Comments from the United States
On the International Law Commission's Draft Conclusions on
The Identification of Customary International Law
As Adopted by the Commission in 2016 on First Reading

General Observations

The United States appreciates the opportunity to provide written comments on the International Law Commission's Draft Conclusions on the Identification of Customary International Law, and accompanying commentaries, which were adopted on first reading in 2016. The United States recognizes and greatly appreciates the efforts of the Commission, and in particular its Special Rapporteur, Sir Michael Wood, on this important topic.

The United States believes that identifying whether a rule has become customary international law requires a rigorous analysis to determine whether the strict requirements for formation – a general and consistent practice of States followed by them out of a sense of legal obligation – are met. Although there is no precise formula to indicate how widespread and consistent a practice must be, the State practice must generally be extensive and virtually uniform, including among States particularly involved in the relevant activity (i.e., specially affected States). This high threshold required to establish that a particular rule is customary international law is important to all aspects of analyzing or otherwise identifying customary international law.

Against this background, we agree with many of the propositions in the Draft Conclusions and commentaries. The Commission and its Special Rapporteur have produced an impressive draft that is already contributing to a better understanding of the formation and identification of customary international law. However, the United States continues to have serious concerns regarding certain issues addressed in the Draft Conclusions and commentaries. We are particularly concerned about Draft Conclusions and commentaries that we believe go beyond the current state of international law such that the result is best understood as proposals for progressive development on those issues. Although recommendations regarding progressive development are appropriate in some Commission topics, we believe that they are not well-suited to this project, whose purpose and primary value, as we understand it, is to provide non-experts in international law, such as national court judges, with an easily understandable guide to the established legal framework regarding the identification of customary international law.[1] Mixing elements of progressive development and established rules in this project risks confusing and misleading readers and undermining the utility, authority, and credibility of the final product. We therefore recommend revising the conclusions and commentaries to focus exclusively on sound, existing legal methodology, and in particular not to depart from established standards on

[1] The United States agrees with the Special Rapporteur's statement in his first report that "the Commission should aim to describe the current state of international law on the formation and evidence of rules of customary international law, without prejudice to developments that might occur in the future." First Report on Formation and Evidence of Customary International law, International Law Commission, Sixty-fifth session (2013)(A/CN.4/663), para. 16.

the formation of customary international law. To the extent that the Commission wishes to include recommendations with regard to progressive development in its conclusions and commentary on this topic, we believe it is essential that such recommendations be clearly identified as such and distinguished from elements that reflect the established state of the law or that reflect existing legal methodology.

We take this opportunity to address the most significant of our concerns regarding the Draft Conclusions and commentaries. We note that our failure to comment on any particular aspect of the commentaries should not be taken as U.S. agreement with it.

Practice of International Organizations

The United States believes that Draft Conclusion 4 (Requirement of practice) is an inaccurate statement of the current state of the law to the extent that it suggests that the practice of entities other than States contributes to the formation of customary international law. In particular, the statement in paragraph 1 that "it is *primarily* the practice of States that contributes to the formation, or expression, of rules of customary international law" (emphasis added) inaccurately suggests that entities other than States contribute to the formation of customary international law in the same way as States. In addition, the statement in paragraph 2 that "[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law" inaccurately suggests that international organizations may contribute to the formation of customary international law in the same way as States.

It is axiomatic that customary international law results from the general and consistent practice of States followed by them out of a sense of legal obligation. This basic requirement has long been reflected in the jurisprudence of the International Court of Justice.[2] It is also reflected in the practice of States in their own statements about the elements required to establish the existence of a customary international law rule.[3]

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[2] See, e.g., *Colombian-Peruvian asylum case, Judgment of November 20th, 1950. I C.J. Reports 1950*, p. 266, at pp 276-277; *North Sea Continental Shelf, Judgment, I C.J Reports 1969*, p 3, at pp. 42-43, paras. 73-74; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment, I C.J. Reports 1986*, p. 14, at pp. 97-98, paras. 183-186, *Jurisdictional Immunities of the State (Germany v. Italy Greece intervening). Judgment, I.C.J. Reports 2012*, p 99, at pp. 122-123, para. 55, p 143, para 101.

[3] See, e.g., John B. Bellinger, III and William J Haynes II, "A US Government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*," International Review of the Red Cross, Volume 89, number 866, June 2007, p, 444; Trans-Pacific Partnership Agreement, done at Auckland February 4, 2016, Annex 9-A ("The Parties confirm their shared understanding that 'customary international law' generally and as specifically referenced in Article 9.6 (Minimum Standard of Treatment) results from a general and consistent practice of States that they follow from a sense of legal obligation.") (reflecting the agreed views of Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam); Dominican Republic-Central America-United States Free Trade Agreement, done at Washington, August 5, 2004, Annex 10-B (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, United States), U.S -Morocco Free Trade Agreement, signed at Washington, June 15, 2004, Annex 10-A; Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, signed at Mar del Plata, November 4, 2005, Annex A; U.S -Oman Free Trade Agreement, signed at Washington, January 19, 2006, Annex 10-A; U.S-Colombia Trade Promotion Agreement, signed at Washington, November 22, 2006, Annex 10-A; U S.-Panama Trade Promotion

Draft Conclusion 4 deviates from this established understanding of the practice requirement by asserting that the practice of international organizations – as distinct from the practice of member States that constitute those international organizations – may, in some cases, similarly contribute to the formation of customary international law. There is no similar support for this proposition either in the practice and *opinio juris* of States or in other authoritative sources, and the commentary to Draft Conclusion 4 cites none.[4] To the contrary, a number of States have explicitly rejected this proposition in their statements before the General Assembly Sixth Committee, and others have expressed doubts or seem only to support a role for certain international organizations.[5]

Accordingly, the claim in the Draft Conclusion with regard to a direct role for the practice of international organizations as such in the formation of customary international law can only be understood as a proposal by the Commission for the progressive development of international law. As noted above, we believe that such proposals are inappropriate to this project, whose principal value is to distill and clarify existing law for non-experts in international law, including judges and practitioners at the national level. If these claims are nonetheless retained, we believe it is essential that they be clearly identified as proposals for progressive development to avoid giving readers the misimpression that they are intended to reflect the established state of the law as it currently exists.

However, even if understood as a proposal for the progressive development of customary international law, the United States does not believe that the statements in Draft Conclusion 4 suggesting a direct role for international organizations in the development of customary international law are sufficiently explained and developed to provide a meaningful basis on which States could assess their merits. In this regard, we have concerns in at least five respects.

The first way in which the proposition that the practice of international organizations contributes to the formation and expression of customary international law is not adequately developed concerns when it is that such contributions occur. Draft Conclusion 4, paragraph 2, states that "[i]n certain cases" the practice of international organizations contributes to the formation, or expression, of rules of customary international law. Yet neither the Draft Conclusion nor the commentary fully defines what those cases are. Rather, the commentary states that where States have transferred exclusive competences to an international organization,

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Agreement, signed at Washington, June 28, 2007, Annex 10-A; U.S.-South Korea Free Trade Agreement, signed at Washington, June 30, 2007, Annex 11-A; Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, signed at Kigali, February 19, 2008, Annex A.

[4] Indeed, the only cases the commentary cites on this issue underscore that it is the practice of States from which customary international law is derived. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 97, para. 183, and *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 143, para. 101

[5] See, e.g., 2016 statements by Israel (A/C.6/71/SR.22, para. 39), Mexico (A/C.6/71/SR.22, para 22), and Russia (A/C.6/71/SR.21, para. 49); 2015 and 2016 statements by Argentina (A/C.6/70/SR 23, para 70 and A/C.6/71/SR.22, para 75); 2014 statement by Malaysia (A/C.6/69/SR.27, para. 44), and 2014 statement by Norway on behalf of the Nordic countries (A/C.6/69/SR.25, para. 130). See also the statement of the European Union (A/C.6/71/SR.20, para 45).

the practice of the organization "most clearly" counts; when States have only conferred powers that are functionally equivalent to those of States, the organization's practice "may" count "in certain [undefined] cases;" and where States have done neither, the organization's practice is "unlikely" to be relevant. However, even when States provide broad State-like powers or exclusive competences to an international organization, it is rarely, if ever, with the express authorization that the organization exercise the powers of the member States to generate practice for the purpose of customary international law. Since the mandates of international organizations are generally carefully negotiated in treaties, we would be concerned by a novel interpretation of international law that would implicitly and retroactively expand the mandates of international organizations in this unclear way. Moreover, we note that the commentary does not cite any legal support for the commentary's approach to any of the three categories of practice by international organizations discussed.

The second way in which the proposition is not adequately developed is that the Draft Conclusions and commentary fail to address how one would determine the *opinio juris* of an international organization. If the practice of an international organization ever directly contributed to the formation or expression of customary international law, it would only be when the international organization engages in the practice out of a sense that it has the legal obligation to do so. See Draft Conclusion 9. The question that arises is how to determine whether an international organization has the requisite *opinio juris*. Is it the *opinio juris* of the secretary general (or equivalent), the secretariat, all member States, or a subset thereof? This crucial question is not addressed in the Draft Conclusions or commentary, and as noted above, is not, in our experience, addressed expressly in the mandates of international organizations.

The third way in which the proposition is not adequately developed is the failure to articulate the types of conduct by international organizations that might constitute practice for the purpose of Draft Conclusion 4. International organizations are very different from States in that they are created by and composed of States and do not have distinct branches of government. Therefore, the forms of State practice discussed in Draft Conclusion 6 do not all have clear analogues in the activities of international organizations.

The fourth way in which the proposition is not adequately developed concerns the consequences for a traditional analysis of saying that the practice of some or all international organizations contributes to the creation or expression of customary international law. One implication is that in some circumstances the practice of international organizations may contribute in such a way that the conclusion would be that a customary international rule exists when an analysis of the practice and *opinio juris* of States alone would say that the rule has not attained the status of custom. The reverse might also be true, i.e., the practice and *opinio juris* of States might dictate that a certain act is a requirement of customary international law, but contrary practice by international organizations would preclude that conclusion. The United States does not believe that support exists for either of these important implications of the proposition set forth in Draft Conclusion 4, paragraph 2.

The fifth way in which the proposition is not adequately developed is the failure to consider the precise range of practice deemed relevant in conducting a customary international law analysis. The practice of *all* States is relevant to whether there is a general and consistent

State practice, and the task of analyzing State practice is made easier since they number fewer than 200. By contrast, the Commission's text has paid no attention to how such an approach would operate with respect to international organizations. Indeed, we believe that the Commission's approach unnecessarily confuses matters by implying that every time one engages in an analysis of the existence of a rule of customary international law, it is necessary to analyze not just State practice, but the practice of hundreds if not thousands of international organizations with widely varying competences and mandates.

Finally, the United States believes that the discussion in paragraph (8) of the commentary demonstrates why the better approach is to recognize that it is the practice of States within international organizations that is the practice (with *opinio juris*) that contributes to the formation and expression of custom, not the practice of the international organization as such. That paragraph argues that, in weighing the practice of an international organization, one should consider the number of member States and their reaction to the practice of the international organization plus whether the organization's practice is carried out on behalf of the member States, whether the members States have endorsed the practice, and whether the practice is consonant with that of member States. In other words, one should look through the international organization to its member States to see how to value the practice of the international organization. We believe that, as the discussion in paragraph (8) suggests, what is really of relevance is the practice and *opinio juris* of the member States themselves, not the practice of the international organization.

For the above reasons, we believe Draft Conclusion 4 should be revised as follows:

Conclusion 4
Requirement of practice
1. The requirement, as a constituent element of customary international law, of a general practice means that it is ~~primarily~~ the practice of States that contributes to the formation, or expression, of rules of customary international law.
~~2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.~~
2. Conduct of other actors, such as international organizations, 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~~.

The same point should be clarified in Draft Conclusion 2, which would read:

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 of States that is accepted as law (*opinio juris*).

Corresponding changes need to be made in the commentary.

We also note here our recommended changes to paragraph (10) of the commentary to Draft Conclusion 4, which discusses the role of the International Committee of the Red Cross (ICRC). Although we support the important role of the ICRC provided in the 1949 Geneva Conventions, the paragraph could be more consistent with the primacy of States in the development and determination of customary international humanitarian law. In particular, we recommend avoiding characterizing the statements of the ICRC as "shaping" the practice of States reacting to such statements, which is a term used with respect to no other non-state actor and also appears inconsistent with the final sentence of the paragraph. (The commentary could perhaps note the role of the ICRC in "encouraging" States to act in certain ways.) States' reactions to such statements should be considered in line with what is said in the earlier paragraphs of the commentary to this conclusion.

In addition, we note that States have expressed concerns to the ICRC that its accounts of relevant practice, at times, do not accurately reflect the actual practice of States. The ICRC generally does not involve States in the preparation of ICRC publications that characterize State practice, such as the ICRC's study on Customary International Humanitarian Law and the ICRC's Commentaries to the Geneva Conventions. Outside observers, who are not as familiar with the nuances of a State's practice and internal procedures, may misinterpret the ICRC's account of the State's statements or practice or mistake documents discussed by the ICRC as constituting official government views.[6] The commentary's use of the term "records" to describe the ICRC's publications may also contribute to confusion on this point by suggesting that such publications simply record State practice, as opposed to summarizing and offering the ICRC's characterization of it, as is usually the case. For these reasons, we recommend noting that States have expressed concerns with the accuracy or characterization of such accounts and revising the last clause of the first sentence of paragraph (10) to read as follows: "and publications of the ICRC may assist in identifying relevant practice (although the best approach will be to review a State's practice directly)." By way of example, the United States has noted in its comments on the ILC's Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties that the draft commentary inadvertently misinterprets U.S. practice by relying on the ICRC's characterization of such practice in the ICRC's study on Customary International Humanitarian Law.

Opinio Juris and "Rights"

The United States notes that the State practice that contributes to the formation of customary international law has often been referred to historically as practice that is undertaken out of "a sense of legal obligation."[7] The Draft Conclusions and commentaries expand this

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[6] John B. Bellinger, III and William J. Haynes II, "A US Government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*," International Review of the Red Cross, Volume 89, number 866, June 2007, p. 447 ("Finally, the Study often fails to distinguish between military publications prepared informally solely for training or similar purposes and those prepared and approved as official government statements. This is notwithstanding the fact that some of the publications cited contain a disclaimer that they do not necessarily represent the official position of the government in question ")

[7] See, e.g., Restatement Third of the Foreign Relations Law of the United States, section 102(2), John B. Bellinger, III and William J Haynes II, "A US Government response to the International Committee of the Red Cross study

language to include practice undertaken with a sense of legal right. In particular, paragraph 1 of Draft Conclusion 9 provides that:

> **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. (underlining added)
> 2. ...

Similar language is found in the commentaries, including repeated references to a requirement that the State practice be accompanied by a conviction that it is "permitted, required or prohibited"[8] (underlining added).

As an initial matter, we suggest using "out of" rather than "with" because "out of" more clearly conveys that the entirety of the practice must be out of a sense of legal obligation. For example, a practice might be conducted that was driven only partially by legal considerations. The entirety of the practice might be understood to be undertaken "with" a sense of legal obligation, but only that part of the practice that was done "out of" a sense of legal obligation would be the practice that is accepted as law.

The United States agrees, in principle, that international law recognizes that States have certain rights (such as the inherent right of self-defense, or navigational rights and coastal state entitlements under the law of the sea), and that States exercising those rights may do so with the legal view that they are legally entitled to do so. However, we believe that, in this context, expressly including the concept of a legal right in Draft Conclusion 9 is unnecessary because States have generally understood the phrase undertaken out of "a sense of legal obligation" to encompass, where appropriate, State practice undertaken out of a sense of legal right or obligation (or, in the words of the International Court of Justice, a "recognition that a rule of law or legal obligation is involved"[9]). For example, one State's legal obligation can sometimes be characterized as a right of other States (e.g., one State's obligation not to commit acts of aggression is also the right of other States to be free from acts of aggression), and vice versa Adding "right or" to the Draft Conclusion risks creating the misimpression that the concept of legal rights is not already contemplated in the phrase "a sense of legal obligation."

Addition of the phrase "right or" is also potentially confusing by suggesting that the same inquiry into State practice and *opinio juris* to identify whether States *must* act in a certain way is also needed to ascertain whether States *may* act. The United States believes that it is important that the Draft Conclusion and commentary adhere to common, widely used language on this issue, both to avoid suggesting any conflict with existing State practice and in order to avoid being misunderstood to affect the longstanding principle that States are free to act in the absence

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Customary International Humanitarian Law," International Review of the Red Cross, Volume 89, number 866, June 2007, p. 444.

[8] See, e.g., paragraph (2) to the commentary to Draft Conclusion 9.

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

of a legal restriction. See *The Case of the S.S. "Lotus,"* P.C.I.J., Series A, No. 10 (1927), p. 18. States are not required to establish *opinio juris* or that a general and consistent practice of States supports an action as lawful before they can lawfully engage in a practice that is not otherwise legally restricted.

Given the potential for misunderstanding on this issue and the longstanding use of "a sense of legal obligation," we therefore believe the text of the Draft Conclusion should retain the common formulation and omit "right or," which was not found in the Special Rapporteur's initial draft of the Draft Conclusion.[10] We believe the commentary should then explain that the widely used phrasing "a sense of legal obligation" can encompass not merely legal obligations but also, in appropriate circumstances, legal rights. The commentary should also be explicit that, where there is no legal restriction, a State need not identify a specific customary international law right to justify its action, but instead the State may rely on the general principle that States are free to act in the absence of legal restrictions.

For the foregoing reasons, the United States believes that Draft Conclusion 9 should be edited as follows:

> **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~~ out of 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.

In any event, the United States also believes language along the following lines should be added to the commentary:

> (#) Acceptance of a rule as law (*opinio juris*) has commonly been described in terms of "a sense of legal obligation," and Draft Conclusion 9 adheres to this phrasing to avoid suggesting any change in the common understanding. In appropriate circumstances, however, States have long understood the concept to encompass legal rights as well as legal obligations—showing, in the words of the International Court of Justice, a "general recognition that a rule of law or legal obligation is involved."[11]
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> (##) Draft Conclusion 9, however, does not suggest that, where there is no legal restriction, a State needs to identify a specific customary international law right to justify its action. In other words, consistent with the longstanding principle that States are free to act in the absence of a legal restriction, it is not necessary to establish *opinio juris* or a general and consistent State practice that an action is lawful before a State may engage in the activity. See *The Case of the S.S. "Lotus"*, P.C.I.J., Series A, No. 10 (1927), p. 18.

[10] Report of the International Law Commission, 66th Session (2014), Official Records of the General Assembly, Sixty-ninth session, Supplement No. 10 (A/69/10), pp. 240-241, footnote 830.
[11] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 43, para. 74.

Comments on Specific Text

Draft Conclusion 2 (Two constituent elements), Commentary paragraph (5)

The United States agrees that the two-element approach "does not ... preclude a measure of deduction," as stated in paragraph (5) of the commentary to Draft Conclusion 2. However, we are concerned that that paragraph does not adequately define the circumstances in which deductive reasoning is appropriate and when it would run afoul of the rule in Draft Conclusion 2 that – to determine the existence of a customary rule – it is necessary to ascertain whether there is a general practice that is accepted as law. We recommend revising paragraph (5) to emphasize that a deductive approach must be used with caution to avoid identifying purported rules as customary international law that do not result from a general and consistent practice of States followed by them out of a sense of legal obligation.

We also believe that the final phrase of paragraph (5), referring to the concept of an "indivisible regime," should be deleted. Although the International Court of Justice used the term in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* judgment to describe the unique interplay of three provisions of the Law of the Sea Convention, the Court does not suggest that the concept is generally applicable (or define the criteria for its application). Nor is there any basis in State practice that we are aware of that would support the suggestion that "indivisible regimes" are an exception to the requirements of a general practice that is accepted as law.

Draft Conclusion 5 (Conduct of the State as State practice), Commentary paragraph (5).

The United States has concerns with the statement in paragraph (5) of the commentary to Draft Conclusion 5, which asserts that "[p]ractice must be publicly available or at least known to other States in order to contribute to the formation and identification of rules of customary international law." The statement does not indicate what is meant by the purported requirement that practice be "publicly available" and no authority is cited to support it. The fact that the practice might not otherwise be "publicly available" or known to some would not, in our view, preclude its relevance to the formation and identification of customary international law. For this reason, we suggest that the sentence either be deleted or revised accordingly.

Draft Conclusions 6 (Forms of practice) and 10 (Forms of evidence of acceptance as law (*opinio juris*)) -- Inaction

The United States shares the concerns reflected in the statements of many States before the General Assembly's Sixth Committee in 2016 regarding the circumstances in which State inaction should be considered either State practice or evidence of *opinio juris* for the purpose of the identification of customary international law. We agree that great caution is appropriate

because of the many different factors and motivations that may lead a State to decline to take action, particularly in the international arena.

With regard to inaction as State practice, we agree with the statement in paragraph (3) of the commentary to Draft Conclusion 6 that "only deliberate abstention from acting may serve" as State practice. Therefore, in order for a State's inaction to "count" as State practice, it must be shown that the State had full knowledge of the facts and deliberately declined to act. However, the United States believes that three edits should be made to this paragraph of the commentary to underscore the limited circumstances in which inaction constitutes relevant State practice. First, to acknowledge the challenge this standard properly imposes, the United States believes a new third sentence should be added to paragraph (3) that reads: "It is recognized that this deliberate abstention may be difficult to demonstrate and should not be presumed to exist." Second, the word "may" should be added to the next sentence to make clear that the examples given of omissions that may constitute State practice only do so if the above standard of deliberate abstention is met. Third, the last example ("abstaining from the threat or use of force") should be deleted as there are so many reasons other than customary international law (including treaty and policy-based reasons) that a State may abstain from threatening or using force that it is unlikely that it could be demonstrated that a State did so out of a belief that it was required by customary international law.

Paragraph (3) would, therefore, read:

> (3) Paragraph 1 further makes clear that inaction may count as practice. The words "under certain circumstances" seek to caution, however, that only deliberate abstention from acting may serve such a role; the State in question needs to be conscious about refraining from acting in a given situation. It is recognized that this deliberate abstention may be difficult to demonstrate and should not be presumed to exist. Examples of such omissions (sometimes referred to as "negative practice") may include abstaining from instituting criminal proceedings; and refraining from exercising protection in favour of certain naturalized persons~~; and abstaining from the threat or use of force~~. [footnote omitted]

Situations in which a State's inaction reflects the State's *opinio juris* are even more exceptional than those situations in which the State's inaction is deliberate and thus may constitute practice. Most State behavior (both action and inaction) is not motivated by international legal considerations. Therefore, a State's failure to act rarely evidences its views on international law. For example, one could not infer from a State's decision not to exercise diplomatic protection in a given circumstance that the State had concluded a particular act (a regulation or other measure) was not wrongful under international law. There are many instances where a State may believe that it has valid grounds to exercise diplomatic protection and that the international responsibility of the other State has been engaged, but for political or practical reasons decides not to espouse the claim (e.g., to avoid a bilateral irritant, to address domestic political concerns, or for other non-legal reasons).

Given this context, we recommend changes both to the text of Draft Conclusion 10 and to paragraph 7 to the commentary to it.

In order to make clear that a State's deliberate inaction must be motivated by legal considerations to reflect *opinio juris*, we recommend that paragraph 3 of Draft Conclusion 10 be revised to read as follows:

> 3. Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that the States ~~were~~ was in a position to react and the circumstances called for some reaction, and that the State's decision not to react was made out of a sense of legal obligation

In addition, although we agree with the two "requirements" for silence to serve as acceptance as law stated in paragraph (7) to the commentary on Draft Conclusion 10, we believe that the first requirement needs to be revised in order to reflect the fact that States frequently choose for political (international or domestic) or other reasons, such as limited government resources, to refrain from engaging in legally permissible acts.

Therefore, we believe that the sentence beginning "First" in paragraph (7) should read:

> First, it is essential that a reaction to the practice in question would have been called for: this may be the case, for example, where the practice is one that (directly or indirectly) affects — usually unfavourably — the interests or rights of the State failing or refusing to act to such a degree or under such circumstances that its failure to react is evidence of its legal position. [footnotes omitted]

Draft Conclusion 6 (Forms of practice) – Other Issues

The United States agrees that State practice comes in a wide variety of forms as stated in Draft Conclusion 6. We are concerned, however, that the structure of this Draft Conclusion may be misleading to readers in two respects.

First, we believe that the first paragraph of the Draft Conclusion should be reworded to add "may" in the second sentence both for consistency with the first and third sentences (both of which use "may") and to underscore that each State act must be assessed to determine whether it is relevant practice for the purposes of a given customary international law analysis.

Second, the United States believes that the examples of forms of State practice in paragraph 2 of the Draft Conclusion should be reordered. Although paragraph (5) of the commentary says that the order of the items in paragraph 2 is not intended to be significant, we believe that it is nonetheless more appropriate to start with more action-oriented practice as it is frequently the most probative form of practice. A reordering may also help the reader distinguish between practice and *opinio juris,* as statements are more likely to embody the latter.[12]

[12] See paragraph (3) of the commentary to Draft Conclusion 10.

The United States, therefore, proposes that Draft Conclusion 6 read:

Conclusion 6
Forms of practice

1. Practice may take a wide range of forms. It may 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~~ executive conduct, including operational conduct "on the ground"; legislative and administrative acts; decisions of national courts; diplomatic acts and correspondence; conduct in connection with treaties; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.

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

Along the same lines, we suggest refining the draft commentary to paragraph 3 to provide more guidance to practitioners in assessing the various forms of practice. As the United States noted in response to the ICRC's *Customary International Humanitarian Law* study, "[a]lthough [military] manuals may provide important indications of State behavior and *opinio juris*, they cannot be a replacement for a meaningful assessment of operational State practice in connection with actual military operations."[13] Therefore, we suggest including discussion in the commentary indicating that actual operational conduct is frequently the most probative form of a State's practice.

Draft Conclusion 7 (Assessing a State's practice)

The United States is concerned that paragraph 2 of Draft Conclusion 7 could be misread to suggest that States with varying practice are afforded less weight relative to the practice of other States under customary international law. A State with varying practice might not support an asserted rule to the same degree as a State whose practice consistently supports the rule. However, it seems inconsistent with the principle of the sovereign equality of States to say that the former State's practice is of less weight than the latter. The former's "weight" is merely placed in support of a different legal rule, or the absence of a rule. For this reason, we would suggest revising paragraph 2 to read:

> 2. Where the practice of a particular State in relation to a purported rule varies, ~~the weight to be given to that practice may be reduced~~ that practice contributes less to the

[13] John B. Bellinger, III and William J. Haynes II, "A US Government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*," International Review of the Red Cross, Volume 89, number 866, June 2007, p. 445.

conclusion that such a customary law rule has formed than where a State's practice is consistent in relation to the purported rule.

Draft Conclusion 8 (The practice must be general)

The United States continues to believe that Draft Conclusion 8 should define more clearly the quantum and quality of State practice that is required to identify a rule of customary international law. We do not believe that "sufficiently" in the first paragraph of the Draft Conclusion is adequate for this purpose – indeed, it begs the question of what degree of widespread and representative practice is "sufficient" to meet the standard. Rather, the Draft Conclusion should incorporate the "extensive and virtually uniform" standard articulated by the International Court of Justice in the *North Sea Continental Shelf* cases,[14] as it is widely recognized by States as the threshold that generally must be met to demonstrate the existence of a customary rule.

The United States also believes that the important role of specially affected States should be addressed in the Draft Conclusion itself. A requirement that the practice of specially affected States be considered is an integral part of the *North Sea Continental Shelf* standard.[15] Moreover, as noted in the commentary at paragraph (4), "[i]t would clearly be impractical" to determine the existence or content of a rule of customary international law without considering the practice of the States most engaged in the relevant activity. Further, although the commentary makes passing reference to specially affected States in paragraph (4) and footnote 297, we believe that the Draft Conclusions and commentary may lead to confusion by defining what it means for practice to be "general" in the Draft Conclusion with no reference to specially affected States, but then suggesting their practice is "an important factor" in paragraph (4) of the commentary and only using the term "specially affected" in a footnote.

Finally, the United States believes that Draft Conclusion 8 should explicitly acknowledge that the practice of States that does not support a purported rule is to be considered in assessing whether that rule is customary international law.[16] It is critical that "negative practice" be given

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

[15] *Id* ("[A]n indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; — and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.").

[16] See, e.g., *The Case of the S.S. "Lotus,"* P.C.I.J., Series A, No. 10 (1927), pp. 28-29 ("[I]t will suffice to observe that the decisions quoted sometimes support one view and sometimes the other. . . . [A]s municipal jurisprudence is thus divided, it is hardly possible to see in it an indication of the existence of the restrictive rule of international law which alone could serve as a basis for the contention of the French Government."); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996* p 266, at pp 311-12 (Dissenting Opinion of Vice-President Schwebel) ("One way of surmounting the antinomy between practice and principle would be to put aside practice. That is what those who maintain that the threat or use of nuclear weapons is unlawful in all circumstances do. ... State practice demonstrates that nuclear weapons have been manufactured and deployed by States for some 50 years; that in that deployment inheres a threat of possible use, and that the international community, by treaty and through action of the United Nations Security Council, has, far from proscribing the threat or use of nuclear weapons in all circumstances, recognized in effect or in terms that in certain circumstances nuclear weapons may be used or their use threatened."); *Colombian-Peruvian asylum case, Judgment of November 20th, 1950, I.C.J. Reports*

sufficient weight.[17] Just as seeking contrary evidence to disprove a hypothesis is a sound methodological practice that is part of the scientific method, consideration of contrary evidence should also be part of sound methodology for identifying customary international law.

For the foregoing reasons, the United States believes Draft Conclusion 8 should read as follows:

Conclusion 8
The practice must be general

1. The relevant practice must be general, meaning that it must generally be extensive and virtually uniform, ~~sufficiently widespread and representative, as well as consistent~~ including among States whose interests are specially affected.
2. Provided that the practice is general, no particular duration is required.
3. Evidence of contrary practice, i.e., practice evincing a different potential interpretation of the law, is to be considered.

Corresponding edits should be made to the commentary. For example, in paragraph (4) of the commentary to Draft Conclusion 8, it would be helpful to explain further why it is important to consider the extent to which "those States that are particularly involved in the relevant activity or most likely to be concerned with the alleged rule have participated in the practice." In particular, the practice of States that are particularly involved in the relevant activity is likely to be "of a significantly greater quantity and quality" as compared to the practice of States that do not have significant experience in the matter.[18]

1950, p. 266, at p. 277 ("The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence "); *Jurisdictional Immunities of the State (Germany v Italy. Greece intervening), Judgment, I C J Reports 2012*, p 99, at p. 134-135, para. 77 ("In the Court's opinion, State practice in the form of judicial decisions supports the proposition that State immunity for *acta jure imperii* continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum State. That practice is accompanied by *opinio juris*, as demonstrated by the positions taken by States and the jurisprudence of a number of national courts which have made clear that they considered that customary international law required immunity. The almost complete absence of contrary jurisprudence is also significant, as is the absence of any statements by States in connection with the work of the International Law Commission regarding State immunity and the adoption of the United Nations Convention or, so far as the Court has been able to discover, in any other context asserting that customary international law does not require immunity in such cases.")

[17] John B. Bellinger, III and William J. Haynes II, "A US Government response to the International Committee of the Red Cross study Customary International Humanitarian Law," International Review of the Red Cross, Volume 89, number 866, June 2007, p. 445 ("Fourth, although the Study acknowledges in principle the significance of negative practice, especially among those States that remain non-parties to relevant treaties, that practice is in important instances given inadequate weight").

[18] John B. Bellinger, III and William J. Haynes II, "A US Government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*," International Review of the Red Cross, Volume 89, number 866, June 2007, pp 445-46; see also Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 American Journal of International Law 235, 249 (1996) ("I find it difficult to

Draft Conclusion 10 (Forms of evidence of acceptance of law (*opinio juris*)) – Other Issues

Please see the discussion above for U.S. concerns with regard to the circumstances in which the inaction or silence of a State may properly be viewed as State practice or evidence of the *opinio juris* of the State concerned.

The United States wishes also to note with regard to paragraph (5) of the commentary to Draft Conclusion 10 that caution must be exercised in assessing what constitutes evidence of the *opinio juris* of the State. For example, official government publications frequently (if not most commonly) reflect policy and domestic legal considerations rather than, or in addition to, any international law factors. Moreover, as the United States noted in response to the ICRC's *Customary International Humanitarian Law* study, "[a]lthough [military] manuals may provide important indications of State behavior and *opinio juris*, they cannot be a replacement for a meaningful assessment of operational State practice in connection with actual military operations."[19] Similarly, decisions of national courts are generally based on domestic law, rather than international law. Evidence must therefore be carefully assessed to determine whether it in fact reflects a State's views on the current state of customary international law.

In addition, in many instances, limited information about the full range of relevant State practice or *opinio juris* should warrant caution in reaching conclusions about whether a customary law rule has formed. Some practice of States may be known to other States but not otherwise publicly available. In addition, most legal advice that is given within the executive branches of governments is provided on a confidential basis. Care must be taken to account for all relevant practice and *opinio juris*, even such practice and *opinio juris* as may be inaccessible to the public, in reaching conclusions about whether a customary law rule exists.[20]

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accept the view, sometimes advanced, that all states, whatever their geographical situation, military power and interests, inter alia, have an equal role in this regard. Belligerency is only one factor here. The practice and opinion of Switzerland, for example, as a neutral state, surely have more to teach us about assessment of customary neutrality law than the practice of states that are not committed to the policy of neutrality and have not engaged in pertinent national practice. The practice of 'specially affected states' -such as nuclear powers, other major military powers, and occupying and occupied states-which have a track record of statements, practice and policy, remains particularly telling I do not mean to denigrate state equality, but simply to recognize the greater involvement of some states in the development of the law of war, not only through operational practice but through policies expressed, for example, in military manuals ").

[19] John B. Bellinger, III and William J. Haynes II, "A US Government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*," International Review of the Red Cross, Volume 89, number 866, June 2007, p. 445

[20] See, e.g., Daniel Bethlehem, *The Secret Life of International Law*, 1 Cambridge Journal of International and Comparative Law 23, 24 (2012)("And, uniquely in the case of international law, the interpretation and application of the law by states is an important part of the creation and development of the law—through state practice, through opinio juris, through the conduct of states in the interpretation and application of treaties—for example, under some of the sub–provisions of Article 31 of the Vienna Convention on the Law of Treaties, such as subsequent practice in the interpretation of treaties—in their conduct relevant to the interpretation and application of Security Council resolutions, and so on. Given this. if one is concerned to undertake a rigorous, considered exercise of deciding what the law is, you cannot simply look at the text of an instrument. You have to look more widely at a whole range of other things. And some of this is visible and collected, for example, in the British Yearbook, British practice Most

Draft Conclusion 11 (Treaties)

The United States agrees with the text of Draft Conclusion 11 (Treaties) and believes it accurately reflects the ways in which a treaty provision may come to reflect a rule of customary international law.

We are, however, concerned about aspects of the commentary to the Draft Conclusion.

First, we believe that the last phrase of the first sentence of paragraph (3) of the commentary ("treaties that have obtained near-universal acceptance may be seen as particularly indicative in this respect") and accompanying footnote should be deleted. We believe that this passage is likely to be misunderstood to suggest that widely ratified treaties most likely reflect customary international law norms, when that is not the case. Similarly, we believe that the quotations included in footnote 323 may inaccurately suggest that the requirement to demonstrate both a general practice and acceptance as *customary international law* may be bypassed in the case of widely ratified treaties.

Second, the last sentence of paragraph (3) of the commentary should be edited to replace "participation" with "ratification," which would be more precise. "Participation" could be misunderstood to suggest that a treaty negotiated by only a handful of States is likely to be influential, when it is not. In addition, this paragraph should be supplemented to observe that mere ratification by States of a treaty does not itself reflect that particular provisions of the treaty may correspond to customary international law. To the extent, for example, that particular provisions of a widely ratified treaty are not implemented in practice by States parties to the treaty, such lack of implementation would cast doubt on the conclusion that the requisite State practice existed to establish that the treaty rules in question reflected customary international law.

Third, with respect to Paragraph 2 of the Draft Conclusion on rules set forth in multiple treaties, we strongly agree with the statement in paragraph (8) of the commentary to the effect that the fact that a rule is set forth in a number of treaties does not create a presumption that the rule is reflective of customary international law. Indeed, the need to repeat the rule in many treaties may be evidence of exactly the opposite—that the rule is not customary international law. In order to determine whether an oft-repeated treaty provision is a customary rule, the same assessment of State practice and *opinio juris* is required as for any other potential customary rule. It is not sufficient to show that States have treaty obligations. States must be shown to have expressed the view that they have an obligation under customary international law as well.

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of it, however, is invisible to the world at large because it happens internally within governments and never needs to be, and sometimes would not appropriately be, made public").

Draft Conclusion 12 (Resolutions of international organizations and intergovernmental conferences)

The United States appreciates the care with which the Commission and Special Rapporteur have addressed the question of resolutions of international organizations and intergovernmental conferences as evidence of customary international law. The United States agrees that such resolutions may provide relevant information regarding a potential rule of customary international law, most likely regarding the *opinio juris* of States, although potentially also their practice. However, as the Draft Conclusion and commentary reflect, resolutions must be approached with a great deal of caution. The United States notes that the UN General Assembly alone adopted 329 resolutions in its 71st session. By necessity, many resolutions of international organizations and conferences are adopted with minimal debate and consideration and through procedures (such as by consensus) that provide limited insight into the views of particular States. Moreover, because of the volume of resolutions and the limited capacity of States, the choice of whether to support or oppose a resolution may be made for political or other reasons in lieu of a legal analysis of its content, or despite disagreement with the articulation or assessment of a purported rule of customary international law addressed therein.[21] As a result, even widely supported resolutions may provide limited or ambiguous insight into the practice and *opinio juris* of the States that support them. As a result, they must be approached with a degree of skepticism when proffered as evidence of State practice or *opinio juris*. Such resolutions are certainly insufficient on their own to prove the existence of a customary law rule. It must be established that the provision corresponds to a general practice that is accepted as law (*opinio juris*) as stated in Draft Conclusion 12.

In order to reflect the caution with which resolutions should be approached when assessing a potential customary international law rule, and consistent with the language of the International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion cited in paragraph (5) of the commentary, the United States believes that the words "in certain circumstances" should be added to the second paragraph of Draft Conclusion 12. It would then read:

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

[21] The United States agrees with the statements in the commentary regarding the relevance of general statements, explanations of vote, explanations of position, and disassociations from consensus in determining whether a particular resolution is relevant to the identification of a particular rule of customary international law. Such statements may indicate that one or more States held views that departed significantly from specific language of a resolution despite the States' support for the resolution as a whole. However, it is also important to note that not all States make extensive use of such statements, even if they do not fully support the language of a resolution. Moreover, even where explanations of position or similar statements have been given, they may be challenging to locate years later, making it difficult to determine whether the language of a resolution reflected the views of all States supporting it at the time it was adopted.

Draft Conclusions 13 (Decisions of courts and tribunals) and 14 (Teachings)

Draft Conclusions 13 and 14 address circumstances in which decisions of courts and tribunals and teachings may serve as subsidiary means for the identification of customary international law rules. The commentaries to these Draft Conclusions appropriately note the important point that (except where national court decisions may constitute State practice) these are not themselves sources of international law, but rather are sources that may help elucidate rules of law where they accurately compile and soundly analyze evidence of State practice and *opinio juris*. In line with this point, we recommend that the Commission clarify in the commentary some of the limitations on the value of judicial opinions as subsidiary means in efforts to identify customary international law.

For example, as reflected in the qualification in Article 38 of the Statute of the International Court of Justice that was omitted from Draft Conclusion 13, decisions of international tribunals are generally only binding on the parties before the tribunal. Even the International Court of Justice does not offer interpretations of customary international law that are binding on all States.

As a case in point, in the context of litigation, States may choose to assert or decline to contest that rules are customary in nature for reasons of litigation strategy rather than out of a thorough assessment that such rules are customary in nature. In one case, a tribunal might accept without analysis that a rule is customary based on nothing more than the absence of a dispute between the parties, while in another case, a tribunal might carefully consider the issue after robust argument by parties and amici. Similar considerations might apply in relation to assessments of customary law by international criminal tribunals, especially when States do not appear as parties or amici to the proceedings to provide their views on such questions.

Consideration should also be given to those instances in which tribunals give conflicting decisions or eminent experts disagree on complex questions of customary international law. It would be helpful to recommend that those using these subsidiary means seek out conflicting or divergent views to allow for the most accurate assessment of the law.

Adding the above points to the commentary could usefully assist readers to assess more critically the pronouncements on customary law by courts, tribunals or publicists.

Draft Conclusion 15 (Persistent objector), Commentary paragraph (9)

The United States agrees with the observation in paragraph (9) of the commentary to Draft Conclusion 15 that assessing whether an objection to a customary law rule has been maintained persistently must be done in a pragmatic manner, bearing in mind the circumstances of each case, and with its important affirmation that States cannot "be expected to react [restate their objection] on every occasion, especially when their position is already well known." In this context, we are concerned that the particular example used in paragraph (9) involving "a conference attended by the objecting State at which the rule is reaffirmed" may be misleading. In our view, it would rarely, if ever, be necessary for a State to object at a particular conference

to maintain its status as a persistent objector to a rule of customary international law accepted by other States. For example, a State might decline to make a statement at a diplomatic conference for a variety of political or practical reasons that do not evince a legal view, and it seems strange that a statement after the conference would not have the same effect under customary international law as a statement at the conference. More generally, the example could misleadingly suggest that there is a particular significance to international conferences as fora for practice relevant to the formation of customary international law, which we do not believe to be the case. Accordingly, we believe this example should be deleted from the commentary.

Draft Conclusion 16 (Particular customary international law)

Draft Conclusion 16, titled "Particular customary international law," is also of concern for the United States for two reasons. First, we question whether paragraph 2 of the Draft Conclusion adequately defines when a rule of particular customary international law should be determined to exist. Notably, by stating only that "it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*)," the Draft Conclusion leaves open the nature of the *opinio juris* that must be held by the States concerned. As a result, it is unclear whether the *opinio juris* requirement would be met if the States concerned simply mistakenly believe the rule is a rule of general customary international law or whether they must correctly understand the rule to apply among themselves only.

Our second concern is regarding the ideas of bilateral custom and custom among groups of States other than regional groups. The commentary does not provide any evidence that State practice has generally recognized the existence of bilateral customary international law or particular customary law involving States that do not have some regional relationship. In this regard, we appreciate the language in paragraph (5) of the commentary that "there is no reason *in principle* why a rule of particular customary international law should not also develop" among States linked by something other than geography (emphasis added). However, we do not believe this language will make clear to the reader that particular customary international law among States other than those linked by geography, and bilateral customary international law generally, are theoretical concepts only and are not yet recognized parts of international law. We believe that it is important that this fact be made clear in the commentary to avoid confusing readers.

For the foregoing reasons, the United States suggests that Draft Conclusion 16 be reworded as follows:

> **Conclusion 16**
> **Particular customary international law**
> 1. A rule of particular customary international law, whether regional~~,~~ or 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*) applicable only among the States concerned.

The commentary would need to be conformed to the above changes. If any discussion of bilateral or "other" custom is retained, we believe the commentary should make clear that the concepts are not yet recognized in international law, but constitute examples of progressive development.

Conclusion

The United States appreciates the opportunity to have our views considered, and we hope that these written comments are helpful to the Commission and its Special Rapporteur as these Draft Conclusions continue to be developed and refined. We look forward to continued engagement with the Commission to help address remaining issues before the Draft Conclusions and commentary are finally adopted.