between the principle of compulsory jurisdiction and the convention, and it did not embody that principle in a separate document which several States might fail to sign, as experience since 1958 had shown.

17. Mr. CAMERON (United States of America) said that his delegation had voted in favour of article 72 when it had been considered by the First Committee. The adoption of that article indicated that some progress, albeit small, had been made towards the ultimate objective of ensuring that all legal disputes were disposed of by judicial settlement. The adoption of an optional protocol would be an admission that no progress had been made in the matter since the 1958 Conference on the Law of the Sea.

18. In the debate in the First Committee, he had pointed out the difference between the acceptance of the jurisdiction of the International Court of Justice with regard to the interpretation and application of a particular treaty, and the general acceptance of the jurisdiction of the Court under article 36, paragraph 1, of the Statute of the Court. The scope and range of Article 36, paragraph 1, of the Statute of the Court was very wide indeed, but a clause for the settlement of disputes such as article 72 constituted a provision on judicial settlement limited to the subject matter of the treaty. It would only affect the interpretation and application of the convention on consular relations. For that reason, his delegation had hoped that certain States which could not accept the jurisdiction of the Court under article 36, paragraph 2, of the Statute would nevertheless be prepared to accept that jurisdiction with regard to a purely technical convention having very modest political implications. His delegation had also hoped that all States which proclaimed their faith in the principle of the peaceful settlement of disputes would join in urging other delegations to accept article 72.

19. Article 72 had been adopted by the First Committee by a simple majority. The vote had clearly shown that the provision did not have the support of two-thirds of the delegations. Thorough and recent consultations had confirmed that the article would not obtain that two-thirds majority. In that event, the Conference had before it an alternative proposal for an optional protocol along the lines of that adopted at the 1958 Conference on the Law of the Sea and the 1961 Conference on Diplomatic Relations. His delegation would be prepared to accept such an optional protocol as an alternative to article 72, but regretted the indication that little progress had been made during the past five years towards a system of compulsory judicial settlement of legal disputes.

20. His delegation would not oppose a motion by the sponsors of the joint proposal that that proposal should be put to the vote first.

21. Mr. WESTRUP (Sweden) paid a tribute to the United States delegation, whose attitude had made it possible to adopt in the First Committee the provision on settlement of disputes embodied in paragraph 1 of article 72. He also paid a tribute to the Yugoslav delegation which, by reintroducing during the discussion in the First Committee the proposal for what was now paragraph 2, had enabled that committee to adopt a disputes clause which represented some progress from the formula of the optional protocol.

22. The advantage of the formula embodied in article 72 lay in the fact that a State which did not wish paragraph 1 of that article to apply would have to make an express declaration under paragraph 2. Silence would be construed as signifying support for the principle of judicial settlement. The position would be exactly the reverse if article 72 were to be replaced by an optional protocol.

23. He regretted that a move should have been made for putting the proposed optional protocol to the vote first. That procedural move would have the result of avoiding a vote on the substance of the question. However, Sweden had always bowed to the will of the majority in such procedural matters and would not adopt an intransigent attitude regarding the motion for priority.

24. His delegation saw grounds for satisfaction in the results of the work of the First Committee. The adoption of article 72 by that committee represented some progress towards the ideal of judicial settlement of international disputes to which Sweden had always been faithful. The votes cast in that committee had shown increasing support for that ideal.

25. Mr. RUEGGER (Switzerland) said that his delegation would not oppose the motion that the proposed optional protocol should be put to the vote first. It had decided on that course in the light of the special circumstances prevailing at the close of the Conference and more particularly in the light of the attitude adopted by the delegations of the United States and Sweden and the fact that opinion in the Conference was clearly divided. His delegation had also taken into account the fact that the roll-call vote in the First Committee had shown that satisfactory progress had been made towards the idea of a genuinely compulsory clause for judicial settlement. He was convinced that the idea put forward by his delegation would continue to gain ground and that as a result of a wider measure of agreement, future conventions codifying international law

would contain watertight clauses for the judicial settlement or arbitration of disputes. He earnestly appealed to all States which had signified by their votes their support for the idea of compulsory jurisdiction to sign the protocol and to render it a living and effective instrument, thus contributing to the establishment of a link between international legislation and compulsory jurisdiction.

26. Mr. MAMELI (Italy) said that the Italian school of public law had consistently upheld the principle that all disputes, however important, could and should be settled by the International Court of Justice or alternatively by arbitration. Accordingly, his delegation had voted in favour of article 72 in the First Committee. His delegation would also have been prepared to accept an arbitration clause, if one had been proposed. If, however, article 72 was not included in the convention finally adopted by the plenary and if no arbitration clause was suggested, his delegation would accept an optional protocol as a second best, or perhaps even a third best, solution. The adoption of such a protocol would mean that something would remain of the principle of the judicial settlement of disputes.

27. Mr. QUINTANA (Argentina) said that his delegation had fully explained its views in the First Committee. His government was in favour of the pacific settlement of international disputes and it had always been its policy to resort to arbitration in disputes with another country. Many important problems had been solved by that method, but in each case his government had accepted arbitration only for the particular matter in question: the only exceptions made by his government concerned certain humanitarian conventions. He would therefore be unable to accept any article which did not provide for consent in each case where a dispute was to be submitted to the International Court of Justice.

28. For the reasons stated, he considered that the convention under consideration should follow the precedent set by the Convention on Diplomatic Relations and be accompanied by an optional protocol. Such a solution would meet the wishes of most delegations and remove the risk of reservations to the convention. He therefore supported the joint proposal.

29. Mr. USTOR (Hungary) endorsed the statement of the representative of India. The peaceful settlement of disputes was one of the most important problems of international law. There were numerous methods for peaceful settlement, ranging from direct negotiation between the States concerned to compulsory submission to the International Court of Justice. Although he preferred the method of direct negotiation, he would not oppose other methods, such as recourse to the International Court of Justice; but his government, like most other governments, would not wish to commit itself irrevocably under the convention to accept the jurisdiction of the Court.

30. The question facing the Conference was really a procedural and not a substantive one — namely, how to deal with a situation in which some States were ready to submit disputes to the International Court and some were not. There were two solutions: to adopt article 72, which did not correspond with existing practice and would therefore cause difficulty to many States which would have to make reservations, or to adopt the proposal for an optional protocol, which in his opinion fully met the requirements of the situation. He would therefore vote against article 72 and in favour of the joint proposal. He would also support the motion that the proposal be put to the vote first.

31. Mr. de ERICE y O'SEA (Spain) said he had sponsored the joint proposal in a spirit of co-operation with friendly States and also because the Convention on Diplomatic Relations had an optional protocol. He reaffirmed his belief in international justice and in the peaceful settlement of disputes, the value of which had been amply demonstrated in practice. Nevertheless, he agreed with the views of the representatives of Argentina, Sweden, Switzerland and the United States of America and recognized that an optional protocol would be better than an article which might attract reservations. He therefore supported the proposal for an optional protocol and the Indian motion that it be voted on first.

32. Mr. VAZ PINTO (Portugal) said that he was in general agreement with the statements made by the representatives of Switzerland, United States of America, Sweden and Italy. The question of the settlement of disputes raised serious issues of principle. His delegation would not oppose the joint proposal for an optional protocol on the subject, but wished to make it clear that it accepted the protocol as a mere political expedient. The Portuguese delegation in no wise accepted the reasons which had been put forward in favour of that proposal. It considered it as a compromise solution and as such, as one based not on legal grounds but on grounds of policy.

33. Professor Kelsen had once referred to the three key figures in an organized society: the legislator, the judge and the policeman. He had said that, in international society, it was the judge who was needed most. The work of the legislator was useless without a judge to apply it, and the policeman could not perform his task unless the judge was there to lay down the law. International law was greatly in need of a judiciary capable of performing the role fulfilled by the Praetor in Roman law and by the judge in countries where English and American law prevailed. It had been suggested that international justice was imperfect because of the imperfection of international law. In fact, the position was quite the reverse: it was the deficiency of international justice which accounted for the imperfections of international law.

34. Mr. BARTOŠ (Yugoslavia) recalled that, in the First Committee, his delegation had reintroduced that part of the Swiss amendment which had since become paragraph 2 of article 72. Accordingly, his delegation had a duty to make its position clear on that article and on the proposal for an optional protocol in lieu thereof.

35. The United Nations Charter embodied the ideal of the compulsory jurisdiction of the International Court of Justice; that jurisdiction would not only provide

international law with a sanction but would also make for the certainty of international law. In that connexion, he was in agreement with the valuable remarks made by the representative of Portugal. However, the Charter did not impose a legal obligation upon States Members to accept judicial settlement. The Charter had thus accepted the idea that, for a variety of reasons, States might not be able to subscribe to a clause on the compulsory settlement of disputes by the Court. It would therefore not be appropriate to impose at the present Conference an obligation which, according to the Charter, did not constitute a general obligation under international law. It was necessary to take into account the reasons for which compulsory jurisdiction might have been rejected or accepted by States Members in pursuance of the right given to them by the Charter to subscribe to that compulsory jurisdiction or not, at their choice.

36. His delegation could support any solution which was consistent with the foregoing principles. It would therefore vote in favour of the joint proposal for an optional protocol when that proposal was put to the vote. In that connexion, he stated that, of all the countries of Europe and America, Yugoslavia alone had deposited its instrument of ratification of the Optional Protocol concerning the Compulsory Settlement of Disputes attached to the Convention on Diplomatic Relations, 1961.

37. He fully understood, however, the reluctance of some States to accept an obligation which was not imposed by the Charter but which was presented by the Charter as an ideal. It would not serve the cause of the development of international justice, nor would it strengthen the authority of the International Court of Justice, to insist on a vote on the text of article 72, which had no prospect of obtaining the two-thirds majority required for adoption. The failure to obtain the required majority might even be interpreted as a rejection of the idea of the judicial settlement of international disputes.

38. After the adoption of paragraph 1 of article 72, his delegation had sponsored the introduction of paragraph 2, although it believed that the resulting formula would be less elegant than an optional protocol on the settlement of disputes. A declaration under paragraph 2 would mean that the State making the reservation wished to depart from the general principle of international justice. With the formula of an optional protocol, however, States would instead be invited to affirm their faith in international justice by subscribing to the protocol. The adoption of paragraph 1 of article 72, however, had left his delegation no option but to propose the adoption of the somewhat inelegant formula of inserting paragraph 2 but he still preferred an optional protocol and would vote in favour of the joint proposal to that effect.

39. His delegation would agree to the optional protocol being voted upon first.

40. Mr. CRISTESCU (Romania) said that he had fully explained in the First Committee the reasons why his delegation could not accept article 72, which provided for the settlement of disputes arising out of the convention by the International Court of Justice. When the Statute of the Court had been drafted, most States had taken the view that its jurisdiction should not be compulsory but that the consent of all parties to a dispute concerning the interpretation of any article of an international convention should be required before the dispute could be submitted to the Court. In other words, the majority of States had recognized that the procedure should be optional and not compulsory; of the few which had recognized compulsory jurisdiction, some had made extensive reservations. Article 36, paragraph 1, of the Statute should accordingly be applied subject to the proviso that States were free to decide in each specific case whether they would accept the Court's jurisdiction; otherwise the sovereign rights of States would be infringed. The principle of freedom of recourse to the Court was the basis of international justice. National sovereignty was of paramount importance to countries which had acquired it through hard struggle and at the cost of many sacrifices. The introduction in the convention of an article imposing a compulsory obligation would be at variance with the practice observed at other United Nations codification conferences, such as the Conference on the Law of the Sea and the Conference on Diplomatic Relations, where separate optional protocols had been adopted. Even the provision for reservations under article 72, paragraph 2, would be unacceptable to many delegations. It was true that every sovereign State had the right to make reservations to multilateral conventions in order to protect their special interests, but paragraph 2 would open the door to arbitrary interpretations of the convention. In his opinion a provision for the compulsory settlement of disputes on the interpretation and application of the convention by the International Court of Justice would be out of place in an instrument codifying the international law on consular relations. There were many modes of peaceful settlement, such as those mentioned in Article 33 of the Charter. The best method was negotiation. Recourse to the International Court of Justice was the most difficult and the most costly. For those reasons he would vote against article 72 and would support the proposed optional protocol.

41. Mr. LETTS (Peru) supported the joint proposal for an optional protocol concerning the settlement of disputes and also the motion that it should be voted on first. The optional protocol would be consistent with practice; it would promote acceptance and ratification of the convention; and it followed an established precedent. The adoption of article 72 would undoubtedly cause difficulties. He would vote for the optional protocol and, if it were adopted, would sign it.

42. Mr. MUÑOZ MORATORIO (Uruguay) said he would support article 72 if it were put to the vote, for its provisions were in keeping with his government's traditional policy, though he would have preferred the article without paragraph 2, which gave States the possibility of making reservations. If, however, the Conference adopted the joint proposal for an optional protocol, he would sign the protocol. He would abstain

from voting on the motion that it be put to the vote first, for in his opinion the optional protocol and article 72 were of equal importance.

43. Mr. EVANS (United Kingdom) said that his government fully supported the International Court of Justice and regarded it as the appropriate body to adjudicate on disputes arising from the convention. He would have preferred the article on the settlement of disputes as approved by the First Committee, for it represented a step forward; but he would vote for the optional protocol if the Conference preferred it and decided to vote on it first. He would abstain from voting on the motion for giving the protocol priority.

44. Mr. PETRŽELKA (Czechoslovakia) said that he had opposed article 72 in the First Committee. A convention on consular relations should become part of general international law and it should not contain a provision making it compulsory for States to refer disputes arising out of the convention to the International Court of Justice. Such a provision would violate the principle of the sovereignty and equality of States. He fully supported the optional protocol, which represented a serious effort to reach a compromise acceptable to all the States represented at the Conference. He also supported the motion that the protocol be put to the vote first.

45. Mr. HENAO-HENAO (Colombia) said that his delegation had voted in favour of article 72 in the First Committee and recalled that the Colombian delegation had proposed the compulsory settlement of disputes at the Conference on the Law of the Sea in 1958.[2] At the Conference on Diplomatic Relations in 1961, the Colombian delegation had voted in favour of the optional protocol because, like the other countries of Latin America, Colombia's traditional policy was to seek the peaceful settlement of international disputes.

46. Of the many efforts made in the past to promote methods of peaceful settlement of disputes, he would mention only the treaties of conciliation and peaceful settlement known as the Gondra and Saavedra Lamas treaties which, between 1923 and 1931, had started the codification of such methods. The most far-reaching effort had been made by the Latin American countries at the Ninth Pan-American Conference at Bogotá, which had adopted a treaty known as the Pact of Bogotá or Inter-American Treaty on Pacific Settlement, whose fundamental article provided that States parties to the treaty recognized, in relation to other American States, as compulsory *ipso facto*, without the necessity of any special agreement, the jurisdiction of the International Court of Justice in all disputes of a juridical nature arising between them concerning, among other things, the interpretation of a treaty.[3]

47. That treaty had been ratified by Colombia, in keeping with his country's traditional policy, shared with other Latin American countries, of endeavouring to secure the settlement of international disputes by judicial process.

48. He supported the views of the representatives of Switzerland, Italy and Portugal. Although the compromise of an optional protocol was not the ideal solution, nor fully satisfactory, he was prepared to accept it as the best obtainable in the circumstances and because it maintained the position of the International Court of Justice.

49. Mr. CABRERA-MACIA (Mexico) said that article 72 had been produced after prolonged debate in the First Committee as a compromise between representatives who wanted a provision for compulsory jurisdiction and those who did not. To that extent the result was a good one, but it was made less satisfactory by the escape clause in paragraph 2. The proposed optional protocol was also a compromise solution, and it would be better to have a convention with an optional protocol than a convention which invited reservations. He would therefore vote for the proposed optional protocol.

50. Mr. MARAMBIO (Chile) confirmed the views of his delegation as stated in the First Committee. He was anxious that the convention should contain a provision concerning the settlement of disputes. He would support the proposal for an optional protocol because such a protocol would satisfy the majority of delegations and enable their governments to accept the convention.

51. The PRESIDENT invited the Conference to vote on the motion of the representative of India that the proposal for an optional protocol should be put to the vote first.

The motion was carried by 48 votes to 1, with 28 abstentions.

The proposal for an optional protocol (A/CONF.25/L.46) was adopted by 79 votes to none, with 3 abstentions.[4]

52. Mr. de MENTHON (France) said he had supported article 72 in the First Committee because it was realistic. Although he was in favour of compulsory jurisdiction, he had voted for the optional protocol and would sign it when he signed the convention.

53. Miss LAGERS (Netherlands) said that as representative of the host country of the International Court of Justice, which had accepted the Court's compulsory jurisdiction, she was disappointed at the rejection of article 72. She had not, however, wished to vote against the wishes of the majority and had therefore abstained from voting on the motion for priority and on the optional protocol itself. She shared the views of the representative of Switzerland and hoped that as many countries as possible would sign the optional protocol.

54. Mr. SHU (China) said that his government was a strong supporter of the compulsory jurisdiction of the International Court of Justice. He would have preferred article 72 as approved by the First Committee for the reason stated by the representative of Switzerland, and had therefore voted against the motion for priority. In a spirit of co-operation, however, he had voted in favour of the optional protocol as the second best solution.

[2] See *United Nations Conference on the Law of the Sea, 1958, Official Records*, vol. II (United Nations publication, Sales No. 58.V.4, vol. II), p. 111.

[3] See United Nations, *Treaty Series*, vol. 30, No. 449, p. 94.

[4] In consequence of this decision, it was unnecessary to vote on article 72. The text of the optional protocol will be found in document A/CONF.25/15.

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Glossary

Glossary of terms relating to Treaty actions

This glossary is intended as a general guide and is not presumed to be exhaustive

Acceptance and Approval

The instruments of "acceptance" or "approval" of a treaty have the same legal effect as ratification and consequently express the consent of a state to be bound by a treaty. In the practice of certain states acceptance and approval have been used instead of ratification when, at a national level, constitutional law does not require the treaty to be ratified by the head of state.

[Arts.2 (1) (b) and 14 (2), Vienna Convention on the Law of Treaties 1969]

Accession

"Accession" is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force. The Secretary-General of the United Nations, in his function as depositary, has also accepted accessions to some conventions before their entry into force. The conditions under which accession may occur and the procedure involved depend on the provisions of the treaty. A treaty might provide for the accession of all other states or for a limited and defined number of states. In the absence of such a provision, accession can only occur where the negotiating states were agreed or subsequently agree on it in the case of the state in question.

An "exchange of notes" is a record of a routine agreement, that has many similarities with the private law contract. The agreement consists of the exchange of two documents, each of the parties being in the possession of the one signed by the representative of the other. Under the usual procedure, the accepting State repeats the text of the offering State to record its assent. The signatories of the letters may be government Ministers, diplomats or departmental heads. The technique of exchange of notes is frequently resorted to, either because of its speedy procedure, or, sometimes, to avoid the process of legislative approval.

[Art.13, Vienna Convention on the Law of Treaties 1969]

Full Powers

"Full powers" means a document emanating from the competent authority of a state designating a person or persons to represent the state for negotiating, adopting, authenticating the text of a treaty, expressing the consent of a state to be bound by a treaty, or for accomplishing any other act with respect to that treaty. Heads of State, Heads of Government and Ministers for Foreign Affairs are considered as representing their state for the purpose of all acts relating to the conclusion of a treaty and do not need to present full powers. Heads of diplomatic missions do not need to present full powers for the purpose of adopting the text of a treaty between the accrediting state and the state to which they are accredited. Likewise, representatives accredited by states to an international conference or to an international organization or one of its organs do not need to present full powers for the purpose of adopting the text of a treaty in that conference, organization or organ.

[Art.2 (1) (c) and Art.7 Vienna Convention on the Law of Treaties 1969]

Modification

The term "modification" refers to the variation of certain treaty provisions only as between particular parties of a treaty, while in their relation to the other parties the original treaty provisions remain applicable. If the treaty is silent on modifications, they are allowed only if the modifications do not affect the rights or obligations of the other parties to the treaty and do not contravene the object and the purpose of the treaty.

[Art.41, Vienna Convention on the Law of Treaties 1969]

Notification

The term "notification" refers to a formality through which a state or an international organization communicates certain facts or events of legal importance. Notification is increasingly resorted to as a means of expressing final consent. Instead of opting for the exchange of documents or deposit, states may be content to notify their consent to the other party or to the depositary. However, all other acts and instruments relating to the life of a treaty may also call for notifications.

[Arts.16 (c), 78 etc,. Vienna Convention on the Law of Treaties 1969]

Objection

Any signatory or contracting state has the option of objecting to a reservation, inter alia, if, in

Transcript of Media Briefing on visit of President of Iran to India (February 17, 2018)

February 19, 2018

Official Spokesperson, Shri Raveesh Kumar: Good afternoon and a very warm welcome to this special briefing on the visit of Hon'ble President of Iran to India. You must have seen on the television screens that the Prime Minister and President read out the press statements and there was also this exchange of MoU ceremony.

To brief you on the visit and also on the discussions which took place I have with me JS (PAI) Dr. Deepak Mittal but before I hand it over to him I would just like to share that there is at least one document which we have uploaded which is the list of nine MoUs. Press statement has also been uploaded and the Joint Statement which has been signed between the two countries will be uploaded very shortly. So with this I give the floor to JS (PAI).

Jt. Secretary (PAI), Dr. Deepak Mittal: Thank you Raveesh. Good afternoon ladies and gentlemen. It is a pleasure to be with you today. We have just completed the discussions between the Hon'ble President of Iran who is here on a state visit. As you all know he arrived day before yesterday starting his visit from Hyderabad. Yesterday he had a full day at Hyderabad and yesterday night he arrived in Delhi and today his official engagement started.

In the morning he had a ceremonial welcome in the forecourt of RashtrapatiBhawan, received by Hon'ble President and Hon'ble Prime Minister in the morning. Then External Affairs Minister called on the President of Iran and as I mentioned we just concluded the meeting between the Prime Minister and the President of Iran. Prime Minister also hosted a lunch for him and you all would have heard the press statement as JS (XP) just mentioned which has also been put on the website.

There are a series of agreements which have been signed, to be precise nine agreements have been exchanged between the two sides beside four agreements between the trade bodies which has been signed and exchanged on the margins of the visit. Hon'ble Vice President would be calling on the President of Iran and later in the evening there would be a meeting between the two Presidents and RashtrapatiJi will be hosting a state banquet in his honor before the Iranian President departs.

As you know this visit which is happening is after ten years. Last visit of President of Iran happened in 2008 and this visit happens within two years of our own Prime Minister's state visit to Iran in 2016. This

provided an opportunity to both sides where we are able to review comprehensively the progress which have been achieved over the last two years in our overall relationship.

To give you some highlights of the visits and the areas which came in discussions on the both sides in the meeting between the President and the PrimeMinister, the broad areas touched were connectivity, energy, trade and investment cooperation, people to people civilizational connect and promotion of friendly exchanges, then the issue of how do deal with terrorism and other issues of regional and international mutual interest were broad areas where both sides exchanged views over two hours of discussions which went on over lunch as well.

In the connectivity, there was a sense of progress and satisfaction which was expressed during the Prime Minister's visit in 2016 there was an agreement on Chabahar Port where India was to participate in development of Chabahar Port and also tri-lateral agreement between India Afghanistan and Iran for Chabahar Port in a trilateral framework. Both sides expressed satisfaction that this has moved with speed. We saw that the inauguration of the phase I of the Chabahar Port happened in last Decemberwhich was inaugurated by President Rouhani and our Minister for State for Shipping was also present at that event.

We also had successful initiation of supply of wheat assistance to Afghanistan in a ship through Chabahar which is ongoing and successfully being undertaken through Chabahar Port. Besides that the trilateral agreement having been ratified by all the three countries is taking shape in terms of finalizing the protocol and to full implementation.

The step forward today was the agreement which was reached on Indian company taking over the interim operations of the Chabahar Port in the coming months so that they can operate run the facilities at the terminal. There was also the commitment which was announced by the Prime Minister in his press statement, as you would have also heard, about India to support the establishment of railway line from Chabahar to Zahidan which will mean full potential of Chabahar Port to be utilized in terms of connectivity to the hinterland in Afghanistan and other central Asian region, that was also announced.

Besides that both sides also expressed that in terms of connectivity that India's accession to the Ashkhabad agreement in which Iran is also a member country as also the TIR Convention in which also Iran is a member country, enhances the connectivity and promotes this partnership and regional movement of goods and people.

On the energy front there were discussions how, as you know, that Iran is an important energy partner in this region and there was an understanding that the relationship has to move in a more comprehensive energy partnership. Team on both sides will discuss on how to take it forward and move beyond buyer seller relationship and they will continue these discussions. Oil ministers from both the countries were present during the discussions and they and their concerned ministries will be taking it forward.

On the trade and investment front I think there was a satisfaction drawn in terms of trying to ease out measures and facilitative measures to be put in place. The Double Taxation Avoidance Agreement

which has been under discussion from the last over a decade has been signed and exchanged today that lays down the framework for promoting trade and investment. So was the decision to finalize the Preferential Trade Agreement and Bilateral Investment Treaty on both sides in a time bound manner. That was also a decision.

In terms of easing out the trade measures there was a thing on how to establish banking payment channel. India has allowed investment in rupees and there was request in terms of opening banking channels and bank branches to be established in each other's countries. There is an Iranian bank who has shown interest to it, its application is in advanced stage and it hopefully we will have a decision very soon on that which could ease the banking and the trade and investment cooperation to be taken forward.

On promotion of the people to people cultural contacts and friendly exchanges, there has been understanding that in both countries given our both countries enjoy civilizational contacts, Prime Minister said that this is not a relationship of contemporary times only, it is something which is million year old relationship and the historic cultural connect which is there. In terms of people to people contacts it was agreed to easing of visas and extending e-visa facility on reciprocal basis and also to facilitate officials movement in terms of visa waiver for diplomatic officials and also the commitment that for businessmen visas will be issued in a time bound manner to facilitate business on both sides.

Besides building upon the cultural connect to cooperate in terms of decision to hold festival in Iran later this year and also to cooperate in terms of setting up of a chair on Indian studies in Iran and to cooperate in the Persian language given the commonalities which we have and also to look at exchanges and special programs on Indology for the officials and diplomats also has been agreed to between the two sides.

Besides this there was an attempt to expand cooperation in new areas giving a depth and substance. You will see a number of agreements and MoUswhich have been exchanged also included expanding cooperation in the areas of agriculture, health, traditional medicine and communications. These were the areas where discussion on more cooperation was held.

There was shared concern in terms of how terrorism poses a challenge to humanity and this is something which effects the entire humanity and the commonality in terms of how terrorism needs to be condemned in all its forms and manifestations. You would have heard both the leaders speaking about it even in their press conference. There was a commonality of thought that terrorism cannot be linked with any religion. Terrorism supporters who aid, abet and support terrorism needs to be condemned and there cannot be any condonation on that front.

There was discussion on regional and international situation and as was said today in the press conference, the statements made by the two leaders that there is commonality of interest and there is no divergence of views in a sense that peace, security, stability in the region is of larger interest for all the countries and all the issues that will be settled peacefully and amicably.

This is to give you the broad areas touched in the discussions and how it went President is here and he will be having further interactions with our RashtrapatiJi late in the evening where they will exchange

views. Thank you.

Official Spokesperson, Shri Raveesh Kumar: Thank you Deepak. Now the floor is open to questions.

Question: You mentioned about the security cooperation and information exchange. Did we raise the issue of KulbhushanJadhav's abduction from Iran and after the ratification of extradition treaty as it happened today, will we ask Iranians to prosecute those who have aided and abated his kidnapping in Iran?

Jt. Secretary (PAI), Dr. Deepak Mittal: This issue did not figure in the discussions. On the Extradition Treaty as you would have seen the exchange of instrument of ratification has happened today, this was a treaty which was signed in 2008 and for whatever reason it could not be put into force. Today the exchange of instrument of ratification has brought it into effect in fact the element coming out of the visit is also that lot of efforts which have been put by both sides in terms of addressing old standing issues and bring them to fruition. So this was an issue which had not come into force and that has now been done.

Same is the case with discussion which have been held on mutual legal assistance in civil and commercial matters which have been under discussion, so some understandings have been reached, hopefully some agreements will come out it soon. So is the case, as I mentioned, of DTA which was under discussion for a long time so that was as I can say the speed, which was recognized by the Vice President of Iran himself in his remarks that in two years we have seen a lot of speed in terms taking it to new heights and resolving issues which were pending for a long time.

Question: On the issue of security cooperation and counter-terrorism, just wanted to know, if specifically the discussion on Pak based terror networks and terrorism emanating from Pakistan figured during the talks?

Jt. Secretary (PAI), Dr. Deepak Mittal: As I said terrorism discussion did focus on how terrorism poses a challenge for the humanity and there was a unanimity on both sides that terrorism needs to be condemned and anybody who aid or abets, there should be an end to the sanctuaries of terrorism. I think there was no difference of opinion on where it is emanating form.

Official Spokesperson, Shri Raveesh Kumar: There will be a paragraph or may be two in the joint statement. Please wait for the release which I think will happen in next couple of hours from now.

Question: Is there any reason why the Jadhav issue did not come up, why did we not bring it up in our discussions?

Jt. Secretary (PAI), Dr. Deepak Mittal: It is not a bilateral matter with Iran in any case.

Question: As you mentioned about Double Taxation Avoidance Treaty, how it will work and is it on the lines with what we have with Singapore or Mauritius?

Jt. Secretary (PAI), Dr. Deepak Mittal: Double Taxation Avoidance Treaty is based upon the model

what is being driven by our Ministry of Finance. I won't have the complete text in terms of going to nuances and comparing between two countries but our negotiator in this had been Ministry of Finance and I will go with the standards that are maintained.

Question Contd.: For easing the trade and investment?

Jt. Secretary (PAI), Dr. Deepak Mittal: Certainly, it is to avoid double tax in two countries so I would assume it is the same as I don't have the comparison.

Question: The Oil Minister of Iran is here so do we see any movement on Farzad B oilfield work?

Jt. Secretary (PAI), Dr. Deepak Mittal: As I said there was a discussion on how to have energy partnership in a comprehensive and long term manner. So in that context discussions continue on both sides to see how to investments from both sides are welcome. Iranian side welcomes Indian investment in Oil & Gas sector, whether it is upstream or downstream, whether it is in oil or gas sector. Discussions continue on how to take them to fruition and these are ongoing in nature.

Question: Afghanistan was talked about during the press statement. How much was that focus and did the Iranian side briefed on the Iranian deal?

Jt. Secretary (PAI), Dr. Deepak Mittal: On Afghanistan as was also mentioned in the press statement, there is a shared interest, we support peace, security, stability, unity, democracy, plurality in Afghanistan and that's what Prime Minister himself mentioned in his statement to the media today. Certainly we are cooperating in a trilateral format between India Iran and Afghanistan. If you look at Chabahar this is also an initiative which helps to provide alternative and very robust connectivity to land locked Afghanistan which is making progress. So in that context given the shared interest that there should be stability there is a support which both sides express for the national unity government and the people of Afghanistan and their search for peace and stability in their country, so that very much got discussed.

Question: Was the Iran Nuclear deal, though India is not a party to it, discussed?

Jt. Secretary (PAI), Dr. Deepak Mittal: President Rouhani shared his views on how they see their own discussions going and they remain committed to this JCPOA and from our side also we have supported this deal and called for full and effective implementation of this JCPOA and this is something which is in the interest of international peace, security and stability.

Question: Can you say specifically whether Farzad B was discussed and has there been any progress on those plans?

Jt. Secretary (PAI), Dr. Deepak Mittal: As I said Iran side has said they welcome all Indian investments into oil & gas sector and Farzad B is one such oil & gas sector where discussion continue on both sides. I would say that the two oil ministries are discussing and more than oil ministries, companies on both the sides, the potential Indian companies investing and the Iranian National Oil Company, they are looking at how to make it in economic. They continue to hold discussions and it was encouraged that

they should come to some discussions in a more time bound manner so that they can reach a decision on the same.

Question: Shahid Beheshti port ko lekar jo MoU sign hua uske baad wahan par kis tarah ke import ya export keliye channel open honge, kayuski modalities hongi, ek sawaal to ye hai. Doosara sawaal hai ki Afghanistan ko lekar baat cheet ho rahi hai, saajhi soch hai dono deshon kii ki aatankwaad mukt Afghanistan bane, to kis tarah ki ranneeti par kaam hoga, do-teen cheezon ka jikra haalanki PM ne statement mein kiya hai, agar usko aap detail mein bata paayein?

(The MoU that has been signed regarding Shahid Beheshti port, so after it what kind of channel for import and export will be opened and what would be their modalities, this is one question. The second is there are discussion regarding Afghanistan, both the countries have shared approach that Afghanistan becomes terrorism free, so what would be the strategy for that, even though PM has spoken two or three points related to that, would you explain them further?)

Jt. Secretary (PAI), Dr. Deepak Mittal: Jahantak Chabahar Port ki modalities ki baat hai usme inaisa hai ki jo trilateral agreement hai usme in hi modalities ka jikra kiya gaya hai. Uska ratification hua hai to ab uska implementation ab aage liya jaayega. Ismein ye bhi ek nirnay hua ki isko aur promote karne ke liye wahan par ek business event karna chahiye jsimein businesses involved ho, teenodeshonkealawakshetraaurksehtrakebaaharke businesses bhiismeinaanechahiye. Jo bhi modalities hainwo experts group mil karke, kyon ki iske andar coordination council ki suvidha hai, expert group ki suvidha hai. Jab ab ye ratify ho gayahai to ab sab coordination council and expert group milkarkeiskoaagebadhaayenge.

Jahantak Afghanistan ki baat hai, usme in jaise main abhi bola ki ye Chabaharbhi ek initiative hain Afghanistan ko kholta hai, ek land locked country hone ke kaaranun ko iski wajah se ek raasta milta hai, to ye ke tareeka hai.

Jaisa maine aapse pehle kahaa ki dono desho mein ek sanjhavi chaarhai ki wahan par shanti, sthirta, samruddhi ityadi sab honi chahiye. Usko lekar ke baat cheet chalegi. Aapne kai saare dekhehonge jaise chaahe Heart of Asia process ho, chaahe REKA process ho, Kabul process ho, SCO mein ho, Moscow mein ho, hum sab sahbhagi rahe hain, Bharat bhi raha hai, Iran bhi usme in raha hai, to is tarah se hum sab mil kar wahaan par shanti aur sthirta ka samarthan karte hain.

(As far as modalities of Chabahar port is concerned they are mentioned in the trilateral agreement only. Since that has been ratified to it will be implemented in future. It was also decided that to promote it a business event should be organized there and in which businesses from all the three countries should be involved and along with them businesses from the region and out of region should also be invited. Whatever the modalities it will be decided by the Expert Group since the agreement has the facility of Coordination Council and Expert Group and since it has been ratified so it will be taken forward with the help of all.

As far as Afghanistan is concerned as I said this port opens of Afghanistan as it being a land locked country, it opens a new way of access to them, so this is also a way. As I said earlier we both countries have a shared view that Afghanistan must have peace, stability, prosperity so that will be discussed.

You have seen that be it Heart of Asia process, REKA process, Kabul Process or in SCO or in Moscow, we all have been partners so in this way we all support peace and stability in Afghanistan.)

Question: In terms of fighting terrorism, tareekakyahoga, ye to business model kejariye hum wahanjaatehainki progress ho, prosperity aaye, leking terrorism se ladnekeliyehamaare pass kyahogaunke operations kekhilaaf, kyonki do-teen cheezonka hint to wahaandiyagayakijo cultural exchange hai, jo communication hai, hogakyadarasal, strategic point of view se agar hum baatkarein?

(What would be the method in terms of fighting terrorism, we have talked about progress and prosperity in Afghanistan through this business model but how we would fight terrorism there, what would be the approach against the terrorist operations there. There was a hint of two or three things like cultural exchange and communication but if we talk about strategically it will be approached?)

Jt. Secretary (PAI), Dr. Deepak Mittal: Dekhiye Afghanistan kistithialagsihai, usmeinhumari approach ekdum clear haikijobhi initiative hogawo Afghan led, Afghan owned and Afghan controlled hogaaur Iran kabhiyahi mat haikikaiseaatankwaad se ladnahai. To ye Afghanistan aurwahaanke logon kipraathmikjimmedaarihaiaurunkenikatpadosi hone kekaaranaurantarrashtriyasahyogi hone kekaaran hum unkoismeinpoorasamarthandetehain.

(The situation in Afghanistan is different, our approach on that is very clear that whatever initiative is there it will be Afghan led, Afghan owned and Afghan controlled and Iran also has the same view point on how to fight with terrorism in Afghanistan. So this is the primary responsibility of Afghanistan and its people and we support them fully in this as their close neighbors and international partners.)

Question: Iran had said that they would probe how KulbhushanJadhav was kidnapped from Iran and last that we have lerned that they were not getting any cooperation from Pakistan on that front to be able to probe it. Have they ever gotten back to India and whether they probed that issue at all, have they officially communicated anything at any level?

Jt. Secretary (PAI), Dr. Deepak Mittal: I thought we are talking about the ongoing visit, as I mentioned this was not the topic of discussion today.

Question: Just a bit of clarification, the MoU of this leasing of ShahidBeheshti port, you have mentioned that it is towards the takeover of the operations so and this is for 18 months, so when are looking to completely take over the operations of the port? Secondly when the Turkish President came over here we did discuss the Kashmir issue in the sense that we explained our position on terrorism and all that, with Iranians we have been discussion this issue for nearly 25 years, so was this discussed with President Rouhani in the sense that Kashmir and what is happening there, did we discuss this issue with Iran?

Jt. Secretary (PAI), Dr. Deepak Mittal: Well, on the ShahidBeheshti Port, Chabahar Port, as you know the first and main contract that was signed in 2016 provides for India to take over after the current contract activation and it provides 18 month's time, by the time the civil works and all the equipment are in place, so while this period when the civil works and all the equipment is being completed certain facilities have been created in the port, so the discussion was that since the facilities have been

created and the port is operationalized so this interim contract provides that we can, Indian company, can takeover port operations and whatever little formality it involves.

On your second question, I would say that there is certain understanding on terrorism and everybody understands India's position on J&K and it has not changed and how the people of the state of J&K continue to face the brunt of terrorism and violence. I think that is very well understood. It is not an issue in India – Iran context but certainly when we talk about terrorism and how India is a victim of terrorism, so there was an understanding of the fact that India is victim of terrorism and there was an appreciation of the fact.

Question: Can you name of the Indian oil companies which are in active talks with Iranian National Oil Company and what is the status of these talks?

Jt. Secretary (PAI), Dr. Deepak Mittal: These are all very commercial questions which continue so it is difficult for me to say who else because there will be certainly many Indian private sector and public sector companies who would have an interest in oil, they continue to invest. So it is difficult for me as the discussions are between the oil companies, so I won't have a take on that as to where they are, but certainly they are engaged on this.

Question: When the areas of focus were being decided between India and Iran in the run up to the President's visit you mentioned that KulbhushanJadhav was not discussed but was it our decision that we did not want to include KulbhushanJadhavin one of the areas during the visit or we wanted it but Iran didn't want? Second one of the focus areas of this bilateral is how to help Afghanistan and the actions that both the countries are taking will directly or indirectly help Afghanistan both in anti-terror and commercial aspect but Afghanistan always blames that the reason for its instability is Pakistan, did specifically CPEC or Pakistan related issued was discussed between our Prime Minister and Iranian President?

Jt. Secretary (PAI), Dr. Deepak Mittal: On both the issues the answer would be no and as I mentioned this is not a bilateral issue in any way between India and Iran and as I mentioned there was a lot of substantive discussion in a lot of areas which were under discussion.

Question: Any discussion on promoting defence exchanges and cooperation?

Jt. Secretary (PAI), Dr. Deepak Mittal: There is an ongoing discussion and there are engagements at various levels between the two governments which includes at the level of National Security Councils and National Security Advisors. So there is a normal defence and security cooperation issues which were discussed. There was appreciation of how the port call visits happen on the two sides and that should continue, exchanges and participation in the training courses and exchange of experiences on both sides will continue and the established structures and mechanisms should continue to meet and discuss and explore opportunities of cooperation.

Question: What was the kind of discussion on South Asia strategy by the US administration?

Jt. Secretary (PAI), Dr. Deepak Mittal: There was no discussion specifically on that. As I mentioned

there was discussion generally on the situation in Afghanistan and as I said there was a commonality as to how we see the situation and how we see the future in Afghanistan. Thank you.

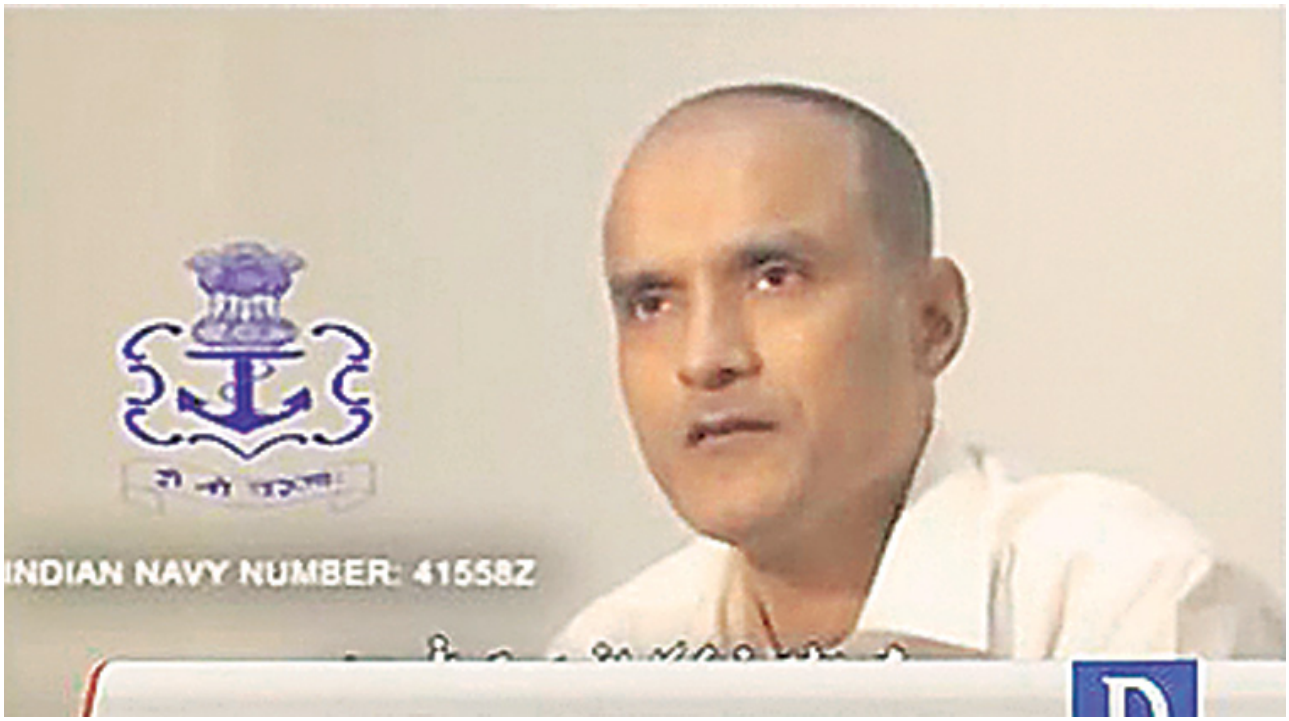
Official Spokesperson, Shri Raveesh Kumar: Thank you friends for joining in for this special briefing. Have a good day.

(Concludes)

Iran probing Jadhav case, says Ambassador Gholamreza Ansari

He said Iran, after completing its own probe, will share the findings with "friendly countries".

By: **Express News Service** | New Delhi | Updated: April 12, 2017 10:53:34 am



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Kulbhushan Jadhav and his business activities in Chabahar. He said Iran, after completing its own probe, will share the findings with "friendly countries".

While Pakistan has alleged that Jadhav, who was running a business in Chabahar, was caught in Pakistan for "subversive activities" in Balochistan, India has said he was abducted from Iran.

"We are trying to complete our own information on this case. I don't think I am in a position now to say any more about that. We are looking into this issue very accurately," Ansari said at a media interaction at the Foreign Correspondents' Club of South Asia on Thursday.

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On the proposed Iran-Pakistan-India pipeline, he said, "I think we should forget about pipeline because the people who have invested in the LNG in India… I don't think that they will let any pipes to come in a substantial quantity. They have invested in LNG so much … Americans are looking for the Indian market for the future. And any sort of pipeline will put an end to these investments. So I don't think pipelines can be a serious project. I am sure Americans will not let this pipeline go ahead which they have done before as well," the Iranian envoy said.

On the possible competition between Chabahar and Gwadar ports, he said he does not see it in that manner. He proposed that since they are just 72 km apart, they could be linked in the future.

On the possible visit by Prime Minister Narendra Modi, he said that "sooner, the better", without giving out any dates.