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Identification of customary international law

Statement of the Chair of the Drafting Committee

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Mr. Chair,

This morning, it is my pleasure to introduce the third report of the Drafting Committee for the seventieth session of the International Law Commission, which concerns the topic “Identification of customary international law”. The report, which is to be found in document A/CN.4/L.908 issued on 17 May 2018, contains the texts and titles of the draft conclusions on identification of customary international law provisionally adopted by the Drafting Committee, and which the Drafting Committee recommends for adoption by the Commission on second reading.

Before commencing, allow me to pay tribute to the Special Rapporteur, Sir Michael Wood, whose mastery of the subject, guidance and cooperation once again greatly facilitated the work of the Drafting Committee. I also thank the other members of the Committee for their active participation and significant contributions. Furthermore, I wish to thank the Secretariat for its invaluable assistance. As always, and on behalf of the Drafting Committee, I am pleased to extend my appreciation to the interpreters.

Mr. Chair,

The Drafting Committee held five meetings on the topic, from 14 to 16 May 2018. It examined the 16 draft conclusions as adopted on first reading, which were referred to it by the Commission at the conclusion of the plenary debate.

Part One - Introduction

I shall begin with Part One, entitled “Introduction”, which comprises a single draft conclusion.

Draft conclusion 1

Mr. Chair,

The title of draft conclusion 1 is “Scope”, which was the title adopted on first reading. This draft conclusion deals with the scope of the draft conclusions, outlining what they seek to cover and apply to, and what matters fall outside their scope.

The Drafting Committee adopted this draft conclusion with no changes to the text adopted on first reading. In so doing, members of the Committee considered that clarifying that the draft conclusions do not deal with any possible burden of proof of rules of customary international law – a question raised by some members of the Commission – could be done in the general commentary. The Drafting Committee also noted that the commentary could clarify that no attempt is made to explain in general terms the question of the relationship between customary international law and other sources of international law; and that the topic did not address questions of hierarchy among rules of international law, including those concerning peremptory norms of general international law (*jus cogens*) and *erga omnes* obligations. A discussion took place regarding the apparent discrepancy, in English, between the term “determined” in draft conclusion 1 and the term “identification” in the title of the topic. The Special Rapporteur explained that the two terms were used interchangeably throughout the draft conclusions, with the word “determine” relating more to the identification of a particular rule (as opposed to customary international law more broadly), in the sense that it is used in Article 38, paragraph 1, of the Statute of the International Court of Justice. The Drafting Committee found that to be appropriate.

Part Two

Let me now turn to Part Two - “Basic approach” - which sets out the basic approach to the identification of customary international law. It comprises two draft conclusions.

Draft conclusion 2

Mr. Chair,

The title of draft conclusion 2 is “Two constituent elements”. The Drafting Committee adopted the draft conclusion with no changes to the text adopted on first reading.

Draft conclusion 2 sets out the basic approach, according to which the identification of rules of customary international law requires an inquiry into two distinct, yet related, questions: whether there is a general practice and whether such general practice is accepted as law (that is, accompanied by *opinio juris*). The Drafting Committee acknowledged the strong support expressed by States for this two-element approach over the years of the Commission’s consideration of the topic. The proposal by some States to add the words “of States”, after the word “practice” was considered. In view of the unqualified formulation “a general practice” employed in the Statutes of both the Permanent Court of International Justice and the International Court of Justice, and given the possible relevance of practice of international organizations, it was deemed preferable to maintain the text adopted on first reading. The Drafting Committee also considered that Part Three of the draft conclusions was devoted to the question of explaining the meaning of “general practice”, so that a qualifier in draft conclusion 2 was anyhow unnecessary.

The Drafting Committee also considered whether an additional paragraph should be added to draft conclusion 2 in order to clarify that a rigorous and systematic approach ought to be employed in the identification of customary international law. It was considered, however, that the draft conclusions as a whole require just that, and that the commentary will highlight that. The commentary would also clarify that a measure of deduction, as an occasional aid in the application of the two-element approach, may only be resorted to with great caution, and not as an alternative to the standard, inductive approach.

Draft conclusion 3

Let me turn to draft conclusion 3, which is entitled “Assessment of evidence for the two constituent elements”. The Drafting Committee adopted the draft conclusion with no changes to the text adopted on first reading.

The purpose of draft conclusion 3 is to provide guidance as to the assessment of evidence for the two constituent elements of customary international law in ascertaining whether there is indeed a general practice accepted as law. The Special Rapporteur highlighted the importance of the draft conclusion in setting out clear yet flexible requirements, and the Drafting Committee noted that the text had met with general approval both among States and among members of the Commission.

Draft conclusion 3 comprises two paragraphs.

Paragraph 1 sets out an overarching principle that underlies all of the draft conclusions, namely that the assessment of any and all available evidence must be careful and contextual. Whether a general practice that is accepted as law exists must be carefully investigated in each case, in the light of all the relevant circumstances. The Drafting Committee considered that no amendment was required for this paragraph.

According to paragraph 2: “Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element.” In light of comments received by some States in relation to the need for a rigorous analysis, the suggestion was made to add a qualifier such as “rigorous”, “careful”, or “systematic”, before the word “assessment” in the second sentence of paragraph 2. The Drafting Committee considered this suggestion, and members generally agreed that the assessment of evidence for the two constituent elements must indeed be careful in nature. However, the Drafting Committee noted that the focus of paragraph 2 was limited to emphasising that the existence of one of the two constituent elements may not be deduced merely from the existence of the other, and that a separate inquiry needs to be carried out for each. In order not to detract from that, the Drafting Committee decided to maintain the language adopted on first reading unchanged, with the understanding that the commentary would indeed clarify that the assessment of evidence for the two constituent elements must be rigorous and systematic.

Part Three

Mr. Chair,

Let me now address Part Three, which offers more detailed guidance on the first of the two constituent elements of customary international law, “a general practice”, and comprises five draft conclusions. Its title is “A general practice”, as was adopted on first reading.

Draft conclusion 4

The title of draft conclusion 4 is “Requirement of practice”. It comprises three paragraphs. The Drafting Committee adopted this draft conclusion with some stylistic changes to paragraph 1. No changes were made to paragraphs 2 and 3 as adopted on first reading.

Mr. Chair,

The purpose of draft conclusion 4 is to specify whose practice is to be taken into account when ascertaining the existence of a general practice for purposes of determining whether a rule of customary international law exists, as well as the role of such practice. Its three paragraphs refer, in sequence, to States, to international organizations, and to actors other than States and international organizations, recognizing that only practice of States and international organizations may be creative, or expressive, of customary international law. The Drafting Committee considered that it was important to preserve the careful balance between these three paragraphs that had been reached during the adoption of the draft conclusions on first reading, with some necessary clarifications to be made in the commentary.

In relation to all three paragraphs, further to a suggestion by the Special Rapporteur in light of the debate in the plenary, the terminology “formation, or expression, of rules of customary international law” was maintained, as it was understood to indicate clearly the two different aspects of the contribution of practice to the identification of customary international law.

Paragraph 1 of draft conclusion 4 reads as follows: “The requirement of a general practice, as a constituent element of customary international law, refers primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law”. This paragraph indicates that it is primarily the practice of States that is to be looked to in determining

the existence and content of rules of customary international law. The Drafting Committee considered several possible modifications to the text for purposes of greater clarity, and eventually introduced two stylistic changes to this paragraph: the term “of a general practice” was repositioned immediately after “the requirement”, and the term “refers” was employed instead of “means that it is”.

The Drafting Committee also considered whether to maintain the word “primarily” before “the practice of States”, as the concern was expressed that removing it, instead of highlighting the primary role of the practice of States in the formation, or expression, of rules of customary international law, might be interpreted to imply the opposite. It was thus decided to maintain the word “primarily” in light of its dual purpose. First, this term reflects the primacy of States as subjects of international law possessing a general competence, emphasizing the preeminent role that their conduct has for the formation and identification of customary international law. At the same time, it indicates that it is not exclusively State practice that may be relevant, thus linking this paragraph with the practice of international organizations, which is addressed in paragraph 2.

Paragraph 2 concerns the practice of international organizations and indicates that “in certain cases” such practice also contributes to the identification of rules of customary international law. The paragraph deals with practice attributed to international organizations as such, not that of their member States acting within them (which is attributed to the States in question).

This paragraph attracted much interest on the part of States and members of the Commission, as well as a range of opinions as to the appropriate way in which the relevance of practice of international organizations should be captured. A lengthy discussion took place in the Committee as to whether the word “may” should be added to paragraph 2 before “also contributes”, and as to whether the word “rules” should be changed with the singular “a rule”. The proposed changes aimed at emphasizing that caution was needed in assessing the relevance of the practice of international organizations, as well as better indicating that the practice of international organizations would not be relevant in all cases. Members of the Committee were generally of the view that the text adopted on first reading was clear enough in this respect, and that the delicate balance achieved on first reading with regard to the wording of this paragraph would be altered by the proposed changes. More specifically, the addition of the word “may” as an additional qualifier was considered by some to be excessive, and also unnecessary in light of the presence of the term

“in certain cases” at the beginning of the paragraph. The proposed modification of “rules” to “a rule” was deemed too restrictive as well.

The Drafting Committee also discussed the concern raised by some members of the Commission that the wording of paragraph 2 did not make it sufficiently clear that the practice of international organizations should only be relevant when contributing to the “general practice” that is a constitutive element of customary international law. A proposal was considered to make the relationship between paragraph 2 and paragraph 1 more explicit in this regard. The Committee concluded, however, that the word “primarily” in paragraph 1, and the word “also” in paragraph 2, provide a sufficiently clear link between the two paragraphs.

The Drafting Committee thus decided to maintain the language of paragraph 2 unchanged from the text adopted on first reading, with the understanding that the commentary would clarify the reference to the practice of international organizations, including when such practice may be of relevance; what kind of practice may be relevant; and what considerations should guide an assessment of the weight to be given to it.

Paragraph 3 of draft conclusion 4 clarifies that the conduct of actors other than States and international organizations is neither creative nor expressive of customary international law. As such, their conduct does not serve as primary evidence of the existence and content of rules of customary international law. The paragraph recognizes, however, that such conduct may have a limited and indirect role in the identification of customary international law, by stimulating or recording practice and acceptance as law (*opinio juris*) of States and/or international organizations. The Drafting Committee discussed the view that, as currently drafted, paragraph 3 may be considered as too restrictive in relation to the conduct of non-State actors, for example in relation to self-determination and non-international armed conflicts. It was decided to retain the language adopted on first reading, not least given the positive consideration thereof by States, on the understanding that the commentary would clarify the possible relevance of the conduct of actors other than States and international organizations.

Draft conclusion 5

Mr. Chair,

Let me now turn to draft conclusion 5, entitled “Conduct of the State as State practice”, as adopted on first reading. This draft conclusion indicates that “State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.” The formulation adopted on first reading is familiar to States, having been used in the Articles on Responsibility of States for internationally wrongful acts. The Drafting Committee adopted the text of the draft conclusion without making any changes to it.

Draft conclusion 6

The title of draft conclusion 6 is “Forms of practice”. The draft conclusion comprises three paragraphs. It was adopted with no changes to the text adopted on first reading.

The purpose of this draft conclusion is to clarify the types of conduct that are covered under the term “practice”, providing examples thereof and stating that no type of practice has *a priori* primacy over another.

Paragraph 1 provides that practice may take a wide range of forms, including inaction. An extensive debate took place with regard to the proposal by the Special Rapporteur to qualify “inaction” with the term “deliberate”. The proposal reflected the concerns of a number of States that there should be greater clarity about the circumstances, already recognized by the Commission in the draft commentary adopted as part of the first reading text, in which inaction would amount to practice.

Some members of the Drafting Committee considered that the term “deliberate” might hinder the necessary flexibility in the identification of customary international law, as it might constitute too stringent a threshold for the identification of practice in relation to certain categories of rules. Given this insistence, the Committee considered that the words “may, under certain circumstances”, could sufficiently point to the necessity that the State in question be conscious about refraining from acting in a given situation, as explained in the commentary adopted on first reading.

Paragraph 2 provides a non-exhaustive list of forms of practice that are commonly found useful for the identification of customary international law. The Committee considered the issue of the absence from this draft conclusion of any reference to the practice of international organizations. It was noted that the commentary to draft conclusion 4 included reference to the

fact that “references in the draft conclusions and commentaries to the practice of States should ... be read as including, in those cases where it is relevant, the practice of international organizations”. The Drafting Committee decided to maintain the language adopted on first reading, with the understanding that this general *mutatis mutandis* clause be given more prominence in the commentaries.

Paragraph 3 of draft conclusion 6 indicates that there is no predetermined hierarchy among the various forms of practice. No proposals for textual changes were considered by the Drafting Committee, which adopted it without change from the text adopted on first reading.

Draft conclusion 7

Mr. Chair,

I will now proceed to draft conclusion 7 - “Assessing a State’s practice”. This draft conclusion concerns the assessment of the practice of a particular State in order to determine the position of that State as part of assessing the existence of a general practice. It comprises two paragraphs.

Paragraph 1 states that in seeking to determine the position of a particular State on the matter in question, account is to be taken of all available practice of that State, which is to be assessed as a whole. The Drafting Committee adopted this paragraph without change from the text adopted on first reading.

Paragraph 2 reads as follows: “Where the practice of a particular State varies, the weight to be given to that practice may, depending on the circumstances, be reduced”. This provision refers explicitly to situations where there is or appears to be inconsistent practice of a particular State. Taking into consideration comments by States, and further to a proposal by the Special Rapporteur, the Drafting Committee added the term “depending on the circumstances” to convey more clearly the need for caution in such situations, given that not all cases of inconsistency would point to the same outcome. The commentary will explain this.

Draft conclusion 8

Mr. Chair,

The title of draft conclusion 8 is “The practice must be general”. The Drafting Committee adopted draft conclusion 8 with no changes to the formulation adopted on first reading. It comprises two paragraphs.

The purpose of paragraph 1 is to clarify the notion of generality of practice; it embodies two requirements. First, the practice must be followed by a sufficiently large and representative number of States. Second, such instances must exhibit consistency. As to the first aspect, the Committee considered, following a debate on the matter, that the word “sufficiently” before the expression “widespread and representative” was necessary, as it implied and provided the necessary flexibility in the assessment of the generality of the practice, especially in circumstances where only a small number of States was involved in a given type of practice. As to the second element of generality, the requirement of consistency, the Drafting Committee considered the proposal by the Special Rapporteur that the term “consistent” be replaced by “virtually uniform”, thus addressing a proposal made by some States in light of the terminology employed by the International Court of Justice in the *North Sea Continental Shelf* cases.

In this regard, members of the Drafting Committee considered that “virtually uniform” was only one of the terms used in the case-law, which all referred to a similar standard; and that it might be read to imply not only a stricter threshold of consistency, but also of participation by States in the relevant practice. It was accepted that complete consistency was not required.

The Drafting Committee also considered the question of “specially affected States”, which had been raised by the Special Rapporteur and by a number of States and members of the Commission. As suggested by the Special Rapporteur, it was agreed that given the balance achieved on first reading, the term will be discussed in the commentary to the conclusion, including by explaining that it does not refer to powerful States but rather to those States whose interests may be particularly affected by a certain rule of customary international law.

Paragraph 2 of draft conclusion 8 refers to the temporal element, making clear that a relatively short period in which a general practice is followed is not, in and of itself, an obstacle to determining that a corresponding rule of customary international law exists. The Drafting Committee adopted this paragraph without change from the text adopted on first reading. It was agreed that some time must however elapse, as there was no such thing as “instant custom”.

Part Four

Mr. Chair,

Let me now turn to Part Four - entitled “Accepted as law (*opinio juris*)” - which offers more detailed guidance on the second of the two constituent elements of customary international law. It comprises two draft conclusions.

Draft conclusion 9

The title of draft conclusion 9 is “Requirement of acceptance as law (*opinio juris*)”. The Drafting Committee adopted the draft conclusion with no changes to the text adopted in 2016.

The purpose of this draft conclusion, which comprises two paragraphs, is to encapsulate the nature and function of the second constituent element of customary international law, acceptance as law (*opinio juris*). Paragraph 1 indicates that acceptance as law (*opinio juris*), as a constituent element of customary international law, refers to the requirement that the relevant practice must be undertaken with a sense of legal right or obligation. Paragraph 2 distinguishes a general practice accepted as law from mere usage or habit.

Draft conclusion 10

Let me now address draft conclusion 10, entitled “Forms of evidence of acceptance as law (*opinio juris*)”. It comprises three paragraphs concerning the forms of evidence of the second constitutive element of rules of customary international law. The Drafting Committee once again retained the wording adopted on first reading.

Paragraph 1 states the general proposition that acceptance as law (*opinio juris*) may take a wide range of forms.

Paragraph 2 provides a non-exhaustive list of forms of evidence of acceptance as law (*opinio juris*), including those most commonly resorted to for such purpose, which also explains why there are some differences between this list and the one provided by draft conclusion 6, paragraph 2, as each intends to refer to the principal examples connected with each of the constituent elements. A debate took place as to whether the list in paragraph 2 should be expanded to include two additional potential forms of evidence: legislative acts; and resolutions adopted by international organizations or at intergovernmental conferences. As for legislative acts, it was

considered that these would be covered in the commentary since it is only rarely specified in laws (as opposed perhaps to acts in connection with their adoption) that they are mandated under or give effect to customary international law. As for resolutions, these were considered to be covered under the existing wording of “conduct in connection with resolutions”, and it was recalled that a particular draft conclusion was dedicated to exploring their role. It was also noted that the list in paragraph 2 is not meant to be exhaustive. The Committee also understood that the commentary will indicate that the forms of practice listed in paragraph 2 may apply, *mutatis mutandis*, to international organizations.

Paragraph 3 addresses the failure by States to react, within a reasonable time, to a practice as possible evidence of their *opinio juris*. The Drafting Committee noted that the reference to inaction in this conclusion served a different purpose from that in draft conclusion 6. This justified the differences between the reference to inaction in the two draft conclusions. Furthermore, the Drafting Committee considered a proposal to delete the words “over time”, as they might suggest the necessity of a particular duration of a State’s inaction, which may not always be required. The view of the Drafting Committee was that the text adopted on first reading captured well the fact that, where a State did not or could not have been expected to know of a certain practice, or had not yet had a reasonable time to respond, inaction could not be attributed to an acknowledgment that such practice was mandated (or permitted) under customary international law.

Part Five

Mr. Chair,

Let me now turn to Part Five, which is entitled “Significance of certain materials for the identification of customary international law”. This part comprises four draft conclusions.

Draft conclusion 11

The title of draft conclusion 11 is “Treaties”. The Drafting Committee made no change to the text adopted on first reading.

The purpose of this draft conclusion, which comprises two paragraphs, is to address the potential significance of treaties for the identification of customary international law.

Paragraph 1 sets out three distinct circumstances in which rules set forth in a treaty may be relevant to the identification of customary international law, distinguished by the time when the

rule of customary international law was (or began to be) formed. Subparagraph (a) concerns the situation where it is established that a rule set forth in a treaty is declaratory of a pre-existing rule of customary international law. Subparagraph (b) deals with the case where it is established that a general practice that is accepted as law (accompanied by *opinio juris*) has crystallized around a treaty rule elaborated on the basis of only a limited amount of State practice. Subparagraph (c) concerns the case where it is established that a rule set forth in a treaty has generated a new rule of customary international law. This paragraph reflects the terminology used by the International Court of Justice.

Paragraph 2 seeks to caution that the existence of similar provisions in a number of bilateral or other treaties, establishing similar rights and obligations for a broad array of States, does not necessarily indicate that a rule of customary international law is reflected in such provisions. Indeed, it may suggest that no rule exists and thus the need for treaties. This question was addressed by the International Court of Justice in the *Diallo* case.

Draft conclusion 12

Let me now turn to draft conclusion 12, entitled “Resolutions of international organizations and intergovernmental conferences”. It comprises three paragraphs. The Drafting Committee adopted paragraphs 1 and 3 without changes to the first reading text, and amended paragraph 2.

The purpose of this draft conclusion is to address the potential role that resolutions adopted by international organizations or at intergovernmental conferences may play in the identification of rules of customary international law and their content. The lack of parallelism between this draft conclusion and draft conclusion 11, on treaties, was found to be justified given the different guidance and clarifications that were sought to be made with respect to each of these materials.

Paragraph 1 clarifies that “a resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law”. It thus makes clear that the adoption of a resolution does not create such law. The Drafting Committee adopted it without changes to the formulation on first reading.

Paragraph 2, as reformulated, reads as follows: “A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development.” Taking into account the plenary debate, the Drafting Committee decided not to add the words “in

certain circumstances” to this paragraph as the Special Rapporteur had originally proposed, as the word “may” was considered sufficient in conveying that. In order to maintain consistency throughout the text of the draft conclusions, the Drafting Committee replaced the word “establishing” with the term “determining”.

Paragraph 3 clarifies that a provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law. This paragraph was adopted with no change to the first reading text.

Draft conclusion 13

The title of draft conclusion 13 is “Decisions of courts and tribunals”, as adopted on first reading. The Drafting Committee adopted the draft conclusion without making any change to the first reading text. It comprises two paragraphs.

The purpose of this draft conclusion is to address the potential role of decisions of courts and tribunals, both international and national, as subsidiary means in the identification of rules of customary international law. Paragraph 1 refers to “international courts and tribunals”, a term intended to cover any international body exercising judicial powers that is called upon to consider rules of customary international law. Express reference is made to the International Court of Justice in view of the significance of its jurisprudence for the identification of customary international law. Paragraph 2 concerns decisions of national courts.

The Drafting Committee considered a suggestion made by some members of the Commission to address together decisions of national and international courts as subsidiary means for determining rules of customary international law. The Drafting Committee considered that the distinction between international and national courts and tribunals was important to maintain, in practical terms and also in view of the dual nature of decisions of national courts, which could be a form of State practice or acceptance as law as well as a subsidiary means for the determination of rules of customary international law. Furthermore, in view of the positive reception of this draft conclusion by States, the Drafting Committee considered that no change to the text adopted on first reading was warranted. The commentary will highlight that in any case, that is, as regards decisions of both national and international courts, their value would primarily depend on the quality of reasoning and on how they were received by States and future case-law.

Draft conclusion 14

Let me now address draft conclusion 14, “Teachings”. The Drafting Committee adopted it with no changes to the formulation adopted on first reading.

The purpose of this draft conclusion is to address the role of teachings (in French, *doctrine*) as subsidiary means for the identification of customary international law. In following closely the language of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice, it provides that such works may be resorted to as a subsidiary means for determining a rule of customary international law. The term “teachings” is to be understood in a broad sense, including for instance audiovisual materials. Furthermore, as indicated in the commentary adopted on first reading, the term “publicist” covers all those whose scholarly work may elucidate questions of international law. The importance of having regard, so far as possible, to writings representative of the principal legal systems and regions of the world and in various languages, was emphasized.

Part Six

Mr. Chair,

Let me now turn to Part Six, which comprises a single draft conclusion on the persistent objector. Its title is “Persistent objector”.

Draft conclusion 15

The title of draft conclusion 15 is also “Persistent objector”. It comprises three paragraphs. The Drafting Committee adopted paragraphs 1 and 2 without change from the first reading text, and introduced an additional paragraph 3.

Paragraph 1 indicates that “[w]here a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection”. The timing of objection is critical: it must have been made while the rule in question was in the process of formation. If a State establishes itself as a persistent objector, the rule is not opposable to it for so long as it maintains the objection. Paragraph 2 elaborates further on the stringent requirements for the application of the rule, providing that “[t]he objection must be clearly expressed, made known to other States, and

maintained persistently”. Although different views were expressed by members of the Commission as to place of this draft conclusion within the set of conclusions on the topic of ‘Identification of customary international law’, the Drafting Committee considered it appropriate to retain the text of these two paragraphs as adopted on first reading, also in view of the wide support expressed by States for this draft conclusion.

Further to a proposal made by the Special Rapporteur, the Drafting Committee introduced an additional paragraph 3, which reads as follows: “The present draft conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).” While the general commentary to the draft conclusions would clarify that they are all without prejudice to questions of hierarchy among rules of international law, including those concerning peremptory norms of general international law (*jus cogens*), the Drafting Committee agreed to clarify that in the particular context of draft conclusion 15. It was understood that the commentary will recall that this ‘without prejudice’ clause applies to the other conclusions as well.

The Drafting Committee considered whether the text of paragraph 3 should more explicitly reflect the view that persistent objection was not permissible in relation to peremptory norms of general international law (*jus cogens*) as well as, possibly, *erga omnes* obligations. The Drafting Committee considered these issues were not studied under the topic, and were in fact now examined by the Commission under a different topic. The new paragraph 3 is thus to clarify that the Commission was not prejudging any such questions.

Part Seven

Mr. Chair,

Let me now turn to the final Part Seven, which also consists of a single draft conclusion. Its title is “Particular customary international law”.

Draft conclusion 16

The title of draft conclusion 16 is also “Particular customary international law”. It comprises two paragraphs.

The purpose of this draft conclusion is to address the particular situation of rules of customary international law applying only among a limited number of States.

Paragraph 1 defines a rule of particular customary international law as a rule applying only among a limited number of States. It is to be distinguished from general customary international law, which in principle applies to all States. Importantly, a rule of particular customary international law as such creates neither obligations nor rights for third States.

Paragraph 2 reads as follows: “To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves”. This paragraph addresses the substantive requirements for identifying a rule of particular customary international law. Determining whether such a rule exists consists of a search for a general practice prevailing among the States concerned that is accepted by them as law governing their relations. The Drafting Committee inserted the term “among themselves” at the end of this paragraph, upon suggestion by the Special Rapporteur, to clarify the necessary inquiry and to underline that the two-element approach is stricter in the case of rules of particular customary international law.

Finally, as to the final form of the provisions, the Drafting Committee decided to maintain the term “conclusions”. This was considered appropriate since the objective of the topic is to offer some reasonably authoritative guidance to those called upon to identify the existence and content of rules of customary international law. It was also consistent with the decisions taken by the Commission in connection with other related topics, without prejudice to the substantive consideration of the final forms of other topics presently under discussion.

Mr. Chair,

This concludes my introduction of the third report of the Drafting Committee for this session. As I stated at the beginning of my statement, the Drafting Committee recommends that the Commission adopt the draft conclusions on identification of customary international law on second reading.

Thank you.

Annex

Identification of customary international law

Part One Introduction

Conclusion 1 Scope

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

Part Two Basic approach

Conclusion 2 Two constituent elements

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

Conclusion 3 Assessment of evidence for the two constituent elements

1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.
2. Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element.

Part Three A general practice

Conclusion 4 Requirement of practice

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

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

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

Conclusion 5

Conduct of the State as State practice

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

Conclusion 6

Forms of practice

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

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

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

Conclusion 7

Assessing a State’s practice

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

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

Conclusion 8

The practice must be general

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

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

Part Four
Accepted as law (*opinio juris*)

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

1. The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation.
2. A general practice that is accepted as law (*opinio juris*) is to be distinguished from mere usage or habit.

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

1. Evidence of acceptance as law (*opinio juris*) may take a wide range of forms.
2. Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.
3. Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.

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

Conclusion 11
Treaties

1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:
 - (a) codified a rule of customary international law existing at the time when the treaty was concluded;
 - (b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or
 - (c) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law.
2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.

Conclusion 12

Resolutions of international organizations and intergovernmental conferences

1. A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.
2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development.
3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).

Conclusion 13

Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.
2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules.

Conclusion 14

Teachings

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

Part Six

Persistent objector

Conclusion 15

Persistent objector

1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.
2. The objection must be clearly expressed, made known to other States, and maintained persistently.
3. The present draft conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).

Part Seven

Particular customary international law

Conclusion 16

Particular customary international law

1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.
2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves.
