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# Second report on

# Identification of customary international law

**by Michael Wood, Special Rapporteur***

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## I. Introduction

1. In 2012 the 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 note by the Special Rapporteur.[1] Also in 2012, the General Assembly, following a debate in the Sixth Committee, noted with appreciation the Commission's decision to include the topic in its programme of work.[2]

2. At its sixty-fifth session, in 2013, the Commission held a general debate[3] on the basis of the Special Rapporteur's first report,[4] which was of an introductory nature, and a memorandum by the Secretariat on 'Elements in the previous work of the International Law Commission that could be particularly relevant to the topic'.[5] In light of the debate, and following informal consultations, the Commission decided to change the title of the topic to read 'Identification of customary international law'. This was done partly to avoid difficulties with the translation of the word 'evidence' into other United Nations official languages, and also to emphasise that the principal objective of the topic was to offer guidance to those called upon to identify the existence of a rule of customary international law. The change in title was made on the understanding that matters relating both to what one Commission member referred to as the 'formative elements', and to evidence or proof of customary international law, remained within the scope of this topic.[6]

3. In addition, the Special Rapporteur drew the following conclusions[7] from the debate and informal consultations:

3.1 There was general support among members of the Commission for the 'two-element' approach, that is to say, that the identification of a rule of customary international law requires an assessment of both general practice and acceptance of that practice as law. Virtually all those

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

[2] General Assembly resolution 67/92 of 14 December 2012, para. 4.

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

[4] A/CN.4/663.

[5] A/CN.4/659 (hereinafter: '*Secretariat memorandum*').

[6] A/CN.4/SR.3186 (25 July 2013), at 5. It is worthwhile to recall in this context Jennings' observation that "in international law the questions of whether a rule of customary law exists, and how customary law is made, tend in practice to coalesce": R. Jennings, 'What is International Law and How Do We Tell It When We See It?', *Annuaire Suisse de Droit International*, 37 (1981), 59, 60. See also K. Wolfke, *Custom in Present International Law*, 2nd edition (Martinus Nijhoff Publishers, 1993), 116 ("The ascertainment and formation of customary international law are of necessity closely interrelated, since, on the one hand, the process of formation determines the means of identification of customary rules, and on the other, the action of ascertaining custom or its elements influences its further development. This interdependence is already evident from the content of Article 38.1(b) of the Statute of the [International] Court").

[7] A/CN.4/SR.3186, *ibid.*, at 3-6.

who spoke expressly endorsed this approach, which was also supported by the wide array of materials covered in the first report, and none questioned it. At the same time, it was recognized that the two elements may sometimes be 'closely entangled', and that the relative weight to be given to each may vary according to the circumstances.

3.2 There was widespread agreement that the primary materials for seeking guidance on the topic would be likely to be the approach of States, as well as that of international courts and tribunals, first among them the International Court of Justice.

3.3 There was general agreement with the view that the outcome of the work on the topic should be of a practical nature, and should be a set of 'conclusions' with commentaries. Moreover, there was general agreement that in drafting conclusions the Commission should not be overly prescriptive.

3.4 There was general agreement that the Commission would need to deal to some degree with the relationship between customary international law and other sources of international law, in particular treaties and general principles of law. In addition, there was interest in looking into 'special' or 'regional' customary international law.

3.5 Most members of the Commission were of the view that *jus cogens* should not be dealt with as part of the present topic.

4. During the Sixth Committee debate in 2013, delegations welcomed the 'two-element' approach, while stressing the need to address the question of the relative weight to be accorded to State practice and *opinio juris*. There were differing views on whether to include a detailed study of *jus cogens* within the present topic. The Commission's intention to consider the relationship between customary international law and other sources of international law was generally welcomed, though it was noted that the question of the hierarchy of sources was for separate consideration. The importance of looking at 'special' or 'regional' customary international law, including 'bilateral custom', was stressed.[8]

5. Delegations reaffirmed the importance of having regard, when identifying customary international law, as far as possible, to the practice of States from all regions, while noting, however, that relatively few States systematically compile and publish their practice. Caution was expressed concerning the analysis of State practice, in particular with respect to decisions of domestic and

[8] A/CN.4/666: *Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-eighth session*, paras. 43-44.

regional courts. It was further suggested that the practice of international organizations should be considered.[9]

6. One or two delegations proposed that the form of the final outcome of the Commission's work on the topic should be considered at a later stage; nevertheless, the Commission's present intention that the outcome should take the form of 'conclusions' with commentaries was widely supported. The importance of not being overly prescriptive was emphasised, as was the notion that the flexibility of customary international law must be preserved.[10]

7. At its 2013 session, the Commission requested States –

> "to provide information, by 31 January 2014, on their practice relating to the formation of customary international law and the types of evidence suitable for establishing such law in a given situation, as set out in:
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> (a) official statements before legislatures, courts and international organizations; and
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> (b) decisions of national, regional and subregional courts."[11]

As of the date of writing this report, written contributions had been received from nine States,[12] for which the Special Rapporteur is very grateful. Further contributions would be welcome at any time.

8. The Special Rapporteur also welcomes the contribution that can be made by academic bodies to thinking on the subject. Over the last year or two, various institutions have organised meetings on aspects of the topic, which were both encouraging and stimulating. Since the Commission's sixty-fifth session there have also been some new relevant writings, as well as judgments of international courts and tribunals, which this report has taken into account.

9. The first report sought to describe the basic materials to be consulted for the purposes of the present topic, and considered certain preliminary issues. This second report covers central questions concerning the approach to the identification of rules of 'general' customary international law, in particular the two constituent elements and how to determine whether they are present. Section II of the report covers the scope and outcome of the topic, explaining that the draft conclusions concern the method for identifying rules of customary international law, and do not enter upon the actual substance of such rules. Section III, concerning the use of terms, includes a definition of customary international law which is inspired by the wording of Article 38.1(b) of the Statute of the International Court of Justice, but does not refer directly to that provision. Section IV describes the basic 'two elements' approach in general terms, these elements being 'a general practice' and

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[9] *Ibid*., at paras. 45-46.
[10] *Ibid*., at para. 47.
[11] A/68/10, *supra* note 3, at para. 26.
[12] The Kingdom of Belgium; the Republic of Botswana; Cuba; the Czech Republic; the Republic of El Salvador; the Federal Republic of Germany; Ireland; the Russian Federation; and the United Kingdom of Great Britain and Northern Ireland.

'accepted as law' (commonly referred to as 'State practice' and '*opinio juris*', respectively). Sections V and VI then begin the more detailed inquiry into the two elements, which (as explained in Section VII on the future programme of work) will be continued in the third report.

10. It seems desirable to cover in the same report both practice and *opinio juris*, given the close relationship between the two. At the same time, doing so necessarily means that a large amount of ground had to be covered in this report without the benefit of detailed discussions within the Commission and Sixth Committee. Sections V and VI are thus necessarily of a rather preliminary nature; the Special Rapporteur may need to review and further refine both the text and the proposed conclusions in the next report.

11. The present report proposes 11 draft conclusions, which are reproduced together in the annex. As indicated there, it is proposed that the draft conclusions should be divided into four Parts (Introduction; Two constituent elements; A general practice; Accepted as law). This indicates the general structure envisaged by the Special Rapporteur. Further draft conclusions will be proposed in the next report, but – subject always to the views of members of the Commission – these are unlikely to affect the structure.

## II. Scope and outcome of the topic

12. The debates in the Commission and in the Sixth Committee in 2013 confirmed the utility of the present topic, which aims particularly to offer practical guidance to those, in whatever capacity, called upon to identify rules of customary international law, in particular those who are not necessarily specialists in the general field of public international law. It is important that there be a degree of clarity in the practical application of this central aspect of international law, while recognizing of course that the customary process is inherently flexible. As is widely recognized, "[t]he question of sources is … of critical importance; and the jurisprudential and philosophical debates that continue to rage have much more than an academic significance. It is right and proper to find them absorbing, and to participate in the intellectual exchanges. But we should not ignore that the need for them is a damaging acknowledgment of inadequacies in a legal system".[13]

13. It is not of course the object of the present topic to determine the substance of the rules of customary international law, or to address the important question of who is bound by particular rules (States, international organizations, other subjects of international law). The topic deals solely with the methodological question of the identification of customary international law.

14. The present topic is and its conclusions are intended to be without prejudice to ongoing work on other topics. It will also be important, as work on the topic proceeds, to avoid entering upon

[13] R. Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, 1994), 17.

matters relating to other sources of international law, including general principles of law (Article 38.1(c) of the Statute of the International Court of Justice). The work will also be without prejudice to questions relating to *jus cogens*, which could be the subject of a separate topic.

15. In light of the above the following draft conclusion is proposed:

**Draft Conclusion 1**
***Scope***

**1. The present draft conclusions concern the methodology for determining the existence and content of rules of customary international law.**

**2. The present draft conclusions are without prejudice to the methodology concerning other sources of international law and questions relating to peremptory norms of international law (*jus cogens*).**

## III. Use of terms

16. In the first report, the Special Rapporteur proposed a definition of 'customary international law' that consisted of a simple cross-reference to Article 38.1(b) of the Statute of the International Court of Justice (ICJ).[14] A number of members of the Commission felt that a cross-reference was not entirely satisfactory, both because it was not self-contained and because it might be seen as relying too heavily on the Statute, which was in terms only applicable to the ICJ.[15]

17. The Special Rapporteur therefore proposes that the Commission adopt a definition of customary international law that draws upon the language of the ICJ Statute, without referring directly to it. This would have the advantage of maintaining the key concepts ('a general practice'; 'accepted as law'), which are the basis of the approach not only of the ICJ itself but also of other courts and tribunals and of States.[16] The language of Article 38.1(b), now almost a century old, continues to be widely relied upon and has lost none of its relevance. Indeed, compared with what are perhaps the terms in more common use today ('State practice' and '*opinio juris*') the wording of the Statute seems less problematic and indeed more modern. In any event, the division into two

[14] A/CN.4/663, *supra* note 1, at para. 45.
[15] But see *ibid*., at para. 32 ("Article 38.1 has frequently been referred to or reproduced in later instruments. Although in terms it only applies to the International Court, the sources defined in Article 38.1 are generally regarded as valid for other international courts and tribunals as well, subject to any specific rules in their respective statutes" [citations omitted]). The chapeau of Art. 38.1, as adopted in 1945 ("The Court, whose function is to decide *in accordance with international law*, such disputes as are submitted to it, shall apply:" (emphasis added)), strongly suggests that this provision of the Statute is intended to state the sources of international law.
[16] See paras. 24-25 below.

distinct elements mandated by the language of the Statute "constitutes an extremely useful tool for 'discovering' customary rules".[17]

18. Another term that it may perhaps be useful to define is 'international organization'. It would seem appropriate to adopt the definition used in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character,[18] as well as in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,[19] that is, that "international organization" means an "intergovernmental organization". As is clear from the Commission's commentary, the more elaborate definition employed in the draft articles on the Responsibility of international organizations was devised for the particular circumstances of that topic.[20] In the present context, the more general and broader definition would seem preferable.

19. It will be for consideration, as the topic proceeds, whether further terms need to be defined. If there is eventually a 'use of terms' provision it may be desirable to include a saving clause along the lines of those contained in earlier texts based on the Commission's drafts, such as article 2.3 of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property.[21]

20. In light of the above, the following draft conclusion is proposed:

**Draft Conclusion 2**
***Use of terms***

**For the purposes of the present draft conclusions:**

**(a) "customary international law" means those rules of international law that derive from and reflect a general practice accepted as law;**

[17] A. Pellet, 'Article 38', in A. Zimmermann et al., *The Statute of the International Court of Justice: A Commentary*, 2nd edition (Oxford University Press, 2012), 731, 813. See also G.M. Danilenko, 'The Theory of International Customary Law', *German Yearbook of International Law*, 31 (1988), 9, 10-11 ("… the definition of custom provided by Art. 38 of the statute is extremely important for the theory and practice of customary international law. In the first place, Art. 38 reaffirms the recognition by all States of international custom as one of the main sources of international law … Secondly, Art. 38 reflects the agreement of all members of the international community on basic constituent elements required for the formation and operation of customary rules of international law, namely, practice, on the one hand, and acceptance of this practice as law, on the other"); G. Arangio-Ruiz, 'Customary Law: A Few More Thoughts about the Theory of 'Spontaneous' International Custom', in N. Angelet (ed.), *Droit Du Pouvoir, Pouvoir Du Droit: Mélanges offerts à Jean Salmon* (Bruylant, 2007), 93, 105.

[18] Art. 1.1(1).

[19] Art. 2.1(*i*).

[20] Articles on the Responsibility of international organizations (2011), Art. 2(a) and commentary (1) to (15): *Report of the ILC 2011*, 73-78.

[21] The Article reads: "The provisions of paragraphs 1 and 2 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State".

**(b) "international organization" means an intergovernmental organization;**

**(c) …**

## IV. Basic approach: two constituent elements

21. The present report proceeds on the basis that the identification of a rule of customary international law requires an assessment of both practice and the acceptance of that practice as law ('two-element' approach).[22] There was widespread support for this approach within the Commission in the course of its debate in 2013, as also in the Sixth Committee.[23] As explained below, the two-element approach is indeed generally adopted in the practice of States and the decisions of international courts and tribunals, including the International Court of Justice. It is widely endorsed in the literature.

22. Under this approach, a rule of customary international law may be said to exist where there is 'a general practice' that is 'accepted as law'. These two requirements, "the criteria which [the International Court of Justice] has repeatedly laid down for identifying a rule of customary international law",[24] must both be identified in any given case to support a finding that a relevant rule of customary international has emerged. Thus, for a persuasive analysis of whether a rule of customary international law exists, "it would be necessary to be satisfied that such a rule meets the conditions required for the birth of an international custom".[25]

23. The two elements are indeed indispensable for any rule of customary international law properly so called. As one author has explained, "Without practice (*consuetudo*), customary international law

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[22] See also para. 3.1 above.

[23] See also para. 24 below.

[24] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 122, para. 55; the Court went on, in the same paragraph, to specify that "In particular ... the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*". See also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77 ("…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"); *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at p. 29 ("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"); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 97 ("...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"); P. Tomka, 'Custom and the International Court of Justice', *The Law & Practice of International Courts and Tribunals*, 12 (2013), 195, 197 ("In fact, the Court has never abandoned its view, firmly rooted in the wording of the Statute, that customary international law is 'general practice accepted as law'").

[25] *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 47 (Joint Separate Opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda).

would obviously be a misnomer, since practice constitutes precisely the main *differentia specifica* of that kind of international law. On the other hand, without the subjective element of acceptance of the practice as law the difference between international custom and simple regularity of conduct (*usus*) or other non-legal rules of conduct would disappear".[26]

24. The two-element approach is widely supported in State practice. To mention just a few recent examples, Rwanda, the United States and Uruguay have stated, in bilateral investment treaties, "their shared understanding" that customary international law "… results from a general and consistent practice of States that they follow from a sense of legal obligation".[27] The Netherlands and The United Kingdom have similarly stated that "… the two constituent elements of customary international law [are] the widespread and consistent practice of States (State practice) and the belief that compliance is obligatory under a rule of law (*opinio juris*)".[28] Such a position was adopted by Member States of the European Union as a whole in the *European Union Guidelines on promoting compliance with international humanitarian law*, which define customary international law as a source of international law that "is formed by the practice of States, which they accept as binding upon them".[29] The Supreme Court of Singapore has ruled that "extensive and virtually uniform practice by all States … together with *opinio juris*, is what is needed for the rule in question to become a rule of CIL",[30] and in Slovenia the Constitutional Court has likewise held that that norms "can become compulsory as customary international law when they are applied by a great number of States with the intention of respecting a rule in international law".[31] The Constitutional Court and Supreme Court of the Czech Republic have also recognized the two elements as essential,[32] as did the New Zealand Court of Appeals, which observed that "customary international law, the (unwritten) rules of international law binding on all States … arise when States follow certain practices generally and consistently out of a sense of legal obligation".[33] That both general practice and acceptance as law are required for the formation and identification of customary international law has been acknowledged, moreover, by, among others, Austria, India, Israel, Iran, Malaysia, the

[26] K. Wolfke, *supra* note 6, at 40-41.

[27] Annex A to the *Treaty between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment* (2008) and Annex A to the *Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment* (2005), in which the parties "confirm their shared understanding that 'customary international law' generally and as specifically referenced in Article 5 and Annex B results from a general and consistent practice of States that they follow from a sense of legal obligation".

[28] Brief by the Governments of the United Kingdom of Great Britain and Northern Ireland and The Kingdom of The Netherlands as Amici Curiae in support of the Respondents in the case of *Esther Kiobel et al v Royal Dutch Petroleum Co et al* (3 February 2012) before the United States Supreme Court, 8, 11.

[29] *Updated European Union Guidelines on promoting compliance with international humanitarian law* (2009/C 303/06), section 7.

[30] *Yong Vui Kong v Public Prosecutor*, [2010] 3 S.L.R. 489 [2010] SGCA 20 (Supreme Court of Singapore — Court of Appeal, 14 May 2010), paras. 96-98.

[31] Decision No. U-I-146/07, dated 13 November 2008, para. 19; see also Case No. Up-13/99, decision of 8 March 2001, para. 14.

[32] File no. II. ÚS 214/98 (30 January 2001) and file no. 11 Tcu 167/2004 (16 December 2004), respectively.

[33] *Attorney General v. Zaouvi*, CA20/04, Judgment (30 September 2004), para. 34.

Nordic countries, Portugal, Russia, South Africa, and Vietnam, in their interventions in the Sixth Committee debates on the 2012 and 2013 reports of the International Law Commission.[34] In recent pleadings before the International Court of Justice, States continue to base their arguments upon the two-element approach.[35]

25. Other international courts and tribunals likewise accept that the identification of rules of customary international law requires an inquiry into the two elements. As noted in the first report, notwithstanding the specific contexts in which these other courts and tribunals work, overall there is substantial reliance on the approach and case law of the Permanent Court of International Justice and the International Court of Justice, including the constitutive role attributed to the two elements of State practice and *opinio juris*.[36]

26. Most authors also adopt the two-element approach. It is to be found in both textbooks and treatises on public international law[37] and in monographs on or dealing with custom, whether

[34] The statements by the various States during these debates may be found on the United Nations' PaperSmart Portal, available online at http://www.un.org/en/ga/sixth/.

[35] For example, in *Jurisdictional Immunities of the State (Germany v. Italy)* Germany argued that "No general practice, supported by *opinio juris*, exists as to any enlargement of the derogation from the principle of state immunity in respect of violations of humanitarian law committed by military forces during an armed conflict", and Italy, who was not relying on customary international law, suggested in its Counter-Memorial that "The question at issue in the present case is not whether there is a widespread and consistent practice, supported by the *opinio juris*, pointing to the existence of an international customary rule permitting in general terms the denial of immunity in cases involving gross violations of international humanitarian law or human rights law" (Memorial of the Federal Republic of Germany (12 June 2009), para. 55; Counter-Memorial of Italy (22 December 2009), para. 4.108). For another recent example, see the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* case, in particular *Questions put to the Parties by Members of the Court at the close of the public hearing held on 16 March 2012: compilation of the oral and written replies and the written comments on those replies*, pp. 20-48, especially at pp. 24-25 (Belgium) - "Question put to Belgium - Senegal being invited to comment - by Judge Greenwood at the end of the public sitting of 16 March 2012". In other instances as well, just as States have not argued for the existence of a rule of customary international law based on the presence of either practice or *opinio juris* alone, they have not attempted to question the existence of an alleged rule of customary international law arguing that the two-element approach is theoretically flawed.

[36] A/CN.4/663, *supra* note 1, at paras. 66-82.

[37] See, for example, R. Jennings, A. Watts (eds.) *Oppenheim's International Law*, vol. I, 9th edition (Longmans, 1991), 25-31; A. Cassese, *International Law*, 2nd edition (Oxford University Press, 2005), 153-169 ("the fundamental elements constituting custom: State practice (*usus* or *diuturnitas*) and the corresponding views of States (*opinio juris* or *opinio necessitatis*))"; P.-M. Dupuy, Y. Kerbrat, *Droit international public*, 10th edition (Dalloz, 2010), 364 ("La bivalence du phénomène coutumier trouve un écho direct dans la représentation qu'en donnent les différents courants de la doctrine, aussi bien objectiviste que volontariste. Pour les uns comme pour les autres, confortés par le texte précité de l'article 38. b du statut de la Cour de La Haye (CPJI puis CIJ), la réunion de deux éléments est nécessaire pour que naisse la coutume en tant que règle de droit"); M. Bos, *A Methodology of International Law* (North-Holland, 1984), 109 ("for a custom to exist one merely has to ascertain the existence of the alleged factual aspects of it, i.e. its material and psychological components, and to put these to the test of the definition of custom"); V. Lowe, *International Law* (Oxford University Press, 2007), 36-63; M.N. Shaw, *International Law*, 6th edition (Cambridge University Press, 2008), 72-93 ("it is possible to detect two basic elements in the make-up of a custom. These are the material facts, that is, the actual behaviour of states and the psychological or subjective belief that such behaviour is law"); L. Damrosch, L. Henkin, S. Murphy and H. Smit, *International Law: Cases and Materials*, 5th edition (West, 2009), 59 ("What is clear is that the definition of custom comprises two distinct elements …"); P. Dailler, M. Forteau and A. Pellet, *Droit international public*, 8th edition (L.G.D.J, 2009), 352-379 ("Il est certes admis par tous que le processus coutumier n'est parfait que par la réunion de deux elements"); S. Murphy, *Principles of*

specifically on sources[38] or on some other topic of international law.[39] For example, *Oppenheim* states that "the terms of Article 38(1)(b) … make it clear that there are two essential elements of custom, namely practice and *opinio juris*".[40] And the recent edition of *Brierly* states that "[c]ustom in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it as obligatory … in the words of Article 38(1)(b) of the Statute, we must examine whether the alleged custom shows a 'general practice accepted as law'".[41]

27. As was noted in the first report, certain authors have sought to devise alternative approaches, often emphasising one constituent element over the other, be it practice or *opinio juris*, or even excluding one element altogether.[42] This was also the case, to a degree, with the work of the International Law Association that culminated in its *London Statement* of 2000,[43] which tended to downplay the role of the subjective element.[44] While such writings are always interesting and provocative, and have been (and should be) duly taken into account, it remains the case that they do not seem to have greatly influenced the approach of States or courts. The two-element approach remains dominant.[45]

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*International Law*, 2nd edition (West, 2012), 92-101 ("States through their practice, and international lawyers through writings and judicial decisions, have agreed that customary international law exists whenever two key requirements are met: (1) a relatively uniform and consistent state practice regarding a particular matter; and (2) a belief among states that such practice is legally required"); A. Clapham, *Brierly's Law of Nations: An Introduction to the Role of Law in International Relations*, 7th edition (Oxford University Press, 2012), 57-63; J. Crawford, *Brownlie's Principles of Public International Law*, 8th edition (Oxford University Press, 2012), 23-30 ("the existence of custom is … the conclusion of someone (a legal adviser, a court, a government, a commentator) as to two related questions: (a) is there a general practice; (b) is it accepted as international law?"); M. Diez de Velasco (C. Escobar Hernández, ed.), *Instituciones de derecho internacional public*, 18th edition (Tecnos, 2013), 136-141 ("una prática seguida por los sujetos internacionales e generalmente aceptada por éstos como derecho"); J. Klabbers, *International Law* (Cambridge University Press, 2013), 26-34 ("two main requirements: there must be a general practice, and this general practice must be accepted as law …."); C. Santulli, *Introduction au droit international* (Pedone, 2013), 45 ("la doctrine classique des deux éléments de la coutume: la pratique, qui constitue l'élément materiel, et l'acceptation ou *opinio juris*, qui constitue l'élément volontaire (ou "psychologique")").

[38] See, for example, L. Millán Moro, *La "Opinio Iuris" en el Derecho Internacional Contemporaneo* (Editorial Centro de Estudios Ramon Areces, 1990); H. Thirlway, *The Sources of International Law* (Oxford University Press, 2014), Chapter III ("The traditional criteria in international law for the recognition of a binding custom are that there should have been sufficient State practice … and that this should have been accompanied by, or be backed by, evidence of what is traditionally called *opinio juris* or *opinio juris sive necessitatis*").

[39] For example, O. Corten, *Le droit contre la guerre*, 2nd edition (Bruylant, 2014), Chapter 1; for an earlier edition in English, see O. Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart, 2010), Chapter 1.

[40] R. Jennings, A. Watts (eds.), *supra* note 37, at 27.

[41] A. Clapham, *supra* note 37, at 57.

[42] See A/CN.4/663, *supra* note 1, at paras. 97-101.

[43] *London Statement of Principles Applicable to the Formation of General Customary International Law*, with commentary: Resolution 16/2000 (Formation of General Customary International Law), adopted at the sixty-ninth Conference of the International Law Association, in London, on 29 July 2000 (hereinafter: '*ILA London Statement of Principles*'); see also A/CN.4/663, *supra* note 1, at paras. 89-91.

[44] The final report referred to "the alleged necessity for the 'subjective' element" (*ILA London Statement of Principles*, Introduction, para. 10, as well as Part III).

[45] See also O. Sender, M. Wood, 'The Emergence of Customary International Law: Between Theory and Practice', in Y. Radi, C. Brölmann (eds.), *Research Handbook on the Theory and Practice of International Law-Making* (Edward Elgar, *forthcoming*) ("the two-element approach has … enabled the formation and identification of rules of international law that

28. The first report raised the question whether there might be different approaches to the identification of rules of customary international law in different fields.[46] For example, there have been suggestions in the literature,[47] occasionally echoed in practice,[48] that in such fields as international human rights law, international humanitarian law and international criminal law, among others, one element may suffice in constituting customary international law, namely *opinio juris*.[49] However, the better view is that this is not the case.[50] There may, on the other hand, be a difference in application of the two-element approach in different fields (or, perhaps more precisely, with respect to different types of rules): for example, it may be that "for purposes of... [a specific]

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have for the most part won wide acceptance, while allowing customary international law to retain its characteristic flexibility. It has proven to be both useful and stable, and it remains authoritative through the ICJ Statute, which is binding on 193 States. Other theories on how a rule of customary international law emerges are, essentially, policy approaches; as such they may be instructive, but they remain policy, not law.").

[46] A/CN.4/663, *supra* note 1, at para. 19.

[47] A/CN.4/663, *supra* note 1, at footnotes 32-34; see also R. Kolb, 'Selected Problems in the Theory of Customary International Law', *Netherlands International Law Review*, 50 (2003), 119,128 ("… the time has come to put *à plat* the theory of custom and to articulate different types (and thus elements) of it in relation to different subject matters and areas. There is not one international custom; there are many international customs whose common family-bond is still to be shown. Consequently, a new map of international customary law has to be drawn, reflecting the various contours of international life, instead of artificially pressing the growing diversity of that experience into the Procrustean bed of traditional practice and *opinio juris*"); A. Cassese, *supra* note 37, at 160-161 ("*Usus* and *opinio*, as elements of customary law, play a different role in a particular branch of international law, the humanitarian law of armed conflict … In consequence [of the wording of the Martens Clause] it is logically admissible to infer (and is borne out by practice) that the requirement of State *practice* may not need to apply to the formation of a principle or a rule based on the laws of humanity or the dictates of public conscience …").

[48] See, for example, *Prosecutor v. Kupreškić*, Case No. IT-95-16-T (ICTY Trial Chamber), 14 January 2000, para. 527 ("principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallizing as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law."); see also Appeal Judgment of the Extraordinary Chambers in the Courts of Cambodia (Supreme Court Chamber), Case number 001/18-07-2007-ECCC/SC (3 February 2012), para. 93 ("With respect to customary international law, the Supreme Court Chamber considers that in evaluating the emergence of a principle or general rule concerning conduct that offends the laws of humanity or the dictates of public conscience in particular, the traditional requirement of 'extensive and virtually uniform' state practice may actually be less stringent than in other areas of international law, and the requirement of *opinio juris* may take pre-eminence over the *usus* element of custom").

[49] It has similarly been suggested that "a sliding scale" by which consistent State practice may establish a rule of customary international law even without any evidence of acceptance of the practice as law, and a clearly established acceptance as law may establish a rule of customary international law without any evidence of a settled practice, could be utilized "depend[ing] on the activity in question and on the reasonableness of the asserted customary rule": See F.L. Kirgis, Jr., 'Custom on a Sliding Scale', *American Journal of International Law*, 81 (1987), 146-151 (the model also refers to situations where not "much" of either element, respectively, exists).

[50] See also the Statements on behalf of China, Israel, Iran, Poland, the Russian Federation, Singapore and South Africa in the 2013 Sixth Committee debate on the work of the International Law Commission (available at http://www.un.org/en/ga/sixth), all calling for a unified approach to be applied; T. Treves, 'Customary International Law', in *Max Planck Encyclopedia of Public International Law* (2012), para. 3 ("The essential characteristic which customary international law rules have in common is the way they have come into existence and the way their existence may be determined"); J. Kammerhofer, 'Orthodox Generalists and Political Activists in International Legal Scholarship', in M. Happold (ed.), *International Law in a Multipolar World* (Routledge, 2012), 138-157.

case the most pertinent State practice"[51] would be found in one particular form of practice that would be given "a major role".[52] But the underlying approach is the same: both elements are required. Any other approach risks artificially dividing international law into separate fields, which would run counter to the systemic nature of international law.[53] In any case, as will be illustrated below, it is often difficult to consider the two elements separately.[54]

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[51] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99 at p. 132, para. 73.

[52] *Ibid*., at p. 162 (Separate Opinion of Judge Keith), para. 4. See, for example, *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 582, at p. 614, para. 88 ("in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as the treaties for the promotion and protection of foreign investments, and the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, which created an International Centre for Settlement of Investment Disputes (ICSID), and also by contracts between States and foreign investors. In that context, the role of diplomatic protection somewhat faded, as in practice recourse is only made to it in rare cases where treaty régimes do not exist or have proved inoperative"); *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (ICTY Appeals Chamber), 2 October 1995, para. 99 ("Before pointing to some principles and rules of customary law that have emerged in the international community for the purpose of regulating civil strife, a word of caution on the law-making process in the law of armed conflict is necessary. When attempting To ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions"); *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (ICTY Appeals Chamber), 15 July 1999, para. 194. See also B. Conforti, B. Labella, *An Introduction to International Law* (Martinus Nijhoff Publishers, 2012), 32 ("The weight given to the acts depends on the content of the international customary rule. For example, treaties have great importance in matters of extradition, while domestic court decisions have more weigh in questions of the jurisdictional immunities of foreign States and foreign State organs, etc."). Cf. *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 175 ,176 ,178 (Dissenting Opinion of Judge Tanaka) ("To decide whether these two factors in the formative process of a customary law exist or not, is a delicate and difficult matter … The appraisal of factors must be relative to the circumstances and therefore elastic; it requires the teleological approach ... In short, the process of generation of a customary law is relative in its manner according to the different fields of law, as I have indicated above. The time factor, namely the duration of custom, is relative; the same with factor of number, namely State practice. Not only must each factor generating a customary law be appraised according to the occasion and circumstances, but the formation as a whole must be considered as an organic and dynamic process. We must not scrutinize formalistically the conditions required for customary law and forget the social necessity, namely the importance of the aims and purposes to be realized by the customary law in question").

[53] As was stressed at the outset of the 2006 Fragmentation Study, "International law is a legal system": *ILC Report 2006*, para. 251, Conclusion (1). In addition, "[w]hen courts ignore the traditional requirements for customary international law or fail to subject them to any strict scrutiny they risk giving tacit weight to what has been called 'the rush to champion new rules of law' … [In such cases] [s]cant regard is given to the niceties of state consent or the likelihood of compliance with such easily pronounced norms" (citations omitted): A. Boyle, C. Chinkin, *The Making of International Law* (Oxford University Press, 2007), 285.

[54] See also H. Thirlway, *supra* note 38, at 62 ("Practice and *opinio juris* together supply the necessary information for it to be ascertained whether there exists a customary rule, but the role of each – practice and *opinio* – is not uniquely focused; they complement one another"); *ILA London Statement of Principles*, at 7 ("It is in fact often difficult or even impossible to disentangle the two elements").

29. All evidence must be considered in light of its context.[55] In assessing the existence or otherwise of the two constituent elements, be it by reviewing primary evidence or by looking to subsidiary means, great care is required. While "evidence can be taken [from a variety of sources]… the greatest caution is always necessary."[56] Much depends on the particular circumstances in determining what the relevant practice actually is, and to what extent it is indeed accepted as law,[57] and different weight may be given to different evidence. For example, "[p]articularly significant are manifestations of practice that go against the interest of the State from which they come, or that entail for them significant costs in political, military, economic, or other terms, as it is less likely that they reflect reasons of political opportunity, courtesy, etc."[58] In a similar manner, the care with which a statement is made is a relevant factor; less significance may be given to off-the-cuff remarks made in the heat of the moment.

30. Ascertaining whether a rule of customary international law exists is a search for "a practice, which… has gained so much acceptance among States that it may now be considered a requirement under general international law".[59] Such an exercise may be an "arduous and complex process",[60] not least because "any alleged rule of customary law must [of course] be proved to be a valid rule of international law, and not merely an unsupported proposition".[61] As elaborated below, for this task "caution and balance are indispensable, not only in determining the right mix of what States say and do, want and believe, but also in being aware of the ambiguities with which many elements of practice are fraught".[62]

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[55] See also *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952*, p. 176, at p. 200 ("There are isolated expressions to be found in the diplomatic correspondence which, if considered without regard to their context, might be regarded as acknowledgements 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 …").

[56] J.L. Kunz, 'The Nature of Customary International Law', *American Journal of International Law*, 47 (1953), 662, 667.

[57] See also T. Treves, *supra* note 50, at para. 28 ("[manifestations of practice] help in ascertaining what is customary international law in a given moment. In performing such a task, caution and balance are indispensable, not only in determining the right mix of what States say and do, want and believe, but also in being aware of the ambiguities with which many elements of practice are fraught").

[58] T. Treves, *supra* note 50, at para. 30.

[59] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 83, para. 204.

[60] E. Petrič, 'Customary International Law in the Case Law of the Constitutional Court of the Republic of Slovenia' (to be published by the Council of Europe). See also the Brief by the Governments of the United Kingdom of Great Britain and Northern Ireland and The Kingdom of The Netherlands as *Amici Curiae* in support of the Respondents in the case of *Esther Kiobel et al v Royal Dutch Petroleum Co et al*, *supra* note 28, at 13 ("The methodology of determining what constitutes a new rule of international law is there-fore… no straight-forward matter and requires painstaking analysis to establish whether the necessary elements of State practice and *opinio juris* are present."); *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 100 (Separate Opinion of Judge De Castro) ("It is not easy to prove the existence of a general practice accepted as law"); J.L. Kunz, *supra* note 56, at 667 ("The ascertainment whether the two conditions of the custom procedure have been fulfilled in a concrete case … is a difficult task").

[61] M.N. Shaw, *supra* note 37, at 144.

[62] T. Treves, *supra* note 50, at para. 28. See also A. Boyle, C. Chinkin, *supra* note 53, at 279 ("applying the criteria for establishing custom is not a scientific process, the accuracy of which can be measured. Rather it requires an evaluation of the

31. In light of the above, the following draft conclusions are proposed:

**Draft Conclusion 3**
***Basic approach***

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

**Draft Conclusion 4**
***Assessment of evidence***

**In assessing evidence for a general practice accepted as law, regard must be had to the context including the surrounding circumstances.**

## V. A general practice

32. Practice,[63] often referred to as the 'material' or 'objective' element, plays an "essential role" in the formation and identification of customary international law.[64] It may be seen as the 'raw material' of customary international law, as the latter emerges from practice, which "both defines and limits it".[65] Such practice consists of "material and detectable"[66] acts of subjects of international law, and it is these "instances of conduct"[67] that may form "a web of precedents"[68] in which a pattern of conduct may be observed.

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facts and arguments"); P.W. Birnie, A.E. Boyle, *International Law and the Environment*, 2nd edition (Oxford University Press, 2002), 16 ("the identification of customary law has always been, and remains, particularly problematical, requiring the exercise of skill, judgment, and considerable research").

[63] Practice has also been referred to as, *inter alia* and at times interchangeably, 'usage', '*usus*', '*consuetude*', or '*diuturnitas*'.

[64] As the International Court observed in *Military and Paramilitary Activities in and against Nicaragua*, "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" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at pp. 97-98, para. 184).

[65] See Judge Sir Percy Spender's Dissenting Opinion in *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 99 ("The proper way of measuring the nature and extent of any such custom, if established, is to have regard to the practice which itself both defines and limits it. The first element in a custom is a constant and uniform practice which must be determined before a custom can be defined").

[66] Francois Gény, *Méthode d'interprétation et sources en droit privé positif* (1899), section 110) (referring to 'usage' as a constitutive element of customary international law, quoted in A.A. D'Amato, *The Concept of Custom in International Law* (Cornell University Press, 1971), 49).

[67] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 108. See also Weisburd's definition: "various types of activity … practice means just that"

33. *From 'a general practice' to 'State practice'*. States continue to be the primary subjects of international law.[69] State practice plays a number of important roles in international law, including subsequent practice as an element (or means) for the interpretation of treaties under articles 31.3(b) and 32 of the Vienna Convention on the Law of Treaties.[70] It is the conduct of States which is of primary importance for the formation and identification of customary international law, and the material element of customary international law is thus commonly referred to as 'State practice', that is, conduct which is attributable to States.[71] "[T]he actual practice of States… is expressive, or creative, of customary rules".[72] As the International Court has consistently made clear, it is "State practice from which customary law is derived".[73]

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(A.M. Weisburd, 'Customary international Law: The Problem of Treaties', *Vanderbilt Journal of Transnational* Law, 21 (1988), 1, 7).

[68] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 329 (Separate Opinion of Judge Ammoun). See also *Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949*, p. 4, at pp. 83, 99 (Dissenting Opinion by Judge Azevedo) ("Custom is made up of recognized precedents … [Customary international law requires] significant or constant facts which could justify the assumption that States have agreed to recognize a customary [rule]"); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 175 (Dissenting Opinion of Judge Tanaka) (referring to "a usage or a continuous repetition of the same kind of acts … It represents a quantitative factor of customary law"); B. Stern, 'Custom at the Heart of International Law', *Duke Journal of Comparative and International Law*, 11 (2001), 89, 95 ("it is very generally admitted that the material element is constituted by the repetition of a certain number of facts for a certain length of time, these different variables being modulated according to different situations").

[69] See also C. Walter, 'Subjects of International Law', in *Max Planck Encyclopedia of Public International Law* (2012), para. 5.

[70] Currently under consideration by the Commission in the topic 'Subsequent agreements and subsequent practice in relation to interpretation of treaties': see in particular draft conclusions 4(2) and 5: *ILC Report 2013*. See also A.M. Weisburd, 'The International Court of Justice and the Concept of State Practice', *University of Pennsylvania Journal of International Law*, 31 (2009), 295, 299 (observing that "The significance of State practice in international law is difficult to overstate"); W.J. Aceves, 'The Economic Analysis of International Law: Transaction Cost Economics and the Concept of State Practice', *University of Pennsylvania Journal of International Economic Law*, 17 (1996), 995-1068; C. Parry, 'The Practice of States', *Transactions of the Grotius Society*, 44 (1958) 145, 165 ("One looks to the practice of States, that is to say, for evidence of new rules on new topics of international law, or of changes in the earlier law").

[71] See also M. Wood, O. Sender, 'State Practice', in *Max Planck Encyclopedia of Public International Law* (2014 update); Y. Dinstein, 'The Interaction between Customary Law and Treaties', 322 *Recueil des Cours* (2006), 242, 266 ("The general practice constituting the *font et origo* of customary international law is, in essence, that of States"); M.H. Mendelson, 'The Formation of Customary International Law', 272 *Recueil des Cours* (1998), 155, 201 ("what is conveniently and traditionally called State practice … is, more precisely, the practice of subjects of international law"). On the historical development of the doctrine of State practice as the basis of customary international law, see A. Carty, 'Doctrine versus State Practice', in B. Fassbender, A. Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012), 972-996.

[72] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 46, para. 43.

[73] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 143, para. 101. When used, the term 'international practice' has thus referred to the practice of States: See, for example, *Interpretation of Peace Treaties (Second Phase), Advisory Opinion: I.C.J. Reports 1950*, p. 221, at p. 242 (Dissenting opinion of Judge Read); *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 261 (Separate Opinion of Judge Padilla Nervo), and p. 344 (Dissenting Opinion of Judge Riphagen); *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 83 (Separate Opinion of Judge De Castro); *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 236 (Dissenting Opinion of Judge Skubiszewski); *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432, at p. 554 (Dissenting Opinion of Judge Ranjeva); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at pp. 75, 76 (Joint Separate Opinion of Judges Higgins, Kooijmans and

34. *Attribution of practice to a State*. As in other cases, such as State responsibility and subsequent practice in relation to the interpretation of treaties, for practice to be relevant for the formation of customary international law it must be attributable to the State.[74] For this purpose, the actions of all branches of government (whether exercising executive, legislative, judicial or other functions) may be relevant.[75] The conduct of *de facto* organs of a State, that is, "those individuals or entities which are to be considered as organs of a State under international law, although they are not so characterized under municipal law",[76] may also count as State practice.[77] This may be so "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".[78]

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Buergenthal); *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 170 (Separate Opinion of Judge Keith); *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 422, at p. 457.

[74] See the Commission's *Articles on the Responsibility of States for Internationally Wrongful Acts* (2001), Part One, Chapter II; and the Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, draft conclusion 5. See also I. Brownlie, 'Some Problems in the Evaluation of the Practice of States as an Element of Custom', in *Studi di diritto internazionale in onore di Gaetano Arangio Ruiz*, vol. I (2004), 313, 318 (referring to the 2001 Articles (4, 5, and 8) when suggesting that "[n]o doubt analogous principles should apply to the identification of organs and persons competent to produce statements or materials which qualify as State practice"). It is not necessarily the case that the rules on attribution will be identical in different contexts; see, for example, H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, vol. II (Oxford University Press, 2013), 1190 ("The practice supportive of the existence of a rule of customary law must be State practice, that is to say the practice of organs of the State, though the test is not the same as that for establishing the responsibility of a State").

[75] Article 4 of the Articles on the Responsibility of States for internationally wrongful acts states that "[t]he conduct of any state organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other function ...": J. Crawford, *State Responsibility. The General Part* (Cambridge University Press, 2013), Part II (Attribution to the state), especially pp. 113-126. See also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at p. 87 ("According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State"); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 168, at p. 242; *2 BvR 1506/03*, Order of the Second Senate of 5 November 2003 (German Federal Constitutional Court), para. 51 ("For this purpose [consulting the relevant state practice], the Court focuses on the conduct of the organs of state authority that are competent for legal relations under international law; as a general rule, this will be the government or the head of state. Apart from this, state practice can also result from the acts of other organs of state authority such as acts of the legislature or of the courts to the extent that their conduct is directly relevant under international law"); M. Bos, *supra* note 37, at 229 ("practice can be anything within the scope of a State's jurisdiction. All actions or, more generally, forms of behaviours so qualified are eligible to become the basis of a customary rule"); *ILA London Statement of Principles*, at 17. The older position, according to which only the actions of those designated to represent the State externally ('international organs of a State') may count as State practice (voiced, for example, by K. Strupp, 'Regles générales du droit de la paix', 47 *Recueil des Cours* (1934), 313-315) is no longer generally accepted.

[76] P. Palchetti, 'De Facto Organs of a State', in *Max Planck Encyclopedia of Public International Law* (2012), para. 2.

[77] See also K. Zemanek, 'What is 'State Practice' and who Makes It?', in U. Beyerlin et al (eds.), *Festschrift für Rudolf Bernhardt* (Springer-Verlag, 1995), 289, 305 ("the constitutional authority of the organs performing the acts is immaterial as long as the conduct appears to foreign States, assessing it with due diligence and good faith, as attributable to the State in question and expressing or implementing its attitude towards a rule of customary law").

[78] See Article 4 of the *Articles on State Responsibility*. The ILA Committee's suggestion that in States organized under a federal structure, "[t]he activities of territorial governmental entities within a State which do not enjoy separate international legal personality do not as such normally constitute State practice, unless carried out on behalf of the State or adopted ('ratified') by it" (*ILA London Statement of Principles*, at 16) does not seem accurate.

35. One significant difficulty is ascertaining the practice of States. The dissemination and location of practice remain an important practical issue in the circumstances of the modern world, notwithstanding the development of technology and information resources.[79] As indicated in section VII below, this issue – which the Commission considered several decades ago under the title 'Ways and means of making the evidence of customary international law more readily available' – will be revisited in the Special Rapporteur's third report.

36. The following draft conclusions are proposed:

**Draft Conclusion 5**
***Role of practice***

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

**Draft Conclusion 6**
***Attribution of conduct***

**State practice consists of conduct that is attributable to a State, whether in the exercise of executive, legislative, judicial or any other function.**

37. *Manifestations of practice*. It has occasionally been suggested that 'State practice' should only qualify as such for the purposes of customary international law when it relates to a type of situation falling within the domain of international relations,[80] or to some actual incident or episode of claim-making (as opposed to assertions *in abstracto*).[81] This approach is too narrow; it may indeed be said that "[i]n the international system … every act of state is potentially a legislative act".[82] Such acts

[79] S. Rosenne, *Practice and Methods of International Law* (Oceana Publications, 1984), 56 ("The evidence of customary law [remains] … scattered, elusive and on the whole unsystematic").

[80] J.L. Kunz, *supra* note 56, at 666; *ILA London Statement of Principles*, at 9 (suggesting correctly, however, that "[w]hether a matter concerns a State's international legal relations, or is solely a matter of domestic jurisdiction, depends on the stage of development of international law and relations at the time"); S. Rosenne, *ibid.*, at 56.

[81] See, for example, H.W.A. Thirlway (writing in 1972), *International Customary Law and Codification* (Sijthoff, 1972), 58 ("State practice as the material element in the formation of custom is, it is worth emphasizing, *material*: it is composed of acts by States with regard to a particular person, ship, defined area of territory, each of which amounts to the assertion or repudiation of a claim relating to a particular apple of discord").

[82] A.M. Weisburd, *supra* note 67, at 31. See also I. Brownlie, *supra* note 74, at 313-314 (suggesting, *inter alia*, that "the materials not related to sudden crises are more likely to represent a mature and consistent view of the law"); V.D. Degan, *Sources of International Law* (Martinus Nijhoff, 1997), 149 (noting that while some older scholars had confined the evidence of custom to those able to bind the State internationally, "[n]evertheless, … customary rules can emerge from concordant legislative or other unilateral acts of a number of States, or that even some decisions of municipal courts can influence practice").

may comprise both physical and verbal (written and oral) conduct: views to the contrary, according to which "claims themselves, although they may *articulate* a legal norm, cannot constitute the material component of custom",[83] are too restrictive.[84] Accepting such views could also be seen as encouraging confrontation and, in some cases, even the use of force.[85] In any event, it appears undeniable that "the method of communication between States has widened. The beloved 'real' acts

[83] A.A. D'Amato, *supra* note 66, at 88 (explaining that "a state has not done anything when it makes a claim; until it takes enforcement action, the claim has little value as a prediction of what the state will actually do"). See also *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, at p. 191 (Dissenting Opinion of Judge Read) ("[Customary international law] cannot be established by citing cases where coastal States have made extensive claims, but have not maintained their claims by the actual assertion of sovereignty over trespassing foreign ships … The only convincing evidence of State practice is to be found in seizures, where the coastal State asserts its sovereignty over the waters in question by arresting a foreign ship and by maintaining its position in the course of diplomatic negotiation and international arbitration"); A. D'Amato, 'Custom and Treaty: A Response to Professor Weisburd', *Vanderbilt Journal of Transnational Law*, 21 (1988), 459, 465 ("what governments *say* is at best *a theory about* international law, and not international law itself"); K. Wolfke, *supra* note 6, at 42 ("customs arise from acts of conduct and not from promises of such acts"); G.J.H. van Hoof, *Rethinking the Sources of International Law* (Kluwer Law and Taxation Publishers, 1983), 108. For a dated and extreme position see Conradie J in *S v Petane*, 1988 (3) SA 51 (C) at 59F-G, 61D-E (Cape Provincial Division, South Africa) ("customary international law is founded on practice, not on preaching … One must … look for state practice at what states have done on the ground in the harsh climate of a tempestuous world, and not at what their representatives profess in the ideologically overheated environment of the United Nations where indignation appears frequently to be a surrogate for action").

[84] See also M.E. Villiger, *Customary International Law and Treaties*, 2nd edition (Kluwer Law International, 1997), 19-20 ("there is much merit in qualifying verbal acts as State practice. First, and most important…States themselves as well as courts regard comments at conferences as constitutive of State practice"); C. Parry, *supra* note 70, at 168 ("very often there is very little difference between what a State does and what it says because its actions may consist only in pronouncements"); M. Akehurst, 'Custom as a Source of International Law', *British Yearbook of International Law*, 47 (1977), 1, 53 ("State practice means any act or statement by a State from which views about customary law can be inferred"); R. Müllerson, 'On the Nature and Scope of Customary International Law', *Austrian Review of International & European Law*, 2 (1997), 341, 342 ("even if one would be eager to make a clear-cut distinction between 'actual' practice and other forms of practice (non-actual?) it is not easy and sometimes it is simply impossible"); R. Bernhardt, 'Custom and Treaty in the Law of the Sea', 205 *Recueil des Cours* (1987), 247, 265, 267 ("It has also sometimes been said that only factual deeds and not words are relevant State practice … Words, declarations, communications, even signals must be included in the great variety of practices which can be constitutive for customary law … it is legally unacceptable to exclude communications, written and spoken words, from the world of State practice. There is no *numerus clausus* of State acts and State practice which are exclusively necessary or decisive for the creation and coming into force of customary law. On the other hand, it must be admitted that verbal declarations cannot create customary rules if the real practice is different"); K. Skubiszewski, 'Elements of Custom and the Hague Court', *ZaöRV*, 31 (1971), 810, 812 ("the practice of States is built of their actions and reactions. It is 'a process of reciprocal interaction'. This does not mean that the picture of State practice is composed exclusively of actions *sensu stricto*. Words and inaction are also evidence of the conduct of States" (citations omitted)); R.R. Baxter, 'Multilateral Treaties as Evidence of Customary International Law', *British Yearbook of International Law*, 41 (1965-66), 275, 300 ("The firm statement by the State of what it considers to be the rule is far better evidence of its position than what can be pieced together from the actions of that country at different times and in a variety of contexts"). It is also worthy to recall in this context the words of the *ILA London Statement of Principles*, which accepts that "[v]erbal acts, and not only physical acts, of States count as State practice", at 13-14: "When defining State practice … it is necessary to take account of the distinction between what conduct counts as State practice, and the weight to be given to it … Discussion of the objective element in custom has been bedeviled by a failure to make this distinction").

[85] See also R. Müllerson, 'The Interplay of Objective and Subjective Elements in Customary Law', in K. Wellens (ed.), *International Law: Theory and Practice – Essays in Honour of Eric Suy* (Martinus Nijhoff Publishers, 1998), 161, 162 ("… if only seizures, invasions, genocide and other similar acts were state practice then in some areas of international law (for example international humanitarian law) only so-called rogue states would contribute to the development of customary law … it would [also] increase even more the role of powerful states in the process of international law-making. Finally … in many [] areas of international law only a few states may have such ['actual'] practice or states may become involved in 'actual' practice only occasionally.").

become less frequent because international law, and the Charter of the UN in particular, place more and more restraints on States in this respect".[86] Moreover, "the term 'practice' (as per Article 38 of the ICJ Statute) is general enough – thereby corresponding with the flexibility of customary law itself – to cover any act or behaviour of a State, and it is not made entirely clear in what respect verbal acts originating from a State would be lacking, so that they cannot be attributed to the behaviour of that State".[87] At the same time, as will be suggested below, caution is needed in assessing what States (and international organizations) say: words cannot always be taken at face value.

38. Once both physical and verbal acts are accepted as forms of practice for purposes of identification of customary international law, it appears that "distinctions between 'constitutive acts' and 'evidence of constitutive acts'… are artificial and arbitrary".[88] Such distinctions will be avoided in this report. As was stated in the Commission's debate in 2013, "The material [that needs to be consulted to identify customary international law] can be evidence of the existence of the customary rule and in other situations it can also be the source of practice … itself".[89] Accordingly, "the evidence [for ascertaining whether a rule of customary international law has emerged or otherwise] may take a variety of forms, *including* conduct – What is significant is that the source must be reliable and unequivocal, and should reflect the consistent position of the State concerned."[90]

39. Practice (and evidence thereof) takes a great variety of forms, as "in their interaction and communication ... States do not confine themselves to dogmatically determined types of acts. They

[86] K. Zemanek, *supra* note 77, at 306.
[87] M.E. Villiger, *supra* note 84, at 21.
[88] K. Zemanek, *supra* note 77, at 292 (explaining that "one may disguise the other" and adding that "Furthermore, one might never know of a 'constitutive' act if it were not recorded"). See also A.A. D'Amato, *supra* note 66, at 268 ("… a rule of law is not something that exists in the abstract, nor is *opinio juris* something that we can lay our hands upon. Rules of law and states of mind appear *only* as manifestations of conduct; they are generalizations we make when we find recurring patterns of behavior or structured legal arguments. If the term 'evidence' must be used, we may say that rules of law are expressed *only* in 'evidence'; if the evidence is truly evidence of the rule of law, then it is an outward expression of the rule itself. Evidence is a necessary, and not a dispensable, component of the rule. But because of the confusions resulting from its use, the term 'evidence', along with the term 'sources', is best relegated to the domain of counterproductive terminology").
[89] The Commission's 3183rd meeting, 19 July 2013 (Hmoud).
[90] I. Brownlie, *supra* note 74, at 318 (emphasis added). See also A. Clapham, *supra* note 37, at 58 ("Such evidence [for an alleged custom] will obviously be voluminous and also diverse. There are multifarious occasions on which persons who act or speak in the name of a state, do acts, or make declarations, which either express or imply some view on a matter of international law. Any such act or declaration may, so far as it goes, be some evidence that a custom, and therefore that a rule of international law, does or does not exist. But, of course, its value as evidence will altogether be determined by the occasion and the circumstances").

use all forms which serve their purpose".[91] The Commission itself has relied upon various materials in assessing practice for the purpose of identifying rules of customary international law.[92]

40. Several authors have drawn up lists of the main forms that practice may take. For example, *Brownlie's Principles of Public International Law* contains the following non-exhaustive list:

> "diplomatic correspondence, policy statements, press releases, the opinions of government legal advisers, official manuals on legal questions (e.g. manuals of military law), executive decisions and practices, orders to military forces (e.g. rules of engagement), comments by governments on ILC drafts and corresponding commentaries, legislation, international and national judicial decisions, recitals in treaties and other international instruments (especially when in 'all states' form), an extensive pattern of treaties in the same terms, the practice of international organs, and resolutions relating to legal questions in UN organs, notably the General Assembly."[93]

41. Given the inevitability and pace of change, political and technological, it is neither possible nor desirable to seek to provide an exhaustive list of these 'material sources' of customary international law: it remains impractical for the Commission, as it was in 1950, "to list all the numerous types of materials which reveal State practice on each of the many problems arising in international law".[94] At the same time, it may be helpful to indicate some of the main types of practice that have been relied upon by States, by courts and tribunals, and in writings. The following list is therefore non-exhaustive; moreover, some of the categories below overlap, so that a particular example or type of State practice may well fall under more than one.

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[91] K. Zemanek, *supra* note 77, at 299. In addition, "no rule of international law describes what the facts are whose occurrence leads to the formation of a custom … there are no specific factual elements whose only occurrence prove the existence of a rule": L. Fumagalli, 'Evidence Before the International Court of Justice: Issues of Fact and Questions of Law in the Determination of International Custom', in N. Boschiero et al (eds.), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (Asser Press, 2013), 137, 146.

[92] *Secretariat memorandum*, at 14 ("The Commission has relied upon a variety of materials in assessing State practice for the purpose of identifying a rule of customary international law").

[93] J. Crawford, *supra* note 37, at 24 (footnotes omitted); the author adds that "the value of these sources varies and will depend on the circumstances". Other lists may be found, for example, in L. Ferrari Bravo, 'Méthodes de recherche de la coutume international dans la pratique des États', 192 *Recueil des Cours* (1985), 233, 257-287; M.E. Villiger, *supra* note 84, at 17; A. Pellet, *supra* note 17, at 815-816. Ireland has similar list on its Ministry of Foreign Affairs website: "in the absence of a treaty governing relations between two or more states as to what the law should be, or, in other words, state practice combined with recognition that a certain practice is obligatory, if sufficiently widespread and consistent, such practice and consensus may constitute customary international law. Evidence of custom may be found among the following sources: diplomatic correspondence; opinions of official legal advisers, statements by governments; United Nations General Assembly resolutions; comments by governments on drafts produced by the International Law Commission; the decisions of national and international courts". See also *Federal Republic of Germany v. Margellos and Others* (Special Supreme Court of Greece), Judgment No. 6/2002, 17 September 2002, 129 ILR 525, 528, para. 9; K. Wolfke, 'Some Persistent Controversies Regarding customary International Law', *Netherlands Yearbook of International Law*, 24 (1993), 1, 15 ("As regards these ways and means of proving whether a custom already exists no full list of guidelines can be drawn up").

[94] *Yearbook of the International Law Commission, 1950*, vol. II, 368.

41.1.1 Physical actions of States, that is, the conduct of States 'on the ground'.[95] Examples of such practice may include passage of ships in international waterways;[96] passage over territory;[97] impounding of fishing boats; granting of diplomatic asylum;[98] battlefield or operational behaviour; or conducting atmospheric nuclear tests or deploying nuclear weapons.[99]

41.1.2 Acts of the executive branch. These may include executive orders and decrees,[100] and other "administrative measures",[101] as well as official statements by government such as declarations,[102] proclamations,[103] government statements before parliament,[104] positions expressed by States before national or international courts and tribunals (including in *amicus curiae* briefs of States),[105] and statements on the international plane.[106]

41.1.3 Diplomatic acts and correspondence.[107] This includes protests against the practice of other States and other subjects of international law. Diplomatic correspondence may take a variety of forms, including *notes verbales*, circular notes, third-party notes, and even 'non-papers'.

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[95] Judge Read referred to "actual assertion of sovereignty" in his Dissenting Opinion in the *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, at p. 191.

[96] *Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949*, p. 4, at p. 99 (Dissenting Opinion of Judge Azevedo).

[97] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at pp. 40-41.

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

[99] *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 305 (Separate Opinion of Judge Petrén); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 312 (Dissenting Opinion of Judge Schwebel).

[100] See, for example, *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 104, 107 (Separate Opinion of Judge Ammoun).

[101] See, for example, *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 280 (Separate Opinion of Judge Sepúlveda-Amor).

[102] See, for example, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 295 (Separate Opinion of Judge Ranjeva); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 104 (Separate Opinion of Judge Ammoun); *Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 3, at p. 43 (Dissenting Opinion of Judge Padilla Nervo); *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 84 (Separate Opinion of Judge De Castro).

[103] See, for example, *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 104, 105, 107, 126 (Separate Opinion of Judge Ammoun); *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 84 (Separate Opinion of Judge De Castro).

[104] See, for example, *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 197 (Separate Opinion of Judge Jessup).

[105] See, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 123, para. 55. See also I. Brownlie, *supra* note 74, at 315 ("it seems obvious that statements made by Agents and Counsel before international tribunals constitute State practice").

[106] See, for example, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 312 (Dissenting Opinion of Judge Schwebel).

[107] See, for example, *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 197 (Separate Opinion of Judge Jessup), and pp. 298, 299 (Separate Opinion of Judge Ammoun).

41.1.4 Legislative acts. From constitutions to draft bills,[108] "[l]egislation is an important aspect of State practice".[109] As the Permanent Court of International Justice observed in 1926, "From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures".[110] It is worthwhile to recall the view expressed by the Commission in this context in 1950, according to which "[t]he term legislation is here employed in a comprehensive sense; it embraces the constitutions of States, the enactments of their legislative organs, and the regulations and declarations promulgated by executive and administrative bodies. No form of regulatory disposition effected by a public authority is excluded".[111]

41.1.5 Judgments of national courts. Judicial decisions and opinions of municipal courts may serve as State practice,[112] and "are of value as evidence of that State's practice, even if

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[108] See, for example, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 24; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 123, para. 55; *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952*, p. 176, at p. 220 (Dissenting Opinion of Judges Hackworth, Badawi, Levi Carneiro and Sir Benegal Rau); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 105, 107, 129 (Separate Opinion of Judge Ammoun, where he says, *inter alia*, "The bill [that was submitted to the Belgian Chamber of Representatives] … expresses the official point of view of the Government. It constitutes one of those acts within the municipal legal order which can be counted among the precedents to be taken into consideration, where appropriate, for recognizing the existence of custom"), and p. 228 (Dissenting Opinion of Judge Lachs); *Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 3, at p. 44 (Dissenting Opinion of Judge Padilla Nervo), and p. 51 (Joint Separate Opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda), and p. 84 (Separate Opinion of Judge De Castro); Special Tribunal for Lebanon, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Appeals Chamber), 16 February 2011, paras. 87, 91-98; *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion based on Lack of Jurisdiction (Special Court of Sierra Leone Appeals Chamber), 31 May 2004, p. 13, at para. 18; *Genny de Oliviera v. Embaixada da República Democratica Alema* (Brazilian Federal Supreme Court), Apelação Civel No. 9.696-3/SP, 31 May 1989, pp. 4-5; *Democratic Republic of the Congo v. FG Hemispheric Associates LLC*, in the Court of Final Appeal of the Hong Kong Special Administrative Region, Final Appeal Nos. 5, 6 & 7 of 2010 (Civil), 8 June 2011, para. 68 ("However that may be, a rule of domestic law in any given jurisdiction may happen to result from a rule of customary international law or it may happen to precede and contribute to the crystallisation of a custom into a rule of customary international law"). On constitutional provisions in particular as State practice (and as evidence of *opinio juris*) see R. Crootof, 'Constitutional convergence and Customary International Law', *Harvard International Law Journal Online*, 54 (2013), 195-203.

[109] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 310, para. 3 (Dissenting Opinion of Judge ad hoc Gaja). Judge Gaja went on to say that "It is significant also when the object of a rule of international law is the conduct of judicial authorities, as with regard to the exercise of jurisdiction by courts".

[110] *Certain German Interests in Polish Upper Silesia*, PCIJ, Series A, No 7, at 19.

[111] 'Ways and Means for Making the Evidence of Customary International Law More Readily Available', Report of the International Law Commission on its Second Session (A/CN.4/34), *Yearbook of the International Law Commission, 1950*, Vol. II, 370.

[112] See, for example, *The Case of the S.S. "Lotus" (France/Turkey)*, PCIJ, Series A, No. 10, pp. 28-29; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 24; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 123, para. 55; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 292 (Separate Opinion of Judge Guillaume); *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 6, at p. 63 (Separate Opinion of Judge Wellington Koo); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 88 (Joint Separate Opinion of Judges Higgins,

they do not otherwise serve as evidence of customary international law" itself.[113] When assessing the decisions of domestic courts, however, the position of customary international law within the law to be applied by the various courts and tribunals, and special provisions and procedures that may exist at the various domestic levels for identifying rules of customary international law, must be borne in mind.[114] Moreover, "the value of these decisions varies considerably, and individual decisions may present a narrow, parochial outlook or rest on an inadequate use of sources".[115] Judgments of the highest courts naturally carry more weight. Cases that have been reversed on the particular point are no longer likely to be considered as practice.

41.1.6 Official publications in fields of international law, such as military manuals or instructions to diplomats.[116]

41.1.7 Internal memoranda by State officials. Such memoranda are, however, often not made public. It should be borne in mind, however, that as was said in a different but analogous context, these "do not necessarily represent the view or policy of any government, and may be no more than the personal view that one civil servant felt moved to express to another particular civil servant at that moment; it is not always easy to disentangle the personality elements from what were, after all, internal, private and confidential memoranda at the time they were made".[117]

41.1.8 Practice in connection with treaties. Negotiating, concluding and entering into, ratifying and implementing bilateral or multilateral treaties (and putting forward objections and reservations to them) are another form of practice.[118] Such practice does not concern the

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Kooijmans and Buergenthal); *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (ICTY Appeals Chamber), 15 July 1999, paras. 255-270; Extraordinary Chambers in the Courts of Cambodia, Case No. 001/18-07-2007-ECCC/SC (Supreme Court Chamber), 3 February 2012, paras. 223, 224; *Prosecutor v. Šainović and Others*, Case No. IT-05-87-A, Judgment (ICTY Appeals Chamber), 23 January 2014, paras. 1627-1642; *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgment (ICTY Appeals Chamber), 21 July 2000, Declaration of Judge Robinson, para. 281; Case No. Up-13/99 (Slovenian Constitutional Court), Decision of 8 March 2001, para. 14; *Dralle v Republic of Czechoslovakia* (Austrian Supreme Court), Judgment of 10 May 1950, 17 ILR 155, 157-161. See also H. Lauterpacht, 'Decisions of Municipal Courts as a Source of International Law', *British Yearbook of International Law*, 10 (1929), 65-95; P.M. Moremen, 'National Court Decisions as State Practice: A Transnational Judicial Dialogue?', *North Carolina Journal of International Law and Commercial Regulation*, 32 (2006), 259, 265-290; A. Roberts, 'Comparative International Law: The Role of National Courts in Creating and Enforcing International Law', *International & Comparative Law Quarterly*, 60 (2011), 57, 62; and the lecture by Judge Greenwood before the British Institute of International and Comparative Law entitled "The Contribution of National Courts to the Development of International Law" (4 February 2014), available online at http://www.biicl.org/news/view/-/id/201/.

[113] 'Ways and Means for Making the Evidence of Customary International Law More Readily Available', *supra* note 111. Speaking of, Crawford's *Brownlie's Principles of Public International Law*, *supra* note 37, states that some decisions of national courts "provide indirect evidence of the practice of the forum state on the question involved" (at 41).

[114] A/CN.4/663, *supra* note 1, at para. 84. See also P.M. Moremen, *supra* note 112, at 290-308.

[115] J. Crawford, *supra* note 37, at 41.

[116] See, for example, *Prosecutor v. Galić*, Case No. IT-98-29-A, Judgment (ICTY Appeals Chamber), 30 November 2006, para. 89; *Prosecutor v. Delalić,* Case No. IT-96-21-T, Judgment (ICTY Trial Chamber), 16 November 1998, para. 341.

[117] Red Sea Islands (*Eritrea/Yemen*) arbitration award, 9 October 1998, para. 94; see also I. Brownlie, *supra* note 74, at 316-317.

[118] See, for example, *Nottebohm Case (second phase), Judgment of April 6th, 1955: I.C.J. Reports 1955*, p. 4, at pp. 22-23; *Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951*, p.15, at pp. 24-25; *North Sea*

law of treaties alone; it may also relate to the obligations assumed through the relevant international legal instrument.[119]

41.1.9 Resolutions of organs of international organizations, such as the General Assembly of the United Nations, and international conferences.[120] This mainly concerns the practice of States in connection with the adoption of resolutions of organs of international

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*Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 43; *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 104-105, 126, 128 (Separate Opinion of Judge Ammoun); *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 347 (Dissenting Opinion of Judge Riphagen); *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 26; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 79; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at pp. 38, 48; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at pp. 138, 143, paras. 89, 100; *Interpretation of Peace Treaties (second phase), Advisory Opinion: I.C.J. Reports 1950*, p. 221, at pp. 241-242 (Dissenting opinion of Judge Read); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 292 (Separate Opinion of Judge Guillaume), and pp. 312, 314 (Dissenting Opinion of Judge Schwebel); *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, at pp. 163-164 (Dissenting Opinion of Judge McNair); *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952*, p. 176, at p. 220 (Dissenting Opinion of Judges Hackworth, Badawi, Levi Carneiro and Sir Benegal Rau); *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at pp. 41-42, and also pp. 55-56 (Separate Opinion of Judge Wellington Koo), and p. 104 (Dissenting Opinion of Judge Sir Percy Spender); *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906, Judgment of 18 November 1960: I.C.J. Reports 1960*, p. 192, at p. 223 (Dissenting Opinion of Judge Urrutia Holguín); *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion based on Lack of Jurisdiction (Special Court of Sierra Leone Appeals Chamber), 31 May 2004, p. 13, paras. 18-21; Special Tribunal for Lebanon, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Appeals Chamber), 16 February 2011, paras. 87-89; *The Paquete Habana*, 175 U.S. 677 (United States Supreme Court, 1900), 686-700. See also A.M. Weisburd, *supra* note 67, at 1-46 ("treaties are simply one more form of state practice"); *Human Rights Council Report of the Working Group on Arbitrary Detention* (24 December 2012), A/HRC/22/44, para. 43.

[119] See also A. D'Amato, *supra* note 83, at 462 ("What makes the content of a treaty count as an element of custom is the fact that the parties to the treaty have entered into a binding commitment to act in accordance with its terms. Whether or not they subsequently act in conformity with the treaty, the fact remains that they have so committed to act. The commitment itself, then, is the 'state practice' component of custom"); J. Barboza, 'The Customary Rule: From Chrysalis to Butterfly', in C.A. Armas Barea et al. (eds.), *Liber Amicorum 'In Memoriam' of Judge José María Ruda* (Kluwer Law International, 2000), 1, 2-3 ("Texts express with more precision than actions the contents of a practice, particularly when those texts are carefully written by groups of technical and legal experts"). But see K. Wolfke, 'Treaties and Custom: Aspects of Interrelation', in J. Klabbers, R. Lefeber (eds.), *Essays on the Law of Treaties: A Collection of Essays In Honour of Bert Vierdag* (Martinus Nijhoff Publishers, 1998), 31, 33 ("A treaty *per se* is, therefore, not any element of practice [of course with the exception of the customary law of treaties]. It can, however, contribute to the element of acceptance as law by the parties").

[120] See, for example, *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 26; *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at pp. 302-303 (Separate Opinion of Judge Ammoun) ("I would observe, in addition, that the positions taken up by the delegates of States in international organizations and conferences, and in particular in the United Nations, naturally form part of State practice … it cannot be denied, with regard to the resolutions which emerge therefrom, or better, with regard to the votes expressed therein in the name of States, that these amount to precedents contributing to the formation of custom"); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 312 (Dissenting Opinion of Judge Schwebel, who lists "action of the United Nations Security Council under 'State Practice'); *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90, at p. 188 (Dissenting Opinion of Judge Weeramantry) ("The various resolutions of the General Assembly relating to this right in general terms, which have helped shape public international law … are an important material source of customary international law in this regard"). Security Council resolution 2125 (2013) implicitly recognizes this potential role of resolutions as well by underscoring "that this resolution shall not be considered as establishing customary international law" (para. 13).

organizations or at international conferences, namely, voting in favour or against them (or abstaining), and the explanations (if any) attached to such acts.[121] At the same time, it must be borne in mind that "the final text of a decision of an international organization will always be incapable of reflecting all propositions and alternatives formulated by each and every party to the negotiations …. One should, therefore, not overly rely on the shortcuts provided by the decision-making processes of international organizations in order to identify state practice".[122] (This matter will be addressed more fully in in the third report.)

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[121] See also R. Higgins, *The Development of International Law Through the Political Organs of the United Nations* (Oxford University Press, 1963), 2 ("The United Nations is a very appropriate body to look to for indications of developments in international law, for international custom is to be deduced from the practice of states, which includes their international dealings as manifested by their diplomatic actions and public pronouncements. With the development of international organizations, the votes and views of states have come to have legal significance as evidence of customary law. Moreover, the practice of states comprises their collective acts as well as the total of their individual acts ... The existence of the United Nations ... now provides a very clear, very concentrated, focal point for state practice"); B. Conforti, B. Labella, *supra* note 52, at 35, 42-43 ("The resolutions of international organizations are also relevant to the ascertainment of custom as *acts of States*, i.e., as aggregates of expressions of the volition of States which have voted in favour of the resolutions… [i]nternational organizations are endowed with some elements of international personality. However, with regard to customary law making the resolutions of organizations must be considered as the collective action of all the States that voted for their adoption rather than the action of the organizations themselves. This explains why such resolutions play a role on the development of custom only where they are adopted unanimously, by consensus, or at least by a wide majority"); I. Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (Martinus Nijhoff Publishers, 1998), 19-20 ("The process of synthesizing State practice is assisted by several mechanisms. First, the resolutions of the General Assembly of the United Nations, when they touch upon legal matters, constitute evidence of State practice. So also do resolutions of Conferences of Heads of State"); *ILA London Statement of Principles*, at 19 ("in the context of the formation of customary international law… [a resolution by an organ of an international organization, containing statements about customary international law] is probably best regarded as a series of verbal acts by the individual member States participating in that organ"). But see I. MacGibbon, 'General Assembly Resolutions: Custom, Practice and Mistaken Identity', in B. Cheng (ed.), *International Law: Teaching and Practice* (Stevens & Sons, 1982), 10, 19 ("while a General Assembly resolution (although difficult to envisage as being, in itself, State practice in any meaningful sense) embodies, or rather is the result of, various forms of State conduct in the General Assembly, and so reflects State practice of a kind, it is nevertheless a peripheral kind and – in the context of the development of international custom – of a somewhat artificial kind"); H. Meijers, 'On International Customary Law in The Netherlands', in I.F. Dekker, H.H.G. Post (eds.), *On the Foundations and Sources of International Law* (T.M.C. Asser Press, 2003), 77, 84 ("Does a state, when voting on the acceptance of a resolution, for instance in the General Assembly of the United Nations, act as a state, or as part of an organ of the United Nations, a separate subject of international law? The answer seems evident: as part of the UN organ… [only when] it states its reasons for voting in the way it did, or gives its point of view *vis-à-vis* that resolution, we may identify an act of state").

[122] J. Wouters, P. De Man, 'International Organizations as Law-Makers', in J. Klabbers, A. Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (Edward Elgar Publishing, 2011), 190, 208 (reference omitted). See also R. Higgins, *supra* note 13, at 23-24 ("Resolutions are but one manifestation of state practice. But in recent years there has been an obsessive interest with *resolution*s as an isolated phenomenon. Intellectually, this is hard to understand or justify. We can only suppose that it is easier – that is, that it requires less effort, less rigour, less by way of meticulous analysis – to comment on the legal effect of a resolution than to look at a collective practice on a certain issue in all its complex manifestations. The political bodies of international organizations engage in debate; in the public exchange of views and positions taken; in expressing reservations upon views being taken by others; in preparing drafts intended for treaties, or declarations, or binding resolutions, or codes; and in decision-making that may or may not imply a legal view upon a particular issue. But the current fashion is often to examine the resolution to the exclusion of all else").

42. *Inaction as practice*. Abstention from acting, also referred to as a "negative practice of States",[123] may also count as practice.[124] Inaction by States may be central to the development and ascertainment of rules of customary international law, in particular when it qualifies (or is perceived) as acquiescence.[125] It is intended to examine this matter further in the third report, in light of the debate in the Commission in 2014.

43. *The practice of international (inter-governmental) organizations*. This is an important field that will be covered in greater detail in the third report.[126] Bearing in mind that "[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and

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[123] See, for example, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at pp. 144, 145 (Dissenting Opinion of Judge ad hoc Van den Wyngaert); P. Tomka, *supra* note 24, at 210.

[124] See, for example, *The Case of the S.S. "Lotus" (France/Turkey)*, PCIJ, Series A, No. 10, p. 28; *Nottebohm Case (second phase), Judgment of April 6th, 1955: I.C.J. Reports 1955*, p. 4, at p. 22; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 99 (abstentions from the threat of use of force against the territorial integrity or political independence of any State as practice); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 253, para. 65 (the Court referring to proponents of a prohibition attempting to rely on "a consistent practice of non-utilization of nuclear weapons by States"); *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 135, para. 77 ("The almost complete absence of contrary jurisprudence is also significant, as is the absence of any statements by States"); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 134 (Separate Opinion of Judge Petrén, referring to the practice of non-recognition when saying that the term "implies not positive action but abstention from acts signifying recognition"); *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952*, p. 176, at p. 221 (Dissenting Opinion of Judges Hackworth, Badawi, Levi Carneiro and Sir Benegal Rau); *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at pp. 198, 199 (Separate Opinion of Judge Jessup, referring to the United States Department of State declining to make representation on behalf of an American company, and to the United States not raising a certain argument as a basis for resisting a claim in an inter-State dispute). For support in scholarly writing see, for example, *ILA London Statement of Principles*, at 15; G.I. Tunkin, 'Remarks on the Juridical Nature of Customary Norms of International Law', *California Law Review*, 49 (1961), 419, 421 ("The practice of states may consist in their taking definitive action under certain circumstances or, on the contrary, abstaining from action"); S. Séfériadès, 'Aperçu sur la coutume juridique internationale et notamment sur son fondement', *RGDIP*, 43 (1936), 129, 143 ("… même des actes négatifs, - des omissions, - consécutivement répétés, sont de nature à finir par devenir des coutumes, entrainant l'obligation légale de ne pas faire. … Egalement, en droit des gens, on ne saurait, nous semble-t-il, ne pas reconnaître une origine coutumière à l'obligation des Etats de s'abstenir de faire contre les représentants des pays étrangers tout acte de nature à porter atteinte à leur liberté personnelle ou à la franchise de leur hôtel, ainsi qu'à l'obligation des armées d'occupation de respecter, sur terre, la propriété privée ennemie"); H. Meijers, 'How is International Law Made? – The Stages of Growth of International Law and the Use of Its Customary Rules', *Netherlands Yearbook of International Law*, 9 (1978), 3, 4-5 ("the inactive are carried along by the active … lack of protest – lack of open objection to the development of the new rule – is sufficient for the creation of a rule of customary law (and for the obligation to abide by it)"); J.L. Kunz, *supra* note 56, at 666; M. Mendelson, 'The Subjective Element in Customary International Law', *British Yearbook of International Law*, 66 (1995), 177, 199 ("omissions are perfectly capable, if they are sufficiently unambiguous, of constituting acts of State practice").

[125] See also R. Kolb, *supra* note 47, at 136 ("There is hardly any exaggeration in saying that custom is mainly silence and inaction, not action"); A.M. Weisburd, *supra* note 67, at 7 ("if generality in the sense of affirmative acts by most states is not necessary, it must at least be possible to infer acquiescence in a rule by the very large majority of states"). Danilenko differentiates between "active and passive customary practice", suggesting that the latter "increases the precedent value of active practice and thus becomes a major factor in the process of creating generally accepted customary norms": G.M. Danilenko, *supra* note 17, at 28.

[126] A leading work in this field is G. Cahin, *La coutume internationale et les organisations internationales* (Pedone, 2001).

their nature depends upon the needs of the community",[127] the acts of international organizations on which States have conferred authority may also contribute or attest to the formation of a general practice in the fields in which those organizations operate.[128] In assessing the practice of such organizations one ought to distinguish between practice relating to the internal affairs of the organization on the one hand, and the practice of the organization in its relations with States, international organizations, etc., on the other.[129] It is the latter practice that is relevant for present purposes, and which mostly consists of "operational activities", defined by one author as "the programmatic work of international organizations carried out as part of their overall mission or in fulfilment of a specific mandate".[130] Another important distinction should be drawn in this context between the practice of organs or other bodies composed of the representatives of States and that of organs composed of individuals serving in their personal capacity, as the latter cannot be said to represent States.[131] A distinction should, moreover, be made between "products of the secretariats of international organizations and products of the intergovernmental organs of international organizations. While both can provide materials that can be consulted ... the greater weight ... [is] to be given to the products of the latter, whose authors are also the primary authors of state practice."[132]

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

[128] See, for example, *Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951*, p.15, at p. 25; *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 95 (Separate Opinion of Judge Weeramantry, who refers to "the practice of international financial institutions"). See also *Secretariat memorandum*, at 23 ("Under certain circumstances, the practice of international organizations has been relied upon by the Commission to identify the existence of a rule of customary international law. Such reliance has related to a variety of aspects of the practice of international organizations, such as their external relations, the exercise of their functions, as well as positions adopted by their organs with respect to specific situations or general matters of international relations"); R. Jennings, A. Watts (eds.), *supra* note 37, at 31 ("the concentration of state practice now developed and displayed in international organisations and the collective decisions and the activities of the organisations themselves may be valuable evidence of general practices accepted as law in the fields in which those organisations operate"); *ILA London Statement of Principles*, at 19 ("The practice of intergovernmental organizations in their own right is a form of 'State practice'"). But see M.E. Villiger, *supra* note 84, at 16-17. On this topic more generally see J. Klabbers, 'International Organizations in the Formation of Customary International Law', in E. Cannizzaro, P. Palchetti (eds.), *Customary International Law on the Use of Force* (Martinus Nijhoff Publishers, 2005), 179-195 (also raising the question whether *ultra vires* practice of such organizations may count as 'practice'); L. Hannikainen, 'The Collective Factor as a Promoter of Customary International Law', *Baltic Yearbook of International Law*, 6 (2006), 125-141. Of course, international organizations vary greatly from one another, and this needs to be borne in mind when assessing the significance of their practice (see also commentary (8) to Article 6 of the Commission's *Draft Articles on the Responsibility of International Organizations* (2011)).

[129] For example, administration of territory or peacekeeping operations. Indeed, such practice is no longer thought of as confined to "States' relations to the organizations" ('Ways and Means for Making the Evidence of Customary International Law More Readily Available', *supra* note 111, at 372).

[130] I. Johnstone, 'Law-Making Through the Operational Activities of International Organizations', *George Washington International Law Review*, 40 (2008), 87, 94 (discussing such activities, however, in a somewhat different context; and adding that these activities "are distinguished from the more explicitly normative functions of international organizations, such as treaty making or adopting resolutions, declarations, and regulations by intergovernmental bodies").

[131] Accordingly, the work of the Commission as well, often employed as subsidiary means for determining the existence or otherwise of a rule of customary international law, "cannot be equated with State practice, or evidence an *opinio juris*" (H. Thirlway, 'Law and Procedure, Part Two', *British Yearbook of International Law*, 61 (1990), 1, 59-60).

[132] As suggested by Mr. Tladi in his intervention during last year's debate in the Commission (3182nd meeting, 18 July 2013).

While it has been suggested that "IOs provide shortcuts to finding custom",[133] considerable caution is required in assessing their practice.[134] Considerations that apply to the practice of States may also be relevant to the practice of international organizations, and the present report should be read in that light.

44. The practice of those international organizations (such as the European Union) to which Member States sometimes have transferred exclusive competences, may be equated with that of States, since in particular fields such organizations act in place of the Member States.[135] This applies to the actions of such organizations, whatever forms they take, whether executive, legislative or judicial. If one were not to equate the practice of such international organizations with that of States, it would in fact mean that, not only would the organization's practice not count for State practice, but its Member States would be deprived or reduced of their ability to contribute to State practice in cases where the Member States have conferred some of their public powers to the organization.

45. *The role of other non-State actors*. It has sometimes been suggested that the conduct of other 'non-State actors' such as non-governmental organizations and even individuals, ought to be acknowledged as contributing to the development of customary international law.[136] Some have

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[133] J.E. Alvarez, *International Organizations as Law-makers* (Oxford University Press, 2005), 592 (explaining that "The modern resort to IO-generated forms of evidence for custom might be seen … as a relatively more egalitarian approach to finding this source of law, even if it comes, as critics charge is the case with respect to GA resolutions for example, at the expense of sometimes elevating the rhetoric of states over their deeds").

[134] See also J. Wouters, P. De Man, *supra* note 122, at 208 ("One should thus be mindful not to equate the practice of international organizations with state practice. Whether actions of international organizations can be attributed to the state community as a whole is a complex question and the answer depends on … divergent factors").

[135] See also Statement on behalf of the European Union, A/C.6/68/SR.23 (4 November 2013), para. 37 ("The Union acted on the international plane on the basis of competences conferred upon it by its founding treaties. It was a contracting party to a significant number of international agreements, alongside States. Moreover, in several areas covered by international law it had exclusive competences. Those special characteristics gave it a particular role in the formation of customary international law, to which it could contribute directly through its actions and practices."); see also F. Hoffmeister 'The Contribution of EU Practice to International Law', in M. Cremona, *Developments in EU External Relations Law* (Oxford University Press, 2008), 37–128; M. Wood, O. Sender, 'State Practice', *supra* note 71, at paras. 20-21; E. Paasivirta, P.J. Kuijper, 'Does One Size Fit All? The European Community and the Responsibility of International Organizations', *Netherlands Yearbook of International Law*, 36 (2005), 169, 204-212. Ms. Jacobsson has likewise suggested that "[o]ne cannot disregard… [] the practice of an international organization if that organization has the competence to enact legislation in respect of a particular question. Such practice cannot be described solely as the view on customary international law by the organization. It may also be equalled to State practice" (the Commission's 3184th meeting, 23 July 2013). But see J. Vanhamme, 'Formation and Enforcement of Customary International Law: The European Union's Contribution', *Netherlands Yearbook of International Law*, 39 (2008), 127, 131 ("EC [European Community] acts constitute EU [European Union] practice. To depict them as State practice [that is, to attribute them to the Member States] would deny one of the main features of the European Community, i.e. its autonomous functioning on the basis of the legislative, executive and judicial powers delegated to it by the Member States. Moreover, the EC's international legal practice does faithfully represent the *opinio juris* of all 27 Member States [who gave a permanent commitment to accept its decisions as binding law]").

[136] For such a dynamic view of 'participation' in international law-making or the call to make such processes 'inclusive', see, for example *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 155 (Dissenting Opinion of Judge ad hoc Van den Wyngaert) ("the opinion of *civil society* … cannot be completely discounted in the formation of customary international law today"); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),*

recalled in this context that "according to Article 38 of the ICJ statute, custom … [is] not required to be followed or acknowledged 'by states' only, as it is actually required by the same norm when referring to conventions. So that, in principle, practices may emanate from state and non-state actors."[137] The better view, however, is that, while individuals and non-governmental organizations can indeed "play important roles in the promotion of international law and in its observance"[138] (for example, by encouraging State practice through bringing international law claims in national courts or by being relevant when assessing such practice), their actions are not 'practice' for purposes of the formation or evidencing of customary international law.[139]

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*Advisory Opinion, I.C.J. Reports 1971*, p. 16, at pp. 69-70, 74 (Dissenting Opinion of Judge Ammoun) ("the primary factor in the formation of the customary rule whereby the right of peoples to self-determination is recognized … [may be] the struggle of peoples [for such cause], before they [now members of the international community] were recognized as States ... If there is any 'general practice' which might be held, beyond dispute, to constitute law within the meaning of Article 38, paragraph 1 (b), of the Statute of the Court, it must surely be that which is made up of the conscious action of the peoples themselves, engaged in a determined struggle"); *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at p. 100 (Separate Opinion of Judge Ammoun); L.-C. Chen, *An Introduction to Contemporary International Law: A Policy-Oriented Perspective*, 2nd edition (Yale University Press, 2000), 344 ("the focus on 'states' is unrealistic ... the relevant patterns in behavior extend ... also to those of private individuals and representatives of non-governmental organizations"); D. Bodansky, 'Customary (and Not So Customary) International Environmental Law', *Indiana Journal of Global Legal Studies*, 3 (1995), 105, 108 (referring to the behaviour of States and of "international organizations, transnational corporations and other non-governmental groups"); I. Gunning, 'Modernizing Customary International Law: The Challenge of Human Rights', *Virginia Journal of International Law*, 31 (1991), 211, 212-213 ("In particular, by questioning the comprehensiveness of traditional formulations of national sovereignty, this Article will explore the prospect of permitting transnational and non-governmental groups to have a legal voice in the creation of custom"); C. Steer, 'Non-State Actors in International Criminal Law', in J. D'Aspermont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge, 2013), 295-310 (arguing that in international criminal law non-State actors such as NGOs, judges and lawyers are those who determine the normative content); J.J. Paust, 'Nonstate Actor Participation in International Law and the Pretense of Exclusion', *Virginia Journal of International Law*, 51 (2011), 977-1004; A. Roberts, S. Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law', *Yale Journal of International Law*, 37 (2012), 107-152; and W.M. Reisman, 'The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application', in R. Wolfrum, V. Röben (eds.), *Developments of International Law in Treaty Making* (Springer, 2005), 15-30.

[137] J.P. Bohoslavsky, Y. Li and M. Sudreau, 'Emerging Customary International Law in Sovereign Debt Governance?', *Capital Markets Law Journal*, 9 (2013), 55, 63. Baron Descamps' original proposal with regard to the rules to be applied by the Permanent Court of International Justice referred to custom as "being practice between nations accepted by them as law": see K. Wolfke, *supra* note 6, at 3.

[138] T. Buergenthal, S.D. Murphy, *Public International Law in a Nutshell*, 5th edition (West Publishing, 2013), 75.

[139] Cf. conclusion 5, paragraph 2, of the Commission's draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties (*ILC Report 2013*, para. 38): "Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty". See also the Statements on behalf of Israel and Iran in the 2013 Sixth Committee debate on the work of the International Law Commission (available at http://www.un.org/en/ga/sixth); A.C. Arend, *Legal Rules and International Society* (Oxford University Press, 1999), 176 ("Even though nonstate actors exist, and, in some cases, these nonstate actors have entered into international agreements, these actors do not enter into the process of creating general international law in an unmediated fashion. In other words, the interactions of nonstate actors with each other and with states do not produce customary international law"); J. D'Aspermont, 'Inclusive law-making and law-enforcement processes for an exclusive international legal system', in J. D'Aspermont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge, 2013), 425, 430; M.H. Mendelson, *supra* note 71, at 203 (suggesting that the contribution of non-State actors to the formation of CIL is "in a *broader* sense … [it is an] indirect contribution"); Y. Dinstein, *supra* note 71, at 267-269; *ILA London Statement of Principles*, at 16. With regard to the suggestion by some that the practice of individuals, such as fishermen, has been recognized as giving rise to

46. While the decisions of international courts and tribunals as to the existence of rules of customary international law and their formulation are not 'practice',[140] such decisions serve an important role as "subsidiary means for the determination of rules of law".[141] The pronouncements of the ICJ in particular may carry great weight.[142]

47. *Confidential practice*. Much State practice, such as classified exchanges among Governments, is not publicly available, at least not for some time.[143] It is difficult to see how practice can contribute to the formation or identification of general customary international law unless and until it has been disclosed publicly.[144] At the same time, a practice known among only some or even two

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customary international law (see, for example, K. Wolfke, *supra* note 93, at 4), it is probably more accurate to say that while "[i]t cannot be denied, of course, that actions of individuals may create certain facts which may subsequently become the subject matter of inter-state dialogue … in such circumstances the actions of individuals do not constitute a law-creating practice: they are just simple facts giving rise to international practice of states" (G.M. Danilenko, *Law-Making in the International Community* (Martinus Nijhoff Publishers, 1993), 84). See also K. Wolfke, *supra* note 6, at 58: "whose behaviour contributes to the practice is not important; what is important is to whom the practice may be attributed, and above all, who it is who has 'accepted it as law'"; C. Santulli, *supra* note 37, at 45-46 ("Pour être pertinent aux fins de l'élaboration des règles coutoumières, le précédent doit pouvoir être imputé à un Etat ou à une organisation internationale. Seuls les Etats et les organisations internationales, en effet, pariticipent au phénomène coutoumier. La conduit des sujets internes n'en est pas moins importante, mais elle n'est juridiquement pertinente pour apprécier la formation de la coutume internationale qu'au regard de la réaction qu'elle a sucitée, tolérance ou réprobation").

[140] See also M.H. Mendelson, *supra* note 71, at 202; but see *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 315 (Separate Opinion of Judge Ammoun): "international case-law … [is] considered an element of [custom]"; G.M. Danilenko, *ibid*., at 83 ("The decisions of tribunals, and especially the judgments of the I.C.J., are an important part of community practice"). Cf. L. Kopelmanas, 'Custom as a Means of the Creation of International Law', *British Yearbook of International Law*, 18 (1937), 127, 142 ("the creation of legal rules by custom by the action of the international judge is an incontestable positive fact"); R. Bernhardt, *supra* note 84, at 270 ("This formula [of Article 38 of the International Court's Statute, awarding judicial decision the status of subsidiary means for determining rules of law] underestimates the role of decisions of international courts in the norm-creating process. Convincingly elaborate judgments often have a most important influence on the norm-generating process, even if in theory courts apply existing law and do not create new law").

[141] Article 38.1(d) of the ICJ Statute. See also *Secretariat memorandum*, at 25-26 (observing that "The Commission has, on some occasions, relied upon decisions of international courts or tribunals as authoritatively expressing the status of a rule of customary international law" (Observation 15); that "Furthermore, the Commission has often relied upon judicial pronouncements as a consideration in support of the existence or non-existence of a rule of customary international law" (Observation 16); and that "At times, the Commission has also relied upon decisions of international courts or tribunals, including arbitral awards, as secondary sources for the purpose of identifying relevant State practice" (Observation 17)).

[142] I. Brownlie, *supra* note 121, at 19 ("the judgments of the International Court and other international tribunals have a role in the recognition and authentication of rules of customary international law"). For a recent example see the judgment of the European Court of Human Rights in *Jones and Others v. The United Kingdom* (Applications nos. 34356/06 and 40528/06), 14 January 2014, para. 198. Cf. K. Wolfke, *supra* note 6, at 145 ("… judgments and opinions of international courts, especially of the Hague Court, are of decisive importance as evidence of customary rules. The Court has invoked them almost as being positive law").

[143] Such confidential practice is to be distinguished from practice which is simply hard to access. Practice may go largely unnoticed, for a variety of reasons. This is, for example, the case where the practice of particular States is not published in some widely accessibly form. There is a special problem, to which members of the Commission and States have drawn attention, with practice that is primarily available in languages that are not widely read (which is in fact the case with most languages).

[144] See also Y. Dinstein, *supra* note 71, at 275 ("Another condition for State conduct – if it is to count in assessing the formation of custom – is that it must be transparent, so as to enable other States to respond to it positively or negatively");

States may contribute to the development of a regional, special or local (rather than general) rule of customary international law, opposable to them alone.[145]

48. The following draft conclusion is proposed:

**Draft Conclusion 7**
***Forms of practice***

**1. Practice may take a wide range of forms. It includes both physical and verbal actions.**

**2. Manifestations of practice include, among others, the conduct of States 'on the ground', diplomatic acts and correspondence, legislative acts, judgments of national courts, official publications in the field of international law, statements on behalf of States concerning codification efforts, practice in connection with treaties, and acts in connection with resolutions of organs of international organizations and conferences.**

**3. Inaction may also serve as practice.**

**4. The acts (including inaction) of international organizations may also serve as practice.**

49. *No predetermined hierarchy*. No one manifestation of practice is *a priori* more important than the other; its weight depends on the circumstances as well as on the nature of the rule in question.[146] For example, while in common parlance 'actions speak louder than words', that will obviously not

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*ILA London Statement of Principles*, at 15 ("Acts do not count as practice if they are not public"). On the "representational function of doctrine [coming] up against the *sécret de l'état*" more generally see A. Carty, *supra* note 71, at 979-982. Meijers stresses that "States concur in the creation of law by not protesting, that is to say, by not reacting. If that is so, the states concerned must get an opportunity to react. From this there flow two further requirements for the formation of law: it must be possible to indicate at least one express manifestation of the will to create a law, and this express manifestation of will must be cognoscible for all states which will be considered as wishing to concur in the creation of the new rule if they do not protest" (H. Meijers, *supra* note 124, at 19). But see M. Bos, 'The Identification of Custom in International Law', *German Yearbook of International Law*, 25 (1982), 9, 30 ("even if facilitated, the discovery of evidence [of State practice] at times may be a problem, for not every bit of practice will find its way to digests and collections. It is asking too much, therefore, to say that in additions to the qualifications … [of virtual uniformity, attribution to the State and generality] practice should also be sufficiently perceptible to other States on which the customary rule-to-be may be binding in future").

[145] The issue of regional/special/bilateral custom will be dealt with in the Special Rapporteur's third report.

[146] See also B. Conforti, B. Labella, *supra* note 52, at 32 ("These diverse actions are not governed by a set hierarchy: acts of domestic courts and executive organs, organs conducting foreign relations, and representatives at international organizations, are all on an equal footing. The weight given to the acts depends on the content of the international customary rule"); M. Akehurst, *supra* note 84, at 21 ("There is no compelling reason for attaching greater importance to one kind of practice than to another"); K. Wolfke, *supra* note 6, at 157 ("The absence of any appropriate indication in the Statute of the [international] Court, and the freedom enjoyed by the Court in the choice and evaluation of evidence of customary law, do not give any ground for admitting any formal hierarchy of the kinds of such evidence").

be the case when it is acknowledged that the action is unlawful.[147] At the same time, in many cases it is ultimately the executive that speaks for the State in international affairs.[148]

50. *A State's practice should be "taken as a whole"*.[149] This implies, first, that account has to be taken of all available practice of a particular State. Secondly, it may be the case that the various organs of the State do not speak with one voice. For example, a court, or the legislature, may adopt a position contrary to that of the executive branch, and even within the same branch different positions may be taken. This may be particularly likely with the practice of sub-State organs (for example, in a federal State); it may be necessary to look cautiously at that practice, in the same way one would approach lower court decisions. Where a State speaks in several voices, its practice is ambivalent, and such conflict may well weaken the weight to be given to the practice concerned.[150]

51. The following draft conclusion is proposed:

**Draft Conclusion 8**
***Weighing evidence of practice***

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

**2. Account is to be taken of all available practice of a particular State. Where the organs of the State do not speak with one voice, less weight is to be given to their practice.**

52. *Generality of practice*. "It is of course clear from the explicit terms of Article 38, paragraph 1 *(b)*, of the Statute of the Court, that the practice from which it is possible to deduce a general custom

[147] See, for example, the International Court's consideration of the principle of non-intervention in its *Nicaragua* judgment: *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. 108-109, para. 207. See also R. Müllerson, *supra* note 84, at 344 ("Of course, different categories of state practice may have different weight in the process of custom formation. Usually it matters more what states do than what they say, but on the other hand, at least in official inter-state relations, saying is also doing. 'Actual' practice may be weightier in the process of custom formation but diplomatic practice usually conveys more clearly the international legal position of states. Often only a few states may be engaged in 'actual' practice, while other states' practice may be only diplomatic or even completely absent").

[148] See also A. Roberts, *supra* note 112, at 62 ("Where inconsistencies emerge, the conflicting practice must be weighed, considering factors such as which branch of government has authority over the matter"); but see I. Wuerth, 'International Law in Domestic Courts and the *Jurisdictional Immunities of the State* Case', *Melbourne Journal of International Law*, 13 (2012), 1, 9 ("Privileging the executive branch is unsatisfactory because a national court decision invokes the responsibility of the state as a matter of international law and it often provides clearer evidence of the *opinio juris* than executive branch practice").

[149] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 136, para. 83.

[150] See, for example, *Yong Vui Kong v Public Prosecutor*, [2010] 3 S.L.R. 489 [2010] SGCA 20 (Supreme Court of Singapore — Court of Appeal, 14 May 2010), para. 96. For a different argument, according to which only once differences between the practice followed by different organs of a State disappear can the practice of that State become "consistent and thus capable of contributing to the development of customary law" see M. Akehurst, *supra* note 84, at 22.

is that of the generality of States and not of all of them".[151] Indeed, for a rule of general customary international law to emerge or be identified the practice need not be unanimous (universal);[152] but, it must be "extensive"[153] or, in other words, sufficiently widespread.[154] This is not a purely quantitative test, as the participation in the practice must also be broadly representative,[155] and include those States whose interests are specially affected.

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[151] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 330 (Separate Opinion of Judge Ammoun).

[152] See also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 104 (Separate Opinion of Judge Ammoun) ("[Proving the existence of customary international law] is therefore a question of enquiring whether such a practice is observed, not indeed unanimously, but… by the generality of States with actual consciousness of submitting themselves to a legal obligation"), and p. 229 (Dissenting Opinion of Judge Lachs) ("to become binding, a rule or principle of international law need not pass the test of universal acceptance. This is reflected in several statements of the Court … Not all States have, as I indicated earlier in a different context, an opportunity or possibility of applying a given rule. The evidence should be sought in the behaviour of a great number of States, possibly the majority of States, in any case the great majority of the interested States"); *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 435 (Dissenting Opinion of Judge Barwick) ("Customary law among the nations does not, in my opinion, depend on universal acceptance"); *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 95 (Separate Opinion of Judge Weeramantry) ("The general support of the international community does not of course mean that each and every member of the community of nations has given its express and specific support to the principle – nor is this a requirement for the establishment of a principle of customary international law"). For scholarly support see, for example, J. Dugard SC, *International Law: A South African Perspective*, 4th edition (Juta, 2012), 28 ("For a rule to qualify as custom, it must receive 'general' or 'widespread' acceptance. Universal acceptance is not necessary"); H. Thirlway, *supra* note 38, at 59 ("One thing that can be stated with certainty is that unanimity among all States is not a requirement, either in the sense that all States must have been shown to have participated in [the practice], or in the sense that there is evidence that the *opinio*, the view that it is a binding custom, is held by all States").

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

[154] See, for example, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 40, at p. 102, para. 205 (referring to "[a uniform and] widespread State practice"); *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at 299, para. 111 (referring to "a sufficiently extensive and convincing practice"); *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at pp. 45, 52 (Joint Separate Opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda) (referring to "sufficiently widespread" and "sufficiently general and uniform" State practice), and p. 161 (Separate Opinion of Judge Petrén) (referring to the need for a "sufficiently large" number of States); *Kaunda and Others v. The President of the Republic of South Africa and Others*, Judgment of the Constitutional Court of South Africa (4 August 2004), para. 29 ("…presently this is not the general practice of states… It must be accepted, therefore, that the applicants cannot base their claims on customary international law"); *2 BvR 1506/03*, Order of the Second Senate of 5 November 2003 (German Federal Constitutional Court), para. 59 ("Such practice, however, is not sufficiently widespread as to be regarded as consolidated practice that creates customary international law"). Generality has indeed been described as "the key concept to the essence of a universal customary rule": J. Barboza, *supra* note 119, at 7. See also the *Secretariat memorandum*, at 10 ("The generality of State practice has also been regarded by the Commission as a key consideration in the identification of a rule of customary international law").

[155] See *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 42, para. 73 ("a very widespread and representative participation…"), and p. 227 (Dissenting Opinion of Judge Lachs) ("This mathematical computation, important as it is in itself, should be supplemented by, so to speak, a spectral analysis of the representativity of the States … For in the world today an essential factor in the formation of a new rule of general international law is to be taken into account: namely that States with different political, economic and legal systems, States of all continents, participate in the process"); *Mondev International Ltd v. United States of America* (ICSID, Award, 11 October 2002), para. 117 ("Investment treaties run between North and South, and East and West, and between States in these spheres *inter se*. On a remarkably widespread basis, States have repeatedly obliged themselves to accord foreign investment such treatment. In the Tribunal's view, such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law"); *2 BvR 1506/03*, Order of the Second Senate of 5 November 2003 (German Federal Constitutional Court), para. 50 (referring to "conduct that is continuous in time and as uniform as possible, and which

53. The exact number of States required for the "kind of 'head count' analysis of State practice"[156] leading to the recognition of a practice as 'general' cannot be identified in the abstract.[157] In essence, what is important is that "[t]he practice must have been applied by the overwhelming majority of states which hitherto had an opportunity of applying it"[158] (including, in appropriate cases, through inaction), and that "[t]he available practice … [will be] so widespread that any remaining inconsistent practice will be marginal and without direct legal effect".[159] At times, even a "respectable" number of States adhering to the practice may not necessarily be sufficient;[160] yet it very well may be that only a relatively small number of States engage in a practice, and the inaction of others suffices to create a rule of customary international law.[161]

54. *Specially affected States*. Due regard should be given to the practice of "States whose interests [are] specially affected",[162] where such States may be identified. In other words, any assessment of

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takes place with a broad and representative participation of states and other subjects of international law with law-making authority"); *ILA London Statement of Principles*, at 23 ("For a rule of general customary international law to come into existence, it is necessary for the State practice to be both extensive and representative"); G.M. Danilenko, *supra* note 139, at 94 ("The requirement of generality means that customary practice must acquire a broad and representative character").

[156] To borrow the words of Judge Dillard in his Separate Opinion in *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 56.

[157] See also A. Clapham, *supra* note 37, at 59-60 ("This test of general recognition [among States of a certain practice as obligatory] is necessarily a vague one; but it is of the nature of customary law, whether national or international, not to be susceptible to exact or final formulation"); J. Barboza, *supra* note 119, at 8 ("'Generality' seems to be a rather flexible notion").

[158] J.L. Kunz, *supra* note 56, at 666; and see para. 54 below on 'specially affected States'. See also R. Higgins, *supra* note 13, at 22 ("we must not lose sight of the fact that it is the practice of the vast majority of states that is critical, both in the formation of new norms and in their development and change and possible death"). The German Federal Constitutional Court has held that it suffices if a rule is recognized as binding by an overwhelming majority of States, which need not necessarily include Germany (see Order of the Second Senate of 8 May 2007, 2 BvM 1-5/03, 1, 2/06, para. 33: "A rule of international law is 'general' within the meaning of Article 25 of the Basic Law if it is recognised by the vast majority of states (see BVerfGE 15, 25 (34)). The general nature of the rule relates to its application, not to its content, recognition by all states not being necessary. It is equally not necessary for the Federal Republic of Germany in particular to have recognised the rule").

[159] M.E. Villiger, *supra* note 84, at 30.

[160] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 42, para. 73. See also *Nguyen Tuong Van v. Public Prosecutor* (Singapore Court of Appeal), [2005] 1 SLR 103; [2004] SGCA 47, para. 92.

[161] See, for example, M. Akehurst, *supra* note 84, at 18 ("A practice followed by a very small number of States can create a rule of customary law if there is no practice which conflicts with the rule").

[162] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 42, para. 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"), p. 43, para. 74 ("State practice, including that of States whose interest are specially affected"), and pp. 175-176 (Dissenting Opinion of Judge Tanaka) ("It cannot be denied that the question of repetition is a matter of quantity … What I want to emphasize is that what is important … [is] the meaning which [a number or figure] would imply in the particular circumstances. We cannot evaluate the ratification of the Convention [on the Continental Shelf] 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"). See also *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 90 (Separate Opinion of Judge De Castro) ("For a new rule of international law to be formed, the practice of States, including those whose interests are specially affected, must have been substantially or practically uniform"), and p. 161

international practice ought to take into account the practice of those States that are "affected or interested to a higher degree than other states"[163] 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).[164] Which States are "specially affected" will depend upon the rule under consideration, and indeed "not all areas … allow a clear identification of 'specially affected' states".[165] In many cases, all States are affected equally. Admittedly, some States will often be "specially affected";[166] as mandated by the principle of sovereign equality, however, it is only in such capacity that their practice may be assessed and attributed particular weight.[167]

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(Separate Opinion of Judge Petrén) ("Hence another element which is necessary for the formation of a new rule of customary law is missing, namely its acceptance by those States whose interests it affects"); J.B. Bellinger, W.J. Haynes, 'A US government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*', *International Review of the Red Cross*, 89 (2007), 443, 445 (footnote 4); T. Treves, *supra* note 50, at para. 36 ("While, for instance, it would be difficult to determine the existence of a rule on the law of the sea in the absence of corresponding practice of the main maritime powers, or of the main costal States, or, as the case may be, of the main fishing States, the silence of less involved States would not be an obstacle to such determination. Similarly, rules on economic relations, such as those on foreign investment, require practice of the main investor States as well as that of the main States in which investment is made").

[163] W.T. Worster, 'The Transformation of Quantity into Quality: Critical Mass in the Formation of Customary International Law', *Boston University International Law Journal*, 31 (2013), 1, 63. Meijers refers to "The states which have a predominant share in a given activity" (H. Meijers, *supra* note 124, at 7); Danilenko refers to "a special interest in the relevant principles and rules" (G.M. Danilenko, *supra* note 139, at 95).

[164] See, for example, *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 47 (Joint Separate Opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda) ("…those claims have generally given rise to protests or objections by a number of important maritime and distant-water fishing States, and in this respect they cannot be described as being 'generally accepted'").

[165] G.M. Danilenko, *supra* note 139, at 95. See also M. Mendelson, *supra* note 124, at 186 ("the notion of 'specially affected states' is not very precise"); M.J. Aznar, 'The Contiguous Zone as an Archeological Maritime Zone', *International Journal of Marine and Coastal Law*, 29 (2014), 1, 12. One example for such a challenge may be found in the International Court's *Legality of the Threat or Use of Nuclear Weapons* case, where Judge Shahabuddeen, in his Dissenting Opinion, suggested that "Where what is in issue is the lawfulness of the use of a weapon which could annihilate mankind and so destroy all States, the test of which States are specially affected turns not on the ownership of the weapon, but on the consequences of its use. From this point of view, all states are equally affected, for, like the people who inhabit them, they all have an equal right to exist" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 414. For the same point see also pp. 535-536 (Dissenting Opinion of Judge Weeramantry).

[166] De Visscher compares the growth of customary international law to the "formation of a road across vacant land": "Among the users are some who mark the soil more deeply with their footprints than others, either because of their weight, which is to say their power in the world, or because their interests bring them more frequently this way": C. De Visscher, *Theory and Reality in Public International Law* (Princeton University Press, 1968), 149.

[167] See also *ILA London Statement of Principles*, at 26: "There is no rule that major powers have to participate in a practice in order for it to become a rule of general customary law. Given the scope of their interests, both geographically and *ratione materiae*, they often will be 'specially affected' by a practice; and *to that extent and to that extent alone*, their participation is necessary". See also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 278 (Declaration of Judge Shi) ("any undue emphasis on the practice of this 'appreciable section' [of "important and powerful members of the international community [that] play an important role on the stage of international politics"] would not only be contrary to the very principle of sovereign equality of States, but would also make it more difficult to give an accurate and proper view of the existence of a customary rule"), and p. 533 (Dissenting Opinion of Judge Weeramantry) ("From the standpoint of the creation of international custom, the practice and policies of five States out of 185 seem to be an insufficient basis on which to assert the creation of custom, whatever be the global influence of those five"). But see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 312, 319 (Dissenting Opinion of Judge Schwebel) ("This nuclear practice is not a practice of a lone and secondary persistent objector. This is not a practice

55. *Consistency of the practice*. For a rule of customary international law to become established, the relevant practice must be consistent.[168] While the specific circumstances surrounding each act may naturally vary, "a core of meaning that does not change" common to them is required: it is then that a regularity of conduct may be observed.[169] Where, by contrast, the practice demonstrates "that each specific case is, in the final analysis, different from all the others ... [t]his precludes the possibility of those conditions arising which are necessary for the formation of principles and rules of customary law".[170] In other words, where the facts reveal that "there is so much uncertainty and contradiction, so much fluctuation and discrepancy … so much inconsistency … and the practice has been so much influence by considerations of political expediency in the various cases, [] it is not

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of a Pariah government crying out in the wilderness of otherwise adverse international opinion. This is the practice of five of the world's major Powers, of the permanent members of the Security Council, significantly supported for almost 50 years by their allies and other States sheltering under their nuclear umbrellas. That is to say, it is the practice of States – and practice supported by a large and weighty number of other States – that together represent the bulk of the world's military and economic and financial and technological power and a very large proportion of its population"); *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 306 (Separate Opinion of Judge Petrén) ("It would be unrealistic to close one's eye to the attitude, in that respect, of the State with the largest population in the world"); T. Buergenthal and S.D. Murphy, *supra* note 138, at 28 ("That it [practice] does not have to be universal seems to be clear. Equally undisputed is the conclusion that, in general, the practice must be one that is accepted by the world's major powers and by states directly affected by it").

[168] See, for example, *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at pp. 276, 277 ("a constant and uniform usage"); *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 40 ("a constant and uniform practice"); *Nottebohm Case (second phase), Judgment of April 6th, 1955: I.C.J. Reports 1955*, p. 4, at p. 30 (Dissenting Opinion of Judge Klaestad); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 43, para. 74 (the practice must be "virtually uniform"); *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 90 (Separate Opinion of Judge De Castro) ("For a new rule of international law to be formed, the practice of States, including those whose interests are specially affected, must have been substantially or practically uniform") and p. 50 (Joint Separate Opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda) ("Another essential requirement for the practice of States to acquire the status of customary law is that such State practice must be common, consistent and concordant. Thus contradiction in the practice of States or inconsistent conduct, particularly emanating from these very States which are said to be following or establishing the custom, would prevent the emergence of a rule of customary law"). See also the *Secretariat memorandum*, at 9 ("The uniformity of State practice has been regarded by the Commission as a key consideration in the identification of a rule of customary international law"). One scholar has written that in practice the two requirements of generality and uniformity "meld together in a unitary analytical process. International lawyers cannot, for example, analyze whether State practice is general without having identified a practice that is uniform" (D.P. Fidler, 'Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law', *German Yearbook of International Law*, 39 (1996), 198, 202).

[169] J. Barboza, *supra* note 119, at 7 ("The repetition of conduct is of the essence of custom. Of course, the facts are never the same: Heraclitus used to say that we never bathe twice in the same river. The facts may change, the subjects may be different, the circumstances may vary, but there is a core of meaning that does not change. Whenever there is a repetition, there are individual facts that belong to a common genus; to speak of repetition implies a previous abstraction and elimination of a number of data belonging to the individual facts, the facts that occurred in real life. At the same time, a core of *generic meaning* is kept, i.e. a meaning that can be applied to the other situations ... That *generic meaning* repeats itself in every precedent and establishes the content of the accepted by States concerned as law between them"). See also G.M. Danilenko, *supra* note 139, at 96 ("any customary rule is a normative generalization from individual precedents").

[170] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at p. 290, para. 81.

possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule …".[171]

56. In establishing the consistency of practice it is, of course, important to consider situations that are in fact comparable, where the same or similar issues have arisen.[172] And while frequent repetition of a consistent practice would naturally lend it greater weight, "the degree of frequency has to be weighed against the frequency with which the circumstances arise in which the action constituting practice has to be taken, or is appropriate".[173]

57. *Some inconsistency is not fatal*. Complete uniformity of practice is not required: "[t]oo much account should not be taken of superficial contradictions and inconsistencies".[174] In the words of the

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[171] *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 277. See also *Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949*, p. 4, at p. 74 (Dissenting Opinion by Judge Krylov) ("The practice of States in this matter is far from uniform, and it is impossible to say that an international custom exists in regard to it") and p. 128 (Dissenting Opinion by Judge ad hoc Ečer) ("The practice of States was so varied that no proof of the existence of such a rule [of customary international law] was to be found"); *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, at p. 131 (finding that where "certain States" adopted or applied one rule and "other States" have adopted a different practice, "Consequently, the [] rule has not acquired the authority of a general rule of international law"); *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at pp. 56-57 (Separate Opinion of President Bustamante y Rivero) (asserting that where [practice] is of a "sporadic nature [that] stands in the way of any systemization" the emergence of customary international law is "hardly likely in the circumstances"); *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 175, at p. 212 (Declaration of Judge Nagendra Singh) ("a widely divergent and, discordant State practice [would prevent a rule from crystallizing]"); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at pp. 117-118 (Separate Opinion of Judge Bula-Bula) ("many inconsistencies and equivocations fundamentally characterizing a practice both unilateral and solitary … [mean that] no customary norm has emerged").

[172] See, for example, *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 45, para. 79; *2 BvR 1506/03*, Order of the Second Senate of 5 November 2003 (German Federal Constitutional Court), para 42 ("it must be particularly taken into account that the relevant state practice and the doctrines that the Higher Regional Court has taken into consideration, in their overriding majority refer to situations that involve only two states. In the present case, however, legal relations exist between the Republic of Yemen, as the complainant's state of origin, the United States of America, as the requesting state of the forum, and the Federal Republic of Germany as the requested state of residence. Accordingly, the legal consequences of the alleged violation of international law do not directly refer to criminal proceedings in the state of the forum… but to extradition proceedings in the requested state of residence"); *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-A, Judgment (Special Court for Sierra Leone Appeals Chamber), 28 May 2008, para. 406.

[173] H. Thirlway, *supra* note 38, at 65.

[174] G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law', *British Yearbook of International Law*, 30 (1953), 1, 45. See also M. Villiger, *supra* note 84, at 44 ("… an overly strict test … would jeopardize the formation of customary international law. For example, it would mean neglecting the necessarily general character of customary law when examining the instances of practice in too much detail. Furthermore, what appears at first glance to be inconsistent practice may well contain as a common denominator a general rule, or there may at least be uniformity on partial or special rules. Once the rule has become established, it may well permit various options … Divergence from the rule may, in reality, point to an admissible exception …"); J. Crawford, *supra* note 37, at 24 ("Complete uniformity of practice is not required, but substantial uniformity is"); D. Bodansky, *supra* note 136, at 109 ("customary rules represent regularities, but not necessarily uniformities, of behaviour … mistakes and violations of rules are possible"); R. Müllerson, *supra* note 85, at 167 (making the general point that "Legal regulation is needed only where there are deviations from desired patterns of practice"). In Briggs' words, "Variations from the concordance, generality, or consistency of a practice are grist for judicial interpretations": H.W. Briggs, 'The Colombian-Peruvian Asylum Case and Proof of Customary International Law', *American Journal of international Law*, 45 (1951), 728, 729. According to the *Secretariat memorandum*,

International Court, "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, 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."[175]

58. *Duration of the practice*. Although rules of customary international law have traditionally emerged as a result of a practice extending over a lengthy period of time, it is widely acknowledged that there is no specific requirement with regard to how long a practice must exist before it can ripen into a rule of customary international law.[176] As the International Court held in the *North Sea Continental Shelf* case, "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 … [yet] 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 … and should moreover have occurred in such a way as to show a general

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"Where there was a unifying thread or theme underlying international practice, a certain variability in practice has often not precluded the Commission from identifying a rule of customary international law" (at 12).

[175] *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. The Court added that "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". See also *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 336 (Dissenting Opinion by Judge Azevedo); *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at pp. 40, and also in pp. 104, 107 (Dissenting Opinion of Judge Sir Percy Spender); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 229 (Dissenting Opinion of Judge Lachs). In the *Fisheries* case the Court said that it "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 easily be 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" (*Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, at p. 138).

[176] See, for example, J. Dugard SC, *supra* note 152, at 27 ("In most cases some passage of time is required for a practice to crystallize into a customary rule. In some cases, however, where little practice is needed to establish a rule, it may come into existence very rapidly"); O. Corten, *Métholodologie du droit international public* (Editions de l'Université de Bruxelles, 2009), 150-151 ("Si, auparavant, la doctrine semblait exiger une pratique très ancienne, les évolutions récentes de la jurisprudence ont rendu cette condition caduque. *Ratione temporis*, une coutume peut très bien resultée d'une pratique limitée dans le temps pouvu, ajoute-t-on généralement, qu'elle soit particulièrement intense et univoque"); J.L. Kunz, *supra* note 56, at 666 ("… international law contains no rules as to how many times or for how long a time this practice must be repeated"); K. Wolfke, *supra* note 93, at 3 ("this practice no longer needs to occur for any great length of time"); *ILA London Statement of Principles*, at 20 ("… no precise amount of time is required"). But see the Separate Opinion of Judge Sepúlveda-Amor in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 279: "Time is another important element in the process of creation of customary international law … To claim the existence of a customary right, created in such a short span of time, clearly contradicts the Court's previous jurisprudence on the matter" (citing to the *Right of Passage* case); R.Y. Jennings, 'The Identification of International Law', in B. Cheng (ed.), *International Law: Teaching and Practice* (Stevens & Sons, 1982), 3, 5 ("Certainly practice over a more or less long period is an essential ingredient of customary law").

recognition that a rule of law or legal obligation is involved".[177] While some rules may inevitably take longer to emerge,[178] provided that the practice shows sufficient generality and consistency, no particular duration is required.[179] It ought to be borne in mind in this context, however, that "all states which could become bound by their inaction must have the time necessary to avoid implicit acceptance by resisting the rule".[180]

59. The following draft conclusion is proposed:

**Draft Conclusion 9**
***Practice must be general and consistent***

[177] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 43, para. 74; see also p. 124 (Separate Opinion of Judge Ammoun), p. 230 (Dissenting Opinion of Judge Lachs) ("With regard to the time factor, the formation of law by State practice has in the past frequently been associated with the passage of a long period of time. There is no doubt that in some cases this may be justified. However, the great acceleration of social and economic change, combined with that of science and technology, have confronted law with a serious challenge: one it must meet, lest it lag even farther behind events than it has been wont to do … the short period within which the law on the continental shelf has developed and matured does not constitute an obstacle to recognizing its principles and rules, including the equidistance rule, as part of general law"), and p. 244 (Dissenting Opinion of Judge Sørensen) ("The possibility has thus been reserved of recognizing the rapid emergence of a new rule of customary law based on the recent practice of States. This is particularly important in view of the extremely dynamic process of evolution in which the international community is engaged at the present stage of history"). The Inter-American Court of Human Right has held with regard to 'customary practice' that "the important point is that the practice is observed without interruption and constantly, and that it is not essential that the conduct should be practiced over a specific period of time" (*Baena Ricardo et al.*, Judgment of November 28, 2003, Inter-Am. Ct. H.R., (Ser. C) No. 104 (2003), para. 104).

[178] See H. Thirlway, *supra* note 38, at 64 ("If the issue to be resolved arises frequently, and is regulated in essentially the same way on each occasion, the time required may be short; if the issue arises only sporadically, it may take a longer time for consistency of handling to be observable … It is in fact the consistency and repetition rather than the duration of the practice that carries the most weight."). See also H. Lauterpacht, 'Sovereignty over Submarine Areas', *British Yearbook of International Law*, 27 (1950), 376, 393 (suggesting that "[t]he 'evidence of a general practice as law' – in the words of Article 38 of the Statute – need not be spread over decades. Any tendency to exact a prolonged period for the crystallization of custom must be proportionate to the degree and the intensity, of the change that it purports, or is asserted, to effect"); H. Li, *Guoji Fa De Gainian Yu Yuanyuan (Concepts and Sources of International Law)* (Guizhou People's Press, 1994), 91 (cited in C. Cai, 'Intenrational Investment Treaties and the Formation, Application and Transformation of Customary International Law Rules', *Chinese Journal of International Law*, 7 (2008), 659, 661).

[179] See also I. Brownlie, *supra* note 121, at 19; E. Jiménez de Aréchaga, 'General Course in Public International Law', 159 *Recueil des Cours* (1978), 25 ("The Court's acceptance of a quickly maturing practice shows that the traditional requirement of duration is not an end in itself but only a means of demonstrating the generality and uniformity of a given State practice"); L.B. Sohn, 'Unratified Treaties as a Source of Customary International Law', in A. Bos, H. Siblesz (eds.), *Realism in Law-Making: Essays in International Law in Honour of Willem Riphagen* (Martinus Nijhoff Publishers, 1986), 231, 234 ("The length of time over which a practice has endured is not crucial for formation of custom. More important is the strength of other factors – frequency and repetition of the practice, number of States that have engaged in the practice, and the relative strength of opposing practice"); S. Rosenne, *supra* note 79, at 55 ("It is not necessary that this line of conduct should have been pursued over a long period of time, although assertions of 'quickie' or spontaneous production of customary rules must be treated with reserve. It is more important to establish that there is widespread acceptance of the view that such conduct is in conformity with the law and is required by the law, together with experience of actual conduct consonant therewith"). Cf. M.P. Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (Cambridge University Press, 2013).

[180] H. Meijers, *supra* note 124, at 23-24 (asserting that "[a]ll states that fall within the potential reach of the nascent rule must get an opportunity to protest against its emergence"). But see G. Arangio-Ruiz, *supra* note 17, at 100 ("Particularly nowadays any action or omission of a State is known all over the world with the immediateness of a ray of light").

**1. To establish a rule of customary international law, the relevant practice must be general, meaning that it must be sufficiently widespread and representative. The practice need not be universal.**

**2. The practice must be generally consistent.**

**3. Provided that the practice is sufficiently general and consistent, no particular duration is required.**

**4. In assessing practice, due regard is to be given to the practice of States whose interests are specially affected.**

## VI. Accepted as law

60. The second element necessary for the formation and identification of customary international law – acceptance of the 'general practice' as law – is commonly referred to as *opinio juris* (or "*opinio juris sive necessitatis*"). This "subjective element" of customary international law requires, in essence, that the practice in question be motivated by a "conception... that such action was enjoined by law".[181] States are to "believe[] themselves to be applying a mandatory rule of customary international law",[182] or, in other words, "[feel] legally compelled to … [perform the relevant act] by reason of a rule of customary law obliging them to do so".[183] It is this "internal point of view"[184] through which regularities of conduct may harden into a rule of law, and which enables a distinction to be made between law and non-law.[185] As Judge Chagla put it, "… custom under

[181] M.O. Hudson, *The Permanent Court of International Justice, 1920-1942 – a Treatise* (Macmillan, 1943), 609.
[182] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 76.
[183] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 44-45, para. 78.
[184] D. Bodansky, *supra* note 136, at 109.
[185] A practice unaccompanied by such a sense of obligation does not contribute to customary international law. See also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77 ("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*"); *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 123, para. 55 ("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"). See also H.W.A. Thirlway, *supra* note 81, at 48 ("while the requirement of *opinio juris* does undoubtedly give rise to many problems in practice … it is admittedly difficult to distinguish between usage which has become binding as customary law and usage which has not … without allowing the psychological element in the creation of custom to creep back into the discussion by a devious route and under another name"). On the important function of *opinio juris* in preventing generally unwanted general practice from becoming customary international law see C. Dahlman, 'The Function of *Opinio Juris* in Customary International Law', *Nordic Journal of International Law*, 81 (2012), 327-339. Villiger has remarked that "In addition, the *opinio* serves in particular to distinguish violations of the customary rule from subsequent modifications to the rule – a test not without its significance in view of the dynamic nature

international law requires much more than [a piling up of a large number of instances]. It is not enough to have its external manifestation proved; it is equally important that its mental or psychological element must be established. It is this all-important element that distinguishes mere practice or usage from custom. In doing something or in forbearing from doing something, the parties must feel that they are doing or forbearing out of a sense of obligation. They must look upon it as something which has the same force as law ... there must be an overriding feeling of compulsion – not physical but legal".[186]

61. *Other motives for action*. 'Acceptance as law' is to be distinguished from other, extra-legal considerations that a State may have with regard to the practice in question. In ascertaining whether a rule of customary international law exists it ought to be established, therefore, that the relevant practice was not motivated (solely) by considerations such as "courtesy, good-neighbourliness and political expediency"[187] as well as "convenience or tradition".[188] States must have accorded

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of customary international law. As long as the previous *opinio* has not been eroded, and the new *opinio* is not established, the diverging practice remains a form either of persistent or subsequent objection" (M.E. Villiger, *supra* note 84, at 48).

[186] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 120 (Dissenting Opinion of Judge Chagla, referring to local custom but relies in this context on the general language of Article 38.1(b) of the Statute of the Court).

[187] *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at pp. 285, 286 (adding that "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"). See also *Case concerning Right of Passage over Indian Territory (Preliminary Objections), Judgment of November 26th, 1957: I.C.J. Reports 1957*, p. 125, at p. 177 (Dissenting Opinion of Judge Chagla) ("[the State] must go further and establish that … [the practice was] enjoyed … as a matter of right and not as a matter of grace or concession"); *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 305 (Separate Opinion of Judge Petrén) ("[refraining from a conduct must be] motivated not by political or economic considerations but by a conviction that … [that certain conduct is] prohibited by customary international law"); *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 (where the Court contrasted "statements of international policy" from "an assertion of rules of existing international law"); *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952*, p. 176, at p. 221 (Dissenting Opinion of Judges Hackworth, Badawi, Levi Carneiro and Sir Benegal Rau) (referring to "asserting usage as at least one basis of its rights … [and thus] It was not, therefore, a case of mere 'gracious tolerance'"); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 423-424 (Dissenting Opinion of Judge Shahabuddeen) ("It is also important to have in mind that bare proof of acts or omissions allegedly constituting State practice does not remove the need to interpret such acts or omissions. The fact that States may feel that realities leave them no choice but to do what they do does not suffice to exclude what they do from being classified as part of State practice, provided, however, that what they do is done in the belief that they were acting out of a sense of legal obligation…"); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 145 (Dissenting Opinion of Judge ad hoc Van den Wyngaert) ("A 'negative practice of States', consisting in their abstaining from instituting criminal proceedings, cannot, in itself, be seen as evidence of an *opinio juris*. Abstinence may be explained by many other reasons, including courtesy, political considerations, practical concerns and lack of extraterritorial criminal jurisdiction. Only if this abstention was based on a conscious decision of the States in question can this practice generate customary international law"); C. De Visscher, *supra* note 166, at 149 ("Governments attach importance to distinguishing between custom, by which they hold themselves bound, and the mere practices often dictated by considerations of expediency and therefore devoid of definite legal reasoning. The fact that this is often a political interest is no reason for denying its significance").

[188] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77 ("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"). See also *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at p. 69 (Separate Opinion of Vice-President Sette-Camara)

deference to a rule "as a matter of legal obligation and not merely as a matter of reciprocal tolerance or comity".[189] 'Acceptance as law' is not to be confused with considerations of a social or economic nature either,[190] although these may very well be present especially at the outset of the development of a practice.

62. Nor may practice motivated (solely) by the need to comply with treaty (or some other extra-customary) obligations be taken as indicating 'acceptance as law':[191] when the parties to a treaty act in fulfilment of their conventional obligations, this does not generally demonstrate the existence of an *opinio juris*.[192] By contrast, where States act in conformity with a treaty by which they are not

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("In support of the distance principle political and diplomatic convenience can be invoked – but this is hardly *opinio juris sive necessitatis*").

[189] *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 58 (Separate Opinion of Judge Dillard).

[190] See also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 23 (where the Court said of the equidistance method of maritime delimitation: "In short, it would probably be true to say that no other method of delimitation has the same combination of practical convenience and certainty of application. Yet these factors do not suffice of themselves to convert what is a method into a rule of law, making the acceptance of the results of using that method obligatory in all cases in which the parties do not agree otherwise … Juridically, if there is such a rule, it must draw its legal force from other factors than the existence of these advantages, important though they may be"); *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, at p. 34 ("Humanitarian considerations may constitute an inspirational basis for rules of law … Such considerations do not, however, in themselves amount to rules of law. All States are interested – have an interest – in such matters. But the existence of an "interest" does not of itself entail that this interest is specifically juridical in nature").

[191] See also O. Schachter, 'Entangled Treaty and Custom', in Y. Dinstein, M. Tabory (eds.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff Publishers, 1989), 717, 729; A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, 2008), 81 ("Practice in compliance with some other extra-customary rule will not be independent evidence of customary *opinio juris*, as was established in the *North Sea* case"). Baxter pointed to a paradox in this context, according to which "As the express acceptance of the treaty increases, the number of States not parties whose practice is relevant diminishes" (R.R. Baxter, 'Treaties and Custom', 129 *Recueil des Cours* (1970), 27, 73; see also R. Cryer, 'Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study', *Journal of Conflict and Security Law*, 11 (2006), 239, 244 ("In some ways, it can be more difficult to appraise practice in relation to a norm that has a pre-existing treaty basis, as the practice of parties to the treaties *inter se* can be attributed to the existence of the treaty").

[192] See, for example, *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 43, para. 76 ("over half the States concerned, whether acting unilaterally or conjointly, were or shortly became parties to the Geneva Convention, and were therefore presumably so far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law …"); *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 ("throughout this whole period [of 150 years], the United States consular jurisdiction was in fact based, not on custom or usage, but on treaty rights … [there is] not enough to establish that the States exercising consular jurisdiction in pursuance of treaty rights enjoyed in addition an independent title thereto based on custom or usage"); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 531 (Dissenting Opinion of Judge Jennings) ("… there are obvious difficulties about extracting even a scintilla of relevant 'practice' on these matters from the behaviour of those few States which are not parties to the Charter; and the behaviour of all the rest, and the *opinio juris* which it might otherwise evidence, is surely explained by their being bound by the Charter itself"); *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 422, at p. 479 (Separate Opinion of Judge Abraham) ("such an approach does not demonstrate the existence of an *opinio juris*, that is to say, a belief that there exists an obligation … outside of any conventional obligation"); *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment (ICTY Trial Chamber), 16 November 1998, para. 302. The United States Supreme Court has likewise referred in *The Paquete Habana* case (1900) to a rule of international law existing "independently of any express treaty or other public act": 175 U.S. 677, 708. See also P. Tomka,

(yet) bound or towards States not parties to the treaty, the existence of 'acceptance as law' may indeed be established.[193] This may also be the case where non-parties to a treaty act in accordance with rules embodied therein, as for example with certain non-parties to the United Nations Convention on the Law of the Sea.[194]

63. Where States "freely have recourse [to a set of different methods] in order to reconcile their national interests", there is usually no indication of "any *opinio juris* based on the awareness of States of the obligatory nature of the practice employed".[195] In other words, "the practice of States does not justify the formulation of any general rule of law" where such States are in a position to select a practice appropriate to their individual circumstances (and have thus not recognized a specific practice as obligatory).[196]

64. Acceptance as law is generally to be sought with respect to the interested States, both those who carry out the practice in question and those in a position to respond to it: "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'".[197] In the modern reality of multiple multilateral fora such inquiry into what some refer to as "individual *opinio juris*" may be complemented or assisted by a search for "coordinated or

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*supra* note 24, at 204 ("This will not often be a problem in regard to determining whether the convention codified a pre-existing rule of law, given the extensive preparatory work and opportunities for explicit comments throughout the process of adopting a codification convention, as well as the circumstances of the adoption, which will shed light on this issue").

[193] See, for example, the reference to Venezuelan practice in *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 370 (Dissenting Opinion by Judge ad hoc Caicedo Castilla).

[194] In *Peru v Chile* before the International Court of Justice, the Agent of Peru stated that "Peru accepts and applies the rules of the customary international law of the sea, as reflected in the [Law of the Sea] Convention": *Maritime Dispute (Peru* v. *Chile), CR 2012/34*, p. 43, para. 10 (Wagner).

[195] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 127 (Separate Opinion of Judge Ammoun). Unless, of course, the rule itself permits several courses of action.

[196] *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, at p. 131.

[197] *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 (citation omitted); see also *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 121 (Dissenting Opinion of Judge Chagla) ("There must be an equally clear realization on the other side of an obligation…"); *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at pp. 315 (Separate Opinion of Judge Ammoun) ("a practice only contributes to the formation of a customary rule if … both the State which avails itself thereof or seeks to impose it and the State which submits to or undergoes it regard such practice as expressing a legal obligation which neither may evade"); H. Thirlway, *supra* note 38, at 70-71. By contrast, authors have sometimes suggested that it is mainly the *opinio juris* of either group of States which is most important: for the view that the *opinio juris* of the 'receiving' states is most important see, for example, K. Wolfke, *supra* note 6, at 44,47 ("For a typical custom it suffices that the acceptance of the practice as law should be presumed upon all circumstances of the case in question, above all on the attitude, hence conduct, of the accepting states to be bound by the customary rule … It should be added that the requirement of any 'feeling of duty' or 'conviction' on the part of the acting state is even somewhat illogical, since what is legally important is only the reaction of other states to the practice, in particular, whether they consider it as required by law or legally permitted"); I.C. MacGibbon, 'Customary International Law and Acquiescence', *British Yearbook of International Law*, 33 (1957), 115, 126 ("The *opinio juris* is, of course, relevant to the formation of customary rights, but only from the standpoint of the States affected by the exercise of the right in question …").

general *opinio juris*",[198] that is, acceptance of a certain practice as law (or otherwise) by a general consensus of States.[199] Much like the convenience afforded by examining practice undertaken jointly by States, this may make it easier to identify whether the members of the international community are indeed in agreement or are divided as to the binding nature of a certain practice.

65. While the idea that acceptance as law is necessary for the transformation of habitual practice into a legal rule dates back to the ancient world,[200] the Latin phrase *opinio juris sive necessitatis* is of far more recent origin. Literally meaning 'belief (or opinion) of law or of necessity',[201] this "technical name"[202] for the subjective element is usually shortened to "*opinio juris*", a fact that may well have "its own significance. What is 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".[203]

66. Scholars attempting to expound on the meaning and function of the concept of *opinio juris* have wrestled not only with its linguistic indeterminacy and uncertain provenance,[204] but also with

[198] See, for example, G.M. Danilenko, *supra* note 139, at 102-107.

[199] See also A. Pellet, *supra* note 17, at 819 (citing to several cases when suggesting that "in parallel with practice, [the International Court of Justice] will usually rely on a general opinion, not that of States individually"); E. Jiménez de Aréchaga, *supra* note 179, at 11 ("[The International Court] has searched for the general consensus of States instead of adopting a positivist insistence on strict proof of the consent of the defendant State"); P.B. Casella, 'Contemporary Trends on *Opinio Juris* and the Material Evidence of Customary International Law', 2013 Amado Lecture before the Commission (speaking notes available with the Special Rapporteur) ("*Opinio juris* is no longer to be viewed as individual opinion of one or of certain states, but presently as collective statements, issued by the international community, as a whole, or a substantial part of it); J. Charney, 'Remarks on the Contemporary Role of customary International Law', *ASIL/NVIR Proceedings* (1995), 21 ("Some maintain that individual States must choose to accept the norm as law. But clearly acceptance is required only by the international community and not by every individual State and other international legal persons"). Judge Meron, in his Partly Dissenting Opinion in *Nahimana et al. v. Prosecutor* (ICTR Appeals Chamber), suggests that where a "consensus among states has not crystallized, there is clearly no norm under customary international law" (Case No. ICTR-99-52-A, 28 November 2007, paras. 5-8); see also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 315 (Dissenting Opinion of Judge Schwebel) ("vehement protest and reservation of right, as successive resolutions of the General Assembly show … abort the birth or survival of *opinio juris* to the contrary").

[200] Crawford refers to Isidore of Seville's (c540-636CE) *Etymologiae, Liber V: De Legibus et Temporibus*, ch 3, §§3-4, where it is said that "Custom as law is established by moral habits, which is accepted as law when written law is lacking: it does not make a difference whether it exists in writing or reason, since reason too commits to law … Custom is so called also because it is in common usage" (J. Crawford, *supra* note 37, at 26). For an "intellectual genealogy" of the "extra ingredient" of customary international law see E. Kadens, E.A. Young, 'How Customary Is Customary International Law?', *William & Mary Law Review*, 54 (2013), 885-920.

[201] Thirlway has proposed the following translation "in light of its application in law": "the view (or conviction) that what is involved is (or, perhaps, should be) a requirement of the law, or of necessity" (H. Thirlway, *supra* note 38, at 57).

[202] S. Rosenne, *supra* note 79, at 55.

[203] H. Thirlway, *supra* note 38, at 78. See also L. Millán Moro, *supra* note 38; R. Huesa Vinaixa, *El Nuevo Alcance de la "Opinio Iuris" en el Derecho Internacional Contemporaneo* (tirant lo blanch, 1991). Some have suggested for *opinio juris* an additional role beyond the one commonly accorded to it with regard to customary international law: see, for example, the Dissenting Opinion of Judge Cançado Trindade in *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 283, para. 290 ("one should not pursue a very restrictive view of *opinio juris*, reducing it to the subjective component of custom and distancing it from the general principles of law").

[204] See, for example, M. Mendelson, *supra* note 124, at 194, 207 ("it is submitted that the linguistic incoherence of the phrase *opinio juris sive necessitatis* reflects a certain incoherence of the thought behind it … for its part, [it] is a phrase of dubious provenance and uncertain meaning").

long-standing theoretical problems associated with attempting to capture in exact terms the amorphous process by which a pattern of State conduct acquires legal force.[205] In particular, some have debated whether the subjective element does indeed stand for the belief (or opinion) of States, or rather, for their consent (or will).[206] Others have deliberated the *opinio juris* 'paradox', that "vicious cycle argument" which questions how a new rule of customary international law can ever emerge if the relevant practice must be accompanied by a conviction that such practice is already law.[207] Still others have questioned whether States may be capable at all of having a belief,[208] and whether such inner motivation can ever be proved.[209] Several writers have argued that *opinio juris*

[205] See also E. Kadens, E.A. Young, *supra* note 200, at 907 ("The central problem of custom concerns the 'extra ingredient' necessary to transform a repetitive practice into a binding norm. And a central lesson of our historical discussion is that this has *always* been the central problem").

[206] As has been noted by scholars, the PCIJ and the ICJ have referred to both notions of will and belief (see, respectively, *The Case of the S.S. "Lotus" (France/Turkey)*, PCIJ, Series A, No. 10, p. 18; *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77). For attempts to reconcile the two approaches see, for example, the *ILA London Statement of Principles*, at 30 ("It is possible to achieve an elision or apparent reconciliation of these two approaches by using such terms as "accepted" or "recognized" as law"); O. Elias, 'The Nature of the Subjective Element in Customary International Law', *International and Comparative Law Quarterly*, 44 (1995), 501-520.

[207] See, for example, H. Kelsen, 'Théorie du droit international coutumier', *Revue internationale de la théorie du droit*, X (1939), 253, 262-5, reproduced in C. Leben, *Hans Kelsen, Ecrits français de droit international* (Presses Universitaires de France, 2001), 61; see also H. Taki, '*Opinio Juris* and the Formation of Customary International Law: A Theoretical Analysis', *German Yearbook of International Law*, 51 (2008), 447, 450. (On some of the proposed solutions to the 'paradox' see T. Maluwa, 'Custom, Authority and Law: Some Jurisprudential Perspectives on the Theory of Customary International Law', *African Journal of International and Comparative Law*, 6 (1994), 387-410; A. Verdross, 'Entstehungsweisen und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts', *ZaöRV*, 29 (1969), 635-653; J. Tasioulas, '*Opinio Juris* and the Genesis of Custom: A Solution to the 'Paradox'', *Australian Yearbook of International Law*, 26 (2007), 199-205; D. Lefkowitz, '(Dis)solving the Chronological Paradox in Customary International Law: A Hartian Approach', *Canadian Journal of Law and Jurisprudence*, 21 (2008), 129-148; A.A. D'Amato, *supra* note 66, at 52-53; B.D. Lepard, *Customary International Law: A New Theory with Practical Implications* (Cambridge University Press, 2010), 112; O.A. Elias, C.L. Lim, *The Paradox of Consensualism in International Law* (Kluwer Law International, 1998), 3-21.

[208] See, for example, A. D'Amato, *supra* note 83, at 471 ("it is an anthropomorphic fallacy to think that the entities we call states can 'believe' anything; thus, there is no reason to call for any such subjective and wholly indeterminate test of belief when one is attempting to describe how international law works and how its content can be proved"); B. Cheng, 'Custom: The Future of General State Practice In a Divided World', in R.St.J. Macdonald, D.M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (Martinus Nijhoff Publishers, 1983), 513, 530 ("In the first place, there is the question whether states, being legal entities, can 'think', but this is a simple matter of imputability in international law. If states can 'act' and 'commit illegal acts' through their agents, why can they not 'think'? Are theirs all mindless acts? The next question is, can we really establish the thought of man, let alone that of a legal person? This is an old chestnut. In law, one has no difficulty in ascertaining the 'intention of the parties', the 'intention of the legislator,' *mens rea*, 'willfulness,' and a host of other psychological elements everyday. In law, these psychological elements need not correspond to reality. They are simply what, in lawyers' logic, are deductible from what has been said or done").

[209] M. Akehurst, *supra* note 84, at 36 ("The traditional view seeks evidence of what States believe; the present author prefers to look for statements of belief by States"); H. Taki, *supra* note 207, at 447 ("it is possible to solve the 'problem of proof' by means of inferring the inner consciousness of the acting individual from some external phenomena (for example observable conduct)"); J.L. Slama, '*Opinio Juris* in Customary International Law', *Oklahoma City University Law Review*, 15 (1990), 603, 656 ("A state's actions, express statements, consent, acquiescence, protests, or lack of protests, are all objective factors capable of *manifesting opinio juris*").

ought to be understood as embodying ethical principles and morality,[210] while others deny the relevance of such considerations in this context.[211] These academic debates and others, referred to by one author as "formidable",[212] often reflect deeper controversies on (international) law more broadly.[213] The subjective element of customary international law has, however, "created more difficulties in theory than in practice",[214] and the theoretical torment which may accompany it in the books has rarely impeded its application in practice.[215]

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[210] See, for example, R. Wolfrum, 'Sources of International Law', in *Max Planck Encyclopedia of Public International Law* (2012), para. 25 ("*Opinio iuris*, the belief that a certain conduct is required or permitted under international law, is in fact a conviction that such conduct is just, fair, or reasonable and for that reason is required under law").

[211] See, for example, K. Skubiszewski, *supra* note 84, at 838 ("The assertions of a right by one State or States, the toleration or admission by others that the former are entitled to that right, the submission to the obligation – these are phenomena that are evidence of the States' opinion that they have moved from the sphere of facts into the realm of law. For rights and duties here have a strictly and exclusively *legal* connotation, and not moral, ethical, or one dictated by courtesy or convenience"); M. Akehurst, *supra* note 84, at 37 ("A statement that something is morally obligatory may help to create rules of international morality; it cannot help to create rules of international law").

[212] I.C. MacGibbon, *supra* note 197, at 125.

[213] See also M. Mendelson, *supra* note 124, at 177 ("One reason why the controversies have continued for so long without resolution is that the holders of different theories are able to find in the phenomenon what they want to see, thereby strengthening their pre-conceptions"); K. Wolfke, *supra* note 6, at 44 ("the differences of opinion on this subjective element of custom are closely combined with endless disputes on what is international law in general and on the so-called 'basis of binding force' of that law"); J. Klabbers, *supra* note 128, ay 180 ("More importantly perhaps, the very idea of customary law provokes all sorts of debates not just because of the practical relevance combined with the inherent indeterminacy of the notion, but also because of its acute political relevance. It is through the sources of international law (and custom still ranks as one of the two main sources of that particular legal order) that political values are being distributed, which renders sources doctrine in general highly volatile … Small wonder then that sources doctrine continues to provoke debate, and small wonder then that most of the debate tends to be methodological in nature"); D.P. Fidler, *supra* note 168, at 199 ("the problems associated with CIL ultimately stem from competing perspectives on international relations"). Many of the difficulties and debates owe to a temporal analysis of the subjective element, that is, of its role in a rule's early formative stage as opposed to later emergence and identification: see also A. Orakhelashvili, *supra* note 191, at 80-84. Cheng's observation is most relevant here: "contrary to a rather prevalent view, *opinio juris* is not necessarily the recognition of the binding character of a pre-existing rule in which case the question arises as to the origin of the pre-existing rule itself. In a horizontal legal system like international law, where the subjects are also the law-makers, *opinio juris* is simply what the subject/law-maker at any given moment accepts as law, as general law…": B. Cheng, 'On the Nature and Sources of International Law', in B. Cheng (ed.), *International Law: Teaching and Practice* (Stevens & Sons, 1988), 203, 223.

[214] H.W. Briggs, *supra* note 174, at 730 (adding that "Theoretical difficulties involved in the determination of these elements [required for the establishment of a rule of customary international law] or of the methods and procedures by which customary rules of international law are created or evolve from non-obligatory practice often receive more attention than the fact that in a given case courts have relatively little difficulty in determining whether or not an applicable rule of customary international law exists" (at 729)). See also *ILA London Statement of Principles*, at 30 ("… in the real world of diplomacy the matter [of the subjective element in customary international law] may be less problematic than in the groves of Academe"); S. Yee, 'The News that *Opinio Juris* "Is Not a Necessary Element of Customary [International] Law" Is Greatly Exaggerated', *German Yearbook of International Law*, 43 (2000), 227, 230 ("The idea of *opinio juris* remains the chief culprit in creating confusion among scholars and practitioners of international law in general, but this is probably more so among legal theorists"); C. De Visscher, *supra* note 166, at 149 (footnote 29) ("… proving the existence of the psychological element of custom does not present the insurmountable difficulties sometimes alleged"); E. Jiménez de Aréchaga, *supra* note 179, at 24 (referring to the argument that obtaining evidence of the existence of *opinio juris* in concrete cases is difficult when saying that "This difficulty may be somewhat exaggerated"); H.W.A. Thirlway, *supra* note 81, at 47 ("The precise definition of the *opinio juris*, the psychological element in the formation of custom, the philosopher's stone which transmutes the inert mass of accumulated usage into the gold of binding legal rules, has probably caused more academic controversy than all the actual contested claims made by States of the basis of alleged custom, put together"); I. Brownlie, *supra* note 121, at 21 ("in practice the question of proof does not present as much difficulty as the writers have anticipated"); *Restatement*

67. The International Court has used a range of different expressions to refer to the subjective element imported by the words "accepted as law" in its Statute. These include a "feeling of legal obligation";[216] "a belief that [the] practice is rendered obligatory by the existence of a rule of law requiring it … [a] sense of legal duty";[217] a "recognition of necessity";[218] a "conviction of necessity";[219] "a belief in the respect due to this long-established practice";[220] "a deliberate intention … a common awareness reflecting the conviction… as to [a] right";[221] "the general feeling… regarding the obligatory character of [the practice]";[222] an "actual consciousness of submitting [] to a legal obligation" or a "consciousness of the binding nature of the rule";[223] "a conviction that they [the parties] are applying the law";[224] and "a conviction, a conviction of law, in the minds of [States], to the effect that they have… accepted the practice as a rule of law, the application whereof they will not thereafter be able to evade".[225] Other courts and tribunals, as well as States, have likewise drawn upon a rich fund of vocabulary in referring to this 'psychological'/ 'qualitative'/ 'immaterial'/ 'attitudinal' requirement of customary international law.[226] In general, however, all such references appear to express a common meaning: acceptance by States that their conduct or the conduct of others is in accordance with customary international law. "Belief, acquiescence, tacit recognition, consent have one thing in common – they all express subjective attitude of states either to their own behaviour or to the behaviour of other states in the light of international law".[227]

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*(Third) of the Foreign Relations Law of the United States* (1987), §102, reporter's note 2 ("Most troublesome conceptually has been the circularity in the suggestion that law is built by practice based on a sense of legal obligation … Such conceptual difficulties, however, have not prevented acceptance of customary law essentially as here defined").

[215] For the argument that pure theorizing, for example about what requirements customary international law should or could have, does not change the law, see J. Kammerhofer, 'Law-making by Scholars', in Y. Radi, C. Brölmann (eds.), *Research Handbook on the Theory and Practice of International Law-Making* (Edward Elgar, forthcoming).

[216] *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 286.

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

[218] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 60 (Separate Opinion of Judge Wellington Koo).

[219] *Ibid.*, at p. 121 (Dissenting Opinion of Judge Chagla).

[220] *Ibid.*, at p. 82 (Dissenting Opinion of Judge Armand-Ugon).

[221] *Ibid*.

[222] *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 370 (Dissenting Opinion by Judge ad hoc Caicedo Castilla).

[223] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 104, 130 (Separate Opinion of Judge Ammoun).

[224] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 90 (Dissenting Opinion of Judge Moreno Quitana).

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

[226] See, for example, *United Parcel Service of America Inc v. Government of Canada* (UNCITRAL, Award, 22 November 2002), para. 97 ("a sense of obligation"); Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia, Criminal Case No. 002/19-09-2007-EEEC/OICJ (PTC38), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, para. 53 ("…*opinio juris*, meaning that what States do and say represents the law"). See also *Secretariat memorandum*, at 17, 18 ("The Commission has often characterized the subjective element as a sense among States of the existence or non-existence of an obligatory rule … In certain instances, the Commission has referred to the subjective element by employing different terminology…" (citations omitted)).

[227] R. Müllerson, *supra* note 85, at 163. See also H. Waldock, 'General Course on Public International Law', 106 *Recueil des Cours* (1962), 49 ("… the ultimate test [in ascertaining a rule of customary international law] must always be: 'is the practice

68. The so-called "subjective element" constitutive of customary international law thus refers to the requirement that the practice in question has "occurred in such a way as to show a general recognition that a rule of [customary international] law or legal obligation is involved".[228] While the term *opinio juris* has undoubtedly become established in referring to this element,[229] it is suggested that 'accepted as law' may be the better term.[230] The International Court, reflecting the language of its Statute, has employed this language in the *Right of Passage* case, one of the first cases in which the Court elaborated on the methodology for ascertaining customary international law, when concluding that "in view of all the circumstances of the case, [it was] satisfied that that practice was accepted as law".[231] Use of this term from the Statute goes a large way towards overcoming the *opinio juris* 'paradox' referred to above.

69. The following draft conclusion is proposed:

**Draft Conclusion 10**
***Role of acceptance as law***

**1. The requirement, as an element of customary international law, that the general practice be accepted as law means that the practice in question must be accompanied by a sense of legal obligation.**

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accepted as law?' This is especially true in the international community, where those who participate in the formation of a custom are sovereign States who are the decision-makers, the law-makers within the community. Their recognition of the practice as law is in a very direct way the essential basis of customary law").

[228] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 43, para. 74. See also K. Wolfke, *supra* note 6, at 44 ("such practice must give sufficient foundation for at least the presumption that the states concerned have accepted it as legally binding").

[229] "[P]erhaps regrettably" so, writes Crawford: J. Crawford, *supra* note 37, at 25; Wolfke refers to the Latin term as "still widely applied, but misleading", explaining that "[m]isunderstandings arise because this term, having a definite meaning in the history of legal theory, is applied by contemporary authors and, as has been seen, even by the [International] Court, with different connotations or shades of meaning": K. Wolfke, *supra* note 6, at 45-46. But see R. Müllerson, *supra* note 85, at 164 ("Depending on a context we may speak of will, consent, consensus, belief, acquiescence, protest, estoppel, or maybe even something else. However, as the term *opinio juris* is so well entrenched in international legal practice and literature, it would hardly be wise to try to get rid of it").

[230] See also I.C. MacGibbon, *supra* note 197, at 129 ("[As compared with the term '*opinio juris*',] [t]he phrase 'accepted as law', however, may admit of interpretation in senses which more accurately reflect the actual processes of evolution from practice or usage to custom, whether viewed from the standpoint of the exercise of rights or that of the performance of obligations"); C. Santulli, *supra* note 37, at 50 ("Le statut de la Cour internationale de Justice considère en son article 38 que la coutume est une pratique "acceptée". Ainsi le statut rompt-il avec une tradition qui aimait présenter *l'opinio iuris sive necessitatis* comme la "conscience" d'obéir à une règle de droit"); A. Pellet, *supra* note 17, at 819 (referring to the *travaux préparatoires* of Article 38.1(b) and to the practice of the Court when suggesting that "'acceptation' is not necessarily restricted to the will of the States but to an 'acceptance', which can be interpreted less strictly"); K. Skubiszewski, *supra* note 84, at 839-840.

[231] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 40 ("This practice having continued over a period extending beyond a century and a quarter unaffected by the change of regime in respect of the intervening territory which occurred when India became independent, the Court is, in view of all the circumstances of the case, satisfied that that practice was accepted as law by the Parties and has given rise to a right and a correlative obligation").

**2. Acceptance as law is what distinguishes a rule of customary international law from mere habit or usage.**

70. *Evidencing 'acceptance as law'*. The motivation behind a certain practice must be discernible in order to identify a rule of customary international law: "[o]nly by objectifying the concept of *opinio* can it have a practical impact on the difficult task of differentiating 'legal' custom from nonlegal 'usage'".[232] In practice, acceptance as law has indeed been indicated by or inferred from a variety of relevant conduct undertaken by States. Some practice may thus in itself be evidence of *opinio juris*, or, in other words, be relevant both in establishing the necessary practice and its 'acceptance as law'.[233] In that sense, "[w]hatever states do … is state practice which has two facets or aspects to it: a visible, observable behaviour of states (or other subjects of international law) and their subjective attitude to this behaviour which may be implicitly present in the very act or behaviour or which may be conveyed to other states through different acts of behaviour constituting, in turn, state practice of a different kind".[234] In any case, it is important that the court or tribunal should nevertheless in fact have separately identified the two elements.

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[232] J.L. Slama, *supra* note 209, at 656. See also M.E. Villiger, *supra* note 84, at 48.

[233] See also *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at 299 ("[the] presence [of customary rules] in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas"); *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 305 (Separate Opinion of Judge Petrén) ("The conduct of these States [that have conducted nuclear atmospheric tests] proves that their Governments have not been of the opinion that customary international law forbade atmospheric nuclear tests"); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 147 (Dissenting Opinion of Judge ad hoc Van den Wyngaert); E. Jiménez de Aréchaga, *supra* note 179, at 24 ("A large amount of what is described as the material element of State practice contains in itself an implicit subjective element, an indication of *opinio juris*"); M. Bos, *supra* note 144, at 30 ("In general, it may be said that anything within the bracket of State practice may serve as evidence of [] 'general practice *accepted as law*'"); J. Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Routledge, 2010), 63 ("In one sense, all that states do or omit to do can be classified as 'state practice', because their behaviour is what they do. State behaviour in a wider sense, however, is also our only guide to what they want or believe to be the law"); M. Koskenniemi, 'Theory: Implications for the Practitioner', in *Theory and International Law: An Introduction* (The British Institute of International and Comparative Law, 1991), 3, 15 ("In legal practice, there exists no way to ascertain the presence or absence of the subjective element which would be separate from the ascertainment of the existence of consistent conforming behaviour"); B. Conforti, B. Labella, *supra* note 52, at 32 ("The subjective element … ties together all the many different types of State conduct"); K. Zemanek, *supra* note 77, at 292-293 ("separating material recording 'State practice' from material recording *opinio juris*, though theoretically perhaps desirable, is practically impossible because the first may, through its language, evidence the second"); H. Thirlway, *supra* note 38, at 58, 62, 70 ("Since the *opinio juris* is a state of mind, there is an evident difficulty in attributing it to an entity such as a State; and it is thus to be deduced from the State's pronouncements and actions, particularly the actions alleged to constitute the 'practice' element of the custom").

[234] R. Müllerson, *supra* note 84, at 344. The International Court has also referred to, for example, "a practice illustrative of belief" (*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). But see M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005), 388 ("we cannot automatically infer anything about State wills or beliefs — the presence or absence of custom — by looking at the State's external behaviour. The normative sense of behaviour can be determined only once we first know the 'internal aspect' — that is, how the State itself understands its conduct … doctrine about customary law is indeterminate because circular. It assumes behaviour to be evidence of the *opinio juris* and the latter to be evidence of which behaviour is relevant as custom").

71. How to determine the evidence of 'acceptance as law' may depend on the nature of the rule and the circumstances in which the rule falls to be applied. There may, for example be a distinction to be drawn between cases involving the assertion of a legal right and those acknowledging a legal obligation, and between cases where the practice concerned consists of conduct 'on the ground' as opposed to verbal practice.

72. Mere adherence to an alleged rule does not generally suffice as evidence of *opinio juris*: "such usage does not necessarily prove that actors see themselves as subject to a legal obligation".[235] In the words of the International Court, "acting, or agreeing to act in a certain way, does not itself demonstrate anything of a juridical nature".[236]

73. Similarly, although some have suggested that a large number of concordant acts,[237] or the fact that such cases have been occurring over a considerable period of time,[238] may suffice to establish the existence of *opinio juris*, this is not so. While these facts may indeed *give rise to* the acceptance of the practice as law,[239] they do not embody such acceptance in and of themselves. As the International Court had observed, "even if these instances of action … were much more numerous

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[235] A.M. Weisburd, *supra* note 67, at 9. See also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 423-424 (Dissenting Opinion of Judge Shahabuddeen) ("It is also important to have in mind that bare proof of acts or omissions allegedly constituting State practice does not remove the need to interpret such acts or omissions. The fact that States may feel that realities leave them no choice but to do what they do does not suffice to exclude what they do from being classified as part of State practice, provided, however, that what they do is done in the belief that they were acting out of a sense of legal obligation").

[236] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 76.

[237] See, for example, *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 336 (Dissenting Opinion by Judge Azevedo) ("concordant cases, by their number, would clearly reveal an *opinio juris*"); Portugal's contention in the *Right of Passage* that "it would be impossible to contend that unanimity and uniformity [of practice of States] do not bear witness to a conviction of the existence of a legal duty (*opinio juris sive necessisatis*)" (*Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 11); H. Lauterpacht, *The Development of International Law by the International Court* (Stevens, 1958), 380 ("Unless judicial activity is to result in reducing the legal significance of the most potent source of rules of international law, namely, the conduct of States, it would appear that the accurate principle on the subject consists in regarding all uniform conduct of Governments (or, in appropriate cases, abstention therefrom) as evidencing the *opinio necessitatis juris* except when it is shown that the conduct in question was not accompanied by any such intention"), quoted with concurrence in *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 246-247 (Dissenting Opinion of Judge Sørensen).

[238] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 83 (Dissenting Opinion of Judge Armand-Ugon) ("A fact observed over a long period of years … acquires binding force and assumes the character of a rule of law").

[239] See, for example, *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 40 ("This practice having continued over a period extending beyond a century and a quarter unaffected by the change of regime in respect of the intervening territory which occurred when India became independent, the Court is, in view of all the circumstances of the case, satisfied that that practice was accepted as law by the parties and has given rise to a right and a correlative obligation"); and p. 82 (Dissenting Opinion of Judge Armand-Ugon) ("The continual repetition of an act over a long period does not weaken this usage; on the contrary, it strengthens it; a relationship develops between the act and the will of the States which have authorized it. The recurrence of these acts over so long a period engenders, both in the State which performs them and in the State which suffers them, a belief in the respect due to this long-established practice (Article 38(I)(b) of the Statute of the Court)").

than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris* … The frequency, or even habitual character of the acts is not in itself enough".[240]

74. 'Acceptance as law' should thus generally not be evidenced by the very practice alleged to be prescribed by customary international law. This provides, moreover, that the same conduct should not serve in a particular case as evidence of both practice and acceptance of that practice as law.[241] Applying this rule to 'non-actual' practice may also serve to guarantee that abstract statements could not, by themselves, create law.[242]

75. *Manifestations of 'acceptance as law'*. "[T]he task of ascertaining the *opinio*, although difficult, is feasible (and is considerably alleviated in the framework of the modern drafting process)".[243] An express statement by a State that a given rule is obligatory *qua* customary international law, for a start, provides "the clearest proof" that it "believes itself bound by, or that from now on it will adhere to, [that] certain principle or rule".[244] Conversely, when a State says that something is not a rule of customary international law, that is evidence of the absence of an *opinio juris*. Such assertions by States of rights or obligations under (customary) international law (or lack thereof) could, *inter alia*, take the form of an official statement by a government or a minister of that government,[245] claims and legal briefs before court and tribunals, transmittal statements by which

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[240] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77. See also *The Case of the S.S. "Lotus" (France/Turkey)*, PCIJ, Series A, No. 10, p. 28; Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia, Criminal, Case No. 002/19-09-2007-EEEC/OICJ (PTC38), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, para. 53 ("A wealth of State practice does not usually carry with it a presumption that *opinio juris* exists").

[241] See also M.H. Mendelson, *supra* note 71, at 206-207 ("What must, however, be avoided is counting the same act as an instance of both the subjective and the objective element. If one adheres to the 'mainstream' view that it is necessary for both elements to be present, and in particular for the subjective element to be accompanied by 'real' practice, this must necessarily preclude treating a statement as both an act and a manifestation of belief (or will)"); M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press, 1999) 136-141.

[242] See also M.E. Villiger, *supra* note 84, at 19 ("Since such fears [that one body, or conference, could 'make' law through abstract statements of State representatives] are justified, we may first attempt a synthesis of views, proceeding from Judge Read's argument that 'claims may be important as starting points'. Clearly, the conditions for the formation of customary law are such that one instance of practice, or a few instances in one occasion, cannot create law. Rather, a qualified series of instances is required, and statements at a conference would lose any value if they were not followed by uniform and consistent practice. Equally clearly however, these conditions serve as adequate safeguards, and the fear of instant customary law hardly warrants attaching further conditions to the single instances of practice" (citations omitted)).

[243] M.E. Villiger, *supra* note 84, at 50.

[244] L.B. Sohn, *supra* note 179, at 235; see also, 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; M.E. Villiger, *supra* note 84, at 50 ("the *express statement* of a State that a given rule is obligatory (or customary, or codificatory), furnishes the clearest evidence as to the State's legal conviction").

[245] See, for example, *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 367 (Dissenting Opinion by Judge ad hoc Caicedo Castilla); *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 pp. 74-75 (Separate Opinion of Judge Ammoun); *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (ICTY Appeals Chamber), 2 October 1995, paras. 100, 105, 113-114, 120-122.

governments introduce draft legislation in parliament,[246] a joint declaration of States through an official document, or statements made in multilateral conferences such as codification conventions or debates in the United Nations.[247] Diplomatic protests, in particular, "may, and frequently do, indicate the view of the law on the matters in questions entertained by the protesting States: to this extent they may afford evidence of the acceptance of a practice as law".[248]

76. Evidence of 'acceptance as law' (or lack thereof) may also be found in a wide range of other practice,[249] depending on the particular case and considering that "[f]or a typical custom it suffices that the acceptance of the practice as law should be presumed upon all circumstances of the case in question, above all on the attitude, hence conduct, of the accepting states to be bound by the customary rule".[250] As was the case with practice (see paragraph 41 above), the following list is non-exhaustive: it is intended to suggest the kind of materials where the subjective element may be found.

76.1 Intergovernmental (diplomatic) correspondence,[251] such as a memorandum from a diplomatic mission to the Minister of Foreign Affairs of the State to which it is accredited,[252] or notes exchanged between governments. Here the language used needs to be carefully analysed in context to determine whether the State is expressing an opinion as to the existence of a legal rule.

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[246] See also *Mondev International Ltd v. United States of America* (ICSID, Award, 11 October 2002), para. 111 ("Whether or not explanations given by a signatory government to its own legislature in the course of ratification or implementation of a treaty can constitute part of the *travaux preparatoires* of the treaty for purposes of its interpretation, they can certainly shed light on the purposes and approaches taken to the treaty, and thus can evidence *opinio juris*").

[247] See, for example, *Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951*, p.15, at p. 26; *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 48 (Joint Separate Opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda) ("On a subject where practice is contradictory and lacks precision, is it possible and reasonable to discard entirely as irrelevant the evidence of what States are prepared to claim and to acquiesce in, as gathered from the positions taken by them in view of or in preparation for a conference for the codification and progressive development of the law on the subject? ... The least that can be said ... is that such declarations and statements and the written proposals submitted by representatives of States are of significance to determine the views of those States as to the law or fisheries jurisdiction and their *opinio iuris* on a subject regulated by customary international law"); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at p. 329 (Separate Opinion of Judge Tomka); E. Jiménez de Aréchaga, *supra* note 179, at 14, 24 ("the deliberations in a plenipotentiary conference itself, even before and independently of the adoption of a convention, may themselves result in the emergence of a consensus of States which, followed by their actual practice, crystallizes in a customary rule … The express or implicit indications of *opinio juris* are particularly significant and frequent when a State participates in the process of a codification and progressive development of international law under United Nations auspices").

[248] I.C. MacGibbon, *supra* note 197, at 124.

[249] See also *Secretariat memorandum*, at 21-22 ("The Commission has relied upon a variety of materials in assessing the subjective element for the purpose of identifying a rule of customary international law"); *Restatement (Third) of the Foreign Relations Law of the United States* (1987), §102, comment (c) ("Explicit evidence of a sense of legal obligation (*e.g.*, by official statements) is not necessary; *opinio juris* may be inferred from acts or omissions").

[250] K. Wolfke, *supra* note 6, at 44.

[251] See, for example, *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, at pp. 135-136; *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 42.

[252] See, for example, *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 371 (Dissenting Opinion by Judge ad hoc Caicedo Castilla).

76.2 The jurisprudence of national courts[253] clearly embodies a sense of legal obligation. Care must be taken, however, as it "may be difficult to tell … whether this sense of legal obligation derives from international law, from domestic law, or from domestic auto-interpretation of international law".[254] Only when such judgments apply the rule in question in a way which demonstrates, mostly by way of its reasoning, that it is accepted as required under customary international law, could they be relevant as evidence of 'acceptance as law'.

76.3 The opinions of government legal advisers when they say that something is or is not in accordance with customary international law,[255] and such opinion has been adopted by the government as legally mandated.[256]

76.4 Official publications in fields of international law, such as military manuals or instructions to diplomats.

76.5 Internal memoranda by State officials, such as instructions of a Ministry of Foreign Affairs to its diplomats.[257]

76.6 Treaties (and their *travaux préparatoires*) may potentially demonstrate the existence of 'acceptance as law' as well,[258] given that "[c]onventions continue to be a very important form for

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[253] See, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 135, para. 77 (where the subjective element was "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"); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 76 (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal); Special Tribunal for Lebanon, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Appeals Chamber), 16 February 2011, para. 100.

[254] P.M. Moremen, *supra* note 112, at 274; see also *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at pp. 171-172 (Dissenting Opinion of Judge ad hoc Van den Wyngaert) ("And even where national law requires the presence of the offender, this is not necessarily the expression of an *opinio juris* to the effect that this is a requirement under international law. National decisions should be read with much caution"). Mr. Hmoud highlighted this point as well in his intervention last year, saying that "[n]ational judicial decisions are an important source of material but they have to be well scrutinized as *national* courts usually implement the internal legal processes of the state involved and are not necessarily experienced or well-resourced to identify the rules of customary international law" (3183rd meeting, 19 July 2013).

[255] See, for example, *Prosecutor v. Galić*, Case No. IT-98-29-A, Judgment (ICTY Appeals Chamber), 30 November 2006, para. 89.

[256] Indeed, it ought to be remembered that such opinions do not necessarily become those of the government, and that at times, as the Commission has previously considered, "the efforts of legal advisers are necessarily directed to the implementation of policy" (*Yearbook of the International Law Commission, 1950*, vol. II, p. 372, where it was added that "[n]or would a reproduction of such opinions be of much value unless it were accompanied by an adequate analysis of the history leading up to the occasion with reference to which they were given").

[257] See, for example, *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 372 (Dissenting Opinion by Judge ad hoc Caicedo Castilla)

[258] See also *Camuzzi International S.A. v. The Argentine Republic* (ICSID, Decision on Objections to Jurisdiction, 11 May 2005), para. 144 ("there is no obstacle in international law to the expression of the will of States through treaties being at the same time an expression of practice and of the *opinio juris* necessary for the birth of a customary rule if the conditions for it are met"); *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at pp. 369-370 (Dissenting Opinion by Judge ad hoc Caicedo Castilla) ("… this article in the Bolivarian Agreement has a special meaning as regards custom in matters of asylum, namely, that it demonstrates the existence in both Columbia and Peru of one of the elements which are necessary for the existence of a custom – the psychological element, the *opinio juris sive necessitatis*. The Bolivarian Agreement recognizes asylum, recognizes the value of the principles applied in America; hence it includes these principles as binding. Consequently, their acceptance by governments or by one individual government implies their

the expression of the juridical conscience of peoples".[259] For present purposes, such juridical consciousness (with regard to the convention as a whole or certain provisions therein) must exist *outside the treaty*, not just within: for a treaty to serve as evidence of *opinio juris*, States (and international organizations), whether parties or not, must be shown to regard the rule(s) enumerated in the treaty as binding on them as rules of law regardless of the treaty.[260] This may well be the case when a treaty purports to be *declaratory* of customary international law, explicitly or implicitly:[261] then "the treaty is clear evidence of the will of States [parties to the treaty], free of the ambiguities and inconsistencies characteristic of the patchwork of evidence of State practice that is normally employed in proving the state of international law".[262] In other words, when States accept (within the treaty or in the negotiations leading up to it or upon or after its adoption) that the treaty or certain provisions in it are declaratory of existing customary international law, this may serve as clear evidence of 'acceptance as law'.[263] Still, "the evidence

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acceptance by that government as 'being the law', that is to say, that they are the applicable law. This is a matter of the utmost importance, since the psychological element of custom, which is always so difficult to prove, is here entirely proved"); *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-A, Judgment (Special Court for Sierra Leone Appeals Chamber), 28 May 2008, para. 403; *Derecho, René Jesús s/incidente de prescripción de la acción penal* (Argentinian Supreme Court), causa N° 24.079C, 11 July 2007, para. III-A (of the State Attorney-General's brief); Appeal Judgment of the Extraordinary Chambers in the Courts of Cambodia (Supreme Court Chamber), Case number 001/18-07-2007-ECCC/SC, 3 February 2012, para. 94.

[259] *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, at p. 148 (Individual Opinion of Judge Alvarez). See also A.T. Guzman, T.L. Meyer, 'Customary International Law in the 21st Century', in R.A. Miller, R.M. Bratpies, *Progress in International Law* (Martinus Nijhoff Publishers, 2008), 207 ("looking to treaties as evidence of CIL can remain a valuable practice… because treaties can send credible signals as to what rules states believe to be binding on non-parties").

[260] Bearing in mind that, as Weisburd asserts, "it does not follow that conclusion of a treaty necessarily implies *opinio juris*, that is, that the parties believe that the treaty's provisions would legally bind them outside the treaty" (A.M. Weisburd, *supra* note 67, at 24). Of course, treaties may serve as evidence of customary international law or contribute to the formation thereof not only with regard to rules enshrined in them, but also with regard to the customary law of treaties.

[261] As Baxter explains, "The declaratory treaty is most readily identified as such by an express statement to that effect, normally in the preamble of the instrument, but its character may also be ascertained from preparatory work for the treaty and its drafting history": R.R. Baxter, *supra* note 191, at 56. See also K. Wolfke, *supra* note 119, at 36 ("if a treaty contains an express, or even an indirect, recognition, of an already existing customary rule, such recognition constitutes additional evidence of the customary rule in question"). Weisburd correctly explains that "Even when this type of statement [that the treaty is declarative of custom] is an inaccurate description of the state of the law as of the date of the treaty's conclusion, it amounts to an explicit acknowledgment by the parties to the treaty that they would be legally bound to the treaty's rules even if the treaty did not exist": A.M. Weisburd, *supra* note 67, at 23. Importantly, however, "complex considerations … have to be taken into account in determining whether, and if so to what extent, a new rule embodied in a codification convention may be regarded as expressive of an existing or emerging norm of customary law. Any such rule has to be analyzed in its context and in the light of the circumstances surrounding its adoption. It also has to be viewed against the background of what may be a rapidly developing State practice in the sense of the new rule" (I. Sinclair, 'The Impact of the Unratified Codification Convention', in A. Bos, H. Siblesz (eds.), *Realism in Law-Making: Essays on International Law In Honour of Willem Riphagen* (Martinus Nijhoff Publishers, 1986), 211, 220).

[262] R.R. Baxter, *supra* note 191, at 36.

[263] See also A.M. Weisburd, *supra* note 67, at 25 ("a treaty is not evidence of *opinio juris* if the parties expressly deny in the treaty text and *opinio juris* as to the legal status of the treaty's rules outside the instrument [i.e. the treaties declare themselves as entered into by the parties purely as an act of grace]. The issue is one of the parties' beliefs. But if belief is the key issue, it would seem to follow that a treaty may deny *opinio juris* even without an express statement to that effect if the treaty contains other evidence demonstrating that the parties would not see the treaty's rules as binding but for the treaty. This is not to say that such treaties are not binding as treaties, or to say that such denials of *opinio juris* in the treaty would preclude the

of the practice of the parties consolidated in the treaty must be weighed in the balance with all other [consistent and inconsistent] evidence of customary international law according to the normal procedure employed in the proof of customary international law", in particular "past practice or declarations of the asserting State[s]".[264] Whether the States concerned have indeed signed and/or ratified the treaty, and the ability of parties to make reservations to articles of the treaty, may also be relevant in assessing the existence of *opinio juris*,[265] yet these considerations do not necessarily signal a lack of it given that custom and treaty may co-exist independently of one another.[266] In any case, "[w]hether a treaty rule is good evidence of *opinio juris* for purposes of customary law is essentially a question of fact. One has to look at the statements, claims, and State conduct …"[267] in order to determine it.

Another issue is whether the repetition of a similar or identical provisions in a large number of bilateral treaties, may be of evidence of 'acceptance as law'. Here too, the provision (and the treaty in which it is incorporated) would need to be analyzed in their context and in the light of the circumstances surrounding their adoption. This is particularly so as "[t]he multiplicity of …

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emergence of a customary rule on the subject outside the treaty. It is only to say that one cannot consider such a treaty itself to be evidence of the customary law status of the rules it establishes").

[264] R.R. Baxter, *supra* note 191, at 43, 44. See also G.M. Danilenko, *supra* note 139, at 154 ("it should be emphasized that codifying conventions, even those which expressly state that they embody existing customary law, can never be considered as conclusive evidence of customary law"). As the Court opined in a different context, "… 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": *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 98, para 184.

[265] See, for example, *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 38-39, para. 63, and p. 42, para. 72; and see p. 130 (Separate Opinion of Judge Ammoun) ("the power to subject the implementation of … [a treaty provision] implies the absence, in the minds of the signatories to the Convention, of the *opinio juris sive necessitatis*. The latter requires consciousness of the binding nature of the rule, and it is self-evident that a rule cannot be felt to be binding when the right not to apply it is reserved"). See also *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 305 (Separate Opinion of Judge Petrén) (observing that by a treaty which allows for denunciation the signatories "show[] that they [are] still of the opinion that customary international law [does] not prohibit [the obligation enumerated in the treaty]"); *Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Judgment (ICTR Appeals Chamber), 28 November 2007 (Partly Dissenting Opinion of Judge Meron), para. 5 ("The number and extent of the reservations reveal that profound disagreement persists in the international community as to whether mere hate speech is or should be prohibited, indicating that Article 4 of the CERD and Article 20 of the ICCPR do not reflect a settled principle. Since a consensus among states has not crystallized, there is clearly no norm under customary international law criminalizing mere hate speech"); *Diplomatic Immunity of Domestic Servants Case* (Austrian Supreme Court), OGH 6 Ob 94/71, judgment of 28 April 1971, SZ 1971 No. 44/56, 204.

[266] With regard to reservations (and, similarly, denunciation) see also R.R. Baxter, *supra* note 191, at 47-53; *ILA London Statement of Principles*, at 44 ("[Conclusion] 22. The fact that a treaty permits reservations to all or certain of its provisions does not of itself create a presumption that those provisions are not declaratory of existing customary law"); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 197-198 (Dissenting Opinion of Judge Morelli). On ratifying (on not) codification conventions as evidence of acceptance as law see, for example, I. Sinclair, *supra* note 261, at 227 ("it is fair to say that even sparsely ratified codification conventions may well be looked upon, in general, as providing some evidence of *opinio juris* on the subject-matter involved. The *quality* of the evidence will depend on the provenance of the particular provision which may be in issue. If the *travaux préparatoires* of a specific codification convention demonstrate that a particular provision was adopted at the codification conference on a sharply divided vote, and that the controversy thus engendered may have led a number of States to refuse to participate in the convention, there is clearly a strong case for discounting the value of that provision in the context of later codification efforts").

[267] O. Schachter, *supra* note 191, at 735.

treaties … is as it were a double-edged weapon".[268] "the concordance of even a considerable number of treaties *per se* constitutes neither sufficient evidence not even a sufficient presumption that the international community as a whole considers such treaties as evidence of general customary law. On the contrary, there are quite a few cases where such treaties appear to be evidence of exceptions from general regulations".[269]

76.7 Resolutions of deliberative organs of international organizations, such as the General Assembly and Security Council of the United Nations, and resolutions of international conferences. *Opinio juris* may be deduced from the attitudes of States vis-à-vis such non-binding texts that purport, explicitly or implicitly, to declare the existing law, as may be expressed by both voting (in favour, against or abstaining) on the resolution, by joining a consensus, or by statements made in connection with the resolution.[270] Such deduction is to be done, however,

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

[269] K. Wolfke, *supra* note 119, at 35. See also *Ahmadou Sadio Diallo, (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 582, at p. 615 ("The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal régimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary."); J.L. Kunz, *supra* note 56, at 668 ("Treaties may, under different circumstances, be evidence for the fulfillment of both conditions, and, under other circumstances, evidence against it"); K. Wolfke, *supra* note 93, at 9-10; H. Thirlway, *supra* note 38, at 71; *ILA London Statement of Principles*, at 47-48 ("There is no presumption that a succession of similar treaty provisions gives rise to a new customary rule with the same content").

[270] See, for example, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at pp. 99-100, 101 ("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 … The 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 by themselves ... the adoption by States of … [a resolution] affords an indication of their *opinio juris* as to customary international law on the question."); *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (ICTY Appeals Chamber), 2 October 1995, paras. 111, 112; *Libyan American Oil Company (LIAMCO)* v. *Government of the Libyan Arab Republic*, Arbitral Award (1977), 62 ILR, 140, 189 ("… the said Resolutions, if not a unanimous source of law, are evidence of the recent dominant trend of international opinion concerning the sovereign right of States over their natural resources …"); *Texaco Overseas Petroleum Company and California Asiatic Oil Company* v. *The Government of the Libyan Arab Republic*, Arbitral Award 1977), 53 ILR, 389, 491-495; P. Tomka, *supra* note 24, at 210-211; H.W.A. Thirlway, *supra* note 81, at 65 ("It is suggested … that in fact the discussions, and the statements made on behalf of member States in the discussions, will almost always be of greater relevance than the resolution"); A. Pellet, *supra* note 17, at 817, 825 ("In the case of ascertaining a customary rule of general international law … it is suggested that … [resolutions adopted by the organs of international organizations] belong more to the manifestation of the *opinio juris* than to the formation of a practice … in assessing their legal value, the important element is not what *they* say, but what *the States* have had to say about them"); J.E. Alvarez, *supra* note 133, at 260 ("GA resolutions can be an efficient mechanism for finding … *opinio juris*, especially as compared to the annoying tendency of states to omit any discussion of the concept in their bilateral diplomatic discourse"); *Human Rights Council Report of the Working Group on Arbitrary Detention* (24 December 2012), A/HRC/22/44, para. 43. See also the conclusions of the commission of the *Institut de Droit International* on 'The Elaboration of General Multilateral Conventions and of Non-contractual Instruments Having a Normative Function or Objective' with regard to Resolutions of the United Nations General Assembly (1987, available at http://www.idi-iil.org/idiE/resolutionsE/1987_caire_02_en.PDF): "A law-declaring Resolution purports to state an existing rule of law. In particular, it may be a means for the determination or interpretation of international law, it may constitute evidence of international custom, or it may set forth general principles of law" (Conclusion 4); "A Resolution may constitute evidence of customary law or of one of its ingredients (custom-creating

"with all due caution",[271] as States may, in fact, have various motives when consenting to (or disapproving of) the text of a resolution: indeed, "[s]upport for law-declaring resolutions … would have to be appraised in the light of the conditions surrounding such action. It is far from clear that voting for a law-declaring resolution is in itself conclusive evidence of a belief that the resolution expresses a legal rule".[272] As the International Court had observed with regard to UN General Assembly resolutions, "even if they are not binding, [such resolutions] may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. 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 it normative character".[273]

While an investigation into the language and specific circumstances of adopting a given resolution is indeed indispensable, it may be suggested that in general, where "substantial numbers of negative votes and abstentions" by States are to be found, a generally held *opinio juris* as to the normative character of the resolution is missing; in other words, such resolution would "fall short of establishing the existence of an *opinio juris*".[274] Similarly, a resolution adopted unanimously (or by an overwhelming and representative majority) may be evidence of a generally held legal conviction.[275] In addition, where a State not only refrains from voicing any

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practice, *opinio juris*), in particular when that has been the intention of States in adopting the Resolution or when the procedures applied have led to the elaboration of a statement of law" (Conclusion 20); "Evidence [of international custom] supplied by a Resolution is rebuttable" (Conclusion 21). Rosenne has observed that "[t]o establish whether a given State has in fact consented to that resolution, in whole or in part, close examination of all the proceedings in the body which adopted the resolution is needed": S. Rosenne, *supra* note 79, at 112.

[271] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 99, para. 188; and see at p. 182 (Separate Opinion of Judge Ago) ("There are, similarly, doubts which I feel bound to express regarding the idea … that the acceptance of certain resolutions or declarations drawn up in the framework of the United Nations or the Organization of American States, as well as in another context, can be seen as proof conclusive of the existence among the States concerned of a concordant *opinio juris* possessing all the force of a rule of customary international law"). See also Guidelines 3.1.5.3 and 4.4.2 of the Commission's *Guide to Practice on Reservations to Treaties* (2011).

[272] O. Schachter, *supra* note 191, at 730. See also S. Rosenne, *supra* note 79, at 112 ("As often as not a vote is an indication of a political desideratum and not a statement of belief that that the law actually requires such a vote or contains any element of *opinio juris sive necessitatis*… or that the resolution is a statement of law"); L. Hannikainen, *supra* note 128, at 138 ("The overwhelming majority of resolutions of international organizations are formally recommendations only. This is well known to States – they may have very different reasons to vote for a resolution. Those reasons may include political expediency and the desire not to be singled out as a dissenter. Even if a resolution employs legal terminology and speaks of all States' obligations, a State's affirmative vote cannot be taken as a definitive proof of *opinio juris*").

[273] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 254-255. See also the synthesized view of the Iran-United States Claims Tribunal in the *Sedco* case (1986): "United Nations General Assembly resolutions are not directly binding upon States and generally are not evidence of customary law. Nevertheless, it is generally accepted that such resolutions in certain specified circumstances may be regarded as evidence of customary international law or can contribute—among other factors—to the creation of such law" (25 ILM 629, 633-634).

[274] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 255, para. 71.

[275] See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 79 (Separate Opinion of Judge Ammoun); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at pp. 235, 236 (Separate Opinion of Judge Al-Khasawneh); J. Barboza, *supra*

objections to the adoption of a law-declaring resolution but also takes an active part in bringing that about, 'acceptance as law' of its normative content may very well be attributed to it.[276] Finally, "a series of resolutions [containing consistent statements] may show the gradual evolution of the *opinio juris* required for the establishment of a new rule";[277] this too, of course, depends on the particular circumstances.[278]

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note 119, at 5 ("The probability of such type of [General Assembly normative resolutions] to serve as a declaration of customary law, or as the basis for the formation of a custom depends, precisely, on the majority behind it. If obtained by unanimity, or by consensus, they represent the international opinion better than multilateral treaties, having a relatively restricted membership").

[276] *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. 133, para 264.

[277] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 255, para. 70; see also at p. 532 (Dissenting Opinion of Judge Weeramantry) ("The declarations of the world community's principal representative body, the General Assembly, may not themselves make law, but when repeated in a stream of resolutions … [they may] provide important reinforcement [to a view of what a rule of customary international law is]"); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 236 (Separate Opinion of Judge Al-Khasawneh) ("[a very large number of resolutions adopted by overwhelming majorities or by consensus repeatedly making the same point] while not binding, nevertheless produce legal effects and indicate a constant record of the international community's *opinio juris*"); *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, at p. 292 (Dissenting Opinion of Judge Tanaka) ("Of course, we cannot admit that individual resolutions, declarations, judgments, decisions, etc., have binding force upon the members of the [international] organization. What is required for customary international law is the repetition of the same practice; accordingly, in this case resolutions, declarations, etc., on the same matter in the same, or diverse, organizations must take place repeatedly. Parallel with such repetition, each resolution, declaration, etc., being considered as the manifestation of the collective will of individual participant States, the will of the international community can certainly be formulated more quickly and more accurately as compared with the traditional method of the normative process. This collective, cumulative and organic process of custom-generation can be characterized as the middle way between legislation by convention and the traditional process of custom making, and can be seen to have an important role from the viewpoint of the development of international law. In short, the accumulation of authoritative pronouncements such as resolutions, declarations, decisions, etc., concerning the interpretation of the Charter by the competent organs of the international community can be characterized as evidence of the international custom referred to in Article 38, paragraph 1 (*b*)"); E. Suy, 'Innovation in International Law-Making Processes', in R. St. John Macdonald et al (eds.), *The International Law and Policy of Human Welfare* (Sitjhoff & Noordhoff, 1978), 187, 190 ("[*opinio juris*] may also arise … through the mere repetition of principles in subsequent resolutions to which states give their approval"). But see S. Rosenne, *supra* note 79, at 112 ("There is a tendency today for the agendas of international organs to be excessively repetitive, and the repeated voting is an inert reflex from a policy decision when the issue was first brought up for discussion"). Cf. *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at p. 99 (Separate Opinion of Judge Ammoun) ("The General Assembly has affirmed the legitimacy of that struggle [for liberation from foreign domination] in at least four resolutions … which taken together already constitute a custom"), and p. 121 (Separate Opinion of Judge Dillard) ("even if a particular resolution of the General Assembly is not binding, the cumulative impact of many resolutions when similar in content, voted for by overwhelming majorities and frequently repeated over a period of time may give rise to a general *opinio juris* and thus constitute a norm of customary international law").

[278] See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 254-255, and also at pp. 319-320 (Dissenting Opinion of Judge Schwebel) ("[General Assembly resolutions] adopted by varying majorities, in the teeth of strong, sustained and qualitatively important opposition … consisting as it does of States that bring together much of the world's military and economic power and a significant percentage of its population, more than suffices to deprive the [General Assembly] resolutions in question of legal authority … the repetition of resolutions of the General Assembly in this vein … rather demonstrates what the law is not. When faced with continuing and significant opposition, the repetition of General Assembly resolutions is a mark of ineffectuality in law formation as it is in practical effect"); *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at pp. 435-436 (Dissenting Opinion of Judge Barwick) ("[it may be that] resolutions of the United Nations and other expressions of international opinion, however frequent, numerous and emphatic, are insufficient to warrant the view that customary international law now embraces [a certain rule]"). See also S. Rosenne, *supra* note 79, at 112 ("Consensus is a particularly misleading notion, as frequently the formal element

77. *Inaction as evidence of the subjective element*. 'Acceptance as law' may also be established by inaction or abstention, when these represent concurrence or acquiescence in a practice.[279] In Fitzmaurice's words, "[c]learly, absence of opposition is relevant only in so far as it implies consent, acquiescence or toleration on the part of the States concerned; but absence of opposition per se will not necessarily or always imply this. It depends on whether the circumstances are such that opposition is called for because the absence of it will cause consent or acquiescence to be presumed. The circumstances are not invariably of this character, particularly for instance where the practice or usage concerned has not been brought to the knowledge of other States, or at all events lacks the notoriety from which such knowledge might be presumed: or again, if the practice or usage concerned takes a form such that it is not reasonably possible for other States to infer what its true character is".[280]

78. Contradictory practice (that is, practice inconsistent with the alleged rule of customary international law) may evidence a lack of 'acceptance as law',[281] just as it may serve to prevent a certain practice from being regarded as settled. On the other hand, the practice that is not in accordance with a rule may be an occasion that reaffirms an *opinio juris*, if the action is justified in terms that support the customary rule.[282]

79. Evidence of 'acceptance as law' by a particular State (or international organization) may be inconsistent; for example, "Governments and national courts in the same State may hold different

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of no vote will conceal the many reservation buried away in the records, and it often only means agreement on the words to be used and on their place in the sentence, and absence of agreement, or even disagreement, on their meaning and on the intent of the document as a whole"); *ILA London Statement of Principles*, at 59.

[279] See, for example, *Interpretation of Peace Treaties (second phase), Advisory Opinion: I.C.J. Reports 1950*, p. 221, at p. 242 (Dissenting opinion of Judge Read) ("The fact that no State has adopted this position [that a State party to a dispute may prevent its arbitration by the expedient of refraining from appointing a representative on the Commission] is the strongest confirmation of the international usage or practice in matters of arbitration which is set forth above"); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 232 (Dissenting Opinion of Judge Lachs); *Priebke, Erich s/ solicitud de extradición* (Argentinian Supreme Court), causa No 16.063/94, 2 November 1995, para. 90. See also K. Wolfke, *supra* note 6, at 48 ("toleration of a practice by other states, considering all relevant circumstances, justifies the presumption of its acceptance as law"); J.I. Charney, 'Universal International Law', *American Journal of International Law*, 87 (1993), 529, 536. Judge Hudson wrote of "the failure of other States to challenge that conception [of the State that acted, that practice was required by law] at the time" as one of the elements of customary international law: M.O. Hudson, *supra* note 181, at 609.

[280] G. Fitzmaurice, *supra* note 174, at 33. See also *The Case of the S.S. "Lotus" (France/Turkey)*, PCIJ, Series A, No. 10, p. 28 ("only if such abstentions were based on their [States] being conscious of having a duty to abstain would it be possible to speak of an international custom"); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 42, para. 73 ("That non-ratification may sometimes be due to factors other than active disapproval of the convention concerned can hardly constitute a basis on which positive acceptance of its principles can be implied: the reasons are speculative, but the facts remain"). Danilenko highlights that "[u]nder existing international law, absence of protest implies acquiescence only if practice affects interests [(direct or indirect)] and rights of an inactive state": G.M. Danilenko, *supra* note 139, at 108.

[281] See, for example, *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 305 (Separate Opinion of Judge Petrén) ("The conduct of these States [that have conducted nuclear atmospheric tests] proves that their Governments have not been of the opinion that customary international law forbade atmospheric nuclear tests").

[282] *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. 106, 108-109 (paras. 202, 207).

opinions on the same question, which makes it even more difficult to identify the *opinio juris* in that State".[283] As with practice, such ambivalence might undermine the significance of the *opinio juris* of that State (or intergovernmental organization) in attempting to identify the existence or not of a rule of customary international law.

80. The following draft conclusion is proposed:

**Draft Conclusion 11**
***Evidence of acceptance as law***

**1. Evidence of acceptance of a general practice as law may take a wide range of forms. These may vary according to the nature of the rule and the circumstances in which the rule falls to be applied.**

**2. The forms of evidence include, but are not limited to, statements by States which indicate what are or are not rules of customary international law, diplomatic correspondence, the jurisprudence of national courts, the opinions of government legal advisers, official publications in fields of international law, treaty practice, and action in connection with resolutions of organs of international organizations and of international conferences.**

**3. Inaction may also serve as evidence of acceptance as law.**

**4. The fact that an act (including inaction) by a State establishes practice for the purpose of identifying a rule of customary international law does not preclude the same act from being evidence that the practice in question is accepted as law.**

## VII. Future programme of work

81. As already announced,[284] the third report, in 2015, will continue the discussion of the two elements of customary international law ('a general practice'; 'accepted as law'), and the relationship between them in the light of progress with the topic in 2014. The next report will address in more detail certain particular aspects touched on in the present report, in particular the role of treaties, resolutions of international organizations and conferences, and international organizations generally. The third report will also cover the "persistent objector" rule, and "special" or "regional" customary international law, as well as "bilateral custom".

[283] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 171 (Dissenting Opinion of Judge ad hoc Van den Wyngaert).
[284] A/CN.4/663, *supra* note 1, at para. 102.

82. As was recalled in the first report, at its first and second sessions in 1949 and 1950 the Commission, in accordance with the mandate in article 24 of its Statute, had on its agenda a topic entitled 'Ways and means of making the evidence of customary international law more readily available'. This led to a series of recommendations, which were adopted by the General Assembly and which are still of importance today.[285]

83. As mentioned above, the dissemination and location of practice (and *opinio juris*) remains an important practical issue in the circumstances of the modern world.[286] It is therefore proposed that the draft conclusions should be supplemented by indications as to where and how to find practice and acceptance as law. This would describe the various places where practice and *opinio juris* may be found, for example in digests and other publications of individual States, as well as publications of practice in specific areas of international law.

84. The Special Rapporteur still aims to submit a final report in 2016, with revised draft conclusions and commentaries in light of the debates and decisions of 2014 and 2015, but acknowledges, as some members of the Commission have said, that this is an ambitious work programme.

[285] See also *Secretariat memorandum*, at paras. 9-11; A/CN.4/663, *supra* note 1, at para. 9.
[286] See, for example, S. Rosenne, *supra* note 79, at 58-61; O. Corten, *supra* note 176, at 149-178.

# ANNEX

## Proposed draft conclusions on the identification of customary international law

## PART ONE

## Introduction

### Draft Conclusion 1
*Scope*

**1. The present draft conclusions concern the methodology for determining the existence and content of rules of customary international law.**

**2. The present draft conclusions are without prejudice to the methodology concerning other sources of international law and questions relating to peremptory norms of international law (*jus cogens*).**

### Draft Conclusion 2
*Use of terms*

**For the purposes of the present draft conclusions:**

**(c) "customary international law" means those rules of international law that derive from and reflect a general practice accepted as law;**

**(d) "international organization" means an intergovernmental organization;**

**(c) …**

## PART TWO

**Two constituent elements**

**Draft Conclusion 3**
***Basic approach***

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

**Draft Conclusion 4**
***Assessment of evidence***

**In assessing evidence for a general practice accepted as law, regard must be had to the context including the surrounding circumstances.**

**PART THREE**

**A general practice**

**Draft Conclusion 5**
***Role of practice***

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

**Draft Conclusion 6**
***Attribution of conduct***

**State practice consists of conduct that is attributable to a State, whether in the exercise of executive, legislative, judicial or any other function.**

**Draft Conclusion 7**

*Forms of practice*

1. **Practice may take a wide range of forms. It includes both physical and verbal actions.**

2. **Manifestations of practice include, among others, the conduct of States 'on the ground', diplomatic acts and correspondence, legislative acts, judgments of national courts, official publications in the field of international law, statements on behalf of States concerning codification efforts, practice in connection with treaties, and acts in connection with resolutions of organs of international organizations and conferences.**

3. **Inaction may also serve as practice.**

4. **The acts (including inaction) of international organizations may also serve as practice.**

**Draft Conclusion 8**
*Weighing evidence of practice*

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

**2. Account is to be taken of all available practice of a particular State. Where the organs of the State do not speak with one voice, less weight is to be given to their practice.**

**Draft Conclusion 9**
*Practice must be general and consistent*

1. **To establish a rule of customary international law, the relevant practice must be general, meaning that it must be sufficiently widespread and representative. The practice need not be universal.**

2. **The practice must be generally consistent.**

3. **Provided that the practice is sufficiently general and consistent, no particular duration is required.**

4. **In assessing practice, due regard is to be given to the practice of States whose interests are specially affected.**

## PART FOUR

## Accepted as Law

### Draft Conclusion 10
*Role of acceptance as law*

**1. The requirement, as an element of customary international law, that the general practice be accepted as law means that the practice in question must be accompanied by a sense of legal obligation.**

**2. Acceptance as law is what distinguishes a rule of customary international law from mere habit or usage.**

### Draft Conclusion 11
*Evidence of acceptance as law*

1. **Evidence of acceptance of a general practice as law may take a wide range of forms. These may vary according to the nature of the rule and the circumstances in which the rule falls to be applied.**

2. **The forms of evidence include, but are not limited to, statements by States which indicate what are or are not rules of customary international law, diplomatic correspondence, the jurisprudence of national courts, the opinions of government legal advisers, official publications in fields of international law, treaty practice, and action in connection with resolutions of organs of international organizations and of international conferences.**

3. **Inaction may also serve as evidence of acceptance as law.**

4. **The fact that an act (including inaction) by a State establishes practice for the purpose of identifying a rule of customary international law does not preclude the same act from being evidence that the practice in question is accepted as law.**