

# INTERNATIONAL LAW ASSOCIATION

## LONDON CONFERENCE (2000)

### COMMITTEE ON FORMATION OF CUSTOMARY (GENERAL) INTERNATIONAL LAW

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### FINAL REPORT OF THE COMMITTEE

#### STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW\*

#### INTRODUCTION

1. At the Paris Conference in 1984 a workshop on customary international law was held, and following this the Executive Council established the present committee in 1985 under the Chairmanship of Prof. Karl Zemanek, with Prof. Maurice Mendelson Q.C. (as he now is) as Rapporteur. The then Rapporteur's proposed programme of work was adopted by the Committee and endorsed by the Warsaw Conference in 1988.<sup>1</sup> In 1993 Prof. Zemanek resigned as Chairman, and his place was taken by Prof. Mendelson, with Prof. Rein Mullerson taking his

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\* As amended at the London Conference.

<sup>1</sup> See Report of the 63<sup>rd</sup> Conference, 936, 940.

place as Rapporteur. The Committee has produced six Interim Reports in all.<sup>2</sup> The 5<sup>th</sup> and 6<sup>th</sup> Interim Reports were prepared and agreed in the period between the last Conference (1998) and the forthcoming one in July 2000. The 5<sup>th</sup> dealt with the role of treaties in the formation of customary international law, and the 6<sup>th</sup> with the role in that process of resolutions of the United Nations and of international conferences. Since their substance has been embodied in Parts IV and V of the present Final Report, they have not been reproduced here. Interim Reports 1, 2, 4, 5 & 6 were drafted by Prof. Mendelson (nos. 4 & 5 in consultation with Professor Mullerson, and no. 6 on the basis of an earlier version by him); no. 3 was prepared by Prof. Mullerson on the basis of a published paper by Prof. Mendelson members responses to a questionnaire based on it. The present Final Report was drafted by Prof. Mendelson in consultation with Prof. Mullerson<sup>3</sup>. The drafts of each of these Reports (including the present one) were circulated to all members of the Committee and revised in the light of their comments. Interim Reports 1-4 were presented to, and approved by, the Conferences to which they were presented. At the Taipei Conference in 1998, the Association approved the proposal of the Chairman that an attempt be made to formulate a statement of the law in the form of articles and a Commentary (as was done in the 4<sup>th</sup> Interim Report presented to that Conference). The present Report has also taken into account, as appropriate, comments and suggestions made about the Committee's Interim Reports at the Conferences to which they have been presented.

2. Despite the fact that customary law is one of the two principal sources of international law (the other being treaty law), there are inherent serious difficulties in setting out the rules on this subject, for a number of reasons. First - a point often overlooked by those vexed or confused by the relative imprecision of this subject - customary law is by its very nature the result of an *informal* process of rule-creation, so that the degree of precision found in more formal processes of law-making is not to be expected here.<sup>4</sup> Secondly, some of the issues concerned touch on controversial questions of deep legal theory and ideology. For instance, those who regard State sovereignty and sovereign will as the very roots of international law are more inclined to look for consent (mani-

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<sup>2</sup> The 1<sup>st</sup> and 2<sup>nd</sup> were submitted to the Warsaw Conference in 1988. There was then a period during which little happened, as the then Chairman, Prof. Zemanek, wished members of the Committee besides the Rapporteur to produce reports: see e.g. discussion in Report of the 63<sup>rd</sup> Conference (Warsaw 1988), 960. Unfortunately, they did not do so. The 3<sup>rd</sup> Report was submitted to the Helsinki Conference in 1996, and the 4<sup>th</sup> to the Taipei Conference in 1998.

<sup>3</sup> Part III was initially drafted by Prof. Mullerson and redrafted by Prof. Mendelson.

<sup>4</sup> See further Mendelson, "The Formation of Customary International Law", 272 *Hague Academy of International Law, Collected Courses* (1998), 155-410, esp. at 172-76. The Chairman wishes to explain what might appear to be an immodestly frequent citation of this work in the present Report. The reason is that many of the ideas set out here are more fully expounded in that course of lectures, together with copious citation of the precedents and the literature. Without reference to it, this Report would have to be considerably longer than it already is. Also, that contribution was one of the most up-to-date available at the time of preparing this Report.

fest or imputed) in the customary process than those who take a less State-centred standpoint. Thirdly, some issues have important political implications. To take but the best-known instance, the question whether customary international law can be made by resolutions of the UN General Assembly is of considerable political significance, given that, in the Assembly, developed countries are considerably outnumbered by developing ones. Fourthly, although much has been written by scholars on the subject, there have been relatively few authoritative determinations. So far as concerns international courts and tribunals, although there have been some pronouncements on the rules for the formation of customary law, these have tended not to be systematic but very much incidental to the substantive questions which happened to be in issue. For this reason, many questions which concern us here have been left unanswered. Similarly, States (and other international actors) tend not to address themselves to the principles of customary law-formation in the abstract; and though politicians and officials sometimes make pronouncements on this subject, it is not always clear that this represents the considered position of their State. An added difficulty is that of finding the material: most States do not publish digests of their practice in international law, and even those that do rarely classify much under the rubric of sources of law, as opposed to substantive topics. (In this connection, it was fortunate that the Committee comprised, not only several of the foremost writers on the subject in the world, but also members with considerable professional experience of the practice of States.)

3. A further complication is an evolution in the ways in which customary law is created. Until the latter part of the 19<sup>th</sup> century, much of diplomacy was bilateral and secret, and communications were slow. Gradually, however, some (but not all) diplomacy came to be conducted multilaterally and in public, and communication has speeded up to the point where it is technically possible for it to be instantaneous. So the existence of, in particular, international organizations, multilateral treaty-making conferences and their products has also contributed to the process in novel ways, as has the fact that the adoption of a position by a State can be communicated instantaneously around the world. Thus, quite a few of the relatively new customary rules - in the fields of human rights, the environment, maritime jurisdiction, and State immunity, for example - have been at least partly influenced by the existence of international organizations, conferences and treaties, and they have tended to develop more rapidly than was the case in the past. This is not to say that the fundamentals of customary law-creation have been entirely overturned: but it is desirable to be aware of the changes and to take them into account as appropriate.

4. The Sections (and accompanying Commentary) which follow are not intended as a draft convention. They are, rather, a statement of the relevant rules and principles, as the Committee understands them. It seems that there has been no previous systematic attempt to set them out in the form of a sort of code -

perhaps understandably, in view of the difficulties just alluded to. However, it was felt that what would be most useful was not an academic treatise (even if such a thing could be usefully created by a committee), but, rather, some practical guidance for those called upon to apply or advise on the law, as well as for scholars and students. Many have a need for relatively concise and clear guidelines on a matter which often causes considerable perplexity, sometimes because those concerned may not be familiar with international law, and sometimes for reasons connected with the difficulty of the subject. Given that the text of these Sections and accompanying Commentary has been drafted by a committee, it is not to be expected that every word fully reflects the views of each and every member - and *a fortiori* those of each and every member of the Association, if the Conference adopts them with or without amendment. But the Committee ventures to think that it has achieved a considerably greater measure of consensus than could have been anticipated when this exercise began - partly by concentrating on quite precise questions and thereby avoiding at least some of the "dialogue of the deaf" which has bedevilled discussion in the past.

5. Another consequence of this Statement not being a draft convention or code is that a certain amount of overlap or repetition has been regarded as acceptable, especially where it helps to elucidate a very complex subject. It should be emphasised that the Sections that follow have to be read in the light of the Comments which accompany them. The Comments both elucidate their meaning and give an indication of the circumstances in which the principles concerned apply.

6. A word on methodology. In attempting to ascertain the law relating to the formation of customary international law, an inductive approach has been used.<sup>5</sup> That is to say, the Committee considered that the rules about the sources of international law, and specifically this source, are to be found in the practice of States.<sup>6</sup> So, for example, the question whether there is a "persistent objector" rule<sup>7</sup> is to be determined by reference to the practice of States, not to an *a priori* method of reasoning. Extensive reference has also been made here to the pronouncements of international tribunals - and especially of the International Court of Justice and its predecessor the Permanent Court of International Justice, with the *caveat* that they do not constitute formally binding precedents. Members of the Committee have also drawn on their own experience of how

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<sup>5</sup> Cf. Schwarzenberger, *The Inductive Approach to International Law* (1965).

<sup>6</sup> This is not, as it might at first seem, circular: one is not simply using customary law to prove customary law. Essentially, this Statement's approach is that, in the absence of a proper written constitution, the test of what constitute the "sources" of international law, and of the specific rules about the operation of each of them, depends on what the key participants in the system - States - recognize as the processes by which law is made. These "secondary", systemic rules of recognition etc. are not the same as the substantive rules created by one of the processes so recognized - custom. Cf. Hart, *The Concept of Law* (1961).

<sup>7</sup> See below, Section 15.

States go about identifying the law.<sup>8</sup> They have relied on writers only for evidence of what the practice is and, on matters of interpretation, only so far as the arguments deployed appear to be supported by the evidence and otherwise well reasoned. The principal - and in some respects the only - treaty text on this subject, the Statute of the International Court of Justice, would have been very helpful were the relevant provision not so laconic and even, in the view of many, badly drafted. Article 38(1) provides in relevant part as follows: “The Court, whose function is to decide according to international law such disputes as are submitted to it, shall apply ... (b) international custom, as evidence of a general practice accepted as law”.<sup>9</sup>

7. In studying the customary process, it is necessary to be aware of the issue of the observational standpoint. By this reference is not mainly made to the (obvious) need to identify for oneself and for others one’s own assumptions and goals.<sup>10</sup> Rather, the suggestion is that different *functions* may lead the persons performing them to adopt a somewhat different attitude to the sources, including this particular one. For example, whereas a judge has essentially to determine the law impartially, as it is at the time of judgment, a government legal adviser may well feel called upon also to assess how matters are likely to develop in the future, and even to try to assist or retard that development in accordance with the national interest.<sup>11</sup>

8. As its title indicates, the Committee’s remit is limited, and it is important to note what it has considered to be *outside* it. First, strictly speaking it is concerned only with the *formation* of rules of customary international law, not with their consolidation, invocation, application, amendment, termination, or other parts of the “constitutive process”.<sup>12</sup> In practice, however, the need for clarity of exposition has at times obliged it to enter these other domains too. Secondly, the Committee is concerned only with *general* customary law: that is to say, with the law which applies to *all* States.<sup>13</sup> Accordingly, it has not in general explored *particular* customary law, of which regional and local law are the best-

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<sup>8</sup> Much of this takes place on a basis of confidentiality and official secrecy, so that it has not always been possible to cite chapter and verse.

<sup>9</sup> See further, Appendix to the 2<sup>nd</sup> Report of the Rapporteur (annexed to 1<sup>st</sup> Interim Report of the Committee), Report of the 63<sup>rd</sup> Conference (1988), 935, 953.

<sup>10</sup> Cf. Schwarzenberger, *op. cit.*; McDougal, Lasswell & Reisman, “Theories about International Law: Prologue to a Configurative Jurisprudence”, 8 *Virginia Journal of International Law* (1968), 189, reprinted in McDougal & Reisman, *International Law Essays* (1981), 43.

<sup>11</sup> See Appendix to the 1<sup>st</sup> Report of the Rapporteur (Mendelson), “Formation of International Law and the Observational Standpoint” (1986), Annex to the 1<sup>st</sup> Interim Report of the Committee, in Report of 63<sup>rd</sup> Conference (Warsaw 1988), 935, 941.

<sup>12</sup> Cf. McDougal, Lasswell & Reisman, “The World Process of Authoritative Decision”, in McDougal & Reisman, *International Law Essays*, 191 - a revised version of an earlier paper.

<sup>13</sup> Except for those who have been able to opt out under the “persistent objector” rule. See below, Sections 1 & 15.

known manifestations - except where this can throw light on the process by which *general law* is formed. Thirdly, the Committee considered it to be beyond its remit to investigate special types of unwritten international law, such as “fundamental” or “constitutional” principles of international law, *ius cogens*, *erga omnes* norms, and so on. Some consider these to constitute categories of unwritten law distinct from customary law, whilst others regard them as species of customary law. But in any case, they clearly have at least some distinctive characteristics which merit separate examination on another occasion.<sup>14</sup>

9. The International Court of Justice has on several occasions underlined the necessity of two elements in customary law. For example, in the *North Sea Continental Shelf cases* it cited the “*Lotus*” case<sup>15</sup> and, referring to the assertion by Denmark and the Netherlands that certain delimitation agreements by non-parties to the Geneva Convention on the Continental Shelf 1958 evidenced the existence of a new rule of customary law regarding delimitation, observed:<sup>16</sup>

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 requiring it. The need for such a belief, i.e. the existence of a *subjective element* [emphasis added], is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

In the *Continental Shelf (Libya v. Malta)* case the Court said that “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...”<sup>17</sup>

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<sup>14</sup> The title of the topic originally given to this Committee was “the formation of customary (general) international law”. However, the Committee felt that this formulation was both unusual and confusing, and so the present Statement refers to “general customary international law”.

Detter considers that there are very few rules of unwritten general law which are truly based on custom. Many, for instance, are the result of what she calls “sociological necessity” and she thinks it possible that custom is only relevant if there is a territorial connection: see her *The Concept of International Law* (1994) and her comments in Report of the 63<sup>rd</sup> Conference (1988), 964-5. However, the majority of members of the Committee would not go so far. See further, Appendix to the 2<sup>nd</sup> Report of the Rapporteur (annexed to 1<sup>st</sup> Interim Report of the Committee), Report of the 63<sup>rd</sup> Conference (1988), 935, 952-53.

<sup>15</sup> (1927) *PCIJ, Ser. A*, No. 10, p. 4 at p. 28. This case is considered further in paragraph (a) of the Commentary to Section 17(iv).

<sup>16</sup> *ICJ Rep.* 1969, p. 3 at p. 44, (para. 77). See also p. 42 (para. 71).

<sup>17</sup> *Ibid.* 1985, p. 13 at 29-30 (para. 27).

10. Many writers, too, have asserted that customary law comprises two elements, the “objective” or “material” element - State practice - on the one hand, and on the other hand, the “subjective” element, often referred to as *opinio juris sive necessitatis* (or *opinio juris* for short). The subjective element usually seen as either the consent of States, or their belief in the legally permissible or (as it may be) obligatory character of the conduct in question. In using this framework of analysis, the writers frequently rely on the pronouncements of the ICJ or its predecessor, such as those just quoted, which appear to impose this two-fold requirement. The alleged necessity for the “subjective” element will be explored in Part III. But it should be noted at the outset that a number of misconceptions have been based on what may well be a faulty reading of these pronouncements.

(a) Statements such as that quoted above from the *North Sea Continental Shelf* cases have been taken out of context: in Part III the position is taken that it is only sometimes necessary to establish the separate existence of a subjective element. (And even scholars who assert the need for it often concede that does not have to be proved if there is practice of sufficient uniformity, density and representativeness).

(b) Part of the confusion may be caused by a failure to distinguish between different stages in the life of a customary rule. Once a customary rule has become established, States will naturally have a belief in its existence: but this does not *necessarily* prove that the subjective element needs to be present during the *formation* of the rule.

(c) The Court has not in fact said in so many words that just because there are (allegedly) distinct elements in customary law the same conduct cannot manifest both. It is in fact often difficult or even impossible to disentangle the two elements. Haggemacher has gone so far as to say:<sup>18</sup>

En vérité, aucun des deux éléments n'existe comme tel dans les faits historiques censés être à la base d'une règle coutumière concrète. ... Les deux prétendus éléments n'ont en réalité aucune individualité propre; ils se trouvent inextricablement mêlés au sein d'une "pratique" unitaire. Cette pratique forme pour ainsi dire un seul "élément" complexe, fait d'aspects "matériels" et "psychologiques".

This *gestalt* approach may perhaps somewhat oversimplify a more complex reality, but undoubtedly it is often difficult or impossible to separate the two elements.

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<sup>18</sup> “La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale” 90 *RGDIP* (1986), 5,114.

(d) Confusion has also been created by a failure to distinguish between manifestations of the subjective element (will or belief) on the part of *individual* States, on the one hand, and of the *generality* of States, on the other.

However, both out of deference to the pronouncements of the Court and the opinions of the majority of writers, and also for convenience of exposition, this Statement deals with each element separately.

11. Part I deals with definitions. Part II deals with the “objective” element, and Part III with the “subjective”. Part IV concerns the role of treaties in the formation of customary international law, and Part V the contribution of resolutions of the United Nations General Assembly and of resolutions of international conferences.

## PART I: DEFINITIONS

### 1. Working definition

*(i) Subject to the Sections which follow, a rule of customary international law is one which is created and sustained by the constant and uniform practice of States and other subjects of international law in or impinging upon their international legal relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future.<sup>19</sup>*

*(ii) If a sufficiently extensive and representative number of States participate in such a practice in a consistent manner, the resulting rule is one of “general customary international law”. Subject to Section 15, such a rule is binding on all States.*

*(iii) Where a rule of general customary international law exists, for any particular State to be bound by that rule it is not necessary to prove either that State’s consent to it or its belief in the rule’s obligatory or (as the case may be) permissive character.*

### Commentary.

(a) Section 1 is not meant to be a formal, prescriptive definition.<sup>20</sup> In particular, as the opening words indicate, it has to be understood in the light of this Statement as a whole. Nevertheless, it was thought that it would be useful to provide a working or introductory definition for users of this Statement, espe-

<sup>19</sup> This definition is adapted from that of Mendelson, 272 *Collected Courses*, 188, 399.

<sup>20</sup> Cf. Javolenus, *omnis definitio in iure civili periculosa est, parum est enim ut non subverti possit* -“every definition in the civil law is dangerous, for there is hardly one which cannot be undermined”: *Digest [of Justinian]*, 50.17. 202.



cially those who had little or no previous experience of the concept of customary international law.

(b) Certain features of this working definition should be mentioned.

(1) It underlines that it is the actions of States in their *international* legal relations which give rise to rules of customary international law. For instance, there might be a great uniformity in some parts of domestic law - such as constitutional or corporate law - without the rules in question becoming part of public international law. Whether 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: see e.g. Nationality Decrees in Tunis and Morocco (1923) PCIJ Ser. B, No. 4, p. 24. There may also be regular conduct by States which does not contribute to the formation of customary law because it does not take place in the context of their international *legal* relations: see Section 17.

(2) It indicates that subjects of international law other than States can contribute to the formation of customary law: for instance, international organizations. This is a subject to which this Statement reverts in Section 11.

(3) It indicates that the customary law process is a continuing one: it does not stop when a rule has emerged.<sup>21</sup>

(4) The definition in (i) and (ii) does not *expressly* say anything about the so-called subjective element in customary law - the element of belief or consent - though there is an indirect allusion to this in the words "in circumstances which give rise to a legitimate expectation<sup>22</sup> of similar conduct in the future". Although traditional formulations often describe customary international law as a combination of the "objective" (or "material") element - State practice - and the "subjective" element (*opinio juris sive necessitatis*), it will be seen later that, in the opinion of the Committee, this would be an over-simplification. As explained in Part III,

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<sup>21</sup> Although this Statement is concerned with the *formation* of customary international law, it is worth noting that conforming practice after the rule has emerged helps to strengthen it (and is thereby both constitutive of the rule and declaratory - evidence - of it), whilst contrary practice can undermine and, if sufficiently constant and widespread, destroy an existing customary rule. It is not entirely possible or desirable to draw too sharp a distinction between the formation of customary law, on the one hand, and its existence after it has come into being, on the other hand.

<sup>22</sup> The use of this phrase also has echoes of the theory that the explanation of (the binding force of) *all* of the sources of international law may lie in the fact that they are processes whereby legitimate expectations are engendered: see Mendelson, 272 *Collected Courses*, 183-86. However, a consideration of the *grundnorm* of international law and of like questions is beyond the scope of this study, and it is therefore not proposed to dwell on the point here.

it is not *usually* necessary to demonstrate the existence of the subjective element before a customary rule can be said to have come into being. There are, however, circumstances where it is necessary, and the Committee also took the view that assent to a rule can create a binding obligation. But these circumstances are so varied that they need to be dealt with specifically, rather than in a working definition. Secondly, in the context of the *formation* of general customary law (as opposed to evidencing rules which have already come into being), the main function of the subjective element is to indicate what *practice* counts (or, more precisely, does not count) towards the formation of a customary rule. See especially Section 17.

(5) The definition does not require the State against whom the customary rule is being invoked to be one of the States who have actively participated in it previously. See Section 14(ii). Section 1(iii) is, in a sense, inserted out of abundance of caution: it is implicit in the statement in (ii) that a general customary rule is binding on *all* States, but it stresses one aspect of that principle.

(c) It is often helpful to think of customary rules as emerging, in the typical case, from a process of express or implied claim and response - an insight which comes from Myres S. McDougal and his associates. Thus, if State A expressly claims the right to exclude foreign warships from passing through its territorial sea, and State B sends a warship through without seeking the permission of A, this is an implicit claim on the part of B that A has no right to prohibit the passage. If A fails to protest against this infringement, this omission can, in its turn, constitute a tacit admission of the existence of a right of passage after all.

(d) As to paragraph (ii), it will be seen (in Sections 14 and 15) that *general* customary law is not necessarily the same as *universal* customary law. Although all general customary law has the potential to be universal, it is possible for states to exclude themselves from the ambit of a general rule by means of persistent objection, within the limits laid down by the relevant rules.

(e) Paragraph (ii) is explained more fully in Part II below, and (iii) in Part III.

## 2. *Use of terms*<sup>23</sup>

**(i) In this Statement, “rule(s)” includes principles.**

### **Commentary.**

Some commentators draw a distinction between “principles” and “rules”.

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<sup>23</sup> Cf. Appendix to the 2<sup>nd</sup> Report of the Rapporteur (annexed to 1<sup>st</sup> Interim Report of the Committee), Report of the 63<sup>rd</sup> Conference (1988), 934, 951-59.

Their definitions vary, but the general idea is that principles operate at a higher level of generality than rules. So, for example, one might speak of the “principle” of the freedom of the high seas, but of the “rule” that submarines, in passing through the territorial sea, must navigate on the surface and show their flag. However, in ordinary (legal) usage the two terms are often used interchangeably, and furthermore it would be cumbersome to have to keep referring to “rules and principles” in this Statement. Accordingly, “rules” here includes “principles”.

*(ii) “(Customary) rule” or “rule of customary (international) law” in this Statement means a rule of general customary international law, unless the context otherwise requires.*

**Commentary.**

The principles concerning the formation of rules of general customary international law, although similar in many respects to those concerning the formation of *particular* customary law, are not necessarily identical. Moreover, the latter topic is beyond the scope of the present Statement. On the other hand, as a matter of style it would be cumbersome to keep referring to “general customary rules”, “rules of general customary law”, and so on; and so where the word “general” is omitted in this Statement, it should be taken as read, unless the context otherwise requires.

*(iii) In this Statement, “customary (international) law” refers to the corpus of such individual rules.*

*(iv) In this Statement, “(State) act(s)”, “conduct”, “behaviour” or “usage” are wholly neutral terms, entailing no judgment as to whether the acts or omissions in question are declaratory or constitutive of a rule of customary law, or neither. “Act” connotes a single instance of conduct; the other terms may, as the context requires, connote either a single instance or a course of conduct.*

*(v) In this Statement, “(State) practice” is similar to (iv) above, save that there is an implication that the conduct is of such a kind that it may in appropriate circumstances evidence, or contribute to the formation of, a customary rule.*

**Commentary.**

For a fuller discussion of State practice, see below, Part II.

*(vi) In this Statement, “mere usage” or “(mere) comity” means conduct which, whilst possibly constant and uniform, does not reflect or constitute a customary rule.*

### Commentary

It is a commonplace that there are some forms of State conduct which, however regular, do not give rise to rules of customary international law.<sup>24</sup> An example would be the habit of addressing letters of condolence when a head of State dies, which is what public international lawyers call “(mere) comity (*courtoisie, comitas gentium*)”, in contradistinction to rules of law.<sup>25</sup> Why certain regular usages do not give rise to rules of customary law is explained in Section 17.

**(vii) In this Statement “State(s)” includes, where appropriate, inter-governmental organizations.**

### Commentary.

For a fuller explanation, see Section 11 below.

**(viii) In this Statement, the term “source(s) of law” is used to denote the processes or means by which rules of law are created or, as the case may be, determined.**

### Commentary.

The term “source” properly belongs to hydrography, but it is so well entrenched in legal discourse that it would be somewhat artificial to avoid its use entirely. For analytical purposes it is important, however, to distinguish between “formal” sources, which are those processes which, if they are observed, create rules of law (such as treaties and custom), and what Schwarzenberger called “law-determining agencies”<sup>26</sup> (or, one might say more simply but more crudely, “evidential sources”). The latter are identified in Article 38(1)(d) of the Statute of the International Court of Justice as “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”. In the present context it should be noted that State practice can be constitutive (a formal source) of a new rule, but it can also be evidence of an *existing* rule. It is also helpful for analytical purposes (and hence for this Statement) to distinguish between a “formal” source of law and an “historic” source of a rule (otherwise known as a “material” source). The latter is the historic origin of a rule which only obtains its legal force, however, when it is subjected to a law-making process (a formal source). For instance, as will be seen (in Section 30), a resolution of the UN General Assembly may provide the inspiration for (be the historic/material source of) subsequent State practice (a formal source, or part

<sup>24</sup> Cf. Parry, *The Sources and Evidences of International Law* (1965), Chap. 1; O’Connell, *International Law* (2<sup>nd</sup> ed., 1970), 7-8; Carreau, *Droit International* (3<sup>rd</sup> ed., 1991), 260-61.

<sup>25</sup> It should be noted that *private* international lawyers sometimes use the term in a different sense, to include rules of public international law.

<sup>26</sup> *Inductive Approach*, 19-21.

thereof) which eventually matures into a rule of customary law. For a fuller discussion of these concepts, see Appendix to the 2<sup>nd</sup> Report of the Rapporteur (annexed to 1<sup>st</sup> Interim Report of the Committee), Report of the 63<sup>rd</sup> Conference (1988), 935, 954-59.

## **PART II: THE OBJECTIVE ELEMENT: STATE PRACTICE**

### **INTRODUCTORY REMARKS**

This Part is based on the 4<sup>th</sup> Interim Report of the Committee and the discussion of it at the Taipei Conference.<sup>27</sup> It concerns what all members of the Committee considered to be the most characteristic, and most members of the Committee considered to be the most important, component of customary international law, namely, State practice. This component is often described as the “material” (in contradistinction to the “subjective”) element in customary law. It is, however, preferable to describe it as the “objective” element, so as to avoid confusion with the jurisprudentially distinct concept of “material source of law” (see above, Commentary to Section 2(viii)).

This Part examines (A) what types of act constitute State practice; (B) whose acts count as State practice; and (C) the density of the practice.

### **A. WHAT TYPES OF ACT CONSTITUTE STATE PRACTICE?**

3. *When defining State practice - the objective element in customary law - it is necessary to take account of the distinction between what conduct counts as State practice, and the weight to be given to it.*

#### **Commentary**

What is suggested here is something analogous to (but not the same as) the well-known distinction in the law of evidence between the admissibility of evidence and its weight (convincingness). Discussion of the objective element in custom has been bedevilled by a failure to make this distinction. For instance, those who would deny that such verbal acts as statements in an international organization count as practice seem to be motivated (whether expressly or not) by the consideration that “talk is cheap”, and that to make a statement is not the same as arresting a ship.<sup>28</sup> However, whilst in some instances this may be so, this goes more to the *weight* to be attributed to the conduct rather than to any inherent *inability* of verbal acts to contribute to the formation of customary rules. (And in any case, talk is not always cheap - see Section 4 below; and on

<sup>27</sup> Report of the 68<sup>th</sup> Conference (1998), 321 & 336.

<sup>28</sup> Cf. the *dictum* in Judge Read’s dissenting opinion in the *Fisheries case*, *ICJ Rep.* 1951, p. 116 at p. 191: “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 negotiations and international arbitration.”

the other hand physical acts are not always formal and deliberate manifestations of State practice. For instance, a ship might be arrested by a minor official without proper instructions, but this will still count as practice if it is not “cancelled” by some higher authority.)

#### 4. *Verbal acts, and not only physical acts, of States count as State practice.*

##### **Commentary.**

(a) Verbal acts, meaning making statements rather than performing physical acts, are in fact more common forms of State practice than physical conduct. Diplomatic statements (including protests), policy statements, press releases, official manuals (e.g. on military law), instructions to armed forces, comments by governments on draft treaties, legislation, decisions of national courts and executive authorities, pleadings before international tribunals, statements in international organizations and the resolutions these bodies adopt - all of which are frequently cited as examples of State practice<sup>29</sup> - are all forms of speech-act. Physical acts, such as arresting people or seizing property, are in fact rather less common.

There is no inherent reason why verbal acts should not count as practice, whilst physical acts (such as arresting individuals or ships) should. For voluntarists<sup>30</sup>, this must necessarily be so: both forms of conduct are manifestations of State will. For those who stress the importance of belief (*opinio juris*), verbal acts are probably more likely to embody the beliefs of the State (or what it says it believes) than physical acts, from which belief may need to be inferred by others. And whichever school one subscribes to - or both or neither - there seems to be no inherent qualitative difference between the two sorts of act.<sup>31</sup>

The practice of international tribunals is replete with examples of verbal acts being treated as examples of practice.<sup>32</sup> Similarly, States regularly treat this sort of act in the same way. See further, Section 31, Commentary, paragraph (c).

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However, it is important to note that this observation was made in the context of claims of territorial sovereignty, where special considerations may obtain.

(For the avoidance of confusion, it should be pointed out that when the expression *dictum* is used in this Statement, this does not mean - as it sometimes does in the United States - *obiter dictum*. It simply means a judicial pronouncement. If *obiter dictum* is intended, both words will be used.)

<sup>29</sup> Cf. e.g. Brownlie, *Principles of Public International Law*, (5th ed., 1998), 5. Villiger says, “There is much merit in qualifying verbal acts as State practice” and that to do otherwise “would hardly be possible, since States themselves as well as courts regard comments at conferences as constitutive of State practice”: *Customary International Law and Treaties* (2<sup>nd</sup> ed. 1997), 20-21.

<sup>30</sup> That is, those who treat the will of States as the source of customary obligation: see below, Part III.

<sup>31</sup> This is not to say that their weight will always be the same: see above, Section 3. However, this depends more on the particular facts than on whether an act is a verbal or a physical one.

<sup>32</sup> E.g. “*Lotus*” case (1927), *PCIJ Ser. A*, No. 10, pp. 23, 26-30; *Nottebohm case (2nd Phase)*, *ICJ Rep.* 1955, p. 4 at pp.21-23; *Fisheries Jurisdiction (Merits)*, *ibid.* 1974, p. 3 at 24- 26 (paragraphs 55-58); *Nicaragua case (Merits)*, *ibid.*, 1986, p. 14 at 97-109 (paragraphs 183-207); *Nuclear Weapons*, *ICJ Rep.* 1996, p. 226, e.g. at 259-61 (paragraphs 86, 88); *Gabcikovo-Nagymaros Project*, *ICJ Judgment of 25 September 1997*, e.g. at paragraphs 49-54, 83, & 85.

Some statements may nevertheless be more usefully regarded as expressions of opinion than as formal acts of State practice.

### **5. *Acts do not count as practice if they are not public.***

#### **Commentary.**

(a) For a verbal act to count as State practice, it must be public - not in the sense that it need necessarily be communicated to all of the world, but that, if it is not publicized generally (e.g. by legislation, press statements, etc.), it must be communicated to at least one other State. (For example, protests are not always generally publicized, but they are at least communicated to one other State.) Internal memoranda are therefore not, as such, forms of State practice, and the confidential opinions of Government legal advisers, for instance, are not examples of the objective element in custom. If the customary process is seen as one of claim and response, the reason is clear: an internal memorandum which is not communicated to others is not a claim or a response. (It is otherwise if the State publicizes the legal analysis in support of its position: it then becomes part of its claim.) If the memorandum is only afterwards made public (e.g. through the operation of laws opening national archives to the public after a certain period of time), it may be evidence of the State's subjective attitude to the issue, but is not an instance of the "objective element".

(b) By the same token, a secret physical act (e.g. secretly "bugging" diplomatic premises) is probably not an example of the objective element. And if the act is discovered, it probably does not count as State practice unless the State tries to assert that its conduct was legally justified.

### **6. *In appropriate circumstances, omissions can count as a form of State practice.***

#### **Commentary.**

It is true that, in the "*Lotus*" case, the PCIJ refused to regard the abstention of States (other than the flag State) from prosecuting for collisions on the high seas as establishing the existence of a rule of customary international law requiring them to refrain.<sup>33</sup> However, that was because, in that case, the abstention was ambiguous: there could have been other reasons, unconnected with international law, why a State might have abstained.<sup>34</sup> See further, Section 17(iv) and Commentary. In appropriate circumstances, where there is not the same degree of ambiguity, it seems reasonable to regard abstentions or omissions as examples

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<sup>33</sup> PCIJ Ser. A, No. 10, p. 28.

<sup>34</sup> See Mendelson, "State Acts and Omissions as Explicit or Implicit Claims", in *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally* (1991), 373; reproduced in *Report of 65<sup>th</sup> Conference* (1992), 360, 370.

of State practice: e.g. if a State were to announce its intention to prosecute a foreign diplomat and then, following a protest, abstained from doing so.<sup>35</sup>

## **B. THE “STATE” FOR THE PURPOSE OF IDENTIFYING STATE PRACTICE**

### **7. *Acts of individuals, corporations etc. do not count as State practice, unless carried out on behalf of the State or adopted (“ratified”) by it.***

#### **Commentary.**

The conduct of individuals, corporations and other, non-governmental bodies undoubtedly contributes to the customary process in its *extended* sense. For example, they may encourage their governments to adopt a certain form of behaviour; they may be the objects of regulation by foreign States; and they may directly invoke rules of law before national courts or before international tribunals to which they have access. However, although they may be the *occasion or reason* for the actions of States and other governmental bodies, only those States and governmental bodies are capable of performing State practice. However, if a State adopts the conduct of individuals as its own, then this does count as State practice. And naturally, a State can act only through individuals or groups of individuals, so that, if they do so as its representatives or agents, it is the State itself which is considered to be the actor.

### **8. *The 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.***

#### **Commentary.**

The activities of provinces within a federation, or of other subordinate local authorities, are capable of giving rise to State responsibility;<sup>36</sup> but as a matter of principle the practice of such bodies, though it may impact on international relations (e.g. California’s unitary tax system) should not, of itself, be regarded as constituting State practice. The reason is that these entities are not States in the international law sense of the term and they are not (normally) capable of conducting their own international relations. It is, however, otherwise if the entities are constitutionally empowered (albeit in a limited way) to conduct their

<sup>35</sup> Cf. also “*Lotus*” case, PCIJ Ser. A. No. 10, p. 23 (absence of protest); *Nottebohm case* (2<sup>nd</sup> phase), ICJ Rep. 1955, p. 4 at p. 22 (refraining from exercising diplomatic protection); *Asylum case, ibid.*, 1950, pp. 277-8 (refraining from ratifying convention).

<sup>36</sup> Cf. Article 7 of the International Law Commission’s draft Articles on State Responsibility, *Yearbook of the ILC* 1980-II, Part 2, 30-34.



own foreign relations, and other States recognize that capacity (e.g. the Byelorussian and Ukrainian Soviet Socialist Republics before the break-up of the USSR). Similarly if the entity concerned acts with the authority of the (federal) State, or if the latter adopts its acts. A State's failure to prevent the conduct in question can amount, for present purposes, to tacit adoption. For example, if other States protest about a component unit's unitary taxation system, and the federal entity does nothing to prevent its being put into effect, then this conduct has to be regarded as having been adopted by the federal State and therefore as an instance of State practice (whether or not the centre is in a position, under its constitutional law, to change the rules in question).

**9. *The practice of the executive, legislative and judicial organs of the State is to be considered, according to the circumstances, as State practice.***

**Commentary.**

(a) According to some earlier writers<sup>37</sup> State practice consists only of the practice of those organs capable of entering into binding agreements on behalf of the State - in other words, the head of State, head of government and foreign minister. However, this approach is closely linked to one which regards customary law as merely tacit treaty law. If one has no *a priori* attachment to such a theory, there is no reason why the criteria should be so restrictive.<sup>38</sup> As a matter of comparative constitutional law and of legal theory, the State comprises the constituent, legislative, and judicial branches as well as the executive. It is certainly the case that the activities of organs of the State other than the executive can also engage its international responsibility;<sup>39</sup> and although this is not a conclusive argument, in the present context the analogy seems persuasive. See further, paragraphs (c) to (e) below.

(b) Certainly, the actions of the whole of the executive, and not just the foreign ministry, should count. In modern practice, it is not always the foreign ministry which has the "lead" in international negotiations and transactions: it can be the ministry of finance, transport, and so on. Unless an organ of the executive is acting outside the scope of its authority and its conduct is disavowed by higher authorities, there seems to be no good reason why the ability to create State practice should be confined to the foreign ministry.

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<sup>37</sup> E.g. Strupp, "Les règles générales du droit de la paix", 47 *RCADI* (1934-I), pp. 313-315; cf. Anzilotti, *Cours de droit international* (tr. Gidel, 1929), 74-75.

<sup>38</sup> *Accord* e.g. Ferrari-Bravo, "Méthodes de recherche de la coutume internationale dans la pratique des Etats", 192 *Collected Courses* (1985), 237, 259-61; Daillier & Pellet, *Droit international public* (6<sup>th</sup> ed. 1999), 321.

<sup>39</sup> See Arts. 5 & 6 of the International Law Commission's draft on State Responsibility, *Yearbook of the ILC* 1980-II, Part 2, 30-34.

(c) The practice of States and international tribunals shows that a State's legislation (including its constitution, which may, for instance, include claims to zones of maritime jurisdiction) can also be regarded as a manifestation of its practice.<sup>40</sup> In addition to the reasons given in paragraph (a) above, it is by no means everywhere the case that only the executive has a role in international transactions: for instance, in many countries the legislature (or a section of it) has a part to play in the making of war and peace, the negotiation of treaties, and so forth. Again, a country's legislation will normally apply to aliens within its territory (and so affect their national State); and it may also be extraterritorial in its range, thus affecting the interests of other States.

(d) Domestic courts, too, are organs of the State, and their decisions should also be treated as part of the practice of the State.<sup>41</sup> For example, a determination that international law does or does not require State immunity to be accorded in a particular case, or the extraterritorial application of a domestic law. This observation is unaffected by the fact that decisions of national courts can also be regarded as (more or less persuasive) "subsidiary means for the determination of rules of law" within the meaning of Article 38(1)(d) of the Statute of the ICJ.

(e) It can happen, particularly in countries where there is a separation of powers, that the position of the judiciary (or of the legislature) conflicts with that of the executive. This is a matter of what *weight* is to be attached to the various instances of the State's practice (see Section 3 above). In the ultimate analysis, since it is the executive which has primary responsibility for the conduct of foreign relations, that organ's formal position ought usually to be accorded more weight than conflicting positions of the legislature or the national courts. But it should also be noted that, in such a case, the internal uniformity or consistency which is needed for a State's practice to count towards the formation of a customary rule may anyway be prejudiced (see Section 13 below).

***10. Although international courts and tribunals ultimately derive their authority from States, it is not appropriate to regard their decisions as a form of State practice.***

**Commentary.**

Some authors regard the decisions of international courts and tribunals as a sort of delegated State practice. But this is misleading. In the first place, the purpose of international courts and tribunals is to act *independently* of those appointing them. To treat them as States' agents is therefore misleading as well as - in a sense - demeaning. Furthermore, the real significance of the decisions of international courts and tribunals (apart from their role in settling a particu-

<sup>40</sup> See e.g. *Nottebohm case (2nd Phase)*, ICJ Rep. 1955, p. 4 at p. 22.

<sup>41</sup> See e.g. "*Lotus*" case, PCIJ Ser. A., no. 10, pp. 23, 26, & 28-9.

lar dispute) lies in their precedential value as determinations of the law. Even if they are, strictly speaking, binding only on the parties and only in the particular case (see e.g. Article 59 of the Statute of the International Court of Justice), their persuasive force can be considerable - depending on the status of the tribunal, the quality of its reasoning, the terms of the *compromis* or Statute by which it is set up, etc.<sup>42</sup>

## ***11. The practice of intergovernmental organizations in their own right is a form of "State practice".***

### **Commentary.**

(a) Many intergovernmental organizations are (to some extent at least) international legal persons in their own right, and are capable of performing acts which contribute to the formation of international law. For instance, in the *Reservations to the Genocide Convention case*,<sup>43</sup> the ICJ took into account the depositary practice of the UN Secretary-General, as well as that of national chancelleries; and the military activities of that organization can contribute to the formation of customary rules relating to conduct during armed conflicts.<sup>44</sup>

(b) Organs of international organizations, and notably the UN General Assembly, also from time to time adopt resolutions containing statements about customary international law. *Formally*, since the decision is recorded as a resolution of (the organ of the) organization, its adoption is a piece of practice *by the organization*; and some writers treat it in this way. However, in the context of the formation of customary international law, it is probably best regarded as a series of verbal acts by the individual member States participating in that organ.<sup>45</sup> If so, it would add little or nothing to the weight of such practice *by the member States themselves* to treat the resolution itself (as distinct from voting for it) as a *further* piece of practice, this time on the part of the organization.

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<sup>42</sup> Prof. Wolfke, in his comments, argued that the fact that States accept the judgments and opinions of judicial organs means that those decisions and opinions can themselves be regarded as a form of State practice. However, this appears to involve a *non sequitur*. His further observation that, in view of its prestige, the World Court can be regarded as "generally accepted law-making practice" is probably best treated as a suggestion that such decisions can in certain circumstances be regarded as a "new" source of binding law. As such, it is outside the scope of this Committee's investigations. Prof. Villiger, whilst agreeing with the formulation of this Section and the accompanying Commentaries, correctly pointed out that what States claim before international tribunals, on the other hand, is a form of State practice.

<sup>43</sup> *ICJ Rep.* 1951, p. 15.

<sup>44</sup> Whether the conduct of organs can create a sort of *internal* customary law of the organization concerned, or of international organizations generally, is beyond the scope of this Statement.

<sup>45</sup> Such verbal acts consisting in voting in favour, voting against or abstaining, along with explanations of vote, etc.

### C. THE DENSITY OF THE PRACTICE.

12. (i) *General customary international law is created by State practice which is uniform, extensive and representative in character. These three requirements are dealt with in Sections 13-15.*
- (ii) *Although normally some time will elapse before there is sufficient practice to satisfy these criteria, no precise amount of time is required.*

#### Commentary.

(a) In the *North Sea Continental Shelf cases*<sup>46</sup> the ICJ observed that “Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked ... .” This fairly summarizes both the State practice and the case-law on this point.

(b) The quotation from the ICJ just cited makes it clear that, as stated in (ii) above, there is no specific time requirement<sup>47</sup>: it is all a question of accumulating a practice of sufficient *density*,<sup>48</sup> in terms of uniformity, extent and representativeness. Some customary rules have sprung up quite quickly: for instance, sovereignty over air space, and the régime of the continental shelf, because a substantial and representative quantity of State practice grew up rather rapidly in response to a new situation.<sup>49</sup>

(c) However, in the nature of things *some* time will normally need to elapse before a practice matures into a rule. The development of the continental shelf is an example of how the process often works. In 1945, President Truman proclaimed the “jurisdiction and control” of the USA over the adjacent continental shelf. Other States with important interests in their own continental shelf, such

<sup>46</sup> *ICJ Rep.* 1969, p. 3 at p. 43 (paragraph 74). Cf. also p. 42 (paragraph 73).

<sup>47</sup> It is probably in the nature of any customary process that, being informal, it is not possible to specify precisely how much time is required for a customary rule emerge (unless an arbitrary figure is set by a central authority). This is certainly true of customary international law.

It is also worth noting that it is often unnecessary to determine at what precise moment the rule did emerge: what is important is to know whether it had emerged by the time the decision-maker (especially a third-party decision maker) had to make his or her decision.

<sup>48</sup> The expression comes from Waldock, “General Course on Public International Law”, 106 *Collected Courses* (1962), 1, 44.

<sup>49</sup> The former because, on the outbreak of the First World War, States suddenly realized that they were vulnerable to bombing and to espionage; the latter because developments in technology and demand for petroleum made it both feasible and desirable for States to exploit deposits in the continental shelf beyond the territorial sea.

as the United Kingdom, followed suit. Some others, though their own interests were affected, failed to object. What started out as, first, a unilateral claim and undertaking, next a bilateral set of obligations, and then a body of particular customary law restricted to a confined (though not regionally defined) group of States, gradually ramified into a rule of general law. The process took several years to be completed. Even in the present era of easy and instantaneous communications, if a State or group of States adopts a practice, others will need to consider how (if at all) they wish to respond. These responses may give rise to further responses, and so on. All of this will usually involve some delay.

(d) It might also be argued that the time element is implicit in the notion of *customary law*, and there is a good deal of truth in this. As against this, it has been argued that there are some principles of unwritten international law which are axiomatic and which therefore do not need to be supported by practice over time. Examples might be the principles of sovereign equality, and of non-intervention. To some extent, this point could be met by observing that the notion of customary international law is not necessarily coterminous with that of unwritten law, so that these other forms of unwritten law are perhaps not really “customary law” at all. See above, Introduction, paragraph 8, where it was also pointed out that the remit of the Committee did not include *ius cogens* or “general principles of law recognized by civilized nations”. But in any case, it could probably also be shown that all or most of the “axiomatic” principles in question actually took some time to become generally accepted.<sup>50</sup>

(e) On the question whether UN General Assembly resolutions are capable of creating “instant” customary law, see Section 32, Commentary, paragraph (e).

**13. *For State practice to create a rule of customary law, it must be virtually uniform, both internally and collectively. “Internal” uniformity means that each State whose behaviour is being considered should have acted in the same way on virtually all of the occasions on which it engaged in the practice in question. “Collective” uniformity means that different States must not have engaged in substantially different conduct, some doing one thing and some another.***<sup>51</sup>

#### **Commentary.**

(a) See the quotation in paragraph (a) of the Commentary to Section 12.

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<sup>50</sup> One has only to think of the nineteenth century law on capitulations and on intervention for humanitarian purposes or for the collection of debts to see that the principles of sovereign equality and non-intervention, for instance, have not always been regarded as axiomatic.

<sup>51</sup> See e.g. *Asylum case*, ICJ Rep. 1950, p. 266 at p. 277; *Fisheries case*, *ibid.* 1951, p. 116 at p. 131.

(The French text renders the requisite practice as “fréquent et pratiquement uniforme”). In the *Asylum case*, the Court referred to the need for “constant and uniform usage”: *ICJ Rep.* 1950, p. 266 at 277.

(b) So far as concerns *internal uniformity* (or consistency), in the following year, in the *Fisheries case*, the Court considered whether the Norwegian system of straight base-lines for the delimitation of the territorial sea was valid and opposable to the United Kingdom. In this context, it said:

The Court considers that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice. They may be easily understood in the light of the variety of the facts and conditions prevailing in the long period which has elapsed since 1812, and are not such as to modify the conclusions reached by the Court.<sup>52</sup>

The ICJ also rightly pointed out in the *Nicaragua case*<sup>53</sup> that inconsistencies between what a State says is the law and what it does are not fatal, so long as it does not try to excuse its non-conforming conduct by asserting that it is legally justified.

(c) So far as concerns what has been termed “*collective*” *uniformity or consistency*<sup>54</sup>, if there is too much inconsistency between States in their practice, there is no *general* custom and hence no general customary rule. (It is beyond the scope of this Statement to consider whether the result is one or more bodies of *particular* customary law, or the relation between parties to a specific body of particular law and those who do not adhere to it.) In the *Fisheries case*, the ICJ pointed out that, although a ten-mile closing line for bays had

been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law.<sup>55</sup>

Another much-cited example is the *Asylum case*. Here, Colombia claimed that a regional custom existed which entitled it to demand a safe-conduct from

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<sup>52</sup> See *ICJ Rep.* 1950, p. 116 at 138. Similarly, in the *Asylum case*, the Court brushed aside certain *internal* inconsistencies in the stated views of the parties: *ICJ Rep.* 1951, p. 266 at 278. The Rapporteur has also observed that statements by the government or governments concerned may smooth out inconsistencies in physical acts.

<sup>53</sup> (*Merits*), *ICJ Rep.* 1986, p. 14 at p. 98.

<sup>54</sup> By Mendelson, 272 *Collected Courses*, 211-14.

<sup>55</sup> *ICJ Rep.* 1950, p. 116 at 131.

its embassy in Lima, Peru, for a political opponent of the Peruvian Government. In support of its claim, Colombia relied on a number of treaties, to some of which Peru was not a party, and on a large number of particular cases in which this type of diplomatic asylum (as opposed to territorial or political asylum) was sought and granted. The International Court observed that

The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.<sup>56</sup>

However, over time inconsistencies may disappear.<sup>57</sup> And, as with internal uniformity, it seems that minor departures from collective uniformity will not necessarily be fatal. Thus, although the various proclamations of an exclusive economic zone were not identical, they were sufficiently similar for the ICJ to be able to hold, in the *Continental Shelf (Libya/Malta)* case that the EEZ had become part of customary international law.<sup>58</sup> At any rate, there was sufficient uniformity for the *main principles* to have become part of international law, even if that was not necessarily so (at least at that time) for detailed rules about, say, the allocation of surplus stocks.

**14. (i) 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. It does not, however, need to be universal.**

**(ii) Subject to the rules about persistent objection in Section 15 below, for a specific State to be bound by a rule of general customary international law it is not necessary to prove that it participated actively in the practice or deliberately acquiesced in it.**

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<sup>56</sup> *ICJ Rep.* 1951, p. 266 at 277. Although this case concerned an alleged *regional* customary rule, it is authority for the proposition stated here. Another case where the practice was held to be too inconsistent was the *Reservations to the Genocide Convention case*, *ibid.*, p. 15 at 25.

<sup>57</sup> As Akehurst pointed out ("Custom as a Source of International Law", 47 *British Year Book of International Law* (1974-5), 1, 20), over time an inconsistent practice may align itself in one sense, citing the *Paquete Habana*, 175 US 677 (US Supreme Ct., 1900).

<sup>58</sup> *ICJ Rep.* 1985, p. 13 at 33 (paragraph 34); cf. *ibid.* 1982, p. 18 at 74 (paragraph 100).

**Commentary.**

(a) Leaving aside the question of persistent objection, which is dealt with in Section 15, no international court or tribunal has ever refused to hold that a State was bound by a rule of alleged general customary international law merely because it had not itself actively participated in the practice in question or deliberately acquiesced in it. In other words, it is not necessary to prove the individual consent of a State for it to be bound by a rule of general law. There have been several cases in which the International Court, for instance, has taken it for granted that the State concerned would be bound by the rule if it could be shown that the other criteria for the formation of general customary law were satisfied.<sup>59</sup> This is also generally the position taken by States, and there have been no substantial challenges to this proposition. For instance, when one examines the emergence of such universally applicable customary rules and principles as those relating to diplomatic immunities, the prohibition of piracy and of privateering, and sovereign rights over the continental shelf, it is impossible to show that every State positively consented to the emergence of the rule in question. Yet it is virtually unanimously accepted that these rules have come to bind all States. It follows, therefore, that a practice does not need to be universal for all States to be bound by it: “general” practice suffices.

(b) It follows, also, that newly-independent States or those new to a particular activity are bound by existing rules of customary law. Although the contrary view is occasionally found in the academic literature, this proposition has not been seriously contested by States which fall into either category. As Waldock pointed out, in the cases in which they participated in the PCIJ and ICJ, respectively, neither Poland nor India sought to rely on the fact that they were new States, and it seems to have been assumed that they would be bound by existing rules.<sup>60</sup> Equally, although the new States formed after the dissolu-

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<sup>59</sup> In the “*Wimbledon*” case (PCIJ Ser. A, No. 1 (1923)), the Permanent Court of International Justice did not rely on any German participation in the State practice concerned; neither did it look for specifically French or Turkish participation when considering, in the “*Lotus*” case, the claim that only the flag State had jurisdiction in the case of collisions on the high seas: *ibid.*, No. 10 (1927). In the *Nottebohm case (2nd Phase)*, the ICJ did not seem concerned to discover whether the parties to the dispute, Liechtenstein and Guatemala, had recognized the rule requiring a “genuine link” of nationality before a diplomatic claim could be brought: it was content to examine the general practice of (third) States: *ICJ Reports, 1955*, p. 4. Similarly, in the *North Sea Continental Shelf cases*, although the ICJ rejected the Danish and Netherlands submissions on customary law, this was because, on the facts, it considered that no new rule had emerged, and not because Germany was not a participant in this practice. In the pleadings in the *Fisheries case*, it was agreed by the parties that the conduct of third parties was sufficient to found a rule of general law: *ICJ Pleadings, Fisheries case*, I, 381, paragraph 255 (Norwegian counter-memorial); *ibid.*, II, 427, paragraph 161) (UK reply).

<sup>60</sup> Waldock, “General Course on Public International Law”, 106 *Collected Courses (1962-II)*, 52-53. See *German Settlers in Poland case (1923)*, PCIJ Ser. B, No. 6 at p. 36; *Certain German Interest in Polish Upper Silesia case (1926)*, *ibid.*, Ser. A, No. 7 at pp. 22 & 42; *Right of Passage case, ICJ Reports, 1960*, p. 6.



tion of the Soviet Union, Yugoslavia and the Czech and Slovak Republics took different stands as to succession to *treaty* obligations of their predecessors, they have never indicated that they do not consider themselves bound by customary international law. On the contrary, many of them have confirmed in their constitutions not only that they are bound by customary international law, but also that they consider generally recognized principles and norms of international law to be a part of the law of the land.<sup>61</sup> Certainly, newcomers are free to try and change the rules through contrary practice which obtains the acquiescence of others (or through amendment by treaty). But that is equally true for longer-established States. And until the existing customary rules are changed, they continue to oblige old and new States alike.

(c) Supporters of the voluntarist approach, which regards the consent of States as a necessary ingredient in customary international law, seek to square the facts stated in paragraphs (a) and (b) with their theory that States are bound by customary rules only because they consent to them. They assert that existing States, by doing nothing, do in fact consent, and that newly independent States (and those new to an activity) voluntarily *choose* to accept existing customary law, even though they are (at least in theory) free to reject it.<sup>62</sup> Section 18 deals with the validity of this theory. For the present it will suffice to note that, whatever the approach taken to the subjective element, it is conceded on all sides that general customary rules are (for whatever reason) binding on all States, even new ones and those new to a type of activity<sup>63</sup>, as well as those existing States which played no part in the new custom, neither engaging in the practice concerned nor acquiescing in any real sense.

(d) A custom will not be binding on all States unless the practice, as well as being uniform, is also “extensive” - to use the language of the Court in the above-quoted passage from the *North Sea Continental Shelf cases*. Given the inherently informal nature of customary law, it is not to be expected, neither is it the case, that a precise number or percentage of States is required. Much will depend on circumstances and, in particular, on the degree of representativeness of the practice: as to which see paragraph (e) below. Provided that participation is sufficiently representative, it is not normally necessary for even a majority of States to have engaged in the practice, provided that there is no significant dissent.<sup>64</sup>

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<sup>61</sup> See, for example, Article 15(4) of the Constitution of the Russian Federation, Article 3 of the Constitution of Estonia, Preamble and Article 17 of the Uzbek Constitution; Article 6 of the Turkmen Constitution, Article 8 of the Belarus Constitution. See further Vereshchetin, “New Constitutions and the Old Problem of the Relationship between International Law and National Law”, 7 *European Journal of International Law* (1996), 28.

<sup>62</sup> E.g. Tunkin, *Theory of International Law* (tr. Butler, 1974), 127 & 129, and Wolfke, *Custom in Present International Law* (2<sup>nd</sup> ed., 1993), esp. at 165-6

<sup>63</sup> See e.g. Accioly, *Tratado de Direito Internacional Publico* (2<sup>nd</sup> ed., 1956), I, 38-39.

<sup>64</sup> See e.g. *The “Scotia”*, 14 Wallace 170 (US Supreme Court, 1871); *The “Paquete Habana”*,

(e) In addition to the explanations already given, one reason why it is impossible to put a precise figure on the extent of participation required is that the criterion is in a sense *qualitative* rather than quantitative. That is to say, it is not simply a question of how many States participate in the practice, but *which* States. In the words of the Court in the *North Sea Continental Shelf cases*, the practice must “includ[e] that of States whose interests are specially affected”. (“Practice” here includes acquiescence.) The criterion of representativeness has in fact a dual aspect - negative and positive. The *positive* aspect is that, if all major interests (“specially affected States”) are represented, it is not essential for a majority of States to have participated (still less a great majority, or all of them). The *negative* aspect is that if important actors do *not* accept the practice, it cannot mature into a rule of general customary law.

The fact that the test is not purely quantitative may appear undemocratic. But leaving aside the question what is meant by “democratic” in this context, it should be noted that customary systems are rarely completely democratic: the more important participants play a particularly significant role in the process. And certainly, the international system as a whole is far from democratic. So, in this regard, customary international law is at least in touch with political reality. In the nature of things, who is “specially affected” will vary according to circumstances. 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.<sup>65</sup> However, it will not necessarily be only the major powers who are “specially affected”. In the law of the sea, for instance, some of the States whose nationals are most heavily engaged in distant-water fishing would not normally be regarded as major powers; and the same is true of most of the coastal States who have a special interest in offshore fisheries. These States have also played an important part in the evolution of customary rules in that domain. In other areas of activity, different States may be particularly affected.<sup>66</sup>

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175 US 677 (1900); and cases cited in Mendelson, 272 *Collected Courses* 214-227, where some statistics are given. Prof. Wolfke rightly pointed out that the requirement of extensiveness and representativeness of practice is particularly important when such practice challenges an existing rule. He went on to say that “In [the] case ... of customary regulation of a completely new situation... a very short and scarce practice may suffice: see, e.g. the legal status of outer space”. As a statement of principle, this may quite possibly be correct; but the example may not be the most apposite. Apart from anything else, it begs the question whether (what might theoretically have been claimed to be) “overflight” by a couple of States, but acquiesced in by many others, can properly be said to constitute “scarce” practice.

<sup>65</sup> A separate but connected point is that, because their extensive interests, major powers often contribute a greater quantity of practice than other States.

<sup>66</sup> See further, Mendelson, *loc. cit.*, for a detailed analysis of the representativeness of the practice in some cases before the International Court.

**15. *If whilst a practice is developing into a rule of general law, a State persistently and openly dissents from the rule, it will not be bound by it.***

**Commentary.**

(a) There is in practice some overlap between two conceptually distinct situations. (i) A State or group of States which is important in a particular area of activity can, by its opposition, prevent any rule of general (as opposed to particular) customary law from developing. (ii) Any State whatsoever can, by its persistent objection, prevent an emerging rule of customary law becoming opposable to it. Case (i) is simply a manifestation of the rule, just discussed in Section 14, Commentary, paragraph (e), that for a rule of general law to come into existence, participation in the practice must be sufficiently representative. If States of sufficient importance in the area of activity in question manifest their dissent, the requisite condition is not fulfilled. Consequently, the present Section is concerned only with case (ii) - the so-called "persistent objector rule".

(b) There is fairly widespread agreement that, even if there is a persistent objector rule in international law, it applies only when the customary rule is in the process of emerging. It does not, therefore, benefit States which came into existence only after the rule matured, or which became involved in the activity in question only at a later stage. Still less can it be invoked by those who existed at the time and were already engaged in the activity which is the subject of the rule, but failed to object at that stage. In other words, there is no "subsequent objector" rule. The rule, if it exists, is available only those who object before the rule has fully emerged.

(c) Although some authors<sup>67</sup> question the existence of this rule, most accept it as part of current international law.<sup>68</sup> As a matter of theory, voluntarists, at any rate, are not in a position to dispute it, because for them consent, whether given or withheld, is crucial. There is a measure of judicial and arbitral support for the existence of the rule,<sup>69</sup> and no decisions which challenge it. There is also a body

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<sup>67</sup> E.g. D'Amato, *The Concept of Custom in International Law* (1973), 233-63; Stein, "The Approach of the Different Drummer: the Principle of the Persistent Objector in International Law", 26 *Harvard Int. Law J.* (1985), 457; Charney, "The Persistent Objector Rule and the Development of Customary International Law", 56 *BYIL* (1985), 1.

<sup>68</sup> E.g. Jennings & A. Watts (eds.), *Oppenheim's International Law, I: Peace* (9th ed., 1992), 29; Rousseau, *Droit international public*, I (1970), 326; Verzijl, *International Law in Historical Perspective*, I (1968), 37; Brownlie, *Principles of Public International Law* (5th ed., 1998), 10; Tunkin, *Theory of International Law* (tr. Butler, 1974), 130; Villiger, *Customary International Law & Treaties* (2<sup>nd</sup> ed. 1997), 33-37; Wolfke, *op. cit.*, 66-7; Danilenko, *Law-Making in the International Community* (1993), 109-13; Hulton, "The Persistent Dissenter Rule in Customary International Law: A Survey of the Case-Law and the Literature", paper circulated on behalf of the British Branch of the ILA at the Cairo conference (1992). An early example is Bynkershoek, *De Foro Legatorum* (1744, tr. G.J. Laing, 1946), Ch. XIX *in fine* (p. 539).

<sup>69</sup> E.g. *Asylum case*, *ICJ Rep.* 1950, pp. 266, 277-8; *Fisheries case*, *ibid.* 1951, pp. 116, 131;

of State practice in support,<sup>70</sup> though it is not as copious as one might at first expect, for two reasons: (i) States often prefer the argumentative strategy of claiming that no general rule exists anyway; and (ii) the lone State swimming against the stream may eventually give up - though this does not, of course, prove that it was not entitled to invoke the persistent objector rule so long as it wished to do so. As a matter of policy, the persistent objector rule could be regarded as a useful compromise. It respects States' sovereignty and protects them from having new law imposed on them against their will by a majority; but at the same time, if the support for the new rule is sufficiently widespread, the convoy of the law's progressive development can move forward without having to wait for the slowest vessel.

(d) The objection must be expressed, not entertained purely privately within the internal counsels of the State; and it must be repeated as often as circumstances require (otherwise it will not be "persistent"). Verbal protests are sufficient: there is no rule that States have to take physical action to preserve their rights.

(e) In its pleadings in the *Fisheries case*, the United Kingdom (unlike Norway) sought to restrict the operation of the rule to cases where the objector had an acquired right under an established rule, which the new rule would remove.<sup>71</sup> There does not seem to be any other support in practice or in theory for this limitation; but as a matter of fact, a State is unlikely to object unless it thinks that its rights (which can include freedom of action in an area previously unregulated) will be infringed by the new rule.

(f) The British written pleadings in that case also suggested that a State could not exclude itself from the operation of a "fundamental principle" of international law.<sup>72</sup> The point was not pursued in the oral arguments, nor dealt with by the Court. A number of writers support this proposition when applied to

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*Fisheries Jurisdiction case (Merits)*, *ibid.*, 1974, pp. 3, 10-11 (cf. especially the individual opinions at pp. 92, 120 & 147-9); *Fischbach & Friedricz case*, 10 *RIAA* 388, 397 (1903, Germany-Venezuela Mixed Claims Commission); *Roach & Pinkerton v. US*, Inter-American Commission on Human Rights, Annual Rep. 1986-7, p. 147 at p. 168 (paragraph 54); *The "Antelope"*, 10 Wheaton 66, 122 (1825, US Supreme Court); *Le Louis, Forest*, (1817) 2 Dods. 210 (England, High Court of Admiralty). Charney, in particular, has argued that the first two cases are not authority for this proposition, particularly on the ground that they constitute *obiter dicta*. However, his reasoning is not convincing: see Hulton, *op. cit.*; Mendelson, 272 *Collected Courses* 227-44.

<sup>70</sup> E.g. the British and Norwegian Pleadings in the *Fisheries case*, *ICJ Pleadings*, I, 381-3, paragraphs 256-60 (Norwegian counter-memorial); II, 426-7, paragraphs 162-4 (UK reply); IV, 98-9 (UK oral argument) - cf. Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rule of Law", 92 *RCADI* (1957-II), 99-101; the opposition of the USA and its allies to the lowering of the standard of "just compensation" for State takings of foreign-owned property; and (broadly) the same group's opposition, as a matter of customary as well as of treaty law, to the rules contained in Part XI of the Law of the Sea Convention 1982.

<sup>71</sup> *Fisheries case*, *ICJ Pleadings*, IV 98-9 (UK oral argument).

<sup>72</sup> *Ibid.*, II, 426-7.

*ius cogens*; but *ius cogens* is outside the scope of the Committee's remit.<sup>73</sup> Nor is it the case that "fundamental principles of international law" are automatically *ius cogens*: for instance, sovereign equality is a fundamental principle, but it can be derogated from by consent (e.g. in the voting rules of some international organizations). To the extent that the "fundamental principle" in question forms part of the *ius dispositivum* and not the *ius cogens*, there seem to be no other precedents to support the British position.<sup>74</sup>

## PART III: THE SUBJECTIVE ELEMENT

### Introductory Remarks

1. The substance of this Part is taken from the 3<sup>rd</sup> Interim Report of the Committee and the discussion of it at the 67<sup>th</sup> Conference in Helsinki in 1996. That Report comprised partly a summary by the Rapporteur of an article by the Chairman entitled "The Subjective Element in Customary International Law",<sup>75</sup> and partly a report of the replies of members of the Committee to a questionnaire, submitted to them by the Rapporteur, about the ideas contained in that summary. The response to the questionnaire indicated that a majority of members agreed with those ideas, save in relation to some small points. The 3<sup>rd</sup> Interim Report did not, however, reduce those ideas to some sort of codified form: this is now attempted in the present Part.

2. The question of the subjective element in customary law is highly controversial. It has been well said that "The precise definition of ... the psychological element in the formation of custom, the philosopher's stone which trans-

<sup>73</sup> Bos, *A Methodology of International Law* (1984), 247-55, suggests that a persistent objector can be bound by a rule embodying a "paramount value". It is not clear whether this concept is coterminous for him with *ius cogens* and, if not, how the paramountcy of such a value is to be determined.

<sup>74</sup> Thirlway, *International Customary Law & Codification* (1972), 28-29, & 110, and Schachter, *International Law in Theory & Practice* (1991), 13-14, give qualified support to such a limitation. But Thirlway does so only insofar as what is dissented from is a fundamental concept or principle, as opposed to a rule, without however succeeding in making a convincing distinction between these notions. In any case, States do not so much dissent from concepts as from norms (rules or principles). For his part, Schachter concedes that the British limitation is not authoritatively established, but finds it attractive on policy grounds. But one of his criteria for determining whether a principle is "fundamental and of major importance" appears to be the attitude of the majority of States, which is precisely where, on policy grounds, the persistent objector rule comes into its own. He also draws attention to the fact that other States are accepting reciprocal obligations, and implies that the dissenting State would otherwise be a "free rider". But a State might reasonably conclude that it has more to lose from a new rule than it gains thereby: reciprocity is not a panacea. Thirdly, it might well be thought that to say that "The degree to which new customary rules may be imposed on recalcitrant States will depend, and should depend, on the whole set of relevant circumstances" is, in this particular context, too vague even by the standards of international law, particularly when it is borne in mind that there is no tribunal with the compulsory jurisdiction to determine these questions.

<sup>75</sup> 66 *British Year Book of International Law* (1995), 177-208. The substance of this Chapter, with some amendments, forms Chapter III of Mendelson's Hague lectures, 272 *Collected Courses* 155.

mutes 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 on the basis of alleged custom, put together.<sup>76</sup> This observation also neatly highlights the fact, however, that in the real world of diplomacy the matter may be less problematic than in the groves of Academe. It is the Committee's conviction that some of the controversy surrounding this topic is due to the fact that the proponents of conflicting views were not always really addressing the same question and that, more generally, distinguishing between different issues can assist in understanding the topic and in dispelling some of the misconceptions and mutual misunderstandings which have bedevilled it. Amongst other things, it is useful to distinguish between (1) individual views or positions of States and their collective view or position; (2) the different form these views or positions may take - on the one hand, belief, and on the other, will or consent; (3) the different stages in the life of a customary rule, and especially the time when it begins to be formed, on the one hand, and the time when it is already established, on the other.

3. As will be seen in the remainder of this Part, the subjective element means, for some, *consent or will* that something be a rule of customary law, and for others a *belief* that it is a rule - to put it simply<sup>76a</sup>. It is possible to achieve an elision or *apparent* reconciliation of these two approaches by using such terms as "accepted" or "recognized" as law.<sup>77</sup> These words can connote a mere acknowledgement of an existing state of affairs (a declaratory viewpoint), or they may bear a constitutive meaning - States are bound by the rule because they *choose* to acknowledge its obligatory character. In some respects these portmanteau terms are useful: except in special circumstances to be described in Section 17, State practice satisfying the criteria set out in Part II *is* accepted as law. But it is nevertheless useful to analyze more precisely the mechanism that is at work, and the degree - in the Committee's opinion limited - to which the presence of a subjective component (and especially its proof) is in fact necessary to the formation of a rule of customary international law.

4. In essence, and without prejudice to the precise way in which these Sections and Commentary are formulated, the Committee's view may be summarized as follows. If it can be shown that States generally *believe* that a pattern of conduct fulfilling the conditions set out in Part II is permitted or (as the case may be) required by law, this is *sufficient* for it to be law; but it is not *necessary* to prove the existence of such a belief. Indeed, it is only in the case of a practice which has

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<sup>76</sup> Thirlway, *International Customary Law and Codification* (1972), 47

<sup>76a</sup> Stern, "La coutume au coeur du droit international: quelques réflexions" in *Melanges offerts à Paul Reuter: le droit international, unité et diversité* (1981), 479, 486 describes the distinction as one between "assentiment" and "sentiment".

<sup>77</sup> As it happens, "accepted as law" is the expression used in Article 38(1)(b) of the Statute of the ICJ.

already achieved an appropriate level of generality that such a belief is likely to exist: those who initiate a new practice which is inconsistent with the previous law (e.g. the assertion of rights to an exclusive economic zone) cannot realistically be said to have a belief in its legality. See Section 16. This is not to say, however, that *opinio juris* has no part to play whatsoever. For even where there is a settled pattern of behaviour which at first sight satisfies the conditions set out in Part II, there may be circumstances which *disqualify* the practice concerned (or some parts of it) from counting towards the formation of a rule of customary law. This is because those concerned assume, assert or take the position that the conduct concerned does not *count*, *has no precedential value*. This is dealt with in Section 17. The reason why this conduct does not count is often expressed in terms of a lack of belief (a sort of *opinio non juris*), and it will be shown that most of the judicial assertions of the necessity of *opinio juris* in fact arose in that context. These are, however, exceptional cases, and most members of the Committee agreed that, where practice exists which satisfies the conditions set out in Part II and is not covered by one of the exceptions discussed in Section 17, it is not necessary to prove the existence of an *opinio juris*. It may often be present, or it may be possible to infer it; but it is not a requirement that its existence be demonstrated. Whilst Section 16 (and, to a large extent, Section 17) is concerned with *belief*, Section 18 deals with *will*. The main point there is that (as already stated in Section 14(ii)), it is not necessary for an individual State to have consented (still less, to be *proved* to have consented) to a rule for it to be bound, provided the other conditions set out in Part II are satisfied. More generally, whilst *someone* needs to have willed a new practice to become law if the process of custom-formation is to begin (namely, the initiators of the practice and those who respond positively to it), it is not necessary that the international community as a whole should have *consented* to the rule in a conscious sense. Customary law is not tacit treaty law. However, this does not mean that consent is *wholly* irrelevant. First, as stated in Sections 14 and 15, the deliberate *withholding* of consent can either exempt the objecting State from itself being bound by a general rule or even, if the objector or objectors are significant actors in the field, prevent a general rule coming into existence. In other words, in the circumstances specified in those Sections, *dissent* counts. Secondly, Section 18 states that whilst, for the reasons given, it is not *necessary* to prove that an individual State (or States generally) did in fact consent to a rule, such proof, if it is in fact forthcoming, will normally be *sufficient* for the State or States to be bound.

5. Broadly stated, therefore, the purport of these Sections is that it is not always, and probably not even usually, *necessary* to prove the existence of any sort of subjective element in addition to the objective element, but (a) where it is *present*, that may be *sufficient* to establish the existence of a customary rule binding on the State(s) in question; and (b) proof of its *absence* may mean that such a rule has not come into existence, either because the practice is not of a sort which “counts” towards the formation of a customary rule, or because per-

sistent objection has prevented a general rule from emerging, or at any rate has prevented its binding the particular objector(s). Finally, Section 19 considers the degree to which a strong showing of the subjective element can make up for a paucity of actual practice (and vice versa).

- 16. *A belief, on the part of the generality of States, that a practice satisfying the criteria set out in Part II corresponds to a legal obligation or a legal right (as the case may be) (opinio juris sive necessitatis) is sufficient to prove the existence of a rule of customary international law; but it is not (subject to Section 17) necessary to the formation of such a rule to demonstrate that such a belief exists, either generally or on the part of any particular State.***<sup>78</sup>

### Commentary

(a) Like the corresponding provisions in the Statute of the PCIJ, Article 38(1)(b) of the Statute of the ICJ instructs the Court to apply “international custom, as evidence of a general practice accepted as law”. Although many have expressed puzzlement with the order of this group of words, the explanation appears to have much to do with the influence, at that time the PCIJ Statute was drafted, of the historical school of legal theory (not, originally, a theory about international law). This held that law, and customary law in particular, was an emanation of the *Volksggeist* (national spirit) and the embodiment of the nation’s “juridical consciousness” - one possible interpretation of the phrase *opinio juris* (*sive necessitatis*). Such theories, which were of dubious validity even in the context of domestic, let alone international, law, have long since been rejected. But the language lingers on to muddy the waters of customary international law.

(b) The so-called subjective element in custom has often been described (including in *dicta* of the ICJ) by the Latin phrase “*opinio juris sive necessitatis*”. The expression is not to be found in classical Roman law and appears to be of relatively recent and rather dubious provenance, especially when applied to international law.<sup>79</sup> Literally, the phrase means “belief of law or of necessity”, and it (and especially its short form *opinio juris*) is probably best rendered

<sup>78</sup> For a different view see especially Cheng, “United Nations Resolutions on Outer Space: ‘Instant’ International Customary Law?”, 5 *Indian Journal of International Law* (1965), 23; reprinted in Cheng (ed.), *International Law: Teaching and Practice* (1982), 273.; *id.*, “Custom: The Future of General State Practice in a Divided World”, in McDonald & Johnston (eds.), *The Structure & Process of International Law* (1983), 515. He holds that it is *opinio juris* which is the crucial element in customary law. For him, State practice is, in the final analysis, significant only as evidence of an *opinio juris*. Most commentators, including most members of the Committee, would not go so far.

<sup>79</sup> Cf. Guggenheim, “L’origine de la notion de l’*opinio juris sive necessitatis* comme deuxième élément de la coutume dans l’histoire du droit des gens”, in *Hommage d’une génération de juristes au Président Basdevant* (1960), 258; Mendelson, 272 *Collected Courses* 268-70.



by “belief in the legal permissibility or (as the case may be) obligatoriness of the practice”.<sup>80</sup> This approach is exemplified by the *dictum* of the International Court in the *North Sea Continental Shelf cases* cited above (Introduction, paragraph 9). For most of those who follow this approach, it is not so much a question of what a State really believes (which is often undiscoverable, especially since a State is a composite entity involving many persons with possibly different beliefs), but rather a matter of what it *says* it believes, or what can reasonably be implied from its conduct. In other words, it is a matter of what it *claims*.

(c) It may well be true (though trivial) to observe that States will usually or always hold an *opinio juris* about an *established* rule of law. The first part of the present Section therefore says that where it can be shown that an *opinio juris* exists about a practice, that will be sufficient. But this tells us nothing about the *necessity* of this subjective state for the *formation* of a *new* rule of customary law; and neither does it follow that, if an established practice exists which satisfies the criteria of Part II, it is also *necessary* to prove the separate existence of an *opinio juris* about that practice.<sup>81</sup> And in fact, it is hard to see how a State, if properly advised, could entertain the belief that its conduct is permitted (or required) by existing law when that conduct is, by definition, a departure from it.<sup>82</sup> States actively engaged in the *creation* of a new customary rule may well wish or accept that the practice in question will give rise to a legal rule, but it is logically impossible for them to have an *opinio juris* in the literal and traditional sense, that is, a belief that the practice is *already* legally permissible or obligatory. This is true both individually and collectively. Hence the last clause of this Section (“it is not necessary to the formation of such a rule that such a belief exists, either generally or on the part of any particular State”).

(d) This latter statement is contrary to a substantial body of doctrine and, more importantly, *appears* to be contrary to a number of *dicta* of the International Court. However, in Section 17 it will be shown that these *dicta* have been taken out of context and that most or all of them relate to special situations where *opinio juris* is relevant, especially in preventing practice counting towards the formation of a customary rule.

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<sup>80</sup> Some conduct may be referable to an *obligation* of States to do or refrain from doing something: e.g. to make reparation for an international wrong or to refrain from prosecuting foreign diplomats; other conduct may be referable to certain action (or inaction) being *permissible* - e.g. sending a ship in innocent passage through another State's territorial waters, or refraining from humanitarian intervention. Of course, what is permissible in the case of State A can connote an obligation on the part of State B: for instance, if A has a right of innocent passage through B's waters, B is under an obligation not to take action to prevent that passage. For further discussion, see the work cited at n. 34 above, and also Section 1.

<sup>81</sup> It might be argued that, although *opinio juris* is necessary, it is not necessary to *prove* it. But from a practical legal perspective, this seems tantamount to saying that it is *not* necessary.

<sup>82</sup> Cf. e.g. Kelsen, “Théorie du droit coutumier”, 1 *Revue internationale de la théorie du droit* (N.S.) (1939), 253, 263.

Those special, and comparatively unusual, cases do not provide guidance on whether, in the more typical instance of a constant and uniform practice by several States, unopposed by others (including those directly affected by the practice), it is necessary to demonstrate some sort of *opinio juris*. Of course, in such a case it might often be relatively easy to infer the existence of the subjective element from the practice, if one so desired. But this begs the question why it is necessary to look for it at all. In practice international tribunals and, it seems, States, do not specifically look for evidence of *opinio juris* unless there is reason to believe, for the sorts of reasons examined in the Section 17, that practice otherwise satisfying the criteria of Part II does not “count” towards the formation of customary law. See further, Section 19, Commentary, paragraph (a) below.

(e) The present Section concerns belief. Section 18 sets out broadly similar principles in relation to will or consent.

**17. Nevertheless, in certain circumstances an assumption, belief, or taking of position on the part of States that certain conduct can not or does not give rise to a legal obligation or right can prevent that conduct from contributing to the formation of a rule of customary law.**

#### **Commentary.**

It is for the purpose of distinguishing practices which generate customary rules from those that do not that *opinio juris* is most useful. The Court itself referred to this function in the *North Sea Continental Shelf* cases.<sup>83</sup> It is useful to think of this criterion as a means of distinguishing, not so much (or only) one class of rules from another, but those precedents which *count* towards the formation of law from those which do not. Another way of putting this, which harks back to the phrase “in their international legal relations” in the working definition in Section 1(i), is to say that certain conduct of States does not take place in the context of their international *legal* relations and so does not count. Acts of mere comity are an example of this.<sup>84</sup>

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<sup>83</sup> *I.C.J. Rep. 1969*, p. 3 at 44 (para. 77), cited in paragraph 9 of the Introduction.

<sup>84</sup> Certain other acts do take place within the overall context of a State’s international legal relations, but nevertheless do not count because of the *specific* circumstances. One example is a compensatory payment made *ex gratia*, which is dealt with in (iii) below. Here the State demanding compensation is certainly acting within the framework of what it perceives to be international law: but by issuing a disclaimer, the respondent is in effect saying that its payment takes place outside the law, but is merely a matter of comity. Similarly, bilateral treaties which settle disputes between States are certainly instruments of *particular* international law, but the circumstances may be such that they have no bearing on the position in *general* international law: see paragraph (b) of the Commentary to (iv) below.

- (i) *Some practices (acts of mere comity), even though regularly observed, are treated by States as being by their nature outside the sphere of legal relations.*

**Commentary.**

There are some practices which, although regularly observed in international relations, might said be to fall into a class of actions which *cannot* give rise to customary obligations. For example, sending condolences on the death of a head of State. It might seem inevitable that these rules of etiquette should not be considered legally obligatory; but given the importance which has been attached to protocol in other times and other societies, it is not entirely axiomatic.<sup>85</sup> If forced to explain why these practices amount merely to comity, one would probably say that it is generally *believed* in the international community that they do not give rise to legal obligations (a sort of *opinio non juris*), or - to put it differently - no-one *claims* performance of these duties as a matter of legal right. But the truth may be that the absence of legal obligation *in such a context* is regarded as self-evident, just as, in municipal law, questions of good manners are treated as self-evidently not a matter for legal regulation.<sup>86</sup>

- (ii) *Some practices would in theory be capable of giving rise to customary rules, but for an understanding on the part of States as a whole that they do not in fact do so.*

**Commentary**

Another group of practices which are regarded as belonging to the sphere of mere comity are cases where the usage is of such a nature that it could perfectly well give rise to legal rights and duties, but it happens not to do so because of a common belief that the conduct does not entail legal rights or duties. Again, there is an *opinio non juris* or, to put it differently, no claim of right. A frequently-cited example is the exemption from customs duties of goods imported for the personal use of diplomats. Article 36 of the Vienna Convention on Diplomatic Relations 1961 shows that this exemption is perfectly capable of being the subject of legal regulation; but before the adoption of the Convention it was regarded as merely a concession granted as a matter of comity. Probably the origin of this *opinio non juris* is that such concessions were always accompanied by disclaimers, as to which see (iii) below.

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<sup>85</sup> Quadri, "Cours général du droit international public", 113 *Collected Courses* (1964-III), 237, 328 seems mistaken when he says that the distinction between legal usages and rules of mere comity depends on the relative importance of the subject-matter.

<sup>86</sup> This meets Akehurst's point ("Custom as a Source of International Law", 47 *BYIL* (1974-75), 34) that States do not normally issue disclaimers about the obligatoriness of this kind of conduct.

- (iii) *Some specific instances of State practice would be capable of giving rise to a customary rule, but for a disclaimer on the part of those performing them.***

### **Commentary**

Here one is dealing with acts of State practice which would be perfectly capable of creating precedents which could in the future be invoked against the State performing the act or against others, but for an accompanying statement by the government concerned that it is, for example, making a compensatory payment *ex gratia* or without prejudice. Here it is possible, once again, to speak in terms of an *opinio non juris*; but it is perhaps more natural to speak, not in terms of belief, but of claims: indeed, the natural expression to describe this type of conduct is *disclaimer*. The point is that the disclaimer prevents a payment which would otherwise be regarded as a precedent from *counting* as one.<sup>87</sup>

- (iv) *Some conduct is too ambiguous to be treated, without more, as constituting a precedent capable of contributing to the formation of a customary rule. In such cases, the conduct will only count if there is positive evidence that the State or States concerned intended, understood or accepted that a customary rule could result from, or lay behind, the conduct in question.***

### **Commentary**

There are cases where the conduct in question is *ambiguous*; here the language of *opinio juris* is commonly employed, not least by the International Court, to explain why it is that it does not count as a precedent. Conduct which is not clearly referable to an existing or potential legal rule - which, in other words, does not necessarily belong to the sphere of international legal relations - should not count towards the creation or determination of the existence of a general customary rule.

(a) One such case involves *ambiguous omissions*. Omissions are perfectly capable, if they are sufficiently unambiguous, of constituting acts of State practice: see Section 6. But even though it is possible, both in theory and in practice, for such omissions to count, in many cases they are ambiguous. An example is the "*Lotus*" case.<sup>88</sup> There, France argued that the rarity of prosecutions for collisions on the high seas (other than by the flag State of the ship on board which the wrongful act took place) was evidence of an obligation not to institute such prosecutions. The Permanent Court disagreed, on the ground that there was no evidence of a "conscious[ness] of having a duty to abstain". What it seems to have meant was the following. There are all sorts of possible reasons why a State might refrain from prosecution in such a case. One possibility, admittedly, is that

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<sup>87</sup> By contrast, the demand for compensation by the other party *is* a precedent.

<sup>88</sup> (1927) *PCIJ Ser. A*, no. 10, at p. 28. Cf. the dissenting opinion of Judge Nyholm, pp. 59 & 60.

it would be contrary to customary international law. But there may be other reasons: for example, lack of jurisdiction under *municipal* law; lack of interest; or a belief that a court of the flag State is a more convenient forum. To use the language of claim and response, it might be said that a mere failure to prosecute could not in itself be said to amount to an implied acknowledgment of an international legal duty to refrain from prosecuting. In other words, the omissions were too ambiguous to count, in the absence of evidence of why (or the context in which) they occurred.

(b) Omissions are not the only kind of ambiguous conduct, however. Another occurred in the *North Sea Continental Shelf cases*.<sup>89</sup> There an alternative argument of Denmark and the Netherlands was that, even if Article 6 of the Geneva Convention on the Continental Shelf 1958 did not embody pre-existing customary law or crystallize an emerging equidistance rule for delimitation, State practice had grown up since 1958 along the same lines, so that a new rule of customary international law had come into being whose content was the same as the conventional rule. In support of this contention they referred to a number of bilateral treaties whereby the continental shelf had been apportioned on the basis of equidistance. The International Court of Justice rejected this argument, relying once again (amongst other things) on the notion of *opinio juris*. The Court found that over half of the States which had delimited on the basis of equidistance were already, or were shortly to become, parties to the Geneva Convention on the Continental Shelf. Their practice could therefore be discounted, as they had a treaty obligation so to act. It went on:

As regards those States, on the other hand, which were not, and have not become parties to the Convention, the basis of their action can only be problematical and must remain entirely speculative. ... [N]o inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law. ... The essential point in this connection ... is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*.<sup>90</sup>

What the Court was apparently saying was the following. One of the conceivable reasons why States might decide to delimit their overlapping continental shelf on the basis of equidistance is the existence of a general legal obligation necessitating it. But there are other possible explanations. For example, to divide a resource equally is an obvious common-sense way of settling a dispute

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<sup>89</sup> *ICJ Reports*, 1969, p. 3.

<sup>90</sup> *Ibid.*, at 43-44 (paras. 76-77). See also the *Asylum case* (though admittedly not a case about general international law), where the Court was also of the opinion that "considerations of convenience or political expediency seemed to have prompted the territorial State to recognize asylum without such a decision being dictated by any feeling of legal obligation": *ICJ Rep.* 1950, p. 266 at 286.

over entitlement; but just because two States decided on this practical solution does not necessarily mean that either of them thought that this was the limit of its entitlement, or that they were obliged to determine the matter in this way. The conduct, in short, was ambiguous, and in such cases it will only be if there is an accompanying *opinio juris* or, to put it in different words, an unambiguous (express or implied) claim and response based on general international law, that the conduct in question will count as a precedent.

**18. Whilst the will or consent of a particular State that a practice satisfying the criteria set out in Part II shall be a rule of law is sufficient to bind that State to a corresponding rule of customary international law, it is not generally necessary to prove that such consent has been given by a State for it to be bound by the rule in question, subject to Section 15. Neither is it necessary to prove the consent of the generality of States.**

### Commentary

(a) For some authorities, often called voluntarists, the key to customary law is not belief (*opinio juris*) but will.<sup>91</sup> For them, sovereignty means that States can only be bound by legal obligations if they consent. Such consent can be given expressly and in writing, by means of a treaty; or informally and often implicitly, in the form of customary law. Although, as Wolfke has pointed out, this is not necessarily to treat customary law as tacit treaty law,<sup>92</sup> it is often, through this approach, tantamount to it.<sup>93</sup> But it is a fallacy to reason that, just because international law *as a system* is based on consent, and just because the identification of the *processes* by which the law is created (i.e. the sources) depends also on the will of States, it necessarily follows that any given process

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<sup>91</sup> Though they often use the phrase *opinio juris (sive necessitatis)* to denote what they understand the subjective element to be, strictly speaking *opinio* cannot mean “will” or “consent”.

To espouse a voluntarist approach it is not necessary to think that the *primary* object of the practice in question is the creation of a rule. The primary purpose may be simply to achieve a particular result; but States are in general aware that their acts can have legal consequences because of the existence of the customary law process. Most members of the Committee who responded to the Rapporteur’s questionnaire agreed with the Chairman that, whether or not customary rules developed in the past in a haphazard or spontaneous way, “much customary law today emerges as a result of careful calculation on the part of its instigators and is thus far from spontaneous”.

<sup>92</sup> *Custom in Present International Law* (2nd ed., 1993), 96-100. A similar view is taken by Sur, “La coutume internationale. Sa vie, son oeuvre”, 3 *Droits, Revue française de théorie juridique* (1986), 111, 122-23.

<sup>93</sup> See e. g. Anzilotti, *Cours de droit international* (tr. Gidel, 1929), 68. For what it is worth, the drafting history of Art. 38(1)(b) of the Statute seems to bear out the conclusion that its authors were not thinking in terms of tacit consent. For a particularly full account, see Haggenmacher, “La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale”, 90 *RGDIP* (1986), 18-32.

(and, in the present context, customary law) has consent as its sole or indispensable ingredient.<sup>94</sup>

(b) Section 14 has already stated the principle, for which there is a great deal of support in State practice and in the decisions of tribunals, not to mention the literature, that it is not necessary for any particular State to have consented to a rule of general international law to be bound by it.

(c) The voluntarist theory in fact suffers for almost exactly the opposite defects to those displayed by the approach which is based on belief (*opinio juris*). As stated in paragraph (c) of the Commentary to Section 16, if a general *opinio juris* exists, that is good evidence that a customary rule has *already* come into existence, but it does not explain the *formation* of the rule, particularly in its early stages, because the pioneers of the new rule could not have had the requisite belief. Voluntarists, on the other hand, can explain quite well the subjective position of, say, the USA at the time of the Truman Proclamation: it wanted a new rule to emerge giving States “jurisdiction and control” over the adjacent continental shelf. But their approach is less useful in explaining the binding force of a rule which *has* matured. The voluntarist approach also seeks to explain why new States (and those new to a practice) are bound by existing customary law by postulating their tacit consent: but that consent is a mere legal fiction developed in order to try and maintain the voluntarist position. Likewise, it is simply not true that, whilst the rule is in the course of emerging, *all* States consent in one way or another to it. Obviously, those who initiate the practice *do* consent to the rule. This applies also to those who imitate the practice. Similarly for those who, being specially affected by a claim, fail to protest against it - e.g. if States whose nationals have traditionally fished in waters adjacent to the territorial sea of State X fail to object when it claims an exclusive economic zone and excludes their fishermen from those waters (before sovereign rights over the EEZ became an established rule).<sup>95</sup> But there may well be a significant number of States who do nothing and who are not so directly affected by a claimed new rule that a response on their part seems called for. (Especially when it is borne in mind that even a protest is often regarded as a relatively unfriendly act.) If the practice nevertheless eventually achieves the requisite level of generality and representativeness, those States will find one day that a rule binding on them has come into being without their having consented to it in any real sense of the term. So, once again, to presume their consent is a mere fiction.

(d) On the other hand, if it can be shown that a particular State *has in fact*

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<sup>94</sup> For a fuller critique of the voluntarist approach, and indeed of a more general insistence on the proof of the presence of a subjective element, see Mendelson, 272 *Collected Courses*, Chap. III.

<sup>95</sup> In the *Fisheries* case the Court held that the United Kingdom’s failure to protest against the Norwegian straight baseline system, of which it must have known and which directly affected its national interests, precluded it from complaining about the application of those rules to its nationals: *ICJ Reports*, 1951, pp. 116, 136-9.

assented to an alleged rule of customary international law, that will usually be enough to bind it. The reason is that, even if there is not a *general* rule of customary law, there can still be a rule of *particular* law, and to establish that narrower form of obligation it is usually sufficient simply to demonstrate that the particular State consented to the alleged rule.<sup>96</sup> The consent of a State is therefore a *sufficient*, but it is not a *necessary*, condition of its being bound by a rule of customary international law.<sup>97</sup>

(e) The consent of States is also significant in two negative ways. First, it has already been shown that, if a sufficient number of States refuse to accept an emerging rule, or if some specially affected States withhold their approval, the threshold requirement of participation by a sufficiently extensive number of States, representative of all the interests affected, will not be satisfied. See above, Section 14. Secondly, it has also been seen (Section 15) that, even if the requisite threshold has been met, a *particular* State which objects whilst the rule is in the process of emerging will not be bound, but can benefit from the “persistent objector” rule.

(f) For the foregoing reasons, it would not be correct to say that consent or will play no part at all in the formation of customary rules. But equally, it would not be accurate to say that it is *only* through consent that customary law is created.

**19. *It appears that, in the conduct of States and international courts and tribunals, a substantial manifestation of acceptance (consent or belief) by States that a customary rule exists may compensate for a relative lack of practice, and vice versa.***

#### **Commentary.**

(a) The view has already been expressed in this Statement that the subjective element is not in fact usually a *necessary* ingredient in the formation of customary international law - certainly on the part of any given State which is allegedly bound by the putative customary rule. But whether or not this approach is accepted, what seems clear is that, if there is a good deal of State practice, the need (if such there be) also to demonstrate the presence of the subjective element is likely to be dispensed with.<sup>98</sup> There are, for instance, numer-

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<sup>96</sup> Although in the *Nicaragua case (Merits)* the ICJ said that “The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States” (*ICJ Rep.* 1986, p. 16 at pp. 97-98, paragraph 184), this attitude is inconsistent with normal judicial attitudes to concessions by the parties to litigation, and also with theory. It perhaps reflects a desire that the Judgment should not just be seen as the application of particular law, but as a pronouncement having a more general applicability.

<sup>97</sup> This is the view propounded by Mendelson, 272 *Collected Courses* 253-67.

<sup>98</sup> Unless there are grounds for considering that the practice does not count towards the formation of a rule - e.g. because it is a usage of mere comity (see above, Section 17).



ous examples where the ICJ has simply referred to the constant and uniform practice of States, without any reference to the subjective element.<sup>99</sup> For voluntarists, this is because, the more widespread the practice, the easier it is to infer the requisite consent. *Mutatis mutandis*, this is also the case for supporters of the belief approach. For Mendelson, it is simply because it is a misconception to think that the subjective element is invariably (or perhaps even usually) necessary.<sup>100</sup> But whatever the theory, the result is the same: the more the practice, the less the need for the subjective element.

(b) More controversial is the converse proposition, that if there is a great deal of evidence of consent or *opinio juris*, less proof of practice is required. Some would question it on the grounds that customary law without custom (practice) is a contradiction in terms. The answer to this could be that terminology is not the key issue. It could also be recalled that, as stated in Section 4, statements are a form of State practice.<sup>101</sup> Others would have reservations on the grounds that, to put it crudely, “talk is cheap” and only practice represents a sufficiently serious *prise de position* by States. But it has already been suggested that this is something of an over-simplification: see Sections 3 and 4. In particular, verbal acts can constitute a form of State practice, and not all verbal acts carry little weight. For those who, like Cheng, consider that *opinio juris* is the key element in customary law, there is no need to attach excessive importance to State practice anyway. And for voluntarists, consent is the key ingredient. Even though this Statement does not endorse either of these positions in an unqualified form, it has already been stated (in Section 18) that, if an individual State *does* consent to a rule, that State will normally be bound by it. It follows that, if the generality of States consent, they will all be bound. Consequently, this assertion in this Section appear to be correct as a matter of theory. It also seems to correspond to current trends in the practice of international courts and tribunals. For instance, in the *Nicaragua case (Merits)*, the International Court of Justice, whilst re-emphasizing the need for both the objective and the subjective elements, in fact demanded very little evidence of actual practice in the face of what it apparently considered to be clear-cut proof of the *opinio juris* of the international community embodied in such instruments as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.<sup>102</sup> On

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<sup>99</sup> See e.g. *Fisheries case, ICJ Reports*, 1951, p. 116 at p. 128 (low, as opposed to high, water mark the starting point for measurement of the territorial sea); *Nottebohm case (Second Phase)*, *ibid.*, 1955, p. 4 at 23 (definition of nationality); *Barcelona Traction case, ibid.* 1970, p. 3 at 42 (para. 70 - attribution of nationality to corporations); *Continental Shelf (Libya/Malta) case, ibid.* 1985, p. 13 at 33 (para. 34 - exclusive economic zone now a part of customary law).

<sup>100</sup> Cf. Mendelson, 272 *Collected Courses*, Chap. III. See also the authors cited in note 103 below.

<sup>101</sup> Though those who insist on the necessity of two *separate* elements must beware of double counting.

<sup>102</sup> Annex to General Assembly res. 2625 (XXV), 24 Oct. 1974.

the basis of this case in particular, Kirgis has speculated that there might be a “sliding scale”:

On the sliding scale, very frequent, consistent state practice establishes a customary rule without much (or any) affirmative showing of an *opinio juris* so long as it is not negated by evidence of non-normative intent. As the frequency and consistency of the practice decline in any series of cases, a stronger showing of an *opinio juris* is required. At the other end of the scale a clearly demonstrated *opinio juris* establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule.<sup>103</sup>

But if this approach is to be accepted, it can only be with the clear proviso that the evidence of States’ intentions or *opinio juris* must be clear-cut and unequivocal. This is a very high threshold. The matter will be considered further below, especially in Part V when considering resolutions of the UN General Assembly. See especially Section 32.

## PART IV: THE ROLE OF TREATIES IN THE FORMATION OF CUSTOMARY INTERNATIONAL LAW

### Introductory Remarks

1. The draft of the 5<sup>th</sup> Interim Report of the Committee, which was prepared by the Chairman after taking into account comments of the Rapporteur, was circulated to members at the end of 1998 and revised by him in the light of comments received from some of the members.<sup>104</sup>

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<sup>103</sup> “Custom on a Sliding Scale, 81 *American Journal of International Law* (1987), 146. Danilenko (*Law-Making in the International Community* (1993), 107) and Schachter (“Entangling Treaty and Custom”, *International law in a Time of Perplexity. Essays in Honour of Shabtai Rosenne* (Dinstein ed., 1989), 731) take a somewhat similar view, the latter holding that this effect is more likely to be present if the rules are of a fundamental character, such as those prohibiting aggression, genocide, torture, the widespread killing of prisoners of war, etc. Henkin takes an analogous view so far as concerns at least “constitutional” norms of the system: *International Law: Politics and Values* (1995), 31-32. However, this encroaches on territory which, as has already been noted, is beyond the scope of the present Report: see Introduction, paragraph 8. Müllerson is of the opinion that “the more consistent and general is practice, the lower the necessity to look for the subjective element confirming the acceptance of such practice as legally binding. And on the contrary, strong *opinio juris generalis* is able to compensate the lack of consistency in ‘actual’ practice” (*Ordering Anarchy: International Law in International Society* (2000), 229).

It might perhaps be added that, the more widespread the participation in a treaty, the more difficult (*ex hypothesi*) it will be to find evidence of practice *outside* the treaty by non-parties, or by parties in relation to non-parties, even though, strictly speaking, it is only such practice, and not the practice under the treaty, which counts towards the formation of a customary rule: see below, Section 24, Commentary, paragraph (b).

<sup>104</sup> Mr. Bangert, Prof. Cheng, Dr. Villiger and Prof. Wolfke. Some other members, whilst not making specific comments, wrote to express their agreement with the draft.

2. The present Statement will not be examining the formal hierarchical relationship between custom and treaty; their relative usefulness; the development of customary rules regarding the application or interpretation of treaties; or the purpose and effectiveness of trying to codify rules of substantive customary international law. It is confined to the *formation* of customary rules. This being the case, even a discussion of whether and how treaties can constitute evidence of *existing* customary law falls, strictly, outside its purview. However, for the purposes of exposition, it will be convenient to deal with this topic, which is the subject of Part IV(A). The Statement then describes the ways in which treaties can sometimes provide the impetus for the formation of *new* customary law (Part IV(B)). Finally, it deals with the more controversial and difficult matters of whether and to what extent treaties can either help to “crystallize” rules of customary law (Part IV(C)) or *of themselves* give rise to new rules of general law (Part IV(D)).

### A. Treaties as Evidence of Pre-existing Customary Law.

#### **20. *There is no general presumption that a treaty codifies existing customary international law.***

##### **Commentary**

Treaties seldom simply codify well-established and uncontroversial rules of customary international law: it would not be worth the parties’ effort to do so.<sup>105</sup> Furthermore, it may be evident from the language (e.g. the preamble) of a particular treaty that it was in order to improve an existing (legal) state of affairs that the treaty was concluded - in other words, that it aimed at the “progressive development of international law”.

#### **21. *Section 20 does not, however, exclude the possibility of a treaty containing specific provisions which do represent existing customary law; it is a question in each case of examining the evidence.***

##### **Commentary**

(a) What is new law (*lex ferenda*) for some may be existing law (*lex lata*) for others, but the disagreement can be circumvented for practical purposes by simply agreeing to a treaty provision. Again, the treaty may contain some elements of customary international law and others of purely conventional law. For instance, (i) some substantive provisions of the treaty may be *lex lata* and others *lex ferenda*, or (ii) some provisions reflecting the customary *lex lata* may be accompanied by others establishing machinery for their implementation. Consequently, whilst it may be reasonable (for the reasons given in Section 20) to presume (rebuttably) that a given treaty will not, *in its entirety*, simply codi-

<sup>105</sup> The point is an elementary one, but it is worthwhile re-stating it in view of the frequency with which non-specialists misunderstand the position. Moreover, it is the logical first step in the present sequence of propositions.

fy existing (undisputed) customary international law, it would not be safe to make that assumption about *each and every* provision contained therein.

(b) The treaty may say on its face that it is declaratory of customary law. Such statements are rare, and where they do exist, the treaty will not necessarily assert that *all* of its terms fall into this category. For instance, the preamble to the Geneva Convention on the High Seas 1958 merely states that the parties wished to codify the law relating to the high seas and had adopted the Convention's provisions as "*generally* declaratory of established principles of international law", which does not exclude the possibility that particular provisions are not. Furthermore, the fact that the *parties* assert that the treaty is declaratory of existing law is (so far as concerns third parties or independent observers) no more than a piece of evidence to this effect; though, naturally, the larger the number of parties the more persuasive this evidence will be. The parties themselves may be bound by their assertion.

**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.***

**Commentary.**

In the *North Sea Continental Shelf cases* the ICJ, pointing out that Article 6 of the Geneva Convention on the Continental Shelf was (unlike Articles 1-3) one of the provisions in respect of which reservations were permitted, said that, "speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted; - whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour".<sup>106</sup> From this, it inferred that Article 6 did not reflect existing customary law or crystallize it. However, this reason has been strongly criticized, both judicially and in the literature.<sup>107</sup> Just because, for some diplomatic reason or another, reservations are permitted to some articles and not to others, this surely does not prove that those to which reservations are permitted are not rules of customary law. If they *were* customary law, the fact that the treaty obligation could be removed or reduced would not affect them.<sup>108</sup> The

<sup>106</sup> *ICJ Reports*, 1969, pp. 38-39 (para. 63).

<sup>107</sup> See esp. the dissenting opinions of Judges Morelli & Lachs, *ibid.*, pp. 197, 198 and 218, 223-25, respectively.

<sup>108</sup> Indeed, the Court's reasoning could be stood on its head, by arguing that, the more secure a rule is in customary law, the less harm can be caused to its integrity by permitting reservations to a purely conventional restatement of it. Furthermore, since on any view both the conventional and the customary rule of continental shelf delimitation were *ius dispositivum* (i.e. derogable, unlike a rule of *jus cogens*), it is not at all clear why derogations would prejudice the rule's normativity. See further below, Section 27, Commentary, paragraph (d).

Committee therefore considered it appropriate respectfully to refrain from adopting the Court's rather categorical statement on this point.

**23. *A treaty concluded in order to settle a specific issue between States does not of itself provide any indication that the general customary law is (or is not) the same as that laid down in the treaty. The same applies to a succession of such treaties.***

### Commentary

(a) If two or more States have a specific dispute (or potential dispute) and agree on terms of settlement, there is no inherent reason to assume that these terms represent their agreement on the general law: they may constitute no more than a compromise to settle that particular controversy. In the *Barcelona Traction Co. case (2<sup>nd</sup> Phase)*,<sup>109</sup> the ICJ, considering whether the lifting of the corporate veil in agreements for compensation arising out of nationalization constituted a precedent in the present circumstances, stated:

Specific agreements have been reached to meet specific situations, and the terms have varied from case to case. Far from evidencing any norm as to the classes of beneficiaries of compensation, such arrangements are *sui generis* and provide no guide in the present case.<sup>110</sup>

However, some settlements may constitute evidence of the position in customary law, if they constitute an acknowledgement of the other party's claim. One example cited by Baxter<sup>111</sup> is the agreement of the United States to compensate Japan for the sinking of a cartel ship during World War II.<sup>112</sup>

The question whether a succession of agreements intended to regulate relations for the *future* in a specific domain - e.g. extradition treaties or investment protection agreements - gives rise to, or evidences, new customary rules is dealt with in Section 25.

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<sup>109</sup> *ICJ Reports*, 1970, p. 3 at 40 (para. 61) - though the Court also relied on the inconsistency of the practice. Cf. the decision of the arbitral tribunal in *Govt. of Kuwait v. American Oil Co. (AMINOIL)*, (1982), 66 *International Law Rep.*, 518 at 606-7, rejecting Kuwait's argument that a series of agreements providing for compensation for nationalization of oil companies' assets based on a calculation of net book value represented customary law.

<sup>110</sup> A similar observation was made in the *North Sea Continental Shelf cases*, but this concerned agreements which were alleged to constitute evidence of the emergence of a *new* rule. It will accordingly be dealt with in Part IV (B) below; but it should be appreciated that the line between evidence of existing law on the one hand, and new or emerging law on the other, can be blurred at times, especially where bilateral treaties are concerned.

<sup>111</sup> "Treaties & Custom", 129 *Collected Courses* (1970), 25, 80.

<sup>112</sup> Agreement between the United States and Japan for the Settlement of the *Awa Maru* Claim, Tokyo, 1949, 89 *UNTS* 141.

## B. Treaties and the Formation of (New) Customary Law

**24. *Multilateral treaties can provide the impulse or model for the formation of new customary rules through State practice. In other words, they can be the historic (“material”) source of a customary rule. However, there is no presumption that they do so. Conduct which is wholly referable to the treaty itself does not count for this purpose as practice: though see Part IV(C) and (D).***

### Commentary

(a) History records several examples of specific treaty provisions being replicated in the practice of States outside the treaty and in due course becoming rules of customary international law. Examples are the abolition of privateering in the Declaration of Paris 1856, and Articles 2(4) and 51 of the United Nations Charter. Essentially what happens is that parties to the treaty, in relation to non-parties, or non-parties in relation to parties or between themselves, adopt a practice in line with that prescribed (or authorized) by the treaty, but which is in fact independent of it because of the general rule that treaties neither bind nor benefit third parties.<sup>113</sup> In the *North Sea Continental Shelf cases* the ICJ acknowledged that this form of custom-creation was a perfectly possible phenomenon.<sup>114</sup> The International Military Tribunal at Nuremberg found that Hague Convention IV on land warfare enunciated norms which had become generally binding rules of customary law, notwithstanding the inclusion in Article 2 of a *si omnes* clause.<sup>115</sup> In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ came to similar conclusions about a broader range of conventions dealing with humanitarian law.<sup>116</sup> A number of conventions drafted under the auspices of the UN have also (in whole or in part) had this effect.

In such cases, the treaty constitutes an historic (“material”) source of the customary rule, but not the “formal” source. For further discussion of this distinction, see the Commentary to Section 2 (viii).

(b) It is, however, important to note that in principle, and subject to what will be said in C and D below, what States do in pursuance of their treaty obligations is *prima facie* referable only to the *treaty*, and therefore does not count towards the formation of a *customary* rule. It was for this reason that the ICJ

<sup>113</sup> Cf. Article 38 of the Vienna Convention on the Law of Treaties 1969: “Nothing in Articles 34 to 37 [embodying the rule that treaties neither burden or benefit third parties, together with very limited qualifications of it] precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.”

<sup>114</sup> *ICJ Rep.* 1969, p. 41 (para. 71).

<sup>115</sup> *Judgment of the International Military Tribunal for the Trial of Major War Criminals* (1946), UK Command Paper Cmd. 6964, p. 65.

<sup>116</sup> *ICJ Rep.* 1996, p. 226 at 256-58 (paras. 74-82). It also expressed the same views (albeit in vaguer terms) about the “principle of neutrality, whatever its content”: *ibid.*, pp. 260-61 (paras. 88-89). Cf. also the *Nicaragua case*, *ibid.* 1986, p.14 at 97-98 (paras. 183-185).

refused, in the *North Sea Continental Shelf cases*, to accept that delimitations and proclamations, based on equidistance, by a number of States following the conclusion of the Continental Shelf Convention had resulted in the emergence of a new rule of customary international law along the same lines as that contained in Article 6, *insofar as these States were parties to the Convention*.<sup>117</sup> Evidently, it considered that practice under the Convention was exclusively referable to the Convention and did not count outside that context. Logically, that must be correct, subject to the observations to be made in C and D below. But the conduct of parties to a treaty in relation to *non-parties* is not practice under the treaty, and therefore counts towards the formation of customary law.<sup>118</sup> (After the rules contained in a treaty have also found general acceptance as rules of customary law, it may in some cases be difficult to distinguish between conduct in pursuance of a conventional obligation from that undertaken in compliance with the customary rule.)

(c) It is also important to notice that, although (as noted above) provisions of multilateral treaties *can* be the historic source of a new customary rule, *they do not necessarily do so*. The normal conditions for the formation of customary law must be satisfied (a sufficiently extensive, representative, and uniform practice and - if and insofar as relevant - the presence of a subjective element: see Parts II & III). Thus, in the *North Sea Continental Shelf cases* the Court held, amongst other things, that the practice was insufficiently extensive to warrant the conclusion that the content of Article 6 of the Continental Shelf Convention had passed into customary law.<sup>119</sup>

**25. *There is no presumption that a succession of similar treaty provisions gives rise to a new customary rule with the same content.***

**Commentary**

(a) As already noted,<sup>120</sup> the International Court of Justice in the *North Sea Continental Shelf cases* refused to regard a number of bilateral treaties and other

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<sup>117</sup> *ICJ Reports*, 1969, p. 3 at 43-44 (paras. 75-76). The Court's exclusion, in addition, of States which were not at the relevant time parties to the Convention, but merely *about to become* parties, seems logically more questionable; but for practical purposes it may have been reasonable.

<sup>118</sup> In some cases, parties to a treaty find themselves compelled, for practical reasons, to apply the same standard to non-parties as they do to parties. This may be for reasons of administrative convenience, or it may be because acting in a manner inconsistent with the treaty, although legally permissible in relation to a non-party, will in fact simultaneously violate the rights of the other treaty parties. For instance, even if a non-party to a nuclear test-ban treaty had no right to complain of the carrying out of such a test, a party to the treaty could not test a nuclear weapon without violating its obligation to other signatories. See further Mendelson, "Disentangling Treaty and Customary International Law", 1987 Proceedings of the American Society of International Law, 160.

<sup>119</sup> It also placed reliance on the absence of evidence that the non-parties who had delimited on the basis of equidistance recognized an obligation to do so: see Section 17(iv).

<sup>120</sup> Above, n. 110.

instruments delimiting the continental shelf on the basis of equidistance as evidence of an emerging customary rule<sup>121</sup> imposing even a *prima facie* obligation to delimit in this way. The question of the legal effect of a succession of similar treaties or treaty provisions arises particularly in relation to bilateral treaties, such as those dealing with extradition or investment protection. Bearing in mind the considerations set out in Sections 23 and 24, there seems to be no reason of principle why these agreements, however numerous, should be *presumed* to give rise to new rules of customary law or to constitute the State practice necessary for their emergence. For instance, even though there are very many bilateral extradition treaties, it would be wrong to assume that there is a duty to extradite in the absence of a treaty. Some have argued that provisions of bilateral investment protection treaties (especially the arrangements about compensation or damages for expropriation) are declaratory of, or have come to constitute, customary law. But for the reasons analogous to those given in relation to Section 23, there seems to be no special reason to *assume* that this is the case, unless it can be shown that these provisions demonstrate a widespread acceptance of the rules set out in these treaties *outside the treaty framework*. In short, there is no presumption that a series of treaties gives rise to a new rule of customary law, though this does not preclude such a metamorphosis occurring in particular cases.<sup>122</sup>

(b) As a matter of principle, similar considerations should apply to a succession of *multilateral* conventions. However, in some cases it may be that frequent repetition in widely accepted treaties evinces a recognition by the international community as a whole that a rule is one of general, and not just particular, law. See, for instance, the discussion of various humanitarian conventions in the *Nuclear Weapons case*,<sup>123</sup> and C and D below. But the test remains qualitative rather than quantitative.

(c) A succession of treaties along similar lines can sometimes give rise to a new customary rule about the *law of treaties* (rather than of substantive law). Thus, according to Schwarzenberger,<sup>124</sup> it became the practice to incorporate into treaties a clause requiring them to be interpreted according to the *ius aequum* (i.e. in good faith) rather than strictly and literally. Eventually, it came to be taken for granted that such was the required method of interpretation, so that express stipulation became unnecessary.

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<sup>121</sup> Arising subsequently to the conclusion of the 1958 Convention on the Continental Shelf.

<sup>122</sup> Baxter, 129 *Collected Courses* 25, 78 ff. gives a number of examples.

<sup>123</sup> *ICJ Rep.* 1996, pp. 226, 256-9, paras. 74-84.

<sup>124</sup> *The Inductive Approach to International Law* (1965), p. 111.



### C. The “crystallization” by treaties of emerging customary international law.

#### 26. *Multilateral treaties can assist in the “crystallization” of emerging rules of customary international law. But there is no presumption that they do.*

##### Commentary.

(a) In the *North Sea Continental Shelf cases*, though the Court considered whether Article 6 of the Geneva Convention on the Continental Shelf was declaratory of pre-existing customary law, this was not actually the contention of Denmark and the Netherlands by the time of the oral argument. Instead, they submitted that the adoption of the Convention by the Geneva Conference of 1958 had “crystallized” an “emerging” customary rule.<sup>125</sup> The ICJ showed itself willing to entertain the possibility, and in effect found that this had actually occurred in relation to the rules embodied in Articles 1 to 3 of the same treaty;<sup>126</sup> but it held on the facts that this was not true of the article at issue (Article 6). Hence there is no presumption that a multilateral treaty (and still less a bilateral treaty or treaties) will have this crystallizing effect.

What Denmark and the Netherlands specifically submitted was that “the process of the definition and consolidation of the emerging customary law took place through [1] the work of the International Law Commission, [2] the reaction of governments to that work and [3] the proceedings of the Geneva Conference”, and that this emerging customary law became “crystallized in [4] the adoption of the Continental Shelf Convention by the Conference”.<sup>127</sup> In one sense, it could be argued that each of these four stages is relevant solely to the creation of *treaty* norms and that they have no bearing on customary law. But in reality, if State practice is developing in parallel with the drafting of the treaty (stages 1-3), the latter can influence the former (as well as vice-versa) so that the emerging customary law is indeed consolidated and given further definition. Similarly for the final stage - the adoption of a convention. Indeed, the longer the drafting and negotiating process takes, the more scope there may be for State practice to become crystallized in this way.<sup>128</sup> The lengthy gestation of the Law of the Sea Convention 1982 is an example of this process: in the thirteen years leading up to

<sup>125</sup> *ICJ Rep.* 1969, pp. 3, 38, para. 61.

<sup>126</sup> *Ibid.*, pp. 38-39, para. 63. A similar willingness to countenance the possibility of crystallization of an emerging norm of customary law in a particular instance can be seen in the *Fisheries Jurisdiction cases (Merits)*, *ibid.*, 1974, p. 3 at pp. 22-23, paras. 51-52, and the *Tunisia/Libya Continental Shelf case*, *ibid.*, 1982, p. 18 at 38, para. 24.

<sup>127</sup> *Ibid.*, 1969, p. 38, para. 61.

<sup>128</sup> Though it is questionable whether the metaphor of the formation of crystals is in fact entirely apt: in chemistry, the beginning of crystallization can be located fairly precisely in time, whereas it is not normally possible (or necessary) to be so precise about the emergence of a customary rule. See Mendelson, 272 *Collected Courses*, 304-5.

its adoption, a number of States anticipated the outcome by unilaterally proclaiming exclusive economic zones, archipelagic waters and the like.<sup>129</sup>

Strictly speaking, it may not even be crucial whether or not the treaty is widely ratified, though if it is not, this may give rise to the suspicion that States' recognition of the rules concerned is not as firm as it may have seemed. But all depends on circumstances and the reasons for their acceptance or non-acceptance of the treaty rules.

(b) But in any event, the holding in the *North Sea Continental Shelf* cases that the equidistance rule had not in fact become a rule of customary law serves as a warning that it is not lightly to be presumed that the adoption of a multilateral convention (or the process leading up to it) will tip the balance.

(c) It is difficult to imagine that, in normal circumstances, "crystallization" as described above could be accomplished by the drafting and conclusion of a single *bilateral* treaty. So far as concerns a *succession* of bilateral treaties, again there is certainly no presumption that they will have assisted in the crystallization of an emerging norm. But it is possible that in certain circumstances this could be the case, for instance where the bilateral treaties are the means of adding precision to a general customary norm.<sup>130</sup>

#### D. Treaties giving rise to customary rules "of their own impact".

**27. *In exceptional cases, it may be possible for a multilateral treaty to give rise to new customary rules (or to assist in their creation) "of its own impact" if it is widely adopted by States and it is the clear intention of the parties to create new customary law. But such an occurrence will be extremely rare, and is to be presumed not to have occurred.***

#### Commentary

(a) In the *North Sea Continental Shelf* cases, the Court considered the submission that a new rule of customary international law had emerged, partly through State practice subsequent to, but outside, the Continental Shelf

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<sup>129</sup> Furthermore, though with all due caution, some statements made at the Third UN Conference on the Law of the Sea can probably be interpreted as *prises de position* contributing to the evidencing or development of customary law, and not merely as proposals or negotiating positions regarding the projected *conventional* regime.

<sup>130</sup> Consular conventions may be an example: see Baxter, 129 *Collected Courses*, 87. Instances sometimes cited to support this proposition are bilateral treaties on the apportionment of the waters of international watercourses, or on delimitation of the continental shelf or exclusive economic zone. But given the variety of geographical circumstances, and the corresponding variety of the detailed arrangements, it might be better to regard these agreements as more or less persuasive illustrations of what States consider "equitable", rather than as strictly normative.

Convention,<sup>131</sup> and partly through Article 6 of the Convention having produced this effect “of its own impact”.<sup>132</sup> The use of the expression “and partly...” suggests that the Court thought that this was a separate basis from that considered in B above. And even though it rejected the submission on the facts (on the grounds that the rule concerned was not of a “fundamentally norm-creating character”, and that in any case the Convention had not yet received a sufficient, or sufficiently representative, number of ratifications), it did not hold that a treaty was *incapable* of producing customary international law “of its own impact”. Paragraphs (b) & (c) below consider the issues of principle involved, and paragraph (d) evaluates the reasons why the Court rejected the submission on the facts of the particular case, in order to see what are the limitations on the doctrine.

(b) It is at first sight surprising that the Court was prepared even to entertain the possibility of a treaty producing customary law “of its own impact”. As indicated above, States who enter into a conventional obligation are essentially doing no more than that, and it is rather hard to see why this should have any effect on customary law. In a tantalizingly delphic indication of its reasoning, the Court said:

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

With respect, this explanation does not seem entirely coherent. In particular, it seems to blur into the cases where a conventional norm is replicated in practice outside the treaty regime (a subject dealt with in Section 24), which was *not* the context in which the Court apparently now claimed to be considering the issue.<sup>133</sup> Perhaps a better justification of what the Court was saying would be along the following lines. As stated in Section 18, the consent of States to a rule of customary law, whilst not a necessary condition of their being bound, is a *sufficient condition*. In other words, if States indicate *by any means* that they intend to be bound as a matter of customary law, being bound will be the consequence, so long as

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<sup>131</sup> See above, Part IV (B).

<sup>132</sup> *ICJ Rep.1969*, pp. 3, 41-3, paras. 70-74 (emphasis added). This point is usually overlooked in the literature and, indeed, the Court’s pronouncements on the point are far from clear.

<sup>133</sup> See the italicized words in paragraph (a) above.

their intention is clear. They can evince that intention by a public statement, for instance. That being so, there is no a priori reason why they cannot instead evince it through, in conjunction with, or subsequent to, the conclusion of a treaty, *provided that it is their clear intention to accept more than a merely conventional norm*. Cases where it can be shown that they intend to go beyond merely conventional law will be rare, but - as the Court indicated without being specific - they are not unknown. One such example is probably the prohibition of the threat or use of force in Article 2(4) of the UN Charter, particularly bearing in mind paragraph 6 of the same Article: "The Organization shall ensure that States which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security." It is also clearly the objective of at least parts of the Geneva Conventions of 12 August 1949 to create obligations extending beyond the parties.<sup>134</sup> Again when, in the Treaty of Peace of 1856, the act of the Congress of Vienna relating to the navigation of international rivers was extended to the Danube, it was done in these terms: "Que cette disposition fait désormais partie du droit public de l'Europe".<sup>135</sup> Rather than basing this explanation on consent, some might prefer to use the concept *opinio juris generalis*; but the effect is the same: there is an acceptance or recognition by States as a whole of the rule as one of customary, and not merely conventional, international law. Cf. Section 16.

(c) It is, however, important to stress again that, in the Court's words, "this result [of a treaty giving rise to new customary law of its own effect] is not lightly to have been regarded as having been attained"; and it should be noted that the Court failed either to give examples or properly to develop the point. Too much emphasis should therefore probably not be placed on the few words it did utter. And certainly, evidence of a more than merely contractual intention will not normally be present in a convention.

(d) Turning to the specific reasons why the Court considered that Article 6 of the Continental Shelf Convention had not in fact produced the effect contended for, two grounds emerge.

(1) The ICJ questioned whether Article 6 was of a "fundamentally norm-creating character". This phrase does not seem to have any antecedents in international law, and the Court was somewhat delphic about what it had in mind. However, from the reasons it adduced for reaching this conclusion, it can be inferred that what it meant was that the rule did not have the degree of generality and compulsoriness that it thought necessary. It pointed out that Article 6 was subject to reservations; that the equidistance "rule" would not apply if "special circumstances" were present; and that States were in any case free to agree to delimit in

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<sup>134</sup> See esp. common Article 3.

<sup>135</sup> For further examples see Koster, *Les fondements du droit des gens* (1925), p. 221.

accordance with any other principles or techniques of their choice. This reasoning has been severely criticized, not only by dissenting Judges, but also in the literature. The point about reservations has already been discussed in another context.<sup>136</sup> So far as the “special circumstances” exception is concerned, it is not incompatible with something being a rule (norm) that it is subject to exceptions. And the point about the primacy of any agreement on delimitation does not seem, with respect, a very strong one: most customary international rules are *ius dispositivum*, which means that they can be derogated from by agreement even without this being expressly stated. It is, accordingly, difficult to see the value in the Court’s requirement that a treaty stipulation has to be of a “fundamentally norm-creating character” before it can even qualify to become customary law “of its own impact” - or at any rate to concur in its understanding of what this requirement entails.<sup>137</sup>

(2) The other reason why the ICJ held that Article 6 of the Convention had not created customary law “of its own impact” was that it was not impressed by the quantity of ratifications and accessions which the Convention had received in the nearly eleven years since its conclusion. Even allowing for the existence of States to whom acceptance was not open or who might not have any particular interest in the Convention (e.g. land-locked States), “the number of ratifications and accessions so far secured is, though respectable, hardly sufficient”. In fact, the number of States who had ratified or acceded at that time was 39 out of a possible total of over 130, of whom about 26 were landlocked. Even though some Judges differed,<sup>138</sup> the Court’s description of this as “though respectable, hardly sufficient” seems reasonable; and in any case, this was a matter of appreciation which it is unproductive to discuss further.<sup>139</sup> The Court was also surely right to add: “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.”

It might perhaps be objected that numbers are irrelevant, since *ex hypothesi* one is not talking about the gradual build-up of customary law through

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<sup>136</sup> See Section 22.

<sup>137</sup> Except, perhaps, that “soft law” provisions in a treaty would certainly not meet the test.

<sup>138</sup> Judges Lachs and Tanaka, in particular, were critical of the Court’s failure to consider more carefully the relative importance in this area of activity of the States which had ratified the Convention: *ICJ Reports*, 1969, pp. 218, 227 and 171, 176 respectively.

<sup>139</sup> In addition, the majority alluded to the fact that, although the short lapse of time since the conclusion and entry into force of the treaty was not in itself a bar, it was necessary that “within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked...”.

the “traditional” process whereby the pool of States engaging or acquiescing in a practice gradually widens, but the creation of law through a treaty’s “own impact”. However, the Court’s (presumed) reasons seem valid. In the “normal” customary process, a few States cannot create law for all: the practice must be sufficiently widespread and representative.<sup>140</sup> It cannot be otherwise just because the vehicle is a treaty, for otherwise a small and unrepresentative group could create law for all.<sup>141</sup>

(e) It follows from the foregoing analysis that a single plurilateral or bilateral treaty cannot instantly create general customary law “of its own impact”, and it seems improbable that even a series of such treaties will produce such an effect, save in (at most) the rarest of circumstances.<sup>142</sup>

## **PART V: THE ROLE OF RESOLUTIONS OF THE UN GENERAL ASSEMBLY AND OF INTERNATIONAL CONFERENCES IN THE FORMATION OF CUSTOMARY INTERNATIONAL LAW**

### **Introductory Remarks**

1. The first draft of the 6<sup>th</sup> Interim Report of the Committee was prepared by the Rapporteur and revised by the Chairman. It was circulated on 7 February 2000. Several members commented either on that draft, or on its equivalent in the draft of this Part of the Final Report.

2. The legal effect of resolutions of the General Assembly has been much debated. The Committee’s examination has been facilitated by a number of factors. First, its task was to study the role of such resolutions in the *formation of general customary law*, and other questions, such as whether a State voting in favour of a resolution asserting the existence of a rule of international law is estopped from denying it are, strictly, beyond its scope, even if it has had to

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<sup>140</sup> See Sections 12-15.

<sup>141</sup> Admittedly, the provisions of a convention (at least one open to all States) cannot even be adopted for signature unless there is at least a simple majority of those present, and often a qualified majority or even a consensus. However, when it comes to ratification it may be that only very few (or even no) States are prepared to commit themselves, and this may (amongst other things) cast doubt on whether they really do assent to the rules in question becoming part of customary law.

<sup>142</sup> In the *Nicaragua* case (*ICJ Rep.*1986, p. 14) the ICJ seems to have been somewhat more ready to derive customary law from certain multilateral and even plurilateral treaties than would be compatible with the foregoing Sections and Commentary. However, (a) the decision has been severely criticised for this, both in dissenting opinions and in the opinions of a number of jurists; (b) the Court seems to have been more cautious in later cases, especially the *Nuclear Weapons* Advisory Opinion (*ibid.* 1996, p. 226); (c) the parties in that case were broadly agreed that at any rate the main treaty provisions were also part of customary law; and (d) in the final analysis, it may be that the problem was less the fact of the (partial) derivation of customary rules from those treaties as the Court’s failure to spell out properly the steps in its reasoning which would have warranted such a conclusion. In short, the Judgment appears not to afford sufficient grounds for deviating from the views expressed in the present Statement.

touch on some of these issues for the sake of completeness. Secondly, much of what has been said in Part IV on the relation between treaties and customary law applies, *mutatis mutandis*, to resolutions of intergovernmental conferences and organizations. Thirdly, some key questions bearing on the present issues, such as the role of consent and the definition of State practice, had already been dealt with in previous Interim Reports, and now in Parts II and III. Finally, without necessarily adopting all of their conclusions, note may be taken of the valuable work already done on this subject by the Thirteenth Commission of the Institute of International Law and in particular its Rapporteur, Prof. K. Skubiszewski.<sup>143</sup>

3. Sections 28-32 deal with the role in the formation of customary international law of resolutions of the United Nations General Assembly, whilst Section 33 considers the role of resolutions of general international conferences.

4. Although discussion has centred on resolutions of the General Assembly, resolutions of other universal intergovernmental organizations can also, in theory, contribute to the formation of general customary international law in a similar way.<sup>144</sup>

## A: RESOLUTIONS OF THE UN GENERAL ASSEMBLY<sup>145</sup>

**28. *As explained in Sections 29-32, resolutions of the United Nations General Assembly may in some instances constitute evidence of the existence customary international law; help to crystallize emerging customary law; or contribute to the formation of new customary law. But as a general rule, and subject to Section 32, they do not ipso facto create new rules of customary law.***

### Commentary.

(a) It should be noted at the outset that many General Assembly resolutions are simply concerned with internal administrative arrangements or the articulation of *political* wishes, etc.: they do not even purport to assert an existing or desired legal obligation. It is only when a resolution claims (explicitly or by implication) to enunciate binding rules that the question of customary law even

<sup>143</sup> Report to the Institute of International Law: in Institute of International Law, 61-I *Yearbook* (1985), 29-358, 62-II, *ibid.* (1987), 65-126.

<sup>144</sup> However, given that the UN is the only universal organization with a general remit, the contribution of such organizations will necessarily be more limited in any event. And in practice, instances seem hard to find.

<sup>145</sup> The question whether resolutions of a given international organizations can contribute to the *internal* law of that organization is beyond the scope of the Committee's work, which is confined to *general* international law. Similarly, it has not explored whether or to what extent resolutions of international organizations generally can contribute to the formation of a general customary law of *international organizations* (if any).

arises, for only these resolutions pass the threshold test of being what one might term “legal pronouncements”.

(b) One must also try to distinguish a statement in a resolution that it would be *desirable* if the law were such-and-such (*lex ferenda*) from a statement that the law *is* such-and-such (*lex lata*). Statements of the former kind can (if circumstances prove propitious) contribute to the crystallization or formation of *new* customary law, but by definition they do not even purport to state existing law. So far as concerns a statement that the law *is* (already) such-and-such, on its face this is simply declaratory (evidence), as opposed to constitutive, of existing law. However, the matter is in fact not so simple. Some of those voting in favour of the resolution may not really consider that the law is already as stated, and it is quite common for States to assert that something is the law in the hope that this will help to bring about the desired state of affairs. So an apparently declaratory resolution may actually be, in whole or in part, for some or all of its supporters, *de lege ferenda*. Moreover, as has previously been observed (note 21), the reiteration of an existing customary rule is always in a sense constitutive, for the customary process is a continuing one, and every new assertion of a rule helps to strengthen it. Nevertheless, it is useful, for the purposes of analysis and exposition, to distinguish the declaratory function from the constitutive, even if in reality they are sometimes intertwined.<sup>146</sup>

(c) It is not intended to elaborate in detail on the idea that a resolution might contribute to the *crystallization* of an emerging rule (i) because the concept was examined more fully in Section 26 (in relation to treaties) and (ii), because in the present context crystallization may amount to little more than a combination of, or an intermediate stage between, the two other functions - evidencing existing, and contributing to the formation of new, customary international law.

(d) The way in which General Assembly resolutions can evidence or contribute to the development of customary international law is similar to the way in which treaties can do so (see Part IV), with one important difference: treaties do at least lay down some legal obligation, even if it is “only” a conventional one. In practice, this may facilitate the transformation from particular to general law, though (as noted in that Part) this is by no means automatic. By contrast, General Assembly resolutions are not usually binding as such.<sup>147</sup>

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<sup>146</sup> Conclusions 4 and 5 (amongst others) of the Institute of International Law's Thirteenth Commission also make this distinction: 62-II *Yearbook of the Institute of International Law* (1987), 111-12.

<sup>147</sup> The language of the Charter in its context, and particularly the contrast between the wording of Chapters IV and VII, make it clear that Assembly resolutions are not normally intended to have binding force. The drafting history of the Charter also tends to bear this out: at the San Francisco Conference, a proposal that the General Assembly should be given the power to enact rules of international law which would be binding when approved by a majority of the Security Council was



**29. Resolutions of the General Assembly expressly or impliedly asserting that a customary rule exists constitute rebuttable evidence that such is the case.**

**Commentary.**

(a) The reference in this Section to express or implicit assertion is due to the fact that a resolution may not in so many words assert that a rule exists, but rather that a State or States are under the obligation or, as the case may be, at liberty, to perform a certain act. This implies, but does not expressly allude to, the existence of a corresponding rule.<sup>148</sup>

(b) That General Assembly resolutions can in appropriate circumstances constitute evidence of existing customary law is not controversial. Thus, in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ observed that resolutions “can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*”.<sup>149</sup> Similarly, the representative of Italy in the General Assembly’s 6<sup>th</sup> Committee observed that “general resolutions or declarations by the United Nations ... could spell out ... existing customary rules”.<sup>150</sup> A resolution can, indeed, not merely reiterate an existing rule, but serve to clarify it or help to crystallize an emerging rule. As Skubiszewski says, it “can become a means whereby the law would be identified in a field where it seems uncertain or controversial whenever other instruments, in particular, judicial decisions and treaties, have not fulfilled that role. A carefully prepared resolution permits to avoid [*sic*] many ambiguities which usually arise if the rule is to be stated on the basis of an analysis that concentrates exclusively on the practice of individual States”<sup>151</sup> Castañeda, referring to resolutions such as Resolution 95 (I)

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defeated by 26 votes to 1: *United Nations Conference on International Organization, Documents* (1945), III, 536-37, IX, 70. If its resolutions were legally binding, the General Assembly would be a world legislature; and whether or not this is regarded as desirable, there is no evidence that international society is yet ready to establish one. In the *South West Africa Voting Procedure* case, Judge Lauterpacht stated that “The absence, in general, of full legal binding force in the Resolutions of the General Assembly is a proposition ... fundamental and ... rudimentary” - *ICJ Rep.* 1955, pp. 90, 92. Resolutions will not normally give rise to an estoppel against those voting for them - not least because of a lack of reliance on them; and they cannot be regarded as “instant treaties” due to a lack of intent to create treaty relations as well as the absence of the appropriate full powers. There are, it is true, instances where the Charter does (exceptionally), give binding force to Assembly decisions: for example, on the apportionment of the budget. The Assembly also has the power of authoritative interpretation of its constituent rules. But none of these exceptions is pertinent to the present topic. (For a fuller justification of these assertions and the others made in this footnote, see Mendelson, 272 *Collected Courses* 347-82.)

<sup>148</sup> Cf. Institute of International Law, 13<sup>th</sup> Commission, Conclusion 3, 62-II *Yearbook of the Institute of International Law* (1987), 108-9.

<sup>149</sup> *ICJ Rep.* 1996, p. 226 at 254 (paragraph 70).

<sup>150</sup> GAOR, 29<sup>th</sup> Sess., 6<sup>th</sup> Cttee, 1429<sup>th</sup> mtg., 5 Nov. 1974.

<sup>151</sup> Institute of International Law, 61-I *Yearbook* (1985), 109.

endorsing the principles of the Nuremberg Charter, has observed that “the resolutions are binding, not in the sense that they created new obligations, but in the sense that they are the expression and the legally irrefutable proof of general principles of law that are obligatory”.<sup>152</sup>

(c) Normally, a resolution expressly or impliedly declaring the law creates only a *rebuttable* presumption that the law is indeed as declared. The first reason is that the assertion is not opposable against those who voted against it, those who were not present or those who were not even Members of the UN.<sup>153</sup> Secondly, even in the case of those who voted in favour of the resolution, one must examine more closely the precise language of the resolution and the circumstances of its adoption before one can be sure that the rule in question has been accepted by those States.<sup>154</sup> So far as concerns the language used, Virally notes that it “always contains some indications on the will or intention of the authors of the text”,<sup>155</sup> but to understand it, some familiarity with the special language of diplomacy is needed. For instance, as Skubiszewski has observed, “normally the term ‘should’ is a sufficient indication that the rule is no more than recommendatory. Hence the choice of ‘shall’ is usually significant”.<sup>156</sup> It is also the case that delegations sometimes feel able to cast a positive vote precisely because they believe that General Assembly resolutions do *not* have any legal effect. Or again, whilst for some Members the resolution may be declaratory of existing law, for others it might be “merely” *lex ferenda*. So the circumstances of adoption need to be examined closely. It is necessary to examine, not just who voted for the resolution as a whole, but also the explanations of vote and the paragraph by paragraph votes of States. Thus, in the *Texaco v. Libya* award, the sole arbitrator noted that, although Resolution 3201 (S-VI), the Declaration on the Establishment of a New International Economic Order, was adopted without a vote, statements made by representatives of the main capital-exporting countries made it clear that they did not agree to the alteration of the rules concerning compensation for expropriation etc. previously embodied in Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources.<sup>157</sup> McDougal puts it in this way: “[I]n order to decide whether a UN statement reflected an accurate description of what peoples’ expectations were concerning the law, one needed to know several facts: Who voted for the statement? Who voted against it? What was the relative and effective power of these voters? How compatible is the asserted policy with past expectations? What followed

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<sup>152</sup> *The Legal Effects of United Nations Resolutions* (1969), 192-93.

<sup>153</sup> It is less clear whether this is true of those who abstained

<sup>154</sup> Cf. the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep. 1996, p. 226 at 254-55, para. 70.

<sup>155</sup> Institute of International Law, 61-1 *Yearbook* (1985), 177.

<sup>156</sup> *Ibid.*, 178.

<sup>157</sup> (1977), 53 *Int. Law Rep.* 389, 489. He reached similar conclusions about resolution 3281 (XXIX) - the Charter of Economic Rights and Duties of States.

from the resolution? What were the expectations coming from other sources? And so on.”<sup>158</sup>

In very exceptional circumstances, because of the degree of unanimity and the clarity of the Assembly’s intention to lay down the law, the presumption that the resolution represents the law may in effect be irrebuttable. This is dealt with in Section 32.

(d) *Pace* the guarded suggestion by Judges Klaested and Lauterpacht in the *South West Africa Voting Procedure* Advisory Opinion,<sup>159</sup> repetition of the same alleged rule in a series of resolutions does not of itself add to the legal obligation. Reiteration may serve to underline the importance attached by a majority of Members to the alleged rule, and/or the emergence of an *opinio juris*: but all depends on the circumstances. Even if there is, as some would say, an increased obligation to consider the resolution in good faith, this does not amount to a substantive obligation to comply. In its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ noted the reiterated resolutions asserting the illegality of the threat or use of nuclear weapons, but in the light of the opposition of nuclear-weapon States to these resolutions felt unable to hold that they represented binding customary law.<sup>160</sup>

### **30. Resolutions of the General Assembly can (but do not necessarily) constitute an historic (“material”) source of new customary rules.**

#### **Commentary.**

As with treaties (see Section 24), there is no reason why a General Assembly resolution should not provide the (or an) inspiration for the formation of a new customary rule. This is uncontroversial. But as with treaties, there is no presumption that the “rule” embodied in the resolution will actually become part of customary law subsequently: in each case it is a question of examining all of the evidence.

### **31. Resolutions of the General Assembly can in appropriate cases themselves constitute part of the process of formation of new rules of customary international law.**

#### **Commentary.**

(a) Section 30 is uncontroversial partly because the statements of any person or association can provide the inspiration for State practice. A somewhat more difficult question is whether the adoption of a resolution can itself form part of

<sup>158</sup> Panel Discussion, “The Legal Status of General Assembly Resolutions”, *Proceedings of the American Society of International Law. 73<sup>rd</sup> Annual Meeting* (1979), 324, 328-29.

<sup>159</sup> *ICJ Rep.* 1955, p. 88 at 118-22.

<sup>160</sup> *ICJ Rep.* 1996, p. 226 at 254-55, paras. 70 & 71.

the process, i.e. constitute a part of the formal source of law<sup>161</sup> known as customary international law. But before proceeding further, it should be noted that the present Section is concerned only with the question whether resolutions can *contribute* to the process of creating customary law, i.e. whether they can be counted amongst the varying kinds of “building block” - in other words elements - from which a rule of customary law can be created.<sup>162</sup> It therefore overlaps with, but is distinct from, the question whether General Assembly resolutions can of their own force *ipso facto* create new general customary law. The latter issue is dealt with in Section 32 below.

(b) In principle, the present question - whether resolutions can *contribute* to the formation of a new rule - can be answered in the affirmative. As indicated in Part III, States can be bound by a rule if they can be shown to have consented to it or otherwise recognized it. It is not impossible for such consent or recognition to be manifested by voting in favour of a resolution.<sup>163</sup> Admittedly, the language of the resolution and all of the circumstances of its adoption need to be examined carefully before coming to the conclusion that such consent or recognition exists; but in appropriate circumstances that may indeed be the case. In the *Nicaragua case (Merits)* the ICJ, referring to Resolution 2625 (XXV), the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, said that “The effect of consent to the text of such resolutions cannot be understood as merely that of a ‘reiteration or elucidation’ of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution *by themselves*”<sup>164</sup> - which, in its context, means as rules of customary law. To explain this phenomenon in traditional terminology, States voting in favour of such resolutions are able thereby to provide the subjective element<sup>165</sup> of customary law. How much weight is attributed to this depends, not only on the terms of the resolution and the whole process of its adoption, but also on any other supporting or conflicting statements or practice.<sup>166</sup>

(c) Some commentators, whilst accepting that (voting for a) General Assembly resolution can supply the subjective element, also require the manifestation of the objective element - State practice. In Section 4, this Statement expresses the view that verbal acts (e.g. protests and voting for General

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<sup>161</sup> Or, better, law-making process.

<sup>162</sup> Other building blocks being acts of State practice of various kinds, and (to the extent appropriate) indications of State will or *opinio juris*: see Parts II and III.

<sup>163</sup> Cf. the comment of Schachter: “[R]esolutions are also a means by which States may express an intent to be bound (with legal effect)...”: Institute of International Law, 61-I *Yearbook* (1985), 284.

<sup>164</sup> ICJ Reports, 1986, p. 14 at pp. 99-100 (para. 188); emphasis added.

<sup>165</sup> See Part III.

<sup>166</sup> Though see also Section 19.

Assembly resolutions), can constitute a form of State practice. Indeed, for States without the material means for concrete activity in the field in question (e.g. States lacking weapons of mass destruction, or landlocked States), verbal acts may be the only form of practice open to them. However, when considering whether the requirements for the formation of a customary rule have been met, it should be realized that one is not dealing with a large quantity of practice *plus* a large number of expressions of consent or belief, but simply with a large number of expressions of consent or belief, the true significance of which will depend on the circumstances. And certainly if (as some do, but as the Committee has not found useful<sup>167</sup>), one treats the adoption of the resolution as the practice of the *Organization*, it would also be a form of double counting to regard that adoption both as an analogue of State practice (the practice of the Organization) and also to treat the separate affirmative votes of each Member as further adding to its significance.

(d) It could be argued that a resolution without accompanying or corroborative practice may not be very convincing; to put it crudely, talk is cheap. But this objection belongs more to Section 32 (where it will be examined). In considering whether the adoption of General Assembly resolutions can form part of the process of customary law creation, it should also be borne in mind that there is no requirement that a specific expression of *opinio juris* should be accompanied by *simultaneous* practice.<sup>168</sup>

**32. Resolutions accepted unanimously or almost unanimously, and which evince a clear intention on the part of their supporters to lay down a rule of international law, are capable, very exceptionally, of creating general customary law by the mere fact of their adoption. In the event of a lack of unanimity, (i) a failure to include all representative groups of States will prevent the creation of a general rule of customary international law (see Section 14); and (ii) even if all representative groups are included, individual dissenting States enjoy the benefit of the persistent objector rule (see Section 15).**

#### **Commentary.**

(a) Unlike Section 31, which was merely concerned with whether General Assembly resolutions can be legitimately regarded as *contributing* elements from which - along with other elements - a customary rule might emerge, the present Section is concerned with the more controversial question whether General Assembly resolutions can ever *of themselves* and *ipso facto* create such law.

<sup>167</sup> See Section 11, Commentary, paragraph (b).

<sup>168</sup> If the subsequent practice *contradicts* the resolution, a customary rule will not be created because the requirement of uniformity will not have been met: see Section 13.

(b) The phrase “lay down [a rule of international law]” in this Section is deliberately chosen for its ambiguity. The phrase can mean declaring existing law, or it can mean making new law. If the conditions set out in this Section are met, it makes no practical difference whether the resolution purports (or is thought by some or all of those voting for it) to declare existing law on the one hand, or to establish a new rule on the other.

(c) It must be stressed that it will be extremely unusual for the condition to be met that there exists a clear intention of the parties to the resolution that it lays down a rule of law. The intentions of governments may be hard to determine. As previously indicated, one cannot simply take a resolution at face value: the language and the process by which it was adopted, as well as the wider context, must be carefully examined. Unanimity or a “consensus” does not necessarily establish such an intention: on the contrary, the price of obtaining unanimity or the absence of objection may be that the “obligation” becomes so watered down as not to constitute a *legal* one, or so ambiguous that it means such different things to different States that it is devoid, or almost devoid, of legally definable content. Furthermore, it is notable that, even in the case of unanimous resolutions on outer space, which was largely “virgin territory” before the adoption of those resolutions and therefore apparently a suitable candidate for the creation of new law, Cheng concluded, after a careful analysis of the relevant resolutions, that there was not a sufficiently widespread or representative agreement that their content should be, as he put it, “instant” customary law.<sup>169</sup> This justifies the use of the term “very exceptionally” in this Section. However, very occasionally the condition may be met, as in the case of the Declaration on Friendly Relations, according to the Judgment of the ICJ in the *Nicaragua case (Merits)*.<sup>170</sup>

(d) The title of the resolution may offer a clue of the intentions of those voting for it, but it is no more than an element to be taken into consideration. The General Assembly sometimes attaches a special name, such as “Declaration”, to its most solemn pronouncements: e.g. the Universal Declaration of Human Rights, the Declaration on the Granting of Independence to Colonial Countries and Peoples, the Declaration on Friendly Relations, etc. But there is no magic in the label.<sup>171</sup> On the one hand, there may not be sufficient, or sufficiently widespread, acceptance of a particular part of a Declaration (or even of the whole Declaration) *as law*. On the other hand, even a resolution which does not

<sup>169</sup> “United Nations Resolutions on Outer Space: ‘Instant’ International Customary Law?” *5 Indian Journal of International Law* (1965), 23; reprinted in Cheng (ed.), *International Law: Teaching and Practice* (1982), 273. See also note 172 below.

<sup>170</sup> See further Section 19 above.

<sup>171</sup> Cf. Conclusion 12 of the Institute of International Law’s 13<sup>th</sup> Commission, 62-II *Yearbook of the Institute of International Law* (1987), 110. For a very full discussion of the subject, in addition to the writings already cited, see Sloan, “General Assembly Resolutions Revisited (Forty Years Later)”, 58 *British Year Book of International Law* (1987), 39. (This is not necessarily to endorse all of the views expressed in that article.)

bear the title “Declaration” or something equally sonorous may nevertheless (in whole or in part) represent the consensus of the whole community as to the law.

(e) It might be argued that “instant customary law”<sup>172</sup> is a contradiction in terms: the very concept of *customary* law normally requires a certain amount of practice and the lapse of at least some time. It might further be suggested that it is too easy for States to be able to make law without the necessary discipline of having to back up their words with deeds and test their aspirations against reality (cf. the Commentary on Sections 3 and 4). Against the first of these objections - the contradiction inherent in the concept of “instant customary law” - the response might perhaps be made that this is simply a matter of terminology: the essence of customary law is that it is the unwritten manifestation of the will of the international community as a whole, and the fact that, in the past, this has usually occurred through the slow accretion of practice is not the essential feature: in short, one should not be unduly attached to labels. To the second objection it might perhaps be retorted that although it is easy to make statements on the spur of the moment, without any real intention to take them seriously or for them to have legal consequences, this is not *invariably* the case. A formal protest, for instance, is a verbal act, but must be taken seriously in the context of the formation of customary law; similarly, a formal *prise de position* by a government is not “mere talk”. All depends on the context. Accordingly, if governments choose to take their formal stance by means of a General Assembly resolution, there is no *a priori* reason why this should not count. To put it in another way, Section 18 has already stated that if it can be shown that a particular State or States have consented to a particular rule, at any rate those States will be bound by it. So it would seem that, *if* it can be shown that States as a whole really did consent to the rule set out in the resolution, they would be bound.<sup>173</sup> The word “if” in the preceding sentence is important, however. Given that General Assembly resolutions are not, in principle, binding<sup>174</sup>, something more is needed to establish this consent than a mere affirmative vote (or failure to oppose a resolution adopted by consensus). It must also be recognized that not all authorities would accept that it is possible - even in exceptional cases - to dispense entirely with the need for at least some “real” practice.<sup>175</sup>

(f) The reason for requiring unanimity or near unanimity (or a true consensus)

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<sup>172</sup> The phrase is taken from an important article by Cheng, cited at n. 169 above. It is important to notice the question mark in the title, and that, although the two key resolutions in question were adopted unanimously, in his view they were merely *pacta de contrahendo* and did not amount to instant customary law. This despite the fact that, for him, practice is not the essential and invariably indispensable element in customary law: rather, *opinio juris* is.

<sup>173</sup> *Mutatis mutandis*, the same is true if they generally *believe* the rule to be law: see Section 16.

<sup>174</sup> With the exception of decisions regarding matters internal to the Organization, etc. The exception is of no significance in the present context.

<sup>175</sup> On this last point, see the last part of paragraph (f) below.

is as follows. Whilst the consent of individual States might (if the requisite conditions are met) bind those States, and the consent of several of them may thereby produce *particular* customary law,<sup>176</sup> the normal rules for the formation of *general* customary law require *widespread and representative* acceptance of the rule. (See Sections 12-15). The second sentence of the present Section reflects this and the further fact that, even if all representative groups *did* accept the resolution, individual dissenters would presumably be entitled to avail themselves of the persistent objector rule described in Section 15. Admittedly, in the more traditional customary process, the requirement of widespread and representative practice could be satisfied by less than unanimity or near-unanimity: a rule can come into being through the participation of far from the totality of States, provided that no important actors or groups of actors in the field in question dissent. See Sections 14 and 15. But in the case of General Assembly resolutions, the fact that almost all existing States are represented in the organ and that virtually all interested parties have the opportunity to register their dissent or hesitation means that, if they do so in any numbers, the requirement of widespread and representative approval will probably not have been met. Perhaps another reason why those commentators who are ready to countenance (at least in theory) the possibility of “instant customary law” tend to assume (almost without thinking about the reason) that the resolution needs to have been adopted unanimously or almost unanimously is the following. Some scholars, especially in the West, have expressed concern that a simple (or even a two-thirds) numerical majority in the General Assembly can easily outvote the major powers. And more generally, however the majority is constituted, it would be in a position to impose its version of international law on a reluctant minority. In other words, if majority resolutions could constitute instant customary law, the General Assembly would have become the world legislature, and the sovereignty of individual States diminished. But *ex hypothesi* these objections disappear if the resolution is unanimous. If all States deliberately choose, by means of a resolution, to be bound, none can claim that its interests are being disregarded or overridden.<sup>177</sup> Admittedly, this argument does not meet the possibility that *non-Members* might object, or that the resolution may be only *nearly* unanimous. But in that case, it is submitted, the interests of dissi-

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<sup>176</sup> Of which local and regional customary law are but two manifestations.

<sup>177</sup> The 13<sup>th</sup> Commission of the Institute of International Law put this somewhat differently. Conclusion 13 asserts that “A law-declaring resolution, adopted without negative vote and abstention, creates a presumption that the resolution contains a correct statement of law. That statement is subject to rebuttal” (emphasis added): 62-II *Yearbook of the Institute of International Law* (1982), 110. (Cf. Conclusion 21, which appears to make all evidence contained in “law-declaring” resolutions rebuttable.) However, in the present Committee’s view, if the General Assembly unanimously evinces a *clear* intention to declare existing law, then in these circumstances rebuttal will not be open to Members, or at any rate will be extremely difficult. Non-members of course have the right to question this evidence. The Institute’s Conclusion 14 goes on to say that, where a rule of customary law is (merely) emerging or there is still some doubt as to its status, a unanimous resolution can consolidate the custom and remove doubts which might have existed. Significantly, the Commission nowhere concludes that a unanimous resolution can *ipso facto* create completely new international law.



dents can be adequately protected by the application of the persistent objector rule.<sup>178</sup> <sup>179</sup> Unanimity also has another consequence. If all (or virtually all) UN Members genuinely agree on a rule (by whatever means), there is very little scope left for contrary practice. Hence it becomes easier to conclude that a new customary rule has come into being, without having to wait and see how the practice develops. This is perhaps particularly true if the resolution enters virgin legal territory.<sup>180</sup> See also Section 19.

## **B: RESOLUTIONS OF GENERAL INTERNATIONAL CONFERENCES.**

### **33. *Mutatis mutandis, the same principles apply to the resolutions of international conferences of a universal character as apply to resolutions of the UN General Assembly.***

#### **Commentary.**

(a) For the avoidance of doubt, it should be stressed here that it is inter-governmental conferences which are envisaged here, not those of non-governmental bodies.

(b) This Section is confined to conferences which are open to all States (here described as “international conferences of a universal character”). Resolutions of more restricted conferences may (in appropriate circumstances) provide rebuttable evidence of the opinions of their participants as to the content of existing customary law, or even help to create new *particular* customary law for those voting in favour; but the lack of generality of participation will prevent such resolutions from becoming general law (unless the participation is nevertheless sufficiently widespread and representative and/or subsequent practice widens the scope of the rule’s recognition and application).

(c) As with other State acts, the resolutions of international conferences are capable, *in appropriate circumstances*, of evidencing existing customary inter-

<sup>178</sup> Of course, if the objector(s) are important actors in the field in question, their opposition will completely block the resolution’s being regarded as representing general customary law. This was the fate, for instance, of the relevant parts of General Assembly resolution 3201 (S-VI), the Declaration on the Establishment of a New International Economic Order, in the *Texaco arbitration*: see text accompanying n. 157 above.

<sup>179</sup> Indirectly, the *Nuclear Weapons* Advisory Opinion may provide support for the view expressed here. For paragraphs 70 and 71 of the Opinion seem to assume that, were it not for the negative votes and abstentions, the relevant resolutions could well have been regarded as laying down the law: *ICJ Rep.* 1996, p. 226 at 254-55.

<sup>180</sup> Cf. paragraph 1 of Conclusion 19 of the Institute of International Law’s 13<sup>th</sup> Commission: “A resolution can serve as a supplementary means for the determination of a rule of international law particularly where evidence of State practice or of the *opinio juris* is not otherwise readily available” - 62-II *Yearbook of the Institute of International Law* (1982), 111 (emphasis added).

national law. The circumstances in which they will do so are essentially the same as those applying to resolutions of the General Assembly: see Sections 29 and 32.

(d) Equally, there is no difficulty about the idea of resolutions international conferences being the material/historic source of (i.e. providing the inspiration for) State practice which develops into a rule of customary law: see Section 30.

(e) Sections 31 and 32 apply in principle (*mutatis mutandis*) to the question whether resolutions of international conferences can themselves contribute to the *formal* creation of a new rule of customary law, or even establish one *ipso facto*. In taking into account all relevant circumstances, however, there is one important difference which should be noted. Most (though admittedly not all) inter-governmental conferences are convened for the purpose of concluding a treaty (or at least for the purpose of considering whether to conclude one). If there is too little consensus for the alleged rule to be embodied in a treaty, *a fortiori* it must be questionable whether there is enough for the creation of a rule of general customary law. (It is not suggested that this is an irrebuttable presumption: it may be, for instance, that the 1972 Stockholm Conference on the Human Environment established, or helped to establish, certain principles of customary international environmental law even though it did not directly result in a treaty.) However, this is certainly a factor which must be taken into account: and if the conference concludes a treaty, but the content of the resolution is not included in it, it must again be open to question how far the resolution can be said to represent customary law.