FORMATION AND EVIDENCE OF CUSTOMARY INTERNATIONAL LAW

[Agenda item 8]

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Elements in the previous work of the International Law Commission that could be particularly relevant to the topic

Memorandum by the Secretariat

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CONTENTS

Multilateral instruments cited in the present report

	Source
Hague Convention of 1899 (II) respecting the Laws and Customs of War on Land (The Hague, 29 July 1899)	J. B. Scott, ed.,*The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed., New York, Oxford University Press, 1918, p. 100.
Hague Convention 1907 (IV) respecting the Laws and Customs of War on Land (The Hague, 18 October 1907)	*Ibid.*

	Source
Agreement concerning prosecution and punishment of the major war criminals of the European Axis (London, 8 August 1945)	United Nations, *Treaty Series*, vol. 82, No. 251, p. 279.
Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948)	*Ibid.*, vol. 78, No. 1021, p. 277.
Convention on the Continental Shelf (Geneva, 29 April 1958)	*Ibid.*, vol. 499, No. 7302, p. 311.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	*Ibid.*, vol. 1155, No. 18232, p. 331.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.

Summary

This memorandum was prepared in response to a request made by the International Law Commission at its sixty-fourth session (2012). It endeavours to identify elements in the previous work of the Commission that could be particularly relevant to the topic "Formation and evidence of customary international law".

After addressing, in the introduction, a few preliminary issues regarding the Commission's mandate and its previous work on the topic entitled "Ways and means for making the evidence of customary international law more readily available", the memorandum turns to the Commission's approach to the identification of customary international law and the process of its formation by focusing on (*a*) the Commission's general approach; (*b*) State practice; (*c*) the so-called subjective element (*opinio juris sive necessitatis*); (*d*) the relevance of the practice of international organizations; and (*e*) the relevance of judicial pronouncements and writings of publicists.

The memorandum then provides an overview of the Commission's understanding of certain aspects of the operation of customary law within the international legal system. These aspects relate to the binding nature and characteristics of the rules of customary international law—including regional rules, rules establishing *erga omnes* obligations and rules of *jus cogens*—as well as to the relationship of customary international law with treaties and "general international law".

Introduction

1. At its sixty-third session, in 2011, the International Law Commission decided to include the topic "Formation and evidence of customary international law" in its long-term programme of work.[1] At its sixty-fourth session, in 2012, the Commission included the topic in its current programme of work and appointed Sir Michael Wood as Special Rapporteur.[2] Also at that session, the Commission requested that the Secretariat prepare a memorandum identifying elements in the previous work of the Commission that could be particularly relevant to the topic.[3] To fulfil that request, the Secretariat has engaged in a review of the Commission's work since 1949 with a view to identifying the aspects most relevant to customary international law. In this regard, the Secretariat has focused primarily on aspects of the Commission's work that are directly relevant to the understanding of the concept of customary international law, the manner in which customary rules emerge and ought to be identified, and the way in which customary law operates within the international legal system. Those aspects of the work of the Commission identified by the Secretariat as most relevant to the present topic are reflected herein in the form of observations and, where deemed appropriate, accompanying explanatory notes.

2. In developing this memorandum, the Secretariat drew guidance from the questions and issues identified as relevant to the topic in two preliminary documents prepared by Sir Michael,[4] and in the initial debate on the topic at the Commission's sixty-fourth session.[5] The memorandum is structured to reflect aspects of the Commission's work relating to the identification of customary international law and the process of its formation, and to the operation of customary law within the international legal system.

3. It is important to note at the outset that the observations presented below reflect a systematic review of only certain components of the Commission's work. Given the Commission's mandate and working methods, numerous components of its work—including reports of Special Rapporteurs and general debates in plenary—could be of potential relevance to the present memorandum and its topic. Yet, in order to finalize the memorandum in an expedient manner, the Secretariat has largely limited its review to the final version of drafts adopted by the Commission on the various topics that it has so far considered,

[1] *Yearbook … 2011*, vol. II (Part Two), p. 175, paras. 365–367. By its resolution 66/98 of 9 December 2012, the General Assembly took note of the inclusion of the topic in the Commission's long-term programme of work (para. 7).

[2] *Yearbook … 2012*, vol. II (Part Two), p. 11, para. 19.

[3] *Ibid.*, p. 69, para. 159.

[4] See *Yearbook … 2011*, vol. II (Part Two), annex I, as well as *Yearbook … 2012*, vol. II (Part One), document A/CN.4/653, p. 183.

[5] See *Yearbook … 2012*, vol. II (Part Two), paras. 169–202.

along with accompanying commentaries.[6] The final versions of such drafts and commentaries were thought best to reveal the Commission's collective approach to customary international law.

A. Codification and progressive development

4. Before proceeding to the observations, it is useful to address briefly a few preliminary matters relating to the Commission's previous work on customary international law. First, a study of such work inevitably calls attention to the distinction between the Commission's work on "codification" and "progressive development".

5. With respect to codification, it is well understood that customary international law has played a significant role in the Commission's work. The statute of the Commission[7] defines "codification of international law" to mean "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine" (art. 15). Moreover, the Statute directs the Commission to codify international law by preparing drafts in the form of articles, together with a commentary containing an "adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine" (art. 20 (*a*)), together with conclusions defining, on the one hand, "the extent of agreement on each point in the practice of States and in doctrine" (art. 20 (*b*) (i)) and, on the other hand, "divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution" (art. 20 (*b*) (ii)).

6. The Commission's mandate, however, is not limited to the codification of existing international rules. The Commission is also tasked with the progressive development of international law, which is defined by article 15 of the statute of the Commission to mean "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States".

7. Codification and progressive development were thus envisioned by the Statute as distinct concepts, though the drafters of the Statute recognized that the two concepts would not necessarily be mutually exclusive—the systematization of existing law may lead to the conclusion that a new rule should be suggested for adoption by States.[8] Also, the Commission has consistently avoided any overarching categorization of a particular topic as exclusively an exercise in codification or progressive development.[9] Moreover, the Commission has indicated that the "distinctions drawn in its statute between the two concepts have proved unworkable and could be eliminated in any review of the statute".[10]

8. On a number of occasions, in relation to the formulation of specific rules, the Commission has clearly distinguished between its work on the codification and its work on the progressive development of international law.[11] Yet, on many other occasions, the Commission has not indicated whether its contemplation of a particular rule represented an exercise in codification or progressive development.[12] Moreover, regardless of whether or not the Commission has identified its consideration of a particular rule as falling within either category, it has often not employed terms that would make its analysis plainly relevant to customary law. Thus, the Secretariat's approach has been to include in the present memorandum those

[6] The draft articles on the expulsion of aliens and commentaries thereto (*Yearbook … 2012*, vol. II (Part One), document A/CN.4/651), adopted by the Commission on first reading at its sixty-fourth session, in 2012, were also included in the review.

[7] General Assembly resolution 174 (II), of 21 November 1947.

[8] See the report of the Committee on the Progressive Development of International Law and its Codification, *Official Records of the General Assembly, Second Session, Sixth Committee*, annex 1, para. 7.

[9] See, for example, *Yearbook … 1978*, vol. II (Part Two), p. 16, para. 72 ("The Commission wishes to indicate that it considers that its work on most-favoured-nation clauses constitutes both codification and progressive development of international law in the sense in which those concepts are defined in article 15 of the Commission's statute. The articles it has formulated contain elements of both progressive development and of codification of the law and, as in the case of several previous drafts, it is not practicable to determine into which category each provision falls."). See also *The Work of the International Law Commission*, 8th edition (United Nations publications, Sales No. E.12.V.2), vol. I, 2012, p. 47.

[10] *Yearbook … 1996*, vol. II (Part Two), p. 84, para. 147 (*a*). See also pp. 86–87, paras. 156–159, indicating that it is "too simple to suggest that progressive development, as distinct from codification, is particularly associated with the drafting of conventions" (para. 156) and "thus the Commission has inevitably proceeded on the basis of a composite idea of 'codification and progressive development'" (para. 157).

[11] See, for example, *Yearbook … 1978*, vol. II (Part Two), p. 13, para. 54 ("The Commission found that the operation of the [most-favoured-nation] clause in the sphere of economic relations, with particular reference to developing countries, was not a matter that lent itself easily to codification of international law in the sense in which that term was used in the [Statute] because the requirements for that process, … namely, extensive State practice, precedents and doctrine, were not easily discernible."); para. (2) of the commentary to draft article 5 on diplomatic protection, *Yearbook … 2006*, vol. II (Part Two), p. 31 (indicating that State practice and doctrine are unclear, and thus the rule has been drafted in an exercise in progressive development of the law); para. (2) of the commentary to draft article 8 on diplomatic protection, *ibid.*, p. 36 ("Draft article 8, an exercise in progressive development of the law, departs from the traditional rule…"); and para. (3) of the commentary to draft article 19 on diplomatic protection, *ibid.*, p. 54 ("If customary international law has not yet reached this stage of development, then draft article 19, subparagraph (*a*), must be seen as an exercise in progressive development."); para. (1) of the commentary to guideline 1.2.1 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), pp. 56–57 (indicating that guideline 1.1.5 "appears to be an element of progressive development of international law, since there is no clear precedent in this regard"); para. (5) of the commentary to draft article 23 on the expulsion of aliens, *Yearbook … 2012*, vol. II (Part Two), p. 39 ("Consequently, paragraph 2 of draft article 23 constitutes progressive development in two respects…"); para. (1) of the commentary to draft article 27 on the expulsion of aliens, *ibid.*, p. 46 ("Draft article 27 … is progressive development of international law."); and para. (1) of the commentary to draft article 29 on the expulsion of aliens, *ibid.*, p. 47 ("Draft article 29 recognizes, as an exercise in progressive development and when certain conditions are met, that an alien who has had to leave the territory of a State owing to an unlawful expulsion has the right to re-enter the territory of the expelling State."). See also para. (5) of the general commentary on the responsibility of international organizations, *Yearbook … 2011*, vol. II (Part Two), pp. 46–47 ("The fact that several of the present draft articles are based on limited practice moves the border between codification and progressive development in the direction of the latter.").

[12] Indeed, the Commission has even stated that it did not consider it necessary to identify the legal status of a particular rule; see, for example, para. (8) of the commentary to draft article 68 on the law of the sea, *Yearbook … 1956*, vol. II, p. 298 ("The Commission does not deem it necessary to expatiate on the question of the nature and legal basis of the sovereign rights attributed to the coastal State [over the continental shelf] … All these considerations of general utility provide a sufficient basis for the principle of the sovereign rights of the coastal State as now formulated by the Commission.").

elements of the Commission's work that appear to constitute an effort to ascertain or assess the possible existence or emergence of a rule of customary international law.

B. Ways and means for making the evidence of customary international law more readily available

9. The topic "Formation and evidence of customary international law" is not the first occasion on which the Commission has addressed a topic concerned directly with the evidence of customary international law. Following its second session, and on the basis of a working paper prepared by Mr. Manley O. Hudson on the subject,[13] the Commission submitted a report in 1950 to the General Assembly on the topic entitled "Ways and means for making the evidence of customary international law more readily available".[14] That report was in direct response to article 24 of the Commission's statute.[15]

10. The Commission's implementation of article 24 was, to a significant extent, conceptually distinct from the topic under consideration here. Concerned primarily with the availability and accessibility of materials relevant to the evidence of customary law, the report of the Commission identified existing collections of texts and international legal materials and suggested that the Secretariat prepare certain publications to increase the availability of evidence of potential relevance to international custom.[16]

11. The Commission's report did, however, also briefly consider the scope of customary international law.[17] Of particular relevance to the topic presently under consideration, the Commission suggested, *inter alia*, that the conventional formulation of international law by certain States is not infrequently relied upon to establish the existence of customary law, and that "evidence of the practice of States is to be sought in a variety of materials".[18] Those conclusions and other salient aspects of the Commission's analysis will be revisited as part of the observations provided below.

[13] *Yearbook … 1950*, vol. II, document A/CN.4/16 and Add.1, p. 24.

[14] *Ibid.*, pp. 367–374, paras. 24–94.

[15] Art. 24 of the statute of the Commission provides that "The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter."

[16] *Yearbook … 1950*, vol. II, pp. 368–374.

[17] *Ibid.*, pp. 367–368, paras. 28–32.

[18] *Ibid.*, p. 368, para. 31.

Chapter I

The identification of customary international law and the process of its formation

12. The present chapter elaborates observations relating to the Commission's approach to the identification of the rules of customary international law and the process leading to their formation. The chapter begins with observations on the Commission's general approach to the identification of customary rules, and continues with observations relating to State practice, the so-called subjective element (*opinio juris sive necessitatis*) and the relevance of the practice of international organizations and judicial pronouncements and writings of publicists.

A. General approach

Observation 1

To identify the existence of a rule of customary international law, the Commission has frequently engaged in a survey of all available evidence of the general practice of States, as well as their attitudes or positions, often in conjunction with the decisions of international courts and tribunals, and the writings of jurists.[19]

13. The commentary to draft article 5 on the law of the non-navigational uses of international watercourses exemplifies the Commission's approach:

> A survey of all available evidence of the general practice of States, accepted as law, in respect of the non-navigational uses of international watercourses—including treaty provisions, positions taken by States in tribunals, statements of law prepared by intergovernmental

[19] In so doing, the Commission has relied upon a variety of materials, an illustrative list of which is provided in sections B and C of the present chapter. See also, for example, the commentary to draft article 15 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), pp. 211–214: upon review of a variety of materials, the Commission concluded, at paragraph (18), that "a newly independent State is not, *ipso jure*, bound to inherit its predecessor's treaties". On some occasions, considerations of logic or fairness have also been relied upon by the Commission to identify certain rules; see, for example, para. (2) of the commentary to draft article 36 on the representation of States in their relations with international organizations, *Yearbook … 1971*, vol. II (Part One), p. 308 (assessment of relevant practice corroborated by an analogy between the privileges and immunities of diplomatic agents and those of permanent representatives, as well as their respective family members and staff); and para. (2) of the commentary to draft article 39 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), p. 110 ("Article 39 recognizes that the conduct of the injured State, or of any person or entity in relation to whom reparation is sought, should be taken into account in assessing the form and extent of reparation. This is consonant with the principle that full reparation is due for the injury—but nothing more—arising in consequence of the internationally wrongful act. *It is also consistent with fairness as between the responsible State and the victim of the breach**."). In certain cases, recourse to analogy would appear to have resulted from the Commission's determination of a scarcity of available practice; see, for example, the following observations made in para. (2) of the general commentary to the draft articles on the responsibility of international organizations dealing with circumstances precluding wrongfulness, *Yearbook … 2011*, vol. II (Part Two), p. 70 ("Also with regard to circumstances precluding wrongfulness, available practice relating to international organizations is limited. Moreover, certain circumstances are unlikely to occur in relation to some, or even most, international organizations. However, there would be little reason for holding that circumstances precluding wrongfulness of the conduct of States could not be relevant also for international organizations: that, for instance, only States could invoke *force majeure*. This does not imply that there should be a presumption that the conditions under which an organization may invoke a certain circumstance precluding wrongfulness are the same as those applicable to States.").

and non-governmental bodies, the views of learned commentators and decisions of municipal courts in cognate cases—reveals that there is overwhelming support for the doctrine of equitable utilization as a general rule of law.[20]

14. The above example usefully illustrates that the Commission has often not clearly distinguished in its commentaries between the materials relied upon to identify the general practice of States and those relied upon to determine the attitudes or positions of States in regard to a rule.[21] It is also useful to note that the Commission has recognized that the various sources referred to in the identification of rules of customary international law are not of the same legal value.[22]

15. On other occasions, however, the Commission has concluded that a rule was supported by State practice without including in the commentaries evidence of a systematic survey.[23]

B. State practice

16. In its identification of rules of customary international law, the Commission has recognized that State practice plays a prominent role.[24] This section seeks to provide an overview of the manner in which State practice has been characterized and assessed by the Commission, as well as the materials relied upon by the Commission in its analysis.

1. The Commission's characterization of State practice

Observation 2

The uniformity of State practice has been regarded by the Commission as a key consideration in the identification of a rule of customary international law.

17. On several occasions, the Commission has found that the requisite uniformity of State practice was present to allow for the identification of a rule of customary international law.[25] Conversely, on some occasions, a lack of uniformity has been regarded as precluding the existence of a rule of customary international law.[26]

[20] Para. (10) of the commentary to draft article 5, *Yearbook … 1994*, vol. II (Part Two), p. 98. See also paras. (3)–(6) of the commentary to draft article 7 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), pp. 45–46 (relying on a review of State practice, international jurisprudence and the writings of jurists to find that a rule is established); paras. (12)–(14) of the commentary to draft article 10 on the responsibility of States for internationally wrongful acts, *ibid.*, pp. 51–52 ("Arbitral decisions, together with State practice and the literature, indicate a general acceptance of the two positive attribution rules in article 10."); paras. (24)–(25) of the commentary to draft article 10 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), p. 40 (determining that the rule formulated in the draft article found precedent in a survey of sources which included judicial decisions, national legislation and treaty practice); paras. (10)–(18) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), pp. 199–201 (engaging in a review of State practice, boundary disputes and treaty practice to ascertain the existence of a general rule); paras.(2)–(4) of the commentary to draft article 15 on the succession of States in respect of treaties, *ibid.*, pp. 211–214 (reviewing State practice, legal opinion of the Secretariat, practice of depositaries and writings of jurists to establish a general rule); paras. (1) and (8) of the commentary to draft article 49 on the law of treaties, *Yearbook … 1966*, vol. II, pp. 246–247 (relying on the Charter of the United Nations and practice of the United Nations, as well as the opinion of a great majority of international lawyers, in discussing a customary rule); and para. (2) of the commentary to draft article 25 on the law of treaties, *ibid.*, p. 213 ("State practice, the jurisprudence of international tribunals and the writings of jurists appear to support the… rule which is formulated in the present article.").

[21] For a more detailed examination of the Commission's treatment of the general practice of States and the attitudes or positions of States *vis-à-vis* a rule, see sections B and C of the present chapter, below. See also para. (13) of the commentary to draft article 16 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), pp. 52–53 (concluding that "the rules enunciated … are supported by State practice, both judicial, legislative and governmental, as well as by multilateral and bilateral treaties", without engaging in separate analysis in the commentary regarding the practice and attitude of States); paras. (11)–(21) of the commentary to draft article 13 on the succession of States in respect of State property, archives and debts, *Yearbook … 1981*, vol. II (Part Two), pp. 33–35 (providing demonstrative examples and concluding that a rule is grounded in State practice, judicial decisions and legal theory, without distinguishing between materials relied upon to reach its conclusion with respect to State practice, attitudes or positions).

[22] See para. (24) of the commentary to draft article 5 on the law of the non-navigational uses of international watercourses, *Yearbook … 1994*, vol. II (Part Two), p. 100 ("The foregoing survey of legal materials, although of necessity brief, reflects the tendency of practice and doctrine on this subject. It is recognized that all the sources referred to are not of the same legal value. However, the survey does provide an indication of the wide-ranging and consistent support for the rules contained in article 5.").

[23] See, for example, para. (1) of the commentary to draft article 22 on the law of the sea, *Yearbook … 1956*, vol. II, p. 276 (stating simply that rules "followed the preponderant practice of States", without any further elaboration in the commentary); commentary to draft article 32 on the law of the sea, *ibid.*, p. 280 (concluding that the principle on the immunity of warships "embodied in paragraph 1 is generally accepted in international law", without providing a survey of evidence); and paras. (1) and (2) of the commentary to draft article 16 on consular relations, *Yearbook … 1961*, vol. II, p. 103 (concluding that "according to a very widespread practice, career consuls have precedence over honorary consuls", without referring to any sources in the commentary). It should be mentioned, however, that in some of those instances in which there is no evidence of a systematic survey in the Commission's commentaries, indications of such a survey may well appear in Special Rapporteurs' reports or in Secretariat studies.

[24] It should be noted, however, that the Commission has found that the mere absence of practice did not necessarily preclude the existence of a right or entitlement under general customary international law; see para. (2) of the commentary to draft article 57 on the responsibility of international organizations, *Yearbook … 2011*, vol. II (Part Two), p. 96 ("In fact, practice does not offer examples of countermeasures taken by non-injured States or international organizations against a responsible international organization. On the other hand, in the context of the rarity of cases in which countermeasures against an international organization could have been taken by a non-injured State or international organization, the absence of practice relating to countermeasures cannot lead to the conclusion that countermeasures by non-injured States or international organizations would be inadmissible.").

[25] See para. (1) of the commentary to draft article 9 on consular relations, *Yearbook … 1961*, vol. II, p. 99 ("At present, the practice of States, as reflected in their domestic law and in international conventions, shows a sufficient degree of uniformity in the use of the four classes set out in article 9 to enable the classes of heads of consular posts to be codified."); and paras. (1)–(2) of the commentary to draft article 16 on consular relations, *ibid.*, p. 103 ("There would appear to be, as far the Commission has been able to ascertain, a number of uniform practices, which the present article attempts to codify. It would seem that, according to a very widespread practice, career consuls have precedence over honorary consuls."). See also paras. (8) and (23) of the commentary to guideline 4.5.1 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), pp. 299 and 302 ("The nullity of an impermissible reservation is in no way a matter of *lex ferenda*; it is solidly established in State practice … State practice is extensive—and essentially homogeneous—and is not limited to a few specific States.").

[26] See, for example, para. (4) of the commentary to draft article 35 on special missions, *Yearbook … 1967*, vol. II, p. 363 ("The Commission noted however, that [consumer] goods are subject to complicated

(*Continued on next page.*)

Observation 3

The generality of State practice has also been regarded by the Commission as a key consideration in the identification of a rule of customary international law.

18. On several occasions, the Commission has found that the requisite generality of State practice was present to allow for the identification of a rule of customary international law.[27] Conversely, the lack of generality of State practice has been regarded as precluding the existence of a rule of customary international law.[28] On certain occasions, however, with respect to the identification of rules governing situations that had arisen in a limited number of cases, such as the law on State succession, the Commission has relied heavily upon the practice of the States involved in those cases in order to identify or formulate a general rule.[29]

19. In other instances, the Commission has found that the speciality of State conduct or of a particular circumstance undermined its probative value for the purpose of identifying a rule of customary international law.[30]

Observation 4

The Commission has employed diverse terminology when determining whether State practice satisfies the requirements of uniformity or generality.

(*Footnote 268 continued.*)

customs regulations which vary from State to State and that there does not appear to be any universal legal rule on the subject."); para. (2) of the commentary to draft article 17 on diplomatic intercourse and immunities, *Yearbook … 1958*, vol. II, p. 94 ("Usage differs from country to country … It is not possible to lay down a hard-and-fast rule."); para. (2) of the commentary to draft article 36 on diplomatic intercourse and immunities, *ibid.*, p. 101 ("It is the general practice to accord to members of the diplomatic staff of a mission the same privileges and immunities as are enjoyed by heads of mission, and it is not disputed that this is a rule of international law. But beyond this there is no uniformity in the practice of States in deciding which members of the staff of a mission shall enjoy privileges and immunities … In these circumstances it cannot be claimed that there is a rule of international law on the subject, apart from that already mentioned."); draft article 3, para. 1, on the law of the sea, *Yearbook … 1956*, vol. II, p. 265 ("The Commission recognizes that international practice is not uniform as regards the delimitation of the territorial sea."); para. (2) of the commentary to draft article 4 on the law of the sea, *ibid.*, p. 267 ("The traditional expression 'low-water mark' may have different meanings; there is no uniform standard by which States in practice determine this line."); para. (18) of the commentary to draft article 14 on the succession of States in respect of State property, archives and debts, *Yearbook … 1981*, vol. II (Part Two), p. 41 ("The practice of States relating to currency is not uniform, although it is a firm principle that the privilege of issue belongs to the successor State …"); paras. (8)–(9) of the commentary to draft article 11 on consular relations, *Yearbook … 1961*, vol. II, p. 101 (indicating that the "universally recognized" right of a receiving State to refuse the *exequatur* is implicitly recognized in the article, but noting that "in view of the varying and contradictory practice of States, it is not possible to say that there is a rule requiring States to give the reasons for their decisions in such a case."); para. (1) of the commentary to draft article 27 on the expulsion of aliens, *Yearbook … 2012*, vol. II (Part Two), p. 46 ("The Commission considers that State practice in the matter is not sufficiently uniform or convergent to form the basis, in existing law, of a rule of general international law providing for the suspensive effect of an appeal against an expulsion decision."); and para. (1) of the commentary to draft article 29 on the expulsion of aliens, *ibid.*, p. 47 ("Although recognition of such a right—on a variety of conditions—may be discerned in the legislation of some States and even at the international level, practice does not appear to converge enough for it to be possible to affirm the existence, in positive law, of a right to readmission, as an individual right of an alien who has been unlawfully expelled.").

[27] See, for example, para. (1) of the commentary to draft article 3 on consular relations, *Yearbook … 1961*, vol. II, p. 94 ("The rule laid down in the present article corresponds to the general practice according to which diplomatic missions exercise consular functions."); para. (1) of the commentary to draft article 49 on consular relations, *ibid.*, p. 121 (indicating that evidence of "a very widespread practice… may be regarded as evidence of an international custom…"); paras. (8) and (23) of the commentary to guideline 4.5.1 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), pp. 299 and 302 ("The nullity of an impermissible reservation is in no way a matter of *lex ferenda*; it is solidly established in State practice … State practice is extensive—and essentially homogeneous—and is not limited to a few specific States."); para. (1) of the commentary to draft article 32 on diplomatic intercourse and immunities, *Yearbook … 1958*, vol. II, p. 100 ("In all countries diplomatic agents enjoy exemption from certain dues and taxes; and although the degree of exemption varies from country to country, it may be regarded as a rule of international law that such exemptions exists, subject to certain exceptions."); para. (1) of the commentary to draft article 22 on the law of the sea, *Yearbook … 1956*, vol. II, p. 276 ("It considered that these rules followed the preponderant practice of States and it therefore formulated article 22 accordingly."); and para. 105 of the commentary to Principle IV of the principles of international law which were recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, *Yearbook … 1950*, vol. II, document A/1316, p. 375 (indicating that a principle is "found in varying degrees in the criminal law of most nations").

[28] See paras. (3) and (6) of the commentary to draft article 54 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), pp. 137 and 139 ("Practice on this subject is limited and rather embryonic … As this review demonstrates, the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States."); para. (13) of the commentary to draft article 16 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), p. 53 (stating that practice found in common-law systems should not be regarded as a "universally applicable practice"); and para. (4) of the commentary to guideline 2.6.10 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), p. 163 ("State practice regarding the confirmation of objections is sparse and inconsistent.").

[29] See para. (18) of the commentary to draft article 9 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 193 (identifying a rule of general scope on the basis of the practice of certain newly independent States); and para. 26 of the commentary to draft article 32 on the succession of States in respect of treaties, *ibid.*, p. 258 (relying on the limited practice of a few unified States to formulate a general rule); see also paras. (4)–(6) of the commentary to draft article 5 of the draft Code of crimes against the peace and security of mankind, *Yearbook … 1996*, vol. II (Part Two), pp. 24–25 (relying on limited international tribunal practice to reaffirm an "existing rule of international law"); and paras. (1)–(3) of the commentary to draft article 6 of the draft Code of crimes, *ibid.*, p. 25 (relying on limited national and international jurisprudence to confirm a principle).

[30] See para. (7) of the commentary to draft article 21 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 231 ("But the cases of the former British Dominions were very unusual owing both to the circumstances of their emergence to independence and to their special relation to the British crown at the time in question. Accordingly, no general conclusion should be drawn from these cases…"); para. (7) of the commentary to draft article 29 on the succession of States in respect of treaties, *ibid.*, p. 250 (indicating that the circumstances of a federation were "somewhat special" and thus "not thought to be a useful precedent from which to draw any general conclusions"); para. (11) of the commentary to draft article 34 on the succession of States in respect of treaties, *ibid.*, p. 262 ("The facts concerning that extremely ephemeral federation are thought to be too special for it constitute a precedent from which to derive any general rule."); para. (4) of the commentary to draft article 8 on the succession of States in respect of State property, archives and debts, *Yearbook … 1981*, vol. II (Part Two), p. 25 (stating that "no generally applicable criteria … can be deduced from", *inter alia*, "two General Assembly resolutions, which were adopted in pursuance of a treaty and related exclusively to special situations."); and para. (13) of the commentary to draft article 13 on the succession of States in respect of State property, archives and debts, *ibid.*, p. 33 (omitting two cases as "not sufficiently illustrative" as their application of a general principle was "due to other causes of a peculiar and specific kind").

20. Such terminology included "uniformity" or "uniform practice",[31] "general practice",[32] "widespread practice",[33] a rule "widely observed in practice",[34] "well-established and generalized practice",[35] "well-established practice",[36] "clearly established" practice,[37] "solidly established" practice,[38] "established practice",[39] "settled practice",[40] "preponderant practice of States",[41] or the "weight of evidence of State practice".[42]

Observation 5

Where there was a unifying thread or theme[43] underlying international practice, a certain variability in practice has often not precluded the Commission from identifying a rule of customary international law.[44]

21. For instance, in the commentary to draft article 34 on the succession of States in respect of treaties, the Commission concluded that

> although some discrepancies might be found in State practice, still that practice was sufficiently consistent to support the formulation of a rule which, with the necessary qualifications, would provide that treaties in force at the date of the dissolution should remain in force *ipso jure* with respect to each State emerging from the dissolution.[45]

22. Similarly, in its commentary to draft article 32 on diplomatic intercourse and immunities, the Commission noted that, "although the degree of exemption [from certain duties and taxes] varies from country to country, it may be regarded as a rule of international law that such exemptions exist, subject to certain exceptions".[46]

Observation 6

The consistency of State practice over time has occasionally been invoked by the Commission as a relevant, though not necessarily decisive, consideration in the formation or evidence of customary international law.[47]

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[31] See para. (1) of the commentary to draft article 9 on consular relations, *Yearbook … 1961*, vol. II, p. 99 (referring to the "degree of uniformity" in State practice); para. (2) of the commentary to draft article 36 on diplomatic intercourse and immunities, *Yearbook … 1958*, vol. II, p. 101 ("But beyond this there is no uniformity in the practice of States…"); para. (2) of the commentary to draft article 3 on the law of the sea, *Yearbook … 1956*, vol. II, p. 265 ("…international practice was not uniform…"); and para. (7) of the commentary to draft article 3 on the law of the sea, *ibid.*, p. 266 ("… international practice was far from uniform").

[32] See para. (1) of the commentary to draft article 3 on consular relations, *Yearbook … 1961*, vol. II, p. 94; para. (6) of the commentary to draft article 22 on the succession of States in respect to treaties, *Yearbook … 1974*, vol. II (Part One), p. 234; and para. (2) of the commentary to draft article 52 on the law of treaties, *Yearbook … 1966*, vol. II, p. 250.

[33] See para. (1) of the commentary to draft article 49, *Yearbook …1961*, vol. II, p. 121; para. (2) of the commentary to draft article 16, *ibid.*, p. 103; and para. (2) of the commentary to draft article 41 on consular relations, *ibid.*, p. 115.

[34] See para. (2) of the commentary to guideline 2.3 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), p. 112.

[35] See para. (1) of the commentary to draft article 8 on the representation of States in their relations with international organizations, *Yearbook … 1971*, vol. II (Part One), p. 291.

[36] See, for example, para. (3) of the commentary to guideline 1.8 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), p. 89; para. (12) of the commentary to guideline 3.1.5.3 on reservations to treaties, *ibid.*, p. 223; and para. (4) of the commentary to draft article 50 on the representation of States in their relations with international organizations, *Yearbook … 1971*, vol. II (Part One), p. 315 ("well-established practice").

[37] See para. (12) of the commentary to draft article 13 on the succession of States in respect of State property, archives and debts, *Yearbook … 1981*, vol. II (Part Two), p. 33.

[38] See para. (8) of the commentary to guideline 4.5.1 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), p. 299.

[39] See para. (1) of the commentary to draft article 21 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), p. 61.

[40] See para. (8) of the commentary to draft article 19 on diplomatic protection, *Yearbook … 2006*, vol. II (Part Two), p. 55 ("Although there is some support … in national legislation, judicial decisions and doctrine, this probably does not constitute a settled practice").

[41] See para. (1) of the commentary to draft article 22 on the law of the sea, *Yearbook … 1956*, vol. II, p. 276.

[42] See para. (17) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 201 (referencing "the weight of the evidence of State practice" in support of excepting boundary treaties from the fundamental change of circumstances rule).

[43] See para. (11) of the commentary to draft article 5 on the non-navigational uses of international watercourses, *Yearbook … 1994*, vol. II (Part Two), p. 98, indicating that, although the language and approaches of international agreements reflecting the doctrine of equitable utilization—which was characterized by the Commission as a "general rule of law"—"vary considerably, *their unifying theme** is the recognition of rights of the parties to the use and benefits of the international watercourse or watercourses in question that are equal in principle and correlative in their application".

[44] On the Commission's general approach to the requirement of uniformity of State practice, see observation 2 above.

[45] Para. (25) of the commentary to draft article 34 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 265.

[46] Para. (1) of the commentary to draft article 32 on diplomatic intercourse and immunities, *Yearbook … 1958*, vol. II, p. 100. See also para. (3) of the commentary to draft article 29 on the law of the sea, *Yearbook … 1956*, vol. II, p. 279 ("Existing practice in the various States is too divergent to be governed by the few criteria adopted by the Commission … The Commission accordingly thought it best to confine itself to enunciating the guiding principle that, before the grant of nationality is generally recognized, there must be a genuine link between the ship and the State granting permission to fly its flag … [T]he majority of the Commission preferred a vague criterion to no criterion at all."); para. (8) of the commentary to draft article 30 on consular relations, *Yearbook … 1961*, vol. II, pp. 109–110 (affirming the inviolability of the consular premises, noting in particular its recognition in numerous consular conventions, despite "certain exceptions to the rule of inviolability" found in some conventions); para. (3) of the commentary to draft article 13 on the law of treaties, *Yearbook … 1966*, vol. II, p. 201 (commenting that the *Right of Passage* case may indicate "the possibility that difficult problems may arise under the rule in special circumstances", but that "the existing rule appears to be well-settled"); and paras. (2)–(3) of the commentary to draft article 11 on the draft Code of crimes against the peace and security of mankind, *Yearbook … 1996*, vol. II (Part Two), p. 34 ("Notwithstanding the diversity of procedural and evidentiary rules that govern judicial proceedings in various jurisdictions", every court or tribunal must comply with the "minimum international standard of due process").

[47] See, for example, para. (18) of the commentary to draft article 5 on consular relations, *Yearbook … 1961*, vol. II, p. 98 ("Paragraph (*j*) confirms a long-established practice whereby consuls ensure the service on the persons concerned."); paras. (4) and (6) of the commentary to draft article 5 of the draft Code of crimes against the peace and security of mankind, *Yearbook … 1996*, vol. II (Part Two), pp. 24–25 (determining that the article reaffirms an "existing rule of international law" and indicating that "the defence of superior orders has been consistently excluded in the relevant legal instruments adopted since the Charter of the Nürnberg Tribunal."); para. (4) of the commentary to draft article 7 of the draft Code of crimes against the peace and security of mankind, *ibid.*, p. 27 ("The official position of an individual has been consistently excluded as a possible defence to crimes under

(*Continued on next page.*)

2. Materials relied upon by the Commission in assessing State practice

Observation 7

The Commission has relied upon a variety of materials in assessing State practice for the purpose of identifying a rule of customary international law.

23. In its work, the Commission appears to have followed the approach originally envisaged in its 1950 report to the General Assembly on ways and means for making the evidence of customary international law more readily available.[48] A non-exhaustive list of materials upon which the Commission has relied as elements of State practice includes internal law,[49] municipal court decisions,[50] practice of the executive branch,[51] diplomatic practice[52] and treaty practice.[53]

24. Furthermore, the Commission has relied upon other materials as secondary sources of information regarding State practice. These materials include, in particular,

(*Footnote 47 continued.*)

international law in the relevant instruments adopted since the Charter of the Nürnberg Tribunal."); and para. (26) of the commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property (which was referred to by the Commission in its commentary to the corresponding article 5 of the final version of the draft articles on the topic as "still generally applicable", see *Yearbook … 1991*, vol. II (Part Two), pp. 22–23); *Yearbook … 1980*, vol. II (Part Two), pp. 147–148 ("It should be observed … that the rule of State immunity, which was formulated in the early nineteenth century and was widely accepted in common law countries as well as in a large number of civil law countries in Europe in that century, was later adopted as a general rule of customary international law solidly rooted in the current practice of States. Thus the rule of State immunity continues to be applied, to a lesser or greater extent, in the practice of the countries whose case law in the nineteenth century has already been examined … Its application seems to be consistently followed in other countries."). See also *a contrario*, para. (3) of the commentary to draft article 54 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), p. 137 ("Practice on this subject is limited and rather embryonic.").

[48] See *Yearbook … 1950*, vol. II, p. 368, para. 31 ("Evidence of the practice of States is to be sought in a variety of materials. The reference in article 24 of the Statute of the Commission to 'documents concerning State practice' (*documents établissant la pratique des Etats*) supplies no criteria for judging the nature of such 'documents'. Nor is it practicable to list all the numerous types of materials which reveal State practice on each of the many problems arising in international relations."). In that report, the Commission provided the following non-exhaustive list of the types of materials that are of potential relevance to the evidence of customary international law: (*a*) texts of international instruments; (*b*) decisions of international courts; (*c*) decisions of national courts; (*d*) national legislation; (*e*) diplomatic correspondence; (*f*) opinions of national legal advisers; and (*g*) practice of international organizations (*ibid.*, pp. 368–372, paras. 33–78). Notably, the Commission indicated that "national legislation" is "employed in a comprehensive sense; it embraces the constitutions of States, the enactments of their legislative organs, and the regulations and declarations promulgated by executive and administrative bodies. No form of regulatory disposition effected by a public authority is excluded" (*ibid.*, p. 370, para. 60, in subsection on "national legislation"). In addition, the Commission noted that "the decisions of the national courts of a State are of value as evidence of that State's practice, even if they do not otherwise serve as evidence of customary international law" (*ibid.*, para. 54). The Commission declined, however, to assess "the relative value of national court decisions as compared with other types of evidence of customary international law" (*ibid.*).

[49] See, for example, para. (19) of the commentary to draft article 10 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), pp. 38–39 (engaging in a survey of national legislation); para. (8) of the commentary to draft article 19 on diplomatic protection, *Yearbook … 2006*, vol. II (Part Two), p. 55 ("Although there is some support … in national legislation, judicial decisions and doctrine, this probably does not constitute a settled practice."); para. (13) and footnote 164 of the commentary to draft article 16 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), pp. 52–53 (indicating that rules are supported by State practice, including legislative practice); and paras. (40)–(48) of the commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property (see footnote 47 above), *Yearbook … 1980*, vol. II (Part Two), pp. 152–153 (indicating that "national legislation constitutes an important element in the overall concept of State practice" and engaging in a review of relevant internal laws).

[50] See paras. (13)–(18) of the commentary to draft article 10 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), pp. 36–38 (survey of national judicial practice); para. (13) and footnote 164 of the commentary to draft article 16 on the jurisdictional immunities of States and their property, *ibid.*, pp. 52–53 (indicating that rules are supported by State practice, including judicial practice); para. (7) of the commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property (see footnote 47 above), *Yearbook … 1980*, vol. II (Part Two), p. 143 ("The general rule of international law regarding State immunity has developed principally from the judicial practice of States. Municipal courts have been primarily responsible for the growth and progressive development of a body of customary rules governing the relations of nations in this particular connection."); and para. (3) of the commentary to draft article 59 on the law of treaties, *Yearbook … 1966*, vol. II, p. 257 (referring to the practice of municipal courts).

[51] See para. (39) of the commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property (see footnote 47 above), *Yearbook … 1980*, vol. II (Part Two), pp. 151–152 ("The views of the Government, expressed through its political branch, are highly relevant and indicative of the general trends in the practice of States … The lead taken by the Government may be decisive in bringing about desirable legal developments through forceful assertion of its position or through the intermediary of the legislature or by way of governmental acceptance of principle contained in an international convention. Conversely, the Government is clearly responsible for its decision to assert a claim of State immunity in respect of itself and its property, or to consent to the exercise of jurisdiction by the court of another State or to waive its sovereign immunity in a given case."); and para. (13) of the commentary to draft article 16 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), pp. 52–53 (indicating that rules enunciated in the article are supported by State practice, including governmental practice).

[52] See paras. (14)–(17) of the commentary to draft article 8 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), pp. 185–186 (considering the diplomatic positions, exchanges and practice of States to ascertain whether a general rule exists); and paras. (11)–(17) of the commentary to draft article 12 on the succession of States in respect of treaties, *ibid.*, pp. 199–201 (analysing diplomatic exchanges and positions in boundary disputes as evidence of State practice on the question of whether boundary settlements are affected by a succession of States). See also *Yearbook … 1950*, vol. II, p. 371, para. 71 ("The diplomatic correspondence between Governments must supply abundant evidence of customary international law.").

[53] See paras. (20)–(21) of the commentary to draft article 10 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), p. 39 (indicating that the "accumulation of such bilateral treaty practices could combine to corroborate the evidence of the existence of a general practice of States in support of" certain exceptions to State immunity); paras. (14)–(18) of the commentary to draft article 15 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), pp. 213–214 (considering devolution agreements as evidence of State practice for the purpose of ascertaining the existence of a general rule); para. (1) of the commentary to draft article 15 and para. (5) of the commentary to draft article 19 on consular relations, *Yearbook … 1961*, vol. II, pp. 103 and 105 (citing consular conventions as evidence of practice of States); and paras. (1) and (3) of the commentary to draft article 28 on consular relations, *ibid.*, p. 108 (indicating that the rule is confirmed by numerous consular conventions).

Government comments,[54] publications of international organizations[55] and non-governmental organizations,[56] executive branch publications[57] and international judicial decisions and the writings of jurists.[58]

25. The Commission has also noted the difficulty of identifying and assessing relevant instances of State practice with respect to a particular legal issue.[59]

C. The so-called subjective element (*opinio juris sive necessitatis*)

26. In addition to State practice, the Commission has frequently referred in its work to what is often defined as the subjective element of customary international law.[60] This section seeks to provide an overview of the manner in which this element has been characterized and assessed by the Commission, as well as the materials relied upon by the Commission in its analysis.

1. The Commission's characterization of the subjective element

Observation 8

The Commission has often characterized the subjective element as a sense among States of the existence or non-existence of an obligatory rule.[61] While on many occasions the Commission has specifically relied upon a rule's obligatory character,[62] in certain instances the Commission referred to States' recognition of the necessity of a rule.[63]

Observation 9

The position of States *vis-à-vis* a possible rule of customary international law has often been characterized

[54] The Commission and its special rapporteurs routinely rely on comments received from Governments as one of the main sources of information regarding State practice. Indications of such reliance can be found in certain commentaries; see, for example, para. (1) of the commentary to draft article 56 on consular relations, *Yearbook … 1961*, vol. II, p. 124 ("A study of consular regulations has shown, and the comments of governments have confirmed, that some States permit their career consular officials to carry on private gainful occupation… It was in light of this practice that the Commission … adopted this article."); and para. (5) of the commentary to draft article 7 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), p. 26 ("Express reference to absence of consent as a condition *sine qua non* of the application of State immunity is borne out in the practice of States. Some of the answers to the questionnaire circulated to Member States clearly illustrate this link between the absence of consent and the permissible exercise of jurisdiction.").

[55] See, for example, para. (1) of the commentary to draft article 23 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), p. 76 (citing a study of State practice on *force majeure* prepared by the Secretariat); para. (16) of the commentary to draft article 10 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), p. 36 (citing State practice of Egypt found in a United Nations publication); para. (27) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 203 (citing the Nile Waters Agreement of 1929 and other bilateral agreements reproduced in a United Nations publication); and para. (4) of the commentary to draft article 19 on the succession of States in respect of treaties, *ibid.*, p. 223 (citing a United Nations publication in support of a proposition regarding the practice of successor States).

[56] See, for example, paras. (10) and (12) of the commentary to draft article 9 on the succession of States in respect of treaties (citing International Law Association materials); para. (7) of the commentary to draft article 23 and footnote 392 therein (citing a report of the International Law Association) and para. (17) of the commentary to draft articles 30 and 31 (citing a report of the Nigerian Institute for International Affairs), *Yearbook … 1974*, vol. II (Part One), pp. 191–192, 237–238 and 256, respectively.

[57] See, for example, para. (2) of the commentary to draft article 24 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), pp. 78–79 (citing diplomatic exchanges reproduced in a publication of the Government of the United States of America); para. (3) of the commentary to draft article 32 on the responsibility of States for internationally wrongful acts, *ibid.*, p. 94 (citing State practice found in the *British and Foreign State Papers, 1919*, vol. 112); and para. (4) of the commentary to draft article 14 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), pp. 208–209 (referring to treaty practice found in a publication of the Government of the United Kingdom).

[58] See section E below.

[59] See para. (4) of the commentary to the annex to the draft articles on the effects of armed conflicts on treaties (concerning the indicative list of treaties, referred to in article 7, the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict), *Yearbook … 2011*, vol. II (Part Two) ("The likelihood of a substantial flow of information from States, indicating evidence of State practice, is small. Moreover, the identification of relevant State practice is, in this sphere, unusually difficult.").

[60] See, for example, para. (8) of the commentary to guideline 2.2.1 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), p. 109 (relying on practice and *opinio necessitatis juris* to support the rule that reservations formulated at signature need to be confirmed while expressing consent to be bound); and para. (18) of the commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property (see footnote 47 above); *Yearbook … 1980*, vol. II (Part Two), p. 145 (referring to the *opinio juris* underlying State practice on jurisdictional immunity).

[61] The phrase "the existence or non-existence of an obligatory rule" should be read with the understanding that rules of customary international law may be both permissive (recognizing States' rights or discretion) and restrictive (imposing obligations on States). Examples of explicit reference by the Commission to a permissive rule include the commentary to draft article 67 on consular relations, *Yearbook … 1961*, vol. II, p. 127 (rule according to which each State is free to decide whether it will appoint or receive honorary consular officials); para. (11) of the commentary to draft article 7 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), p. 28 ("Customary international law or international usage recognizes the exercisability of jurisdiction by the court against another State which has expressed its consent in no uncertain terms, but actual exercise of such jurisdiction is exclusively within the discretion or the power of the court, which could require a more rigid rule for the expression of consent."); paras. (7) and (12)–(17) of the commentary to draft article 15 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), pp. 212–214 (evidence of State practice supports the traditional view that a newly independent State is not under any general obligation to take over the treaties of its predecessor; see in particular para. (12): "Here the notion of succession seems to have manifested itself in the recognition of a new State's *right* to become a party without at the same time seeking to impose upon it an *obligation* to do so.").

[62] See paras. (3)–(5) and (9) of the commentary to draft articles 27 ("General rule of interpretation") and 28 ("Supplementary means of interpretation") on the law of treaties, *Yearbook … 1966*, vol. II, pp. 218–220, in particular para. (4) ("recourse to many of these principles is discretionary rather than obligatory") and para. (9) ("… But these elements are all of an obligatory legal character"); and para. (8) of the commentary to draft article 19 on diplomatic protection, *Yearbook … 2006*, vol. II (Part Two), p. 55 ("Nor is there any sense of *obligation** on the part of States to limit their freedom of disposal of compensation awards.").

[63] See, for example, para. (6) of the commentary to draft article 59 on the law of treaties, *Yearbook … 1966*, vol. II, p. 258 ("The acceptance of the [*rebus sic stantibus*] doctrine in international law is so considerable that it seems to indicate a recognition of a need for this safety-valve in the law of treaties"); and para. (9) of the commentary to draft article 20 on the law of non-navigational uses of international watercourses, *Yearbook … 1994*, vol. II (Part Two), p. 120.

by the Commission as "general recognition" or "general acceptance" of the rule. The Commission, however, has also used other formulations, such as "belief" or "attitude" of States with regard to the existence or content of a given rule.

27. In its work, the Commission has, on several occasions, alluded to the so-called subjective element of customary international law by indicating that a rule was "generally (or widely) recognized"[64] or "generally accepted".[65] In considering the notion of "general acceptance", the Commission explained its understanding of the dynamics of claims and acceptances that had led to the emergence of a particular rule of customary international law.[66] In certain instances, the Commission has referred to the subjective element by employing different terminology, such as the "belief"[67] or "attitude"[68] of States regarding the existence or content of a rule.

Observation 10

The Commission has, on some occasions, distinguished between the subjective element of a rule of customary international law and other considerations that might animate State conduct or positions.

28. In particular, the Commission found on some occasions that States' conduct or positions were animated by considerations other than the recognition or acceptance of, or belief in, the existence of a legal rule. Such other considerations identified by the Commission include courtesy,[69] political expediency, will or compromise,[70] precaution-

[64] See, for example, para. (1) of the commentary to draft article 30 on the law of treaties, *Yearbook … 1966*, vol. II, p. 226 (indicating the existence of "abundant evidence of the recognition of the rule in State practice and in the decisions of international tribunals, as well as in the writings of jurists"); para. (4) of the commentary to draft article 39 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), p. 110 ("The relevance of the injured State's contribution to the damage in determining the appropriate reparation is widely recognized in the literature and in State practice."); para. (2) of the general commentary on countermeasures, *ibid.*, p. 128 ("It is recognized both by Governments and by the decisions of international tribunals that countermeasures are justified under certain circumstances."); and para. (2) of the commentary to draft article 51, *ibid.*, p. 134 ("Proportionality is a well-established requirement for taking countermeasures, being widely recognized in State practice, doctrine and jurisprudence.").

[65] See, for example, para. (1) of the commentary to draft article 15 on the law of treaties, *Yearbook … 1966*, vol. II, p. 202 (obligation … "generally accepted"); para. (3) of the commentary to draft article 1 on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, *Yearbook … 1972*, vol. II, p. 313 (indicating that the extension to cabinet officers of the principle of special protection at all times and in all circumstances when in a foreign State "could not be based on any broadly accepted rule of international law…"); para. (35) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 206 ("general acceptance", together with the "strong indications of a belief"); and para. (28) of the commentary to guideline 4.5.1 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), p. 303 ("general agreement" of States, courts and treaty bodies relied upon in support of a rule stating that invalid reservations produce no legal effect).

[66] See para. (2) of the commentary to guiding principle 9 applicable to unilateral declarations of States capable of creating legal obligations, *Yearbook … 2006*, vol. II (Part Two), p. 165: "The 1945 Truman Proclamation, by which the United States of America aimed to impose obligations on other States or, at least, to limit their rights on the American continental shelf, was not strictly speaking accepted by other States. All the same, as the Court has stressed, 'this regime [of the continental shelf] furnishes an example of a legal theory derived from a particular source that has secured a general following. [*North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), I.C.J. Reports 1969*, p. 53, para. 100.] In fact, the other States responded to the Truman Proclamation with analogous claims and declarations [See the case of Mexico, *Yearbook … 2005*, vol. II (Part One), document A/CN.4/557, p. 132, para. 132] and, shortly thereafter, the content of the Proclamation was taken up in article 2 of the 1958 Geneva Convention on the Continental Shelf. It could therefore be said to have been generally accepted and it marked a point of departure for a customary process leading, in a very short time, to a new norm of international law. ICJ remarked in that context: 'The Truman Proclamation however, soon came to be regarded as a starting point of the positive law on the subject, and the chief doctrine it enunciated … came to prevail over all others, being now reflected in article 2 of the 1958 Geneva Convention on the Continental Shelf' [*North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), I.C.J. Reports 1969*, para. 47]".

[67] See para. (35) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 206 (alluding to "strong indications of a belief" along with "general acceptance").

[68] See para. (4) of the commentary to draft article 59 on the law of treaties, *Yearbook … 1966*, vol. II, p. 257 ("The most illuminating indications as to the attitude of States regarding the principle [of *rebus sic stantibus*] are perhaps statements submitted to the Court.").

[69] See para. (1) of the commentary to Part II of the draft articles on special missions, *Yearbook … 1967*, vol. II, p. 358 ("Before the Second World War, the question whether the facilities, privileges and immunities of special missions have a basis in law or whether they are accorded merely *as a matter of courtesy** was discussed in the literature and raised in practice. Since the War, the view that there is a *legal basis** has prevailed. It is now generally recognized that States are under an obligation to accord the facilities, privileges and immunities in question to special missions and their members."). See also para. (2) of the commentary to the annex to the draft articles on the representation of States in their relations with international organizations ("matter of courtesy"; *Yearbook … 1971*, vol. II (Part One), p. 335).

[70] See paras. (1), (8), (9) and (20) of the commentary to draft article 25 on the succession of State in respect of State property, archives and debts, *Yearbook … 1981*, vol. II (Part Two), pp. 54–56 and 59–60 (in particular, "(1) … political solutions that reflected relationships of strength between victors and vanquished rather than equitable solutions", p. 54; and "(8) … solutions … based on a 'given power relationship' ", p. 55–56); para. (36) of the commentary to draft article 35, *ibid.*, p. 90 (role played by "political considerations or considerations of expediency"; "There is a strong presumption that that is not a context in which States express their free consent or are inclined to yield to the demands of justice, of equity, or even of law."); and para. (63) of the commentary to draft article 36 on the same subject, *ibid.*, p. 104 ("State practice shows conflicting principles, solutions based on compromise with no explicit recognition of any principles."); and paras. (4)–(15) of the commentary to draft article 23 on the succession of States in respect of treaties, particularly paras. (8), (12) and (15), *Yearbook … 1974*, vol. II (Part One), pp. 238–240 (instances of succession to bilateral treaties regarded by the Commission as having an "essentially voluntary character" [para. (12)]; the Commission did not believe that continuity of treaties derives "from a customary legal rule rather than the will of the States concerned" [para. (8)]). But see paras. (17)–(18) of the commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property (see footnote 47 above), suggesting that consent does not undermine a customary rule which is supported by usage and *opinio juris* ("The principle of State immunity, which was later to become widely accepted in the practice of States, was clearly stated by Chief Justice Marshall: 'This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.' … In this classic statement of the rule of State immunity, ... *the granting of jurisdictional immunity was based on the consent of the territorial State as tested by common usage and confirmed by the* opinio juris *underlying that usage**." *Yearbook … 1980*, vol. II (Part Two), p. 145, paras. 17–18).

ary measures,[71] expressions of intent[72] and aspirations or preferences.[73]

Observation 11

On some occasions, the Commission appears to have ascribed importance to the absence of opposition to a rule in the practice of States.[74]

2. Materials relied upon by the Commission in assessing the subjective element

Observation 12

The Commission has relied upon a variety of materials in assessing the subjective element for the purpose of identifying a rule of customary international law.

29. A non-exhaustive list of such materials includes positions of States before international organizations (including written comments and responses to questionnaires)[75] or international conferences;[76] pronouncements by municipal courts;[77] statements before international courts and tribunals;[78] stipulations in arbitration agreements;[79] diplomatic practice and notes;[80] a State's actual conduct (as

[71] See para. (4) of the commentary to guideline 2.6.10 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), pp. 163–164 (considering that confirmations of objections in such cases as found in State practice "are precautionary measures that are by no means dictated by a sense of legal obligation (*opinio juris*)").

[72] See para. (7) of the commentary to draft article 30 on the most-favoured-nation clauses, *Yearbook … 1978*, vol. II (Part Two), p. 73 ("While all these developments may show that there might be a tendency among States to promote the trade of developing countries through 'differential treatment', the conclusion of the Commission is that this tendency has not yet crystallized sufficiently to permit it to be embodied in a clear legal rule that could find its place among the general rules on the functioning and application of the most-favoured-nation clause. *All the texts partially quoted above are substantially expressions of intent rather than obligatory rules**.")

[73] Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook … 2006*, vol. II (Part Two), pp. 72–73, paras. 4–5 (referring to principle 22 of the Stockholm Declaration and principle 13 of the Rio Declaration, the Commission noted: "While the principles in these Declarations are not intended to give rise to legally binding obligations, they demonstrate aspirations and preferences of the international community.").

[74] See, for example, para. (32) of the commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property (see footnote 47 above): "The preceding survey of the judicial practice of common law jurisdictions and civil law systems in the nineteenth century and of other countries in the contemporary period indicates a uniformity in the acceptance of the rule of State immunity. While it would be neither possible nor desirable to review the current case law of all countries, which might uncover some discrepancies in historical developments and actual application of the principle, … *it should be observed that, for countries having few or no reported judicial decisions on the subject, there is no indication that the concept of State immunity has been or will be rejected**. The conclusion seems warranted that, in the general practice of States as evidence of customary law, there is little doubt that a general rule of State immunity has been firmly established as a norm of customary international law" (*Yearbook … 1980*, vol. II (Part Two), p. 149). See also para. (2) of the commentary to draft article 13 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), p. 46: "This exception [from immunity where a State owns, possesses or uses property], *which has not encountered any serious opposition in the judicial and governmental practice of States**, is formulated in language which has to satisfy the differing views of Governments."

[75] See, for example, para. (5) of the commentary to draft article 59 on the law of treaties, *Yearbook … 1966*, vol. II, p. 258 (comments in political organs of the United Nations taken as statements of position regarding the acceptance of a rule of international law); para. (4) of the commentary to draft article 16 on consular relations, *Yearbook … 1961*, vol. II, p. 103 (referring to government comments to the Commission's draft articles); and paras. (19) and (21) of the commentary to guideline 4.5.3 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), pp. 310–311 (referring to the views expressed in the Sixth Committee of the General Assembly and in written comments received from Governments as indicating lack of agreement on the approach to be taken regarding the validity of the consent to be bound expressed by the author of an invalid reservation).

[76] See, for example, para. (10) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 199 (referring to the attitude of States during the United Nations Conference on the Law of Treaties); para. (17) of the commentary to the same draft article, *ibid.*, p. 201 (referring, *inter alia*, to "the decision of the United Nations Conference on the Law of Treaties to except from the fundamental change of circumstances rule a treaty which established a boundary"); and para. (3) of the commentary to draft article 8 on the prevention of transboundary harm from hazardous activities, *Yearbook … 2001*, vol. II (Part Two), p. 159 (referring, *inter alia*, to "declarations and resolutions adopted by intergovernmental organizations, conferences and meetings").

[77] See, for example, para. (18) of the commentary to draft article 13 on the succession of States in respect of State property, archives and debts, *Yearbook … 1981*, vol. II (Part Two), p. 34 ("Courts and other jurisdictions also seem to endorse unreservedly the principle of the devolution of public property in general, and *a fortiori* of State property, and therefore of immovable property. This is true, in the first place, of national courts."); and para. (3) of the commentary to draft article 57 on the law of treaties, *Yearbook … 1966*, vol. II, p. 254 ("Municipal courts have not infrequently made pronouncements recognizing the principle that the violation of a treaty may entitle the innocent party to denounce it. But they have nearly always done so in cases where their Government had not in point of fact elected to denounce the treaty, and they have not found it necessary to examine the conditions for the application of the principle at all closely."). See, however, para. (20) of the commentary to the annex to the draft articles on the effects of armed conflicts on treaties (concerning the indicative list of treaties, referred to in article 7, the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict), *Yearbook … 2011*, vol. II (Part Two) ("In this particular context the decisions of municipal courts must be regarded as a problematic source. In the first place, such courts may depend upon guidance from the executive. Secondly, municipal courts may rely on policy elements not directly related to the principles of international law. Nonetheless, it can be said that the case law of domestic courts is not inimical to the principle of survival.").

[78] See para. (7) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 198 (referring to statements before ICJ regarding succession in respect of a boundary settlement and of treaty provisions ancillary to such settlement); and para. (4) of the commentary to draft article 59 on the law of treaties, *Yearbook … 1966*, vol. II, p. 257 (indicating that "The most illuminating indications as to the attitude of States regarding the principle [of *rebus sic stantibus*] are perhaps statements submitted to the Court in the cases where the doctrine has been invoked", and referring to the positions of States in several cases before the Permanent Court of International Justice); paras. (3) *et seq.* of the commentary to draft article 62 on the responsibility of international organizations, *Yearbook … 2011*, vol. II (Part Two) (referring to the positions expressed by States in contentious cases in support of the view that States members of an international organization cannot generally be regarded as internationally responsible for internationally wrongful acts of the organization).

[79] See para. (4) of the commentary to draft article 13 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), p. 58 (common stipulation in arbitration agreements as confirmation of a "generally recognized principle").

[80] See para. (3) of the commentary to draft article 10 on the responsibility of States for internationally wrongful acts, *ibid.*, p. 50 ("Diplomatic practice is remarkably consistent in recognizing that the conduct of an insurrectional movement cannot be attributed to

(*Continued on next page.*)

opposed to its stated positions);[81] a State's treaty practice;[82] multilateral treaty practice;[83] as well as a variety of international instruments.[84]

(*Footnote 80 continued.*)

the State."); para. (17) of the commentary to draft article 8 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 186 (citing correspondence between States); paras. (14) and (21) of the commentary to draft article 12 on the succession of States in respect of treaties, *ibid.*, pp. 200 and 202 (referring to diplomatic notes).

[81] It has occurred that the Commission, in determining the legal position of a State, has relied upon its actual conduct even where that conduct conflicted with the State's asserted position with respect to a given rule; see para. (13) of the commentary to draft article 5 on the law of non-navigational uses of international watercourses, *Yearbook … 1994*, vol. II (Part Two), pp. 98–99 ("A review of the manner in which States have resolved actual controversies pertaining to the non-navigational uses of international watercourses reveals a general acceptance of the entitlement of every watercourse State to utilize and benefit from an international watercourse in a reasonable and equitable manner. While some States have, on occasion, asserted the doctrine of absolute sovereignty, these same States have generally resolved the controversies in the context of which such assertions were made by entering into agreements that actually apportioned the water or recognized the rights of other watercourse States.").

[82] See para. (20) of the commentary to draft article 10 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), p. 39 ("The attitude or views of a Government can be gathered from its established treaty practice … Thus the treaty practice of the Soviet Union amply demonstrates its willingness to have commercial relations carried on by State enterprises … regulated by competent territorial authorities."). See also para. (1) of the commentary to draft article 15 on consular relations, *Yearbook … 1961*, vol. II, p. 103 (referring, *inter alia*, to "a very large number of consular conventions"), as well para. (5) of the commentary to draft article 19 and para. (1) of the commentary to draft article 28 on the same topic (also referring to consular conventions); paras. (3)–(11) of the commentary to draft article 8 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), pp. 183–184 (considering whether devolution agreements "are effective in bringing about a succession to or continuance of the predecessor State's treaties", and "the evidence which they may contain of the views of States concerning the customary law governing succession of States in respect of treaties"); paras. (14)–(18) of the commentary to draft article 15 on the succession of States in respect of treaties, *ibid.*, pp. 213–214 (considering devolution agreements as evidence of State practice for the purpose of ascertaining the existence of a general rule "in regard to a newly independent State's *obligation* to inherit treaties" and finding that States have not "in their practice acted on the basis that they are in general bound to [a predecessor's] treaties").

[83] See, for example, paras. (1) and (5) of the commentary to draft article 49 on the law of treaties, *Yearbook … 1966*, vol. II, p. 246 (referring to the prohibition of the use of force as laid down in the Charter of the United Nations); para. (51) of the commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property (see footnote 47 above); *Yearbook … 1980*, vol. II (Part Two), p. 154 ("The current treaty practice of States indicates the application of provisions of several conventions of a universal character dealing with some special aspects of State immunity."); para. (5) of the commentary to article 11 of the draft Code of crimes against the peace and security of mankind, *Yearbook … 1996*, vol. II (Part Two), p. 34 (recognition of fair trial guarantees in numerous treaties).

[84] At times, the Commission appears to have inferred the general recognition or acceptance of a rule from certain international instruments other than treaties, including, for instance, resolutions and declarations by international organizations. See, for example, para. (3) of the commentary to draft article 8 on the prevention of transboundary harm from hazardous activities, *Yearbook … 2001*, vol. II (Part Two), p. 159 (mentioning, *inter alia*, that the principle of the obligation to notify other States of a risk of significant harm "is embodied in a number of international agreements, … declarations and resolutions adopted by intergovernmental organizations, conferences and meetings."); and para. (16) of the commentary to article 2 of the draft Code of crimes against the peace and security of mankind, *Yearbook … 1996*, vol. II (Part Two), p. 22 (indicating, *inter alia*, that the principle of international criminal responsibility for incitement was recognized in the Charter of the Nuremberg Tribunal); paras. (1)–(3) of the commentary to article 6, *ibid.*, p. 25 (recognition of the principle of command responsibility in treaties and in the statutes of international criminal tribunals); para. (4) of the commentary to article 6, pp. 25–26 (express recognition, in the statutes of international criminal tribunals, of the absence of a defence based on the official position of the offender); and para. (5) of the commentary to article 14, pp. 39–40 (referring to various instruments which do not recognize any defences to those crimes).

D. Relevance of the practice of international organizations

Observation 13

Under certain circumstances, the practice of international organizations has been relied upon by the Commission to identify the existence of a rule of customary international law. Such reliance has related to a variety of aspects of the practice of international organizations, such as their external relations, the exercise of their functions, as well as positions adopted by their organs with respect to specific situations or general matters of international relations.[85]

Observation 14

On some occasions, the Commission has referred to the possibility of the practice of an international organization developing into a custom specific to that organization. Such customs may relate to various aspects

[85] See, for example, paras. (7)–(8) of the commentary to draft article 41 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), pp. 114–115 ("(7) An example of the practice of non-recognition of acts in breach of peremptory norms is provided by the reaction of the Security Council to the Iraqi invasion of Kuwait in 1990 … (8) As regards the denial by a State of the right of self-determination of peoples, … The same obligations are reflected in the resolutions of the Security Council and General Assembly concerning the situation in Rhodesia and the Bantustans in South Africa."); para. (3) of the commentary to draft article 8 on the prevention of transboundary harm from hazardous activities, *ibid.*, p. 159 (indicating that the obligation to notify other States of the risk of significant harm is recognized in "declarations adopted by intergovernmental organizations, conferences and meetings"); para. (2) of the commentary to draft article 17 of the draft Code of crimes against the peace and security of mankind, *Yearbook … 1996*, vol. II (Part Two), p. 44 (indicating that the General Assembly had affirmed that crimes against humanity and genocide constituted crimes under international law, and had adopted the Convention on the Prevention and Punishment of the Crime of Genocide); paras. (1)–(14) of the commentary to draft article 4 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), pp. 177–180 (referring to the practice of numerous international organizations, including the United Nations and certain specialized agencies); paras. (12)–(13) of the commentary to draft article 8, *ibid.*, pp. 184–185 (citing the practice of the Secretary-General of the United Nations as depositary of multilateral treaties) and para. (3) of the commentary to draft article 16 (on the same subject), *ibid.*, p. 215; para. (2) of the commentary to draft article 24 on the representation of States in their relations with international organizations, *Yearbook … 1971*, vol. II (Part One), p. 301 ("The replies of the United Nations and the specialized agencies indicate that the exemption provided for in this article is generally recognized."); para. (1) of the commentary to draft article 49 on the law of treaties, *Yearbook … 1966*, vol. II, p. 246 ("The clear-cut prohibition of the threat or use of force in Article 2 (4) of the Charter of the United Nations, together with the practice of the United Nations itself, have reinforced and consolidated this development in the law."); and para. 112 of the commentary to principle VI of the principles of international law recognized in the charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, *Yearbook … 1950*, vol. II, document A/1316, part. II, p. 376 (referencing a declaration concerning wars of aggression adopted by the Assembly of the League of Nations). See also paragraph 78 of the report of the Commission on the work of its second session, *ibid.*, p. 372 ("Records of the cumulating practice of international organizations may be regarded as evidence of customary international law with reference to States' relations to the organizations.")

of the organization's functions or activities, e.g. the treaty-making power of an international organization or the rules applicable to treaties adopted within the organization.[86]

E. Relevance of judicial pronouncements and writings of publicists

30. As previously indicated,[87] the Commission has on many occasions considered judicial pronouncements and writing of publicists in its analysis of customary international law.[88] As described below, the Commission has relied upon these materials in various ways.

Observation 15

The Commission has, on some occasions, relied upon decisions of international courts or tribunals as authoritatively expressing the status of a rule of customary international law.[89]

Observation 16

Furthermore, the Commission has often relied upon judicial pronouncements as a consideration in support of the existence or non-existence of a rule of customary international law.

31. Where the Commission itself undertook an analysis for the purpose of identifying the existence of a rule of customary international law, judicial recognition has often constituted a relevant, if not decisive, consideration in support of the existence of the rule. Such recognition was found in decisions of international courts and tribunals as well as in arbitral awards.[90]

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[86] See para. (14) of the commentary to draft article 7 on the law of treaties between States and international organizations or between international organizations, *Yearbook … 1982*, vol. II (Part Two), p. 27 (referring to the development of a practice into a "rule of the organization" recognizing the competence of the head of the Secretariat to express the consent of the organization to be bound by a treaty, without reference to another organ of the organization; also pointing out that "[i]t is the acquiescence of ['all the other organs of the organization that might have been entitled to claim the competence and did not do so'] which constitutes the practice"); paras. (11)–(13) of the commentary to draft article 4 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 180 (evoking, in general, the possibility that the internal practice of an international organization may give rise to organization-specific customary rules); and para. (2) of the commentary to draft article 22 on the succession of States in respect of treaties, *ibid.*, p. 233 (indicating that the International Labour Organization has a particular customary practice with respect to the date from which a newly independent State is regarded as bound to labour conventions).

[87] See observation 1 above.

[88] Of potential general relevance to this section is the following comment made by the Commission in paragraph 30 of its report on ways and means for making the evidence of customary international law more readily available:

> Article 24 of the Statute of the Commission seems to depart from the classification in Article 38 of the Statute of the Court, by including judicial decisions on questions of international law among the evidences of customary international law. The departure may be defended logically, however, for such decisions, particularly those by international courts, may formulate and apply principles and rules of customary international law. Moreover, the practice of a State may be indicated by the decisions of its national courts."

(*Yearbook … 1950*, vol. II, p. 368, para. 30).

[89] For example, on the question of straight baselines, the Commission interpreted the ICJ judgment in the *Fisheries* case between the United Kingdom and Norway "as expressing the law in force" and "accordingly drafted the article on the basis of [the] judgment" (paras. (1)–(4) of the commentary to draft article 5 on the law of the sea, *Yearbook … 1956*, vol. II, pp. 267–268). See also paras. (3)–(5) of the commentary to draft article 24 (*ibid.*, p. 277) (relying on the judgment of the Court in the *Corfu Channel* case as expressing the customary rule in force with regard to innocent passage through international straits connecting two parts of the high seas) and para. (2) of the commentary to draft article 23 on the law of treaties, *Yearbook … 1966*, vol. II, p. 211 (stating that "there is much authority in the jurisprudence of international tribunals for the proposition that in the present context the principle of good faith is a legal principle which forms an integral part of the rule *pacta sunt servanda*" and referring to decisions of ICJ, PCIJ and arbitral tribunals).

[90] See, for example, *Yearbook … 2001*, vol. II (Part Two), para. (14) of the commentary to draft article 25 on the responsibility of States for internationally wrongful acts, p. 83 ("On balance, State practice and judicial decisions support the view that necessity may constitute a circumstance precluding wrongfulness under certain very limited conditions, and this view is embodied in article 25."); para. (6) of the commentary to draft article 41, *ibid.*, p. 114 (quoting the *Military and Paramilitary Activities in and against Nicaragua* case and indicating that "the existence of an obligation of non-recognition in response to serious breaches of obligations arising under peremptory norms already finds support in international practice and in decisions of [the] International Court of Justice"); and para. (2) of the commentary to draft article 51, *ibid.*, p. 134 (referring, *inter alia*, to the *Naulilaa* case concerning the requirement of proportionality for taking countermeasures); para. (4) of the commentary to draft articles 16 and 17 on the law of treaties, *Yearbook … 1966*, vol. II, *ibid.*, pp. 203–204 (referring to the ICJ pronouncement in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* case that "The principle of the integrity of the convention, which subjects the admissibility of a reservation to the express or tacit assent of all the contracting parties, does not appear to have been transformed into a rule of law."); paras. (14)–(15) of the commentary to draft article 27, *ibid.*, pp. 221–222 (relying on the jurisprudence of international courts and tribunals to ascertain established rules of treaty interpretation); and para. (8) of the commentary to draft article 29, *ibid.*, pp. 225–226 (analysing whether or not PCIJ, in its *Mavrommatis Palestine Concessions* case, intended to lay down a general rule regarding treaty interpretation in cases of divergence between authentic texts); para. (4) of the commentary to draft article 8 on the succession of States in respect of State property, archives and debts, *Yearbook … 1981*, vol. II (Part Two), p. 25 (referring to several decisions by international courts and tribunals, including the Franco-Italian Conciliation Commission's pronouncement that "customary international law has not established any autonomous criterion for determining what constitutes State property"); para. (19) of the commentary to draft article 13 on the succession of States in respect of State property, archives and debts, *ibid.*, p. 34 ("Decisions of international jurisdictions confirm this rule."); paras. (3)–(8) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), pp. 197–199 (citing numerous decisions of international courts in its analysis of the question of territorial treaties, and indicating that a PCIJ pronouncement "is perhaps the most weighty endorsement of the existence of a rule requiring a successor State to respect a territorial treaty affecting the territory to which a succession of States relates."); para. (18) of the commentary to draft article 3 on the non-navigational uses of international watercourses, *Yearbook … 1994*, vol. II (Part Two), p. 94 ("The existence of the principle of law requiring consultations among States in dealing with fresh water resources is explicitly supported by the arbitral award in the *Lake Lanoux* case."); para. (3) of the commentary to draft article 17 of the draft Code of crimes against the peace and security of Mankind, *Yearbook … 1996*, vol. II (Part Two), p. 44 ("The principles underlying the [Genocide] Convention have been recognized by [the] International Court of Justice as binding on States even without any conventional obligation."); para. (6) of the commentary to draft article 18 of the draft Code of crimes against the peace and security of mankind, *ibid.*, p. 48 ("The absence of any requirement of an international armed conflict as a prerequisite for crimes against humanity was also confirmed by the International Tribunal for the Former Yugoslavia."); and para. (1) of the commentary to draft article 3 on the expulsion of aliens, *Yearbook … 2012*, vol. II (Part Two), p. 20 ("The right to expel has been recognized in particular in a number of arbitral awards and decisions of claims commissions and in various decisions of regional courts and commissions."). See also, generally, *Yearbook … 1950*, vol. II, pp. 369–370, paras. 42–51 (reviewing the availability of publications containing decisions and awards of international courts and tribunals in a section entitled "Evidence of customary international law").

Observation 17

At times, the Commission has also relied upon decisions of international courts or tribunals, including arbitral awards, as secondary sources for the purpose of identifying relevant State practice.[91]

Observation 18

The writings and opinions of jurists have often been considered by the Commission in the identification of rules of customary international law.

32. In its consideration of the writings and opinions of jurists for the purpose of identifying a rule of customary international law, the Commission has, at times, undertaken an overall assessment of the weight of opinion in support of a particular rule.[92] Such an assessment appears to have been based on both quantitative and qualitative aspects.[93]

33. On other occasions, the Commission has relied on the writings of jurists as secondary sources of State practice.[94]

[91] See para. (23) of the commentary to draft articles 16 and 17 on the law of treaties, *Yearbook … 1966*, vol. II, p. 208 ("That the principle of implying consent to a reservation from absence of objection has been admitted into State practice cannot be doubted; for the [ICJ] itself in *Reservations to the Genocide Convention* case spoke of 'very great allowance' being made in international practice for 'tacit assent to reservations'."); para. (10) of the commentary to draft article 5 on the non-navigational uses of international watercourses, *Yearbook … 1994*, vol. II (Part Two), p. 98 (including "decisions of international courts and tribunals" in its "survey of all available evidence of the general practice of States, accepted as law"). See also para. (4) of the commentary to draft article 39 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), p. 110 (relying on the *Delagoa Bay Railway* and the *S.S. "Wimbledon"* cases as evidence of "State practice" with respect to "the relevance of the injured State's contribution to the damage in determining the appropriate reparation").

[92] See, for example, para. (2) of the commentary to draft articles 11 and 12 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 197 ("The weight of opinion amongst modern writers supports the traditional doctrine … In general, however the diversity of the opinions of writers makes it difficult to find in them clear guidance as to what extent and upon what precise basis international law recognizes that treaties of a territorial character constitute a special category for the purposes of the law applicable to succession of States.").

[93] See *Yearbook … 1966*, vol. II, para. (8) of the commentary to draft article 49 on the law of treaties, p. 247 ("The great majority of international lawyers today unhesitatingly hold that Article 2, paragraph 4… authoritatively declares the modern customary law regarding the threat or use of force."), para. (2) of the commentary to draft article 53, *ibid.*, pp. 250–251 ("Some jurists … take the position that an individual party may denounce or withdraw from a treaty only when such denunciation or withdrawal is provided for in the treaty or consented to by all the other parties. A number of other jurists, however, take the position that a right of denunciation or withdrawal may properly be implied under certain conditions in some types of treaties."); para. (1) of the commentary to draft article 57, *ibid.*, pp. 253–254 ("The great majority of jurists recognize that a violation of a treaty by one party may give rise to a right in the other party"); para. (1) of the commentary to draft article 59, *ibid.*, p. 257 ("Almost all modern jurists, however reluctantly, admit the existence in international law of the principle with which this article is concerned…"); para. (9) of the commentary to draft article 17 on the succession of States in respect of State property, archives and debts, *Yearbook … 1981*, vol. II (Part Two), p. 46 ("The foregoing rule conforms to the opinions of publicists, who generally take the view that…"); para. (3) of the commentary to draft article 15 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 211 ("The majority of writers take the view, supported by State practice, …"); para. (15) of the commentary to draft article 15 on the succession of States in respect of treaties, *ibid.*, p. 213 ("Considerable support can be found among writers and in State practice for the view that general international law does impose an obligation…"); and para. (1) of the commentary to draft article 3 on the expulsion of aliens, *Yearbook … 2012*, vol. II (Part Two), p. 20 ("[The right to expel] is uncontested in practice as well as in case law and the legal writings."). See also para. (10) of the commentary to draft article 5 on the non-navigational uses of international watercourses, *Yearbook … 1994*, vol. II (Part Two), p. 98 (referring in general terms to "the views of learned commentators"); and paras. (3)–(5) of the commentary to draft article 32 on the law of treaties, *Yearbook … 1966*, vol. II, pp. 228–229 (finding that the division of opinion among jurists "was primarily of a doctrinal character" and "would be likely to produce different results only in very exceptional circumstances").

[94] See, for example, para. (3) of the commentary to draft article 32 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), p. 94 (citing an example of relevant State practice found in an article by R. L. Buell in the *Political Science Quarterly*, vol. 37 (1922), p. 620); para. (3) of the commentary to draft article 15 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 211 (citing *The Law of Treaties*, by A. D. McNair (Oxford, Clarendon Press, 1961), quoting a statement by the United Kingdom on Finland's position *vis-à-vis* its predecessor's treaties); para. (2) of the commentary to draft article 18 on diplomatic protection, *Yearbook … 2006*, vol. II (Part Two), p. 52 (citing writings of jurists in support of the proposition that "there is support in the practice of States, in judicial decisions and in the writings of publicists, for the position that the State of nationality … may seek redress for members of the crew of the ship who do not have its nationality"); and para. (10) of the commentary to draft article 5 on the non-navigational uses of international watercourses, *Yearbook … 1994*, vol. II (Part Two), p. 98 (including "the views of learned commentators" in "[a] survey of all available evidence of the general practice of States, accepted as law").

Chapter II

Operation of customary international law in the international legal system

34. This chapter includes observations regarding the Commission's apparent understanding of the binding nature and characteristics of the rules of customary international law, and of the relationship of customary international law with other international legal rules.

A. Binding nature and characteristics of the rules of customary international law

Observation 19

The Commission has consistently referred to customary international law as a set of rules generally binding on subjects of international law.[95] On several occasions, the Commission has opposed such rules to

[95] See, for example, paras. (1)–(4) of the commentary to draft article 34 on the law of treaties, *Yearbook … 1966*, vol. II, pp. 230–231 (excerpts reproduced in footnote 121 below) and para. (30) of the commentary to draft article 12 and para. (8) of the commentary to draft article 15 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), pp. 204 and 212, respectively. See also footnote 130 below. In its Guide to Practice on Reservations to Treaties, the Commission has alluded to the so-called theory of the "persistent objector", according to which a rule of customary international law would not be opposable to a State that has persistently objected to the rule during its formation; see para. (7) of the commentary to guideline 3.1.5.3

treaty rules, which, by definition, only bind the parties to the treaty.[96]

Observation 20

Reference was made in the work of the Commission to the possible existence of rules of regional customary international law.[97] In this regard, the question of whether a regional customary law rule would be binding on a State that has not specifically adopted or accepted it was also alluded to.[98] Furthermore, the Commission has referred to the possible existence of special rules, including customary rules or historic rights, governing the delimitation of certain maritime areas[99] or establishing a specific territorial, fluvial or maritime regime.[100]

Observation 21

The Commission has, on certain occasions, referred to the existence of rules of customary international law that are regarded as giving rise to so-called "*erga omnes* obligations".[101]

Observation 22

The Commission has, on various occasions, referred to the existence of rules of customary international law[102] that, by reason of their subject matter, are of a non-derogable character (peremptory norms/*jus cogens*).

35. The Commission has indicated that "the concept of peremptory norms of general international law is recognized in international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine".[103] Examples of peremptory norms presented by the Commission as generally recognized as such include the prohibition of aggression;[104] the prohibitions against slavery and the slave trade, genocide, racial discrimination and apartheid;[105] as well as the prohibition against torture and the obligation to respect the right of self-determination.[106] The Commission emphasized, however, the non-exhaustive character of any such list.[107]

36. It should be recalled that the Commission, in its draft articles on the law of treaties, proposed several provisions relating to *jus cogens*.[108] The Commission has, on multiple occasions, asserted that a treaty rule that conflicts

on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), pp. 221–222. In so doing, the Commission appears to have excluded the operation of any such theory with respect to rules of *jus cogens*; see para. (19) of the same commentary, *ibid.*, p. 224.

[96] See, for example, paras. (1)–(4) of the commentary to draft article 34 on the law of treaties, *Yearbook … 1966*, vol. II, pp. 230–231; para. (2) of the commentary to draft article 5 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 181 (referring to "obligations to which [a State] would be subject under international law independently of the treaty"); para. (30) of the commentary to draft article 12 on the succession of States in respect of treaties, *ibid.*, p. 204 ("While recognizing that an objective regime may arise from such a treaty, [the Commission] took the view that the objective regime resulted rather from the execution of the treaty and the grafting upon the treaty of an international custom."); and para. (7) of the commentary to guideline 3.1.5.3 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), p. 221 ("Customary rules are binding on States, independently of their expression of consent to a treaty rule."). See, however, section B below concerning the relationship between treaty rules and customary international law.

[97] See the report of the Study Group of the International Law Commission on fragmentation of international law, A/CN.4/L.682 and Add.1 and Corr.1 (available from the Commission's website, documents of the fifty-eighth session; the final text will be published as an addendum to *Yearbook … 2006*, vol. II (Part One)), paras. 213–215.

[98] *Ibid.*, para. 213 ("A separate, much more difficult case is the one where it is alleged that a regional rule (either on the basis of treaty practice or custom) is binding on a State even when the State has not specifically adopted or accepted it. This is the claim dealt with (albeit inconclusively) by the International Court of Justice in the *Asylum* (1950) and *Haya de la Torre* (1951) cases.").

[99] See para. (6) of the commentary to draft article 12 on the law of the sea, *Yearbook … 1956*, vol. II, p. 271 (acknowledging the possible existence of "special rules" and alluding to the possibility of "differences in customary law" in the field of maritime delimitation). See also para. (4) of the commentary to draft article 3, *ibid.*, p. 266 ("A claim to a territorial sea not exceeding twelve miles in breadth could be sustained *erga omnes*, by any State, if based on historic rights.").

[100] See para. (1) of the commentary to draft article 34 on the law of treaties, *Yearbook … 1966*, vol. II, pp. 230–231 ("The role played by custom in sometimes extending the application of rules contained in a treaty beyond the contracting States is well recognized. A treaty concluded between certain States may formulate a rule, or establish a territorial, fluvial or maritime regime, which afterwards comes to be generally accepted by other States and becomes binding upon other States by way of custom."). See also para. (8) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), pp. 198–199 (referring to the case made in the *Right of passage* case (*I.C.J. Reports 1960*, p. 6) for the proposition that a territorial right of passage may exist as a local or bilateral custom).

[101] See, in particular, para. (9) of the commentary to draft article 48 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), p. 127 ("While taking up the essence of this statement [the dictum of ICJ in the *Barcelona Traction* case concerning obligations *erga omnes*], the articles avoid use of the term 'obligations *erga omnes*', which conveys less information than the Court's reference to the international community as a whole and has sometimes been confused with obligations owed to all the parties to a treaty. Nor is it the function of the articles to provide a list of those obligations which under existing international law are owed to the international community as a whole. This would go well beyond the task of codifying the secondary rules of State responsibility, and in any event, such a list would be only of limited value, as the scope of the concept will necessarily evolve over time. The Court itself has given useful guidance: in its 1970 judgment it referred, by way of example, to 'the outlawing of acts of aggression, and of genocide' and to 'the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination'. In its judgment in the *East Timor* case, the Court added the right of self-determination of peoples to this list."). See also the commentary to draft article 49 on the responsibility of international organizations, *Yearbook … 2011*, vol. II (Part Two), pp. 89–91.

[102] Article 53 of the Vienna Convention on the Law of Treaties defines a *jus cogens* rule as a "peremptory norm of *general international law*". The Commission has indicated, in para. (14) of its commentary to guideline 3.1.5.3 on reservations to treaties, that a peremptory norm of general international law "is, in almost all cases, customary in nature" (*Yearbook … 2011*, vol. II (Part Three), p. 223), while also acknowledging that "the wording of article 53 of the 1969 and 1986 Vienna Conventions does not exclude the possibility that a treaty rule may, by itself, be a peremptory norm" (*ibid.*, footnote 1709).

[103] Para. (2) of the commentary to draft article 40 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), p. 112.

[104] *Ibid.*, para. (4) of the commentary to draft article 40.

[105] *Ibid.*

[106] *Ibid.*, p. 113, para. (5).

[107] *Ibid.*, para. (6). In the same passage, the Commission also recalls the possibility that new peremptory norms may come into existence as contemplated in article 64 of the 1969 Vienna Convention.

[108] See draft articles 41, paras. 5; 50; 61; and 67 on the law of treaties and commentaries thereto; *Yearbook … 1966*, vol. II, pp. 238–239, 247–249, 261 and 266–267, respectively.

with *jus cogens* is (or becomes) invalid.[109] Furthermore, the Commission has recognized that the peremptory character of a rule of customary international law also affects the operation of certain secondary rules relating to the responsibility for internationally wrongful acts.[110]

Observation 23

The Commission has indicated that peremptory norms are formed as a result of a process of widespread acceptance and recognition of such norms as peremptory by the international community as a whole.[111]

Observation 24

While stating that a rule of *jus cogens* "can be modified only by a subsequent norm of general international law having the same character",[112] the Commission has indicated that, at the present time, a modification of a rule of *jus cogens* would most probably be effected through a general multilateral treaty.[113]

B. Relationship of customary international law with treaties

37. The question of the relationship of customary international law with treaties was addressed in general terms in draft article 34 on the law of treaties, which provided as follows:

Article 34. Rules in a treaty becoming binding through international custom

Nothing in articles 30 to 33 [provisions relating to treaties and third States] precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law.[114]

38. The commentary to that draft article contained, *inter alia*, the following observations:

(1) The role played by custom in sometimes extending the application of rules contained in a treaty beyond the contracting States is well recognized. A treaty concluded between certain States may formulate a rule, or establish a territorial, fluvial or maritime regime, which afterwards comes to be generally accepted by other States and becomes binding upon other States by way of custom, rules of land warfare, the agreements for the neutralization of Switzerland, and various treaties regarding international riverways and maritime waterways. So too a codifying convention purporting to state existing rules of customary law may come to be regarded as the generally accepted formulation of the customary rules in question even by States not parties to the Convention.

(2) In none of these cases, however, can it properly be said that the treaty itself has legal effects for third States. They are cases where, without establishing any treaty relation between themselves and the parties to the treaty, other States recognize rules formulated in a treaty as binding customary law. In short, for these States the source of the binding force of the rules is custom, not the treaty. For this reason the Commission did not think that this process should be included in the draft articles as a case of a treaty having legal effects for third States. It did not, therefore, formulate any specific provisions concerning the operation of custom in extending the application of treaty rules beyond the contracting States. On the other hand, having regard to the importance of the process and to the nature of the provisions in articles 30 to 33, it decided to include in the present article a general reservation stating that nothing in those articles precludes treaty rules from becoming binding on non-parties as customary rules of international law.[115]

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[109] See *Yearbook … 1966*, vol. II, draft article 50 on the law of treaties and commentary thereto, pp. 247 *et seq.* (Draft article 50 reads: "A treaty is void if its conflicts with a peremptory norm of general international law…"); see also para. (8) of the commentary to draft article 41, *ibid.*, p. 239; and para. (1) of the commentary to draft article 61, *ibid.*, p. 261 ("Manifestly, if a new rule of that character—a new rule of *jus cogens*—emerges, its effect must be to render void not only future but existing treaties."). As regards the consequences of the nullity or termination of a treaty conflicting with a peremptory norm of general international law, see draft article 67 on the law of treaties and commentary thereto (*ibid.*, pp. 266–267). Similarly, the Commission has stated, in guiding principle 8 applicable to unilateral declarations of States capable of creating legal obligations, that "A unilateral declaration which is in conflict with a peremptory norm of general international law is void" (*Yearbook … 2006*, vol. II (Part Two), p. 165).

[110] See draft articles 26 (with regard to *jus cogens* in relation to circumstances precluding wrongfulness), 40 and 41 (content of the international responsibility in the case of serious breaches of obligations under peremptory norms of general international law) and 50 (obligations not affected by countermeasures) on the responsibility of States for internationally wrongful acts, and commentaries thereto, *Yearbook … 2001*, vol. II (Part Two), pp. 84–85, 112–116 and 131–134. See also draft articles 26, 41, 42 and 53 on the responsibility of international organizations, and commentaries thereto, *Yearbook … 2011*, vol. II (Part Two), pp. 75, 82, 83–84 and 94.

[111] Regarding this substantive requirement of general acceptance and recognition, see, in particular, para. (7) of the commentary to draft article 12 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), p. 56 ("Even fundamental principles of the international legal order are not based on any special source of law or specific law-making procedure, in contrast with rules of constitutional character in internal legal systems. In accordance with article 53 of the 1969 Vienna Convention, a peremptory norm of general international law is one which is 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. Article 53 recognizes both that norms of a peremptory character can be created and that the States have a special role in this regard as par excellence the holders of normative authority on behalf of the international community."). See also, on this point, *ibid.*, para. (5) of the commentary to draft article 26 on the responsibility of States for internationally wrongful acts, p. 85; and para. (6) of the commentary to draft article 40, p. 113 (referring to the formation of new peremptory norms through the process of acceptance and recognition by the international community of States as a whole). It should be noted that, while draft article 50 on the law of treaties (*Yearbook … 1966*, vol. II, p. 247) and draft article 53 on the law of treaties between States and international organizations or between international organizations (*Yearbook … 1982*, vol. II (Part Two), p. 56) refer in this context to "the international community of States as a whole", the draft articles on the responsibility of States for internationally wrongful acts (draft articles 25, 33, 42 and 48, pp. 28–30, para. 76, *Yearbook … 2001*, vol. II (Part Two)) and the draft articles on the responsibility of international organizations (draft articles 25, 33, 43 and 49; *Yearbook … 2011*, vol. II (Part Two), pp. 42–44) refer more generally to "the international community as a whole".

[112] See, in this regard, draft article 50 *in fine* on the law of treaties (*Yearbook … 1966*, vol. II, p. 247) as well as draft article 53 *in fine* on the law of treaties between States and international organizations or between international organizations (*Yearbook … 1982*, vol. II (Part Two), p. 56). This phrase was included in article 53 of the 1969 and 1986 Vienna Conventions. On the "strength" of *jus cogens* norms, see also para. (3) of the commentary to guideline 4.4.3 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), p. 162 ("Doubtless the rules of *jus cogens* will continue to evolve, but it seems unlikely that a reservation can contribute to destabilizing a norm presenting such a degree of binding force.").

[113] See, on this point, para. (4) of the commentary to draft article 50 on the law of treaties, *Yearbook … 1966*, vol. II, p. 248: "It would be clearly wrong to regard even rules of *jus cogens* as immutable and incapable of modification in the light of future developments. As a modification of a rule of *jus cogens* would today most probably be effected through a general multilateral treaty, the Commission thought it desirable to indicate that such a treaty would fall outside the scope of the article."

[114] *Ibid.*, p. 182.

[115] *Ibid.*, pp. 230–231.

39. The substance of draft article 34 was subsequently retained in article 38 of the 1969 Vienna Convention on the Law of Treaties, where the words "recognized as such" were added to qualify the rule of customary international law referred to in the provision.[116] Article 38 on the law of treaties between States and international organizations or between international organizations, adopted by the Commission in 1982, which later became article 38 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,[117] reiterated this provision, including the additional phrase introduced at the 1969 United Nations Conference on the Law of Treaties.[118]

40. In considering the various topics on its agenda, the Commission has addressed a number of aspects regarding the relationship of customary international law with treaties, as summarized in the following observations:

Observation 25

Recognizing that a treaty may codify existing rules of customary international law,[119] the Commission has often referred to treaties as possible evidence of the existence of a customary rule.[120]

Observation 26

While indicating that a treaty does not itself bind third States,[121] the Commission has, on several occasions, recognized that treaties may contribute to the crystallization[122] or development[123] of a rule of customary international law. The Commission, however, has found that the frequent enunciation of a provision in international treaties did not necessarily indicate that the provision had developed into a rule of customary international law.[124]

Observation 27

The Commission has alluded to the possibility that the emergence of a new rule of customary international law may modify a treaty, depending on the particular circumstances and the intentions of the parties to the treaty.[125]

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[116] This additional phrase was introduced on the basis of an amendment by the Syrian Arab Republic; see *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2, United Nations publication, Sales No. E.70.V.5), p. 155, paras. 311–312.

[117] This Convention is not yet in force.

[118] *Yearbook … 1982*, vol. II (Part Two), pp. 47–48.

[119] See, in general terms, *Yearbook … 1950*, vol. II, p. 368, para. 29 ("Perhaps the differentiation between conventional international law and customary international law ought not to be too rigidly insisted upon, however. A principle or rule of customary international law may be embodied in a bipartite or multipartite agreement so as to have, within the stated limits, conventional force for the States parties to the agreement so long as the agreement is in force; yet it would continue to be binding as a principle or rule of customary international law for other States. Indeed, not infrequently conventional formulation by certain States of a practice also followed by other States is relied upon in efforts to establish the existence of a rule of customary international law. Even multipartite conventions signed but not brought into force are frequently regarded as having value as evidence of customary international law.").

[120] See sections B and C of chapter I, above, concerning treaties as evidence of State practice and/or *opinio juris*. However, the Commission has also pointed to a divergence between a conventional regime and the applicable customary international law; see para. (8) of the commentary to article 8 of the draft Code of crimes against the peace and security of mankind, *Yearbook … 1996*, vol. II (Part Two), p. 29 (referring to the crime of genocide as "a crime under international law for which universal jurisdiction existed as a matter of customary law for those States that were not parties to the Convention and therefore not subject to the restriction contained therein [namely in its article 6, which restricts national court jurisdiction for genocide to the State in whose territory the crime occurred]").

[121] See paras. (1) to (4) of the commentary to draft article 34 on the law of treaties, *Yearbook … 1966*, vol. II, pp. 230–231, in particular, para. (1) ("*The role played by custom in sometimes extending the application of rules contained in a treaty beyond the contracting States is well recognized**. A treaty concluded between certain States may formulate a rule, or establish a territorial, fluvial or maritime regime, which afterwards comes to be generally accepted by other States and becomes binding upon other States by way of custom … *So too a codifying convention may come to be regarded as the generally accepted formulation of the customary rules** in question even by States not parties to the convention.") and para. (2) ("*In none of these cases, however, can it properly be said that the treaty itself has legal effects for third States. They are cases where, without establishing any treaty relation between themselves and the parties to the treaty, other States recognize rules formulated in a treaty as binding customary law**. In short, for these States the source of the binding force of the rules is custom, not the treaty."). This point was addressed in similar terms in para. (30) of the commentary to draft article 12 on the succession of States in respect of treaties and in para. (8) of the commentary to draft article 15 on that same topic; see *Yearbook … 1974*, vol. II (Part One), pp. 204 and 212, respectively.

[122] See para. (11) of the commentary to guideline 3.1.5.3 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), p. 223 ("A 'codification convention' often crystallizes as rules of general international law rules which did not have that status at the time of its adoption.").

[123] See, for example, para. (34) of the commentary to draft article 12 on the succession of Stateis in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 205 (referring to a right of free passage through the Suez Canal "whether by virtue of the treaty or of the customary regime which developed from it"); and para. (3) of the commentary to draft article 18 on the law of transboundary aquifers, *Yearbook … 2008*, vol. II (Part Two), p. 43 ("[The 'Martens clause'], which was originally inserted in the preamble of the Hague Conventions ... of 1899 and 1907 and has subsequently been included in a number of conventions and protocols, now has the status of general international law."). As an illustration of the possible impact of the adoption of a conventional rule on the Commission's views on a legal matter, see para. (5) of the commentary to draft article 11 on special missions, *Yearbook … 1967*, vol. II, p. 353 ("A rule frequently observed in practice is that the receiving State must ensure the possibility of [the local] recruitment [of staff required for special missions], which is often essential for the performance of the special mission's functions. In 1960 the Commission inclined to the view that this rule conferred a genuine privilege on the special mission. *In the light of the two Vienna Conventions, however, the Commission changed its opinion and in 1965 adopted the principle stated in article 10, paragraph 2 of this draft** [stating that 'Nationals of the receiving State may not be appointed to a special mission except with the consent of that State, which may be withdrawn at any time.']").

[124] See para. (3) of the commentary to draft article 7 on most-favoured-nation clauses, *Yearbook … 1978*, vol. II (Part Two), p. 25 ("Although the grant of most-favoured-nation treatment is frequent in commercial treaties, there is no evidence that it has developed into a rule of customary international law. Hence it is widely held that only treaties are the foundation of most-favoured-nation treatment.").

[125] See para. (3) of the commentary to draft article 38 on the law of treaties, *Yearbook … 1966*, vol. II, p. 236 ("As to the case of modification through the emergence of a new rule of customary law, [the Commission] concluded that the question would in any given case depend to a large extent on the particular circumstances and on the intentions of the parties."). This comment was made in relation to the Commission's explanation of its decision to remove, in the final version of the draft article, a subparagraph that appeared in draft article 68 of the 1964 draft and provided that "[a] treaty may be modified … (ii) by the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties". For the commentary to the latter provision, see *Yearbook … 1964*, vol. II, p. 198, para. (3). As is well known, the proposed draft article 38 was not retained by the 1969 United Nations Conference on the Law of Treaties.

Observation 28

The Commission has recognized that, with the exception of *jus cogens* norms,[126] States may depart from rules of customary international law through the conclusion of bilateral or multilateral agreements.[127] At the same time, the Commission has emphasized that a treaty, except where it provides otherwise, must be interpreted and applied in the light of existing rules of international law, including customary law.[128]

C. Relationship of customary international law with "general international law"

Observation 29

In certain instances, the Commission has employed the phrase "general international law" to refer, in a generic manner, to rules of international law other than treaty rules.[129] Also, on some occasions, the Commission appears to have used "general international law" and "customary international law" interchangeably.[130] The phrase "general international law" has also been used by the Commission as an umbrella term that includes both customary international law and general principles.[131]

Observation 30

On some occasions, the Commission has referred to general principles of law—possibly within the meaning of article 38, paragraph (1) (*c*), of the Statute of the International Court of Justice[132]—or to so-called general principles of international law.[133] The Commission has also indicated that such general principles may inform the international regulation of

[126] See section A of the present chapter, above.

[127] See, for example, para. (15) of the commentary to draft article 17 on the succession of States in respect of State property, archives and debts, *Yearbook … 1981*, vol. II (Part Two), p. 47 ("It is obviously within the discretion of States to conclude treaties making exceptions to a principle."); and para. (2) of the commentary to draft article 30 on the law of the sea, *Yearbook … 1956*, vol. II, p. 279 (alluding to the possibility of treaty-based policing rights being granted to warships in respect of foreign ships, thus departing from customary international law).

[128] See, for example, para. (3) of the commentary to draft article 60 on the law of the sea, *Yearbook … 1956*, vol. II, p. 293 ("The existing rule of customary law by which nationals of other States are at liberty to engage in such fishing on the same footing as the nationals of the coastal States should continue to apply. The exercise of other kinds of fishing in such areas must not be hindered except to the extent strictly necessary for the protection of the fisheries contemplated by the present article.") and para. (1) of the commentary to draft article 24 on the law of treaties, *Yearbook … 1966*, vol. II, p. 211 (referring to the "general rule … that a treaty is not to be regarded as intended to have retroactive effects unless such an intention is expressed in the treaty or is clearly to be implied from its terms").

[129] See, for example, para. (2) of the commentary to draft article 30 on the law of the sea, *Yearbook … 1956*, vol. II, p. 279 (indicating that the regulations contained in treaties granting certain policing rights to warships in respect of foreign ships could not yet be regarded as part of "general international law"); the comment made by the Commission with respect to the provisions of the preamble of the Model rules on arbitral procedure, *Yearbook … 1958*, vol. II, p. 86, para. 24 (those provisions … "govern it as principles of general international law rather than as deriving from the agreement of the parties"); draft article 1 (*b*) on the prevention or punishment of crimes against diplomatic agents and other internationally protected persons, *Yearbook … 1972*, vol. II, p. 312 ("'Internationally protected person' means ... [a]ny official of either a State or an international organization who is entitled, *pursuant to general international law or an international agreement**, to special protection."); para. (8) of the commentary to draft article 1, *ibid.*, p. 314 ("The expression 'general international law' is used to supplement the reference to 'an international agreement'…"); para. (3) of the commentary to draft article 18 on the law of transboundary aquifers, *Yearbook … 2008*, vol. II (Part Two), p. 43 (the "Martens clause"—see footnote 123 above); para. (2) of the commentary to draft article 10 on the effects of armed conflicts on treaties, *Yearbook … 2011*, vol. II (Part Two); para. (4) of the commentary to draft article 14 on the expulsion of aliens, *Yearbook … 2012*, vol. II (Part Two) ("It goes without saying that the expelling State is required, in respect of an alien subject to expulsion, to meet all the obligations incumbent upon it concerning the protection of human rights, both by virtue of international conventions to which it is a party and by virtue of general international law."); and, similarly, the commentary to draft article 25 on the expulsion of aliens, *Yearbook … 2012*, vol. II (Part Two).

[130] See, for example, the commentary to draft article 49 on the law of treaties, *Yearbook … 1966*, vol. II, pp. 246–247 ("(1) The endorsement of the criminality of aggressive war in the Charters of the Allied Military Tribunals for the trial of the Axis war criminals, the clear-cut prohibition of the threat or use of force in Article 2 (4) of the Charter of the United Nations, together with the practice of the United Nations itself, have reinforced and consolidated this development in the law… (5)… *The principles regarding the threat or use of force laid down in the Charter are, in the opinion of the Commission, rules of general international law which are today of universal application** … (8) … As pointed out in paragraph (1) above, the invalidity of a treaty procured by illegal threat or use of force is a principle which is *lex lata … [T]he great majority of international lawyers today unhesitatingly hold that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force**.").

[131] See the explanations contained in the report of the Study Group of the International Law Commission on fragmentation of international law, document A/CN.4/L.682 and Add.1 and Corr.1 (available from the Commission's website, documents of the fifty-eighth session; the final text will be published as an addendum to *Yearbook … 2006*, vol. II (Part One)), para. 194 (2) (*a*) ("*General international law (that is, general custom and general principles of law*)* fulfils gaps in the special regime and provides interpretative direction for its operation."); and para. 493 (3) (" 'General international law' clearly refers to general customary law as well as 'general principles of law recognized by civilized nations' under article 38 (1) (*c*) of the Statute of the International Court of Justice. But it might also refer to principles of international law proper and to analogies from domestic laws, especially principles of the legal process (*audiatur et altera pars, in dubio mitius*, estoppel and so on). In the practice of international tribunals, including the Appellate Body of the WTO or the European and Inter-American Courts of Human Rights reference is constantly made to various kinds of 'principles' sometimes drawn from domestic law, sometimes from international practice but often in a way that leaves their authority unspecified.").

[132] See, for example, para. (4) of the commentary to draft article 59 on the law of treaties, *Yearbook … 1966*, vol. II, p. 257 (principle of *rebus sic stantibus*); para. (1) of the commentary to draft article 7 on the nationality of natural persons in relation to the succession of States, *Yearbook …1999*, vol. II (Part Two), p. 30 ("The Commission recognizes that one of the general principles of law is the principle of non-retroactivity of legislation."); and para. (3) of the commentary to article 14 of the draft Code of crimes against the peace and security of mankind, *Yearbook … 1996*, vol. II (Part Two), p. 39 (explaining that "the possible defences to crimes covered by the Code [are] those defences that are well-established and widely recognized as admissible with respect to similarly serious crimes under national or international law"). For additional examples, see footnote 134 below.

[133] See, for example, *Yearbook … 1949*, p. 290, para. 52 (explaining that the articles of the draft declaration on the rights and duties of states enunciate "general principles of international law"); para. (8) of the commentary to article 68 on the law of the sea, *Yearbook … 1956*, vol. II, p. 298 ("[The principle of the sovereign rights of the coastal State], which is based on general principles corresponding to the present needs of the international community, is in no way incompatible with the principle of the freedom of the seas."). See also the following two footnotes.

particular subjects[134] or even the international legal system as a whole.[135]

Observation 31

Furthermore, in the work of the Commission, the phrase "general international law" was also used to refer to general rules of international law as opposed to rules pertaining to specific fields which include, *inter alia*, human rights law, environmental law, the law of the sea, etc.[136]

[134] Both general principles of law and general principles of international law have been referred to in this context. As regards general principles of law, see, in particular, para. (1) of the commentary to draft article 7 on the nationality of natural persons in relation to the succession of States, *Yearbook … 1999*, vol. II (Part Two), p. 30 (referring to non-retroactivity of legislation as a general principle of law that has "an important role to play" as regards nationality issues); article 14 of the draft Code of crimes against the peace and security of mankind, *Yearbook … 1996*, vol. II (Part Two), p. 39 ("The competent court shall determine the admissibility of defences in accordance with the general principles of law, in the light of the character of each crime."); para. (1) of the commentary to draft article 3 on the prevention of transboundary harm from hazardous activities, *Yearbook … 2001*, vol. II (Part Two), p. 153 ("Article 3 is based on the fundamental principle *sic utere tuo ut alienum non laedas*, which is reflected in principle 21 of the Stockholm Declaration."). Concerning general principles of international law, see, in particular, para. (8) of the commentary to draft article 3 on the law of the sea, *Yearbook … 1956*, vol. II, p. 266 ("It follows from the foregoing that the Commission came out clearly against claims to extend the territorial sea to a breadth which, in its view, jeopardizes the principle that has governed maritime law since Grotius, namely, the freedom of the high seas."); para. (1) of the commentary to draft article 27 on the law of the sea, *ibid.*, p. 278 ("The principle generally accepted in international law that the high seas are open to all nations governs the whole regulation of the subject."); the commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property (see footnote 47 above); *Yearbook … 1980*, vol. II (Part Two), p. 144, para. (12) ("That rationale of sovereign immunity appears to rest on a number of basic principles, such as common agreement or usage, international comity or courtesy, the independence, sovereignty and dignity of every sovereign authority, representing a progressive development from the attributes of personal sovereigns to the theory of equality and sovereignty of States and the principle of consent."); and *ibid.*, p. 156, para. (55) (discussing the "rational bases of State immunity" and referring to "the sovereignty, independence, equality and dignity of States" as notions that "seem to coalesce, together constituting a firm international legal basis for State immunity").

[135] See, in this regard, the following observation made by the Commission concerning the draft declaration on the rights and duties of States: "In conclusion it will be observed that the rights and duties set forth in the draft Declaration are formulated in general terms, without restriction or exception, as befits a declaration of basic right and duties. *The articles of the draft Declaration enunciate general principles of international law, the extent and the modalities of the application of which are to be determined by more precise rules**. Article 14 of the draft Declaration is a recognition of this fact. It is, indeed, a global provision which dominates the whole draft and, in the view of the Commission, it appropriately serves as a key to other provisions of the draft Declaration in proclaiming "the supremacy of international law" (*Yearbook … 1949*, p. 290, para. 52). See also para. (2) of the commentary to draft article 4 on the prevention of transboundary harm from hazardous activities, *Yearbook … 2001*, vol. II (Part Two), p. 156 (referring to the principle of good faith as covering "the entire structure of international relations" (citing R. Rosenstock, "The declaration of principles of international law concerning friendly relations: a survey", AJIL, vol. 65 (1971), p. 734)); as well as the observations made by the Commission with regard to the most-favoured-nation clause and the principle of non-discrimination, *Yearbook … 1978*, vol. II (Part Two), p. 11, para. 48 ("The Commission recognized several years ago that the rule of non-discrimination 'is a general rule which follows from the equality of States', and that non-discrimination is 'a general rule inherent in the sovereign equality of States'…"); and *ibid.*, p. 12, para. 50 (referring to "the obvious rule that, while States are bound by the duty arising from the principle of non-discrimination, they are nevertheless free to grant special favours to other States on the ground of some special relationship of a geographic, economic, political or other nature").

[136] See, in particular, the report of the Study Group of the International Law Commission on fragmentation of international law, *Yearbook … 2006*, vol. II (Part Two), p. 176, para. 243 ("The fragmentation of the international social world receives legal significance as it has been accompanied by the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice. What once appeared to be governed by 'general international law' has become the field of operation for such specialist systems as 'trade law', 'human rights law', 'environmental law', 'law of the sea', 'European law' and even such highly specialized forms of knowledge as 'investment law' or 'international refugee law', etc.—each possessing their own principles and institutions."). See also *ibid.*, p. 179, para. 251, subpara. (10), footnote 976 ("There is no accepted definition of 'general international law'. For the purposes of these conclusions, however, it is sufficient to define what is 'general' by reference to its logical counterpart, what is 'special'.").