United Nations A/CN.4/663

General Assembly

Distr.: General
17 May 2013

Original: English

International Law Commission
Sixty-fifth session
Geneva, 6 May-7 June and 8 July-9 August 2013

First report on formation and evidence of customary international law

by Michael Wood, Special Rapporteur*

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* The Special Rapporteur wishes to thank Mr. Omri Sender for his invaluable assistance with the preparation of the present report.

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Part one: introductory

I. Introduction

1. During its sixty-fourth session, in 2012, the Commission decided to place the topic "Formation and evidence of customary international law" on its current programme of work, and appointed Michael Wood as Special Rapporteur.[1] The Special Rapporteur prepared a note setting out his preliminary thoughts on the topic, particularly on the scope and tentative programme of work,[2] which was the basis for an initial debate later in the session.[3]

2. In the course of the Sixth Committee debate later that year, delegations emphasized the importance and utility of the topic, as well as the significant role played by customary international law at the international and national levels. The inherent difficulties of the topic were also stressed, in particular the complexity of assessing the existence of a rule of customary international law. Delegations further underlined the need to preserve the flexibility of the customary process. Other points included the importance of exploring the meaning and manifestations of State practice and *opinio juris* as constitutive elements of customary international law; the relevance of the relationship between treaties and customary international law; the need to examine the role of international organizations with regard to the formation and evidence of rules of customary international law; and the desirability of an outcome that would be practical.[4]

3. In its resolution 67/92, the General Assembly noted with appreciation the Commission's decision to include the topic in its programme of work, and drew the attention of Governments to the importance of having their views on the specific issues identified in chapter III of the report of the International Law Commission on the work of its sixty-fourth session.[5]

4. At its sixty-fourth session the Commission requested States to "provide information on their practice relating to the formation of customary international law and the types of evidence suitable for establishing such law in a given situation, as set out in: (a) Official statements before legislatures, courts and international organizations; and (b) Decisions of national, regional and subregional courts".[6] The Special Rapporteur suggests that the Commission now request replies by 31 January 2014.

5. The Commission also requested the Secretariat to prepare a memorandum identifying elements of the previous work of the Commission that could be particularly relevant to the topic.[7] As described in section II below, the Secretariat's memorandum gives detailed information on the Commission's past practice that is

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[1] A/CN.4/SR.3132, p. 16.

[2] A/CN.4/653.

[3] A/CN.4/SR.3148, 3150, 3151, 3152 (24, 26, 27 and 30 July 2012); A/67/10, pp. 108-115.

[4] A/C.6/67/SR.18-25; Report of the International Law Commission on the work of its sixty-third and sixty-fourth sessions: Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-seventh session, prepared by the Secretariat (A.CN.4/657), paras. 47-52.

[5] General Assembly resolution 67/92 of 14 December 2012, paras. 4 and 7.

[6] A/67/10, p. 8.

[7] A/67/10, p. 108.

relevant to the topic,[8] and will be a valuable resource for the Commission's further work.

6. The present report is introductory in nature. Its aim is to provide a basis for future work and discussions on the topic. As such, after describing the previous relevant work of the Commission, in part two it discusses the scope of the topic (including whether *jus cogens* should be covered), and possible outcomes. Part three then considers some issues concerning customary international law as a source of law, including Article 38.1 (b) of the Statute of the International Court of Justice and terminology. Part four describes the principal categories of materials on the processes of formation and evidence of customary international law (practice of States and other intergovernmental actors; case law of the International Court of Justice and other courts and tribunals; the work of other bodies; and writings). In doing so, it looks at various approaches that have been suggested for, and the experience accumulated with regard to, the formation and evidence of rules of customary international law.

7. The work of the International Law Association deserves special mention at the outset, and is described in greater detail in section X below. The Association's London Statement of Principles of 2000 was the culmination of a major exercise, lasting 15 years and concluded some 13 years ago, to examine the process of the formation of customary international law.[9] The Commission's work will differ from that of the Association in important respects, not least because of the Commission's unique position as a subsidiary organ of the General Assembly and the corresponding relationship that the Commission has with States.[10]

II. Previous work of the Commission

8. It is useful to recall the related work by the Commission, including its early work mandated by article 24 of its Statute, and its work on the law of treaties and the topic "Fragmentation of international law: difficulties arising from the diversification and expansion of international law". Much of the Commission's work has been concerned with the identification of customary international law, though it has sometimes been cautious about clearly distinguishing between the codification of international law and its progressive development.[11]

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[8] A/CN.4/659.

[9] *London Statement of Principles Applicable to the Formation of General Customary International Law*, with commentary: Resolution 16/2000 (Formation of General Customary International Law), adopted at the sixty-ninth Conference of the International Law Association, in London, on 29 July 2000.

[10] G. M. Danilenko, *Law-Making in the International Community* (Martinus Nijhoff Publishers, 1993), 128-9 ("… an authoritative clarification of the criteria of custom would be best accomplished through a carefully drafted restatement, prepared, for example, by the United Nations International Law Commission").

[11] D. McRae, "The Interrelationship of Codification and Progressive Development in the Work of the International Law Commission", *Journal of International Law and Diplomacy (Kokusaiho Gaiko Zassi)*, 111 (2013), 75-94.

9. In accordance with article 24 of its Statute,[12] the Commission considered the topic "Ways and means of making the evidence of customary international law more readily available" at its first and second sessions in 1949 and 1950. Based on a memorandum by the Secretariat[13] and a working paper by Manley O. Hudson,[14] the Commission made a number of recommendations, including that the General Assembly call to the attention of States the desirability of publishing digests of their diplomatic correspondence and other materials relating to international law, to make evidence of their practice more accessible.[15] This influential report led to a number of important publications in the field of international law, on a national and international level, including the *United Nations Legislative Series* and the *Reports of International Arbitral Awards*, as well as national digests of practice.[16]

10. Two important surveys of international law were prepared, in 1948[17] and in 1971,[18] to assist the Commission in its choice of topics. It is interesting to recall what the 1948 survey said under the heading "Sources of International Law":

> "The codification of this aspect of international law has been successfully accomplished by the definition of the sources of international law as given in article 38 of the Statute of the International Court of Justice. That definition has been repeatedly treated as authoritative by international arbitral tribunals. It is doubtful whether any useful purposes would be served by attempts to make it more specific, as, for instance, by defining the conditions of the

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

[13] A/CN.4/6 and Corr.1.

[14] A/CN.4/16 and Add.1. Referring to the scope of customary international law, Hudson suggested, inter alia, that "the emergence of a principle or rule of customary international law would seem to require presence of the following elements: (a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations; (b) continuation or repetition of the practice over a considerable period of time; (c) conception that the practice is required by, or consistent with, prevailing international law; and (d) general acquiescence in the practice by other States" (para. 11). The working paper further elaborated on the evidence of customary international law.

[15] *Yearbook of the International Law Commission 1950*, vol. II, 367-374 (Report of the ILC for 1950, document A/1316, paras. 24-94, especially paras. 90-94); C. Parry, *The Sources and Evidences of International Law* (Manchester University Press, 1965), 70-82, reproduced in A. Parry (ed.), *Collected Papers of Professor Clive Parry* (Wildy, Simmonds and Hill Publishing, 2012), Vol II, 1-105.

[16] A/CN.4/659, paras. 9-11. The Committee of Ministers of the Council of Europe adopted a Model Plan for the Classification of Documents concerning State Practice in the Field of Public International Law in 1968 (CM/Res (68) 17), which has served as a framework for a number of national publications; the Model Plan was substantially revised in 1997 (CM/Rec (97) 11).

[17] *Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of article 18, paragraph 1, of the Statute of the International Law Commission — Memorandum submitted by the Secretary-General* (A/CN.4/1/Rev.1, 10 February 1949) (United Nations publication, Sales No. 1948.V.1(1)). That the 1948 Survey was the work of Hersch Lauterpacht was acknowledged by the Secretary to the Commission in 1960: *Yearbook of the International Law Commission 1960*, vol. I, 52.

[18] Survey of international law: Working paper prepared by the Secretary-General: A/CN.4/245, *Yearbook of the International Law Commission 1971* (United Nations publication, Sales No. E.72.V.6 (Part II) vol. II, Part Two, 1.

> creation and of the continued validity of international custom or by enumerating, by way of example, some of the general principles of law which article 38 of the Statute recognizes as one of the three principal sources of the law to be applied by the Court. The inclusion of a definition of sources of international law within any general scheme of codification would serve the requirements of systematic symmetry as distinguished from any pressing practical need. A distinct element of usefulness might, however, attach to any commentary accompanying the definition and assembling the experience of the International Court of Justice and of other international tribunals in the application of the various sources of international law."[19]

The 1971 survey did not revisit this issue. But an unofficial survey dating from 1998, under the heading "Items that should not be inscribed on the ILC's agenda", contained the following:

> "The ILC should not inscribe the topic 'Sources' (with the exception of treaties) on its agenda. It is counterproductive, and may be impossible, to codify the relatively flexible processes by which rules of customary international law are formed. Moreover, in the field of sources the questions are fundamental (e.g., what is custom? how is it formed?) as opposed to secondary (e.g., what are the rules of treaty interpretation?), and such fundamental questions seem to be exceptionally theory-dependent."[20]

In deciding to take up the present topic, the Commission was aware of these past views. But it was also aware that, in the words of the 2011 syllabus:

> "an appreciation of the process of [customary international law's] formation and identification is essential for all those who have to apply the rules of international law. Securing a common understanding of the process could be of considerable practical importance. This is so not least because questions of customary international law increasingly fall to be dealt with by those who may not be international law specialists, such as those working in the domestic courts of many countries, those in government ministries other than Ministries for Foreign Affairs, and those working for non-governmental organizations."[21]

11. As explained in the memorandum by the Secretariat (A/CN.4/659), the Commission has dealt with the formation and identification of customary international law on numerous occasions. Taking account of the Commission's relevant work since 1949 (in particular final drafts adopted by the Commission over the years on the various topics that it has considered), the memorandum "endeavours to identify elements in the previous work of the Commission that could be particularly relevant to the topic 'Formation and evidence of customary international law'". In its main part, the memorandum considers "the Commission's approach to the identification of customary international law and the process of its formation, by focusing on: (a) the Commission's general approach; (b) State practice; (c) the so-called subjective element (*opinio juris sive necessitatis*); (d) the relevance of the practice of international organizations; and (e) the relevance of

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[19] *Supra* note 17, at 22.

[20] *Report of the Study Group on the Future Work of the International Law Commission*, para. 104, in M. R. Anderson et al. (eds.), *The International Law Commission and the future of international law* (British Institute of International and Comparative Law, 1998), 42.

[21] Annex A to the Commission's 2011 report, A/66/10, para. 3.

judicial pronouncements and writings of publicists." It also covers "certain aspects of the operation of customary law within the international legal system", relating to "the binding nature and characteristics of the rules of customary international law — including regional rules, rules establishing *erga omnes* obligations and rules of *jus cogens* — as well as to the relationship of customary international law with treaties and 'general international law'."[22]

12. The Secretariat memorandum suggests, inter alia, that uniformity and generality of State practice have consistently been regarded by the Commission as key considerations in the formation and evidence of rules of customary international law. It further identifies that, in addition to State practice, the Commission has "frequently referred" in this context — albeit by different formulations — to "what is often defined as the subjective element of customary international law".[23] The memorandum notes that "a variety of materials" have been relied upon by the Commission in assessing both State practice and the "subjective element" associated with it, and that judicial pronouncements and the writings of publicists, as well as the practice of international organizations, have not infrequently proven relevant to such work.

Part two: scope and outcome

III. Scope and outcome of the topic

13. The scope of the present topic and possible outcomes of the Commission's work were discussed during the Commission's debate in 2012,[24] and during the debate in the Sixth Committee at the sixty-seventh session of the General Assembly.[25] The question was raised as to whether the title of the topic, with references both to "formation" and "evidence" of customary international law, accurately covered the subject-matter envisaged; it was also noted that the various language versions of these references were somewhat inconsistent.[26] It was, moreover, suggested that the central issue was the "identification" of customary international law, and that the reference to "formation" risked making the subject too broad or too theoretical.

14. In the view of the Special Rapporteur, whatever the precise title, the aim of the topic is to offer some guidance to those called upon to apply rules of customary international law on how to identify such rules in concrete cases. This includes, but is not limited to, judges in domestic courts, and judges and arbitrators in specialized international courts and tribunals.

15. In the English version of the title, the terms "formation" and "evidence" were intended to indicate that, in order to determine whether a rule of customary international law exists, it is necessary to consider both the requirements for the formation of a rule of customary international law, and the types of evidence that

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[22] See A/CN.4/659, summary.

[23] Ibid., at para. 26.

[24] See note 3 above.

[25] See note 4 above.

[26] These are at present: In Arabic "نشأة الق ... ثباته"; in Chinese "形成与证据"; in French "formation et identification"; in Russian "формирование и доказательство существования"; in Spanish "formación y documentación".

establish the fulfilment of those requirements. It may, nevertheless, be useful to ensure, at an early stage, that the title accurately reflects the intended scope of the topic in the various languages (including English), and has the same meaning in them all.

16. There are many approaches to customary international law among international lawyers, particularly among writers, some looking at it mainly as a source of international law, others more concerned with its operation within a domestic legal system. While some seek to describe and clarify the current position on the methods of its formation and identification, others explicitly look to the future.[27] The Special Rapporteur is of the opinion 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.

17. The debates in the Commission and the Sixth Committee in 2012 suggested that in order to avoid unnecessary overlap, the scope of the topic needs to be clearly delimited vis-à-vis other topics on the Commission's agenda, past and present. Other topics include "Fragmentation of international law: difficulties arising from the diversification and expansion of international law",[28] and "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".[29] This should not be difficult in practice; the dividing lines are reasonably clear.[30]

18. It should not be expected that the outcome of the Commission's work will be a series of hard-and-fast rules for the identification of rules of customary international law. Instead, the aim is to shed light on the general processes of the formation and evidence of rules of customary international law: there seemed to be widespread agreement in the discussions thus far that the appropriate outcome for the Commission's work should be a set of "conclusions" with commentaries.[31]

19. One issue that the Commission will need to address is whether there are different approaches to the formation and evidence of customary international law in different fields of international law, such as international human rights law,[32]

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[27] See section XI below.

[28] For the outcome of the Commission's work on that topic, see Report of the International Law Commission on the work of its fifty-eighth session, A/61/10, para. 251, as well as document A/CN.4/L.682 and Add.1 and Corr.1.

[29] The topic was previously entitled "Treaties over time".

[30] *First report on subsequent agreements and subsequent practice in relation to treaty interpretation, by Georg Nolte, Special Rapporteur* (A/CN.4/660), para. 7.

[31] The *London Statement of Principles*, likewise, comprises "a statement of the relevant rules and principles, as the Committee understands them. ... some practical guidance for those called upon to apply or advise on the law, as well as for scholars and students. Many have a need for relatively concise and clear guidelines on a matter which often causes considerable perplexity …" (pp. 3-4, para. 4).

[32] See, e.g., E. Klein (ed.), *Menschenrechtsschutz durch Gewohnheitsrecht, Kolloquium 26-28 September 2002 Potsdam* (Berliner Wissenschafts-Verlag, 2003); R. B. Lillich, "The Growing Importance of Customary International Human Rights Law", *Georgia Journal of International and Comparative Law*, 25 (1995/6), 1-30; and H. G. Cohen, "Symposium: The Global Impact and Implementation of Human Rights Norms: From Fragmentation to Constitutionalization", *Pacific McGeorge Global Business & Development Law Journal*, 25 (2012), 381-394.

international criminal law[33] and international humanitarian law.[34] The formation and evidence of rules of customary international law in different fields may raise particular issues and it may therefore be for consideration whether, and if so to what degree, different weight may be given to different materials depending on the field in question.[35] At the same time, it should be recalled that, in the words of Judge Greenwood, "[i]nternational law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law."[36]

20. Another question, raised in the initial debate within the Commission, was whether the approach to be adopted depended on the intended audience.[37] It will be recalled that the "observational standpoint" was also considered at the outset of the International Law Association exercise.[38] In the view of the Special Rapporteur, the

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[33] See, e.g., W. Schabas, "Customary Law or 'Judge-Made' Law: Judicial Creativity at the UN Criminal Tribunals", in J. Doria et al. (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (Martinus Nijhoff Publishers, 2009), 77.

[34] See, e.g., J. d'Aspremont, "An autonomous regime of identification of customary international humanitarian law: do not say what you do or do not do what you say?", in R. van Steenbergh (ed.), *Droit international humanitaire: un régime spécial de droit international?* (Bruylant, 2013), 67-95; and T. Meron, "The Continuing Role of Custom in the Formation of International Humanitarian Law", *American Journal of International Law*, 90 (1996), 238-249. Meron has also suggested that "it is difficult to find positive, concrete state practice with respect to rules that are largely prohibitive — as the rules of humanitarian law generally are — because such rules are largely respected through abstentions from violations, rather than affirmative practice": T. Meron, *The Making of International Criminal Justice: A View from the Bench: Selected Speeches* (Oxford University Press, 2011), 32.

[35] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 3 February 2012, para. 73 ("for the purposes of the present case the most pertinent State practice is to be found in […] national judicial decisions …"); *Prosecutor v. Tadić*, ICTY Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 99 ("Before pointing to some principles and rules of customary law that have emerged in the international community for the purpose of regulating civil strife, a word of caution on the law-making process in the law of armed conflict is necessary. When attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions").

[36] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) (Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea), Judgment, 19 June 2012,* Declaration of Judge Greenwood, para. 8. See also A/61/10, para. 251; and the analytical study finalized by the Chairman of the Study Group (A/CN.4/L.682 and Corr.1 and Add.1), paras. 33-34.

[37] A/CN.4/SR.3148, p. 6 (Murase).

[38] *London Statement of Principles*, para. 7; appendix on "Formation of International Law and the Observational Standpoint" to the First Report of the Rapporteur: *International Law Association, Report of the Sixty-third Conference, 1986*, 936.

accepted approach for identifying the law should be the same for all; a shared, general understanding is precisely what the Commission may hope to achieve.

21. In the course of the Commission's work it will be necessary to address general questions of methodology in the identification of rules of customary international law, such as the relative weight to be accorded to empirical research into State practice, as against deductive reasoning. It is also the case that practical considerations may affect methodology, especially in a world of nearly 200 States (as well as other international actors), though this is not a new challenge. Also noteworthy are the inherent difficulties of the topic, primarily the very nature of customary international law as unwritten law, and the ideological and theoretical controversies that are often associated with it.[39]

22. The present topic deals with the processes involved in the formation of rules of customary international law and with the necessary evidence for identifying them. The topic is not concerned with determining the substance of particular rules.[40] It aims to provide guidance on how to identify a rule of customary international law at a given moment, not to address the question of which particular rules have achieved such status.[41] Nor is it the purpose to consider the position of customary international law within the law to be applied by the various courts and tribunals, or special provisions and procedures that may exist at the various domestic levels for identifying rules of customary international law (though these must be borne in mind when assessing the decisions of domestic courts).

23. It follows that (subject to any change that the Commission may make to the title of the topic[42]) a first conclusion, on the scope of the draft conclusions, could read:

> **1. *Scope*. The present draft conclusions concern the formation and evidence of rules of customary international law.**

IV. Whether *jus cogens* should be covered

24. The question was raised, in the debates in the Commission and the Sixth Committee in 2012, as to whether the present topic should cover the formation and evidence of peremptory norms of general international law (*jus cogens*).[43]

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[39] See also *London Statement of Principles*, para. 2.

[40] Cf, the distinction between primary and secondary rules that was so important in the Commission's work on Responsibility of States for Internationally Wrongful Acts.

[41] In any event it is important to bear in mind that "the customary law process is a continuing one: it does not stop when a rule has emerged": M.H. Mendelson, "The Formation of Customary International Law", 272 *Recueil des Cours* (1998), 155, 188; see also K. Wolfke, "Some Persistent Controversies Regarding Customary International Law", *Netherlands Yearbook of International Law*, 24 (1993) 1, 15 ("ascertaining international customs and the formulations of the corresponding legal rules may be carried out repeatedly on various occasions. Such identification is never final …").

[42] *Supra* notes 3 and 4.

[43] Vienna Convention on the Law of Treaties, 1969, articles 53, 64. The definition in the Vienna Convention is of general application: see para. (5) of the commentary to article 26 of the Articles on State Responsibility, *Yearbook of the International Law Commission 2001*, vol. II, p. 85, cited in para (2) of the commentary on article 26 of the Articles on the Responsibility of International Organizations, *ILC Report 2011*, p. 120.

25. Rules of *jus cogens* are legal norms "accepted and recognized by the international community of States as a whole" as norms "from which no derogation is permitted and which can be modified only by a subsequent norm of international law having the same character".[44] While the existence of this category of "superior" international law is no longer seriously contested,[45] doctrinal controversy still abounds with regard to its substantive content, as well as the evidentiary elements associated with it.[46] It is particularly relevant in the present context to note that an "aura of mystery"[47] still surrounds the source of *jus cogens* rules: some international lawyers consider them to be a special category of customary international law;[48]

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[44] Vienna Convention on the Law of Treaties, article 53; see also P. Dailler, M. Forteau and A. Pellet, *Droit international public*, 8th edition (Librairie générale de droit et de jurisprudence (L.G.D.J.) 2009), 220-229; and J. Frowein, "Ius Cogens", in *Max Planck Encyclopedia of Public International Law* (2012).

[45] See, e.g., the conclusions emerging from the studies and discussions of the International Law Commission's Study Group on "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", chaired by Martti Koskenniemi: report of the International Law Commission on the work of its 58th session, 1 May-9 June and 3 July-11 August 2006 (A/CN.4/L.702); and the references to *jus cogens* in judgments of the International Court of Justice, e.g. *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, at p. 52; *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, paras. 92-97); *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, para. 99. See also Frowein, *supra* note 44, paras. 3-5 ("It can thus be said that the existence of *ius cogens* in public international law is recognized today by State practice, by codified treaty law, and by legal theory").

[46] See, e.g., A. D'Amato, "It's a Bird, It's a Plane, It's Jus Cogens", *Connecticut Journal of International Law*, 6 (1990), 1-6; K. Kawasaki, "A Brief Note on the Legal Effects of *Jus Cogens* in International Law", *Hitotsubashi Journal of Law and Politics*, 34 (2006), 27-43; H. Charlesworth, "Law-Making and Sources", in J. Crawford and M. Koskenniemi (eds.), *The Cambridge Companion to International Law* (Cambridge University Press, 2012), 187, 191; P. Tavernier, "L'identification des règles fondamentales, un problème résolu?", in C. Tomuschat and J. M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order:* Jus Cogens *and Obligations* Erga Omnes (Martinus Nijhoff Publishers, 2006), 1, 19; S. Kadelbach, "*Jus Cogens*, Obligations *Erga Omnes* and other Rules — The Identification of Fundamental Norms", in C. Tomuschat and J. M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order:* Jus Cogens *and Obligations* Erga Omnes (Martinus Nijhoff Publishers, 2006) 21, 28; and M. E. Villiger, *Customary International Law and Treaties: A Manual of the Theory and Practice of the Interrelation of Sources*, 2nd edition (Kluwer Law International, 1997), 7.

[47] A. Bianchi, "Human Rights and the Magic of *Jus Cogens*", *European Journal of International Law*, 19 (2008), 491, 493.

[48] See, e.g., A. de Hoogh, *Obligations* Erga Omnes *and International Crimes* (Kluwer Law International, 1996) 45-48; P. Reuter, *Introduction au droit des traités* (Librairie Armond Colin, 1972), 139-140; M. H. Mendelson, *supra* note 41, at 181; A. Kaczorowska, *Public International Law*, 4th edition (Routledge, 2010), 28; R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th edition (Oxford University Press, 1992) 7-8; R. B. Baker, "Customary International Law in the 21st Century: Old Challenges and New Debates", *European Journal of International Law*, 21 (2010) 173, 177; A. D'Amato, *The Concept of Custom in International Law* (Cornell University Press, 1971), 132; A. Cassese, "For an Enhanced Role of *Jus Cogens*", in A. Cassese (ed.), *Realizing Utopia* (Oxford University Press, 2012), 158, 164; T. Meron, "On a Hierarchy of International Human Rights", *American Journal of International Law*, 80 (1986), 1, 13-21; A. McNair, *Law of Treaties* (Clarendon Press, 1961), 213-215; J. Paust, "The Reality of *Jus Cogens*", *Connecticut Journal of International Law*, 7 (1991), 81, 82; J. Crawford, *Brownlie's Principles of Public International Law*, 8th edition (Oxford University Press, 2012), 594; N.G. Onuf and R.K. Birney, "Peremptory Norms of International Law: Their Source, Function and Future", *Denver Journal of International Law and Policy*, 4 (1974), 187, 191; F. Orrego Vicuña, "Customary International Law in a Global Community: Tailor Made?",

others deny that they can derive from custom;[49] still others are of the view that customary international law is merely one possible source of *jus cogens*.[50] It has been suggested that one's view as to the relationship between *jus cogens* and customary international law depends, essentially, on the conception that one has of the latter.[51]

26. There are arguments for and against covering *jus cogens* in the present topic. On one view, rules of customary international law may possibly be found to be, or evolve into, rules of *jus cogens*, and the two may be linked by common constitutive elements. Another view is that *jus cogens* "present[s] its own difficulties in terms of evidence, formation and classification, which [are] outside the scope of the [present] topic".[52] A majority of members of the Commission, and of representatives in the Sixth Committee, who addressed the matter in 2012, considered that it would be better not to cover *jus cogens* in the present topic.

27. For essentially pragmatic reasons, so as not to complicate further what is already a complex topic,[53] the Special Rapporteur considers that it would be

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Estudios Internacionales, 148 (2005), 21, 36-37; and B.D. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press, 2010), 243-260; Mr. Forteau too said during the Commission's sixty-fourth session that "[*j*]*us cogens* rules were by definition part of customary law" (A/CN.4/SR.3150, p. 11).

[49] See, e.g., M.E. O'Connell, "*Jus Cogens*: International Law's Higher Ethical Norms", in D. E. Childress III (ed.), *The Role of Ethics in International Law* (Cambridge University Press, 2012), 78, 83; M.W. Janis, "The Nature of *Jus Cogens*", *Connecticut Journal of International Law*, 3 (1988), 359, 360-361; G.J.H. van Hoof, *Rethinking the Sources of International Law* (Kluwer Law and Taxation Publishers, 1983), 164; J. Vidmar, "Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?", in E. de Wet and J. Vidmar (eds.), *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press, 2012), 13, 26; and F. Domb, "*Jus Cogens* and Human Rights", *Israel Yearbook of International Law*, 6 (1992), 106. Mr. Murphy said during the Commission's sixty-fourth session, with reference to *jus cogens*, that "it was not a creature of any one source of international law but rather a limitation on those sources"; Mr. Tladi too suggested that "customary international law and treaty law were based on a theory of State consent, while *jus cogens* was … based on something different" (A/CN.4/SR.3148, pp. 8, 10).

[50] See, e.g., M. Akehurst, "The Hierarchy of the Sources of International Law", *British Yearbook of International Law*, 47 (1976), 273, 282-284; G.I. Tunkin, "*Jus Cogens* in Contemporary International Law", *University of Toledo Law Review*, 3 (1971), 107, 116; M.N. Shaw, *International Law*, 6th edition (Cambridge University Press, 2008), 127; C.A. Bradley and M. Gulati, "Withdrawing from International Custom", *Yale Law Journal*, 120 (2010), 202, 212; R. Nieto-Navia, *International Peremptory Norms* (Jus Cogens) *and International Humanitarian Law* (2001), available at www.iccnow.org/documents/WritingColombiaEng.pdf, pp. 11-12; P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th revised edition (Routledge, 1997), 58; and A. Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press, 2006), 126.

[51] G. J. H. van Hoof, *supra* note 49, at 163-164 ("the answer to the question of whether or not customary international law can play an important role in establishing *jus cogens* also depends on what concept of this source one takes as a point of departure. Those who adhere to a flexible conception of custom are most likely to consider customary international law a perfect source of *jus cogens*, because in their view it produces rules of general international law binding upon all States in the world … Those, in contrast, who start from a more rigid conception of custom are likely to reach the opposite conclusion; adherents to this view argue that, as a result of changes in the international law-making process prompted by the structure of present international society, there are not many customary rules of international law left, which bind the entire international community of States, and, moreover, such rules cannot be expected to be very numerous in the future").

[52] A/CN.4/SR.3148, pp. 8-9 (Murphy).

[53] Mr. Tladi, for example, expressed doubts that that the Commission "would be able to reach

preferable not to deal with the issue as a part of the present topic. However, as members of the Commission observed, this does not mean that reference will not be made from time to time to rules of *jus cogens* in particular contexts.

Part three: customary international law as a source of international law

V. Customary international law and its relationship to other sources listed in Article 38 of the Statute of the International Court of Justice

28. Public international law is law,[54] and customary international law is one of the main sources of that law.[55] By "source" in this context it is meant a formal source,[56] "that which gives to the content of rules of international law their character as law".[57]

29. Article 38.1 of the Statute of the International Court of Justice, which is widely regarded as an authoritative statement of sources of international law,[58] reads as follows:

> "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
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> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

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agreement on various aspects of *jus cogens*"; Mr. Park suggested that dealing with *jus cogens* might at this time open a "Pandora's box" (see, respectively, A/CN.4/SR.3148, p. 10, and A/CN.4/SR.3150, p. 9). See also the 1993 proposal by A. Jacovides that the Commission should take on the topic: *Yearbook of the International Law Commission 1993*, vol. II, Part One, 213-220.

[54] For a recent examination, see F. Mégret, "International law as law", in J. Crawford and M. Koskenniemi (eds.), *The Cambridge Companion to International Law* (Cambridge University Press, 2012), 64-92.

[55] It is important, for the authority of international law, to maintain a clear distinction between law and non-law, between rules of law and non-legal principles and standards. "Soft law", a term without clear meaning that has been described as more of a "catchword" and mostly refers to rules that are deliberately made non-binding, is not law (see, e.g. D. Thürer, "Soft Law", *Max Planck Encyclopedia of Public International Law* (2012); V. Lowe, *International Law* (Oxford University Press, 2007), 95-97; M. N. Shaw, *supra* note 50, at 117-119; and S. D. Murphy, *Principles of International Law*, 2nd edition (West Publishing Company, 2012), 111-123. Soft law may, however, contribute to the formation of customary international law; this will be explored in future reports.

[56] The formal sources of international law are "the processes through which international law rules become legally relevant", while the material sources "can be defined as the political, sociological, economic, moral or religious origins of the legal rules": A. Pellet, "Article 38", in A. Zimmermann et al., *The Statute of the International Court of Justice: A Commentary*, 2nd edition (Oxford University Press, 2012), Marginal Note (MN) 111.

[57] I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edition (Manchester University Press, 1984), 2.

[58] A. Pellet, *supra* note 56, at 812-32, MN 209-249. There is no need, for present purposes, to enter into the debate as to whether Article 38.1, drawn up in 1920, remains a complete list: see R. Wolfrum, "Sources of International Law", in *Max Planck Encyclopedia of Public International Law* (2012), para. 10.

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

30. Article 38.1 (b) is identical to Article 38 (b) of the Statute of the Permanent Court of International Justice, which itself had been prepared for the Council of the League of Nations by an Advisory Committee of Jurists in 1920.[59] The Chairman of the Advisory Committee of Jurists, Baron Descamps, had originally proposed the following:

"2. international custom, being practice between nations accepted by them as law."[60]

There is little recorded discussion of this provision in the Advisory Committee, or in the Council or Assembly of the League. In the Root-Phillimore plan, this provision read: "International custom, as evidence of a common practice in use between nations and accepted by them as law".[61] Ultimately, however, the following text emerged from the Drafting Committee: "international custom, as evidence of a general practice, which is accepted as law".[62] This text was submitted to the League of Nations, and adopted with only drafting changes.[63] It does not seem to have been discussed during the preparation and adoption of the International Court of Justice Statute in 1944/45.[64]

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[59] There had been earlier attempts to address the issue. In particular, under article 7 of the (unratified) Convention (XII) relative to the Creation of an International Prize Court of 18 October 1907, that Court was to apply, in the absence of a treaty in force, "rules of international law", provided that they were "generally recognized": see A. Pellet, *supra* note 56, MN 11-13. On the work of the Advisory Committee, see O. Spiermann, "'Who attempts too much does nothing well': the 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice", *British Yearbook of International Law*, 73 (2002), 187-260; and O. Spiermann, "Historical Introduction", in A. Zimmermann et al., *The Statute of the International Court of Justice: A Commentary*, 2nd edition (Oxford University Press, 2012), MN 6-22.

[60] Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), 306, Annex No. 3. The United States member of the Advisory Committee, Root, proposed a text that was identical except for the addition of "recognized" before "practice": 344, Annex No. 1. Descamps referred to customary international law as "a very natural and extremely reliable method of development [of international law] since it results entirely from the constant expression of the legal convictions and of the needs of the nations in their mutual intercourse": 322.

[61] Ibid., 548.

[62] Ibid., 567.

[63] Ibid., 680. As adopted by the Advisory Committee on first reading, the subparagraph was changed to read: "International custom, being the recognition of a general practice, accepted as law". The change was not maintained in the text submitted to the League.

[64] On the negotiating history of article 38.1 (b) see P. Haggenmacher, "La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale", *Revue générale de droit international public* (*RGDIP*), 90 (1986), 5, 19-32; A. Pellet, *supra* note 56, MN 17-48; and R. D. Kearney, "Sources of Law and the International Court of Justice", in L. Gross (ed.), *The Future of the International Court of Justice*, Vol. II (Oceana Publications, 1976), 610-723. Looking back at the negotiation in 1950, Manley O. Hudson remarked that the drafters of the Statute "had no very clear idea as to what constituted international custom": *Yearbook 1950*,

31. Article 38.1 (b) is often said to be "badly drafted".[65] On the other hand, it has been said that "[t]here are two key elements in the formation of a customary international law rule. They are elegantly and succinctly expressed in Article 38 of the ICJ Statute";[66] and that "Article 38 of the ICJ Statute cannot be considered a simple guide, limited solely to a technical role in the court, but rather — despite its imperfections — the enunciations of the modes of law formation".[67]

32. Article 38.1 has frequently been referred to or reproduced in later instruments.[68] Although in terms it only applies to the International Court,[69] the sources defined in Article 38.1 are generally regarded as valid for other international courts and tribunals as well, subject to any specific rules in their respective statutes.[70]

33. It is necessary, for the purposes of the present topic, to consider the relationship between customary international law and the other sources of

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vol. I, p. 6, para. 45.

[65] See e.g., J.L. Kunz, "The Nature of Customary International Law", *American Journal of International Law*, 47 (1953), 662, 664; and K. Wolfke, *supra* note 41, at 3. Villiger has written, "It is notorious that this provision is lacking … For the Court cannot apply a custom, only customary *law*; and subpara. 1 (b) reverses the logical order of events, since it is general practice accepted as law which constitutes evidence of a customary rule": M. E. Villiger, *supra* note 46, at 15.

[66] D.J. Bederman, *The Spirit of International Law* (University of Georgia Press, 2006), 9, 33; see also A. A. Cançado Trindade, *International Law for Humankind: Towards a New* Jus Gentium (Martinus Nijhoff Publishers, 2010), 116 ("Article 38 itself of the ICJ Statute duly qualifies international custom in referring to it as 'evidence of a general practice accepted as law'").

[67] S. Sur, *International Law, Power, Security and Justice: Essays on International Law and Relations* (Hart Publishing, 2010), 166; see also R.Y. Jennings, "The Identification of International Law", in B. Cheng (ed.), *International Law: Teaching and Practice* (Stevens & Sons, 1982), 3, 9.

[68] A. Pellet, *supra* note 56, MN 49-54. Article 28 of the 1928 General Act for the Pacific Settlement of International Disputes (and article 28 of the 1948 Revised General Act); article 33 of the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States. Sometimes we find a cross-reference to Article 38 of the Statute: for example, in articles 74 and 83 of the United Nations Convention on the Law of the Sea, 1982. Other instruments use different terms: for example, article 21 (1) (b) of the Rome Statute of the International Criminal Court ("applicable treaties and the principles and rules of international law, including the established principles of the law of armed conflict"); article 20 (1) of the Protocol of the Court of Justice of the African Union, which includes but expands on the language of the International Court of Justice: article 20 (1) (c) is identical to art. 38 (1) (b)). For the use of article 38.1 in the work of the International Law Commission, see article 12 of the 1953 Draft Convention on Arbitral Procedure (*Yearbook of the International Law Commission 1953*, vol. II, p. 210), and article 10 of the 1958 Draft (*Yearbook of the International Law Commission 1958*, vol. II, p. 84) (which each begin with the important qualification "In the absence of any agreement between the parties concerning the law to be applied").

[69] M. Forteau, "The Diversity of Applicable Law before International Tribunals as a Source of Forum Shopping and Fragmentation of International Law: An Assessment", in R. Wolfrum and I. Gätzschmann (eds.), *International Dispute Settlement: Room for Innovations?* (Springer, 2012), 417, 420-421.

[70] Section IX below. Thirlway has written: "it is generally agreed that the sources defined in Art. 38 are valid also for other international tribunals": R. Wolfrum and I. Gätzschmann (eds.), *International Dispute Settlement: Room for Innovations?* (Springer, 2012), 313. Of the reference to "other rules of international law not incompatible with this Convention" in article 293 of the United Nations Convention on the Law of the Sea, Thirlway writes "no further definition is offered, leaving Art. 38 of the ICJ Statute as the recognized yardstick" (ibid., at 314, fn. 9).

international law listed in Article 38.1 of the Statute of the International Court, though the present topic is not intended to cover these other sources as such.

34. The relationship between customary international law and treaties is an important aspect of the topic,[71] to be discussed in later reports. In short, the interplay between these two "entangled" sources of international law may be highly relevant for the present purposes as it is generally recognized that treaties may be reflective of pre-existing rules of customary international law; generate new rules and serve as evidence of their existence; or, through their negotiation processes, have a crystallizing effect for emerging rules of customary international law.[72] Such a relationship is particularly interesting in the light of the fact that "contemporary customary international law, although unwritten, is increasingly characterized by the strict relationship between it and written texts".[73] It should also be borne in mind that customary international law has an "existence of its own" even where an identical rule is to be found in a treaty.[74]

35. It is sometimes suggested that treaties are now a more important source of international law than customary international law.[75] Such generalizations are neither particularly illuminating nor necessarily accurate. Even in fields where there are widely accepted "codification" conventions, the rules of customary international law continue to govern questions not regulated by the conventions[76] and continue to apply in relations with and between non-parties.[77] Rules of customary international

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[71] See A/CN.4/659, section III.B.

[72] See in general O. Schachter, "Entangled Treaty and Custom", in Y. Dinstein (ed.), *International Law in a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff Publishers, 1989), 717-738; B. B. Jia, "The Relations between Treaties and Custom", *Chinese Journal of International Law*, 9 (2010), 81-109; G. Boas, *Public International Law: Contemporary Principles and Perspectives* (Edward Elgar Publishing, 2012), 84; J. K. Gamble, Jr., "The Treaty/Custom Dichotomy: An Overview", *Texas International Law Journal*, 16 (1981), 305-319; K. Wolfke, "Treaties and Custom: Aspects of Interrelation", in J. Klabbers and R. Lefeber (eds.), *Essays on the Law of Treaties: A collection of Essays in Honour of Bert Vierdag* (Martinus Nijhoff Publishers, 1998), 31-39; G. L. Scott and C. L. Carr, "Multilateral Treaties and the Formation of Customary International Law", *Denver Journal of International Law and Policy*, 25 (1996), 71-94; M. E. Villiger, *supra* note 46; and R. R. Baxter, "Treaties and Custom", 129 *Recueil des Cours* (1970), 25-105.

[73] T. Treves, "Customary International Law", in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2012), para. 2.

[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. 94-96, paras. 177-178.

[75] "In the past decades, treaties have superseded customary international law as the most important source of international law …": O. Dörr and K. Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012), 11.

[76] See, for example, Vienna Convention on the Law of Treaties, final preambular paragraph; and article 4 (non-retroactivity). The Martens clause was an early example of the continuing importance of customary international law, notwithstanding a treaty: J. von Bernstorff, "Martens Clause", in *Max Planck Encyclopedia of Public International Law* (2012). In the 1977 Additional Protocol I to the Geneva Conventions, the expression "the usages established between civilized nations" was replaced by "established custom", the term also used in later conventions: Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects, adopted on 10 October 1980, fifth preambular paragraph; and Convention on Cluster Munitions, adopted on 30 May 2008, eleventh preambular paragraph.

[77] For example, the Vienna Convention on the Law of Treaties only directly applies in relations between the States parties thereto. The rules of customary international law on the law of

law may also fill possible lacunae in treaties, and assist in their interpretation.[78] An international court may also decide that it may apply customary international law where a particular treaty cannot be applied because of limits on its jurisdiction.[79]

36. The distinction between customary international law and "general principles of law"[80] is also important, but not always clear in the case law or the literature.[81] Article 38.1 (c) lists "general principles of law recognized by civilized nations" as a source of international law separately from customary international law. In the case law and in writings this is sometimes taken to refer not only to general principles common to the various systems of internal law but also to general principles of international law. The International Court itself may have recourse to general principles of international law in circumstances when the criteria for customary international law are not present. As one author has explained:

> "The relatively frequent reference by the ICJ to principles that are not part of municipal laws is explained, at least in part, by the narrow definition of customary international law that is provided in Art. 38 (1) (b) ICJ Statute. Should custom be regarded, as stated in that provision, as 'evidence of a general practice accepted as law', given the insufficiency of practice, several rules of international law which are not based on

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treaties apply in relations between States not party to the Vienna Convention on the Law of Treaties, and between a State party and a non-party: see E.W. Vierdag, "The Law Governing Treaty Relations between Parties to the Vienna Convention on the Law of Treaties and States not Party to the Convention", *American Journal of International Law*, 76 (1982), 779-801.

[78] Vienna Convention on the Law of Treaties, article 31.3 (c); Conclusions of the work of the study group on the fragmentation of international law: difficulties arising from the diversification and expansion of international law, conclusions (17) to (20) (A/61/10), para. 251. See also *Amoco International Finance Corporation v. Iran* (1987-II) 15 Iran-United States Claims Tribunal (USCTR) 222, para. 112; Baxter, *supra* note 72, at 103 ("Treaties will continue to exercise a most important impact on the content of general international law. Even if all States should expressly assume the obligations of codification treaties, regard will still have to be paid to customary international law in the interpretations of those instruments, and the treaties will in turn generate new customary international law growing out of the application of the agreements").

[79] As in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, *supra* note 74, at pp. 92-97, paras. 172-182. At p. 97, para. 182 the Court concluded that "it should exercise the jurisdiction conferred upon it by the United States declaration of acceptance under Article 36, paragraph 2, of the Statute, to determine the claims of Nicaragua based upon customary international law notwithstanding the exclusion from its jurisdiction of disputes "arising under" the United Nations and Organization of American States Charters".

[80] G. Gaja, "General Principles of Law", in *Max Planck Encyclopedia of Public International Law* (2012); A. Pellet, *supra* note 56, MN 250-269.

[81] On the different meanings of "general principles of law" see, e.g. O. Schachter, *International Law in Theory and Practice* (Martinus Nijhoff Publishers, 1991), 50-55; see also B. Schlütter, *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International* ad hoc *Criminal Tribunals for Rwanda and Yugoslavia* (Martinus Nijhoff Publishers, 2010), 71-86. On a call for clarity in this regard, see B. Simma and P. Alston, "The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles", *Australian Yearbook of International Law*, 12 (1988-1989), 82-108; N. Petersen, "Customary Law without Custom? Rules, Principles, and the Role of State Practice in International Law Creation", *American University International Law Review*, 23 (2008), 275-310.

> treaties would not fit in the definition of custom. Hence the reference to principles or general principles."[82]

While it may be difficult to distinguish between customary international law and general principles in the abstract, whatever the scope of general principles it remains important to identify those rules which, by their nature, need to be grounded in the actual practice of States.[83]

37. Customary international law is also to be distinguished from conduct by international actors that neither generates a legal right or obligation nor carries such a legal implication. Not all international acts bear legal significance: acts of comity and courtesy, or mere usage, even if carried out as a matter of tradition, thus lie outside the scope of customary international law and the present topic.[84]

38. It is perhaps unnecessary, at least at this stage, to enter upon the question of the nature of the rules governing the formation and identification of rules of customary international law, for example, whether such rules are themselves part of customary international law.[85] But as in any legal system, there must in public international law be rules for identifying the sources of the law. These can be found for present purposes by examining in particular how States and courts set about the task of identifying the law.

VI. Terminology

39. Terminology is important. "Customary international law" or "rules of customary international law"[86] would seem to be the expressions in most common use for the source of international law with which the present topic is concerned.[87]

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[82] G. Gaja, *supra* note 80, para. 18.

[83] J. Crawford (ed.), *supra* note 48, at 37.

[84] G.I. Tunkin, "Remarks on the Juridical Nature of Customary Norms of International Law", *California Law Review*, 49 (1961), 419, 422; J. Crawford, *supra* note 48, at 23-24.

[85] Cf. the debate on the nature of some rules of treaty law, particularly *pacta sunt servanda*. Sinclair refers in this connection to "doctrinal arguments" consideration of which "of necessity leads us into somewhat metaphysical regions": I. Sinclair, *supra* note 57, at 2-3. See also J. Kammerhofer, "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems", *European Journal of International Law*, 15 (2004), 523, 538-542.

[86] Vienna Convention on the Law of Treaties 1969, eighth preambular paragraph. Article 38 of the Vienna Convention has "customary rule of international law". The word "rules" is used in this report to include "principles". As a Chamber of the International Court of Justice said (in the context of maritime delimitation), "[t]he association of the terms 'rules' and 'principles' is no more than the use of a dual expression to convey one and the same idea, since in this context 'principles' clearly means principles of law, that is, it also includes rules of international law in whose case the use of the term 'principles' may be justified because of their more general and more fundamental character" (*I.C.J. Reports 1984*, p. 246, at pp. 288-290, para. 79); Gaja has written: "While the distinction between principles and rules has not been elaborated in judicial or arbitral decisions, the use of the term principles denotes the general nature of the norm in question" (G. Gaja, *supra* note 80, para. 31).

[87] An older term for "international law" is "the law of nations", which has by no means fallen out of use: M. W. Janis, "International law?", *Harvard Journal of International Law*, 32 (1991), 363-72; M. W. Janis, *America and the Law of Nations 1776-1939* (Oxford University Press, 2010), chapter 1 ("Blackstone and Bentham: The *Law of Nations* and *International Law*"); A. Clapham, *Brierly's Law of Nations*, 7th edition (Oxford University Press, 2012), xiii-xiv. It is

The expression "general customary international law" is sometimes found, usually in contradistinction to "special" or "regional" customary international law.[88] The term "universal customary international law" may have a similar meaning.

40. The expression "international customary law" is also found, but might suggest a subcategory of "customary law", and hence a misleading relationship between customary international law and the customary law found in some domestic legal systems.

41. Customary international law is commonly referred to as "international custom" or "custom", but this also may be misleading, depending on the context.[89] These terms may be confused with the objective element in the formation of customary international law (practice), where other related terms that are often used interchangeably are "usage" and "practice".[90]

42. The term "general international law" is commonly used,[91] but needs some explanation.[92] The International Court, and the Commission itself, have used the term in a variety of contexts and with a variety of meanings.[93] Its use to mean only

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sometimes suggested that "law of nations" is the more appropriate term given the expanding actors in the field, for example, in P. Dailler, M. Forteau and A. Pellet, *supra* note 44, at 43-50. Blackstone's *Commentaries on the Laws of England* (1765-1769) uses the term "law of nations" to refer broadly to the field of what is now known as international law, thus encompassing both treaties and customary international law. Yet sometimes the term "law of nations" has been used to refer to international law other than treaties. Thus, in the First Judiciary Act of 1789, Ch. 20, § 9, 1 Stat. 73 (1789), the United States Congress adopted a provision that refers to violations of "the law of nations or a treaty of the United States". In this sense, the term "law of nations" is a synonym for what is now called customary international law, rather than international law generally. As the *Restatement (Third) of U.S. Foreign Relations Law*, § 111, Introductory Note (1987) puts it: The term "'law of nations' was used to describe the customary rules and obligations that regulated conduct between states and certain aspects of state conduct towards individuals".

88 Terms used in the internal law of the various States to refer to customary international law vary considerably.

89 Though it will be recalled that the term "international custom" appears in art. 38.1 (b) of the Statute of the International Court of Justice.

90 See also G.I. Tunkin, *supra* note 84, at 422 (differentiating between "usage" and "custom" on the one hand, and "customary norm of international law" on the other hand); K. Wolfke, *supra* note 41, 2 (referring to the "notorious inconsistency in the use of terminology related to customary international law" and calling for a distinction between "international custom" on the one hand and "practice", "habit" or "usage" on the other hand); and C. Ochoa, "The Individual and Customary International Law Formation", *Virginia Journal of International Law*, 48 (2007), 119, 125-129.

91 See, for example, articles 53 and 64 of the Vienna Convention on the Law of Treaties (*Jus cogens*).

92 G. P. Buzzini, "La "généralité" du droit international general: Réflexions sur la polysémie d'un concept", *RGDIP*, 108 (2004), 381-406; G. P. Buzzini, *Le droit international général au travers et au-delà de la coutume*, thesis, University of Geneva (2007); C. Tomuschat, "What is 'general international law'" in *Guerra y Paz: 1945-2009, Obra homenaje al Dr. Santiago Torres Bernardez* (Universidad del País Vasco/Euskal Herriko Unibertsitatea, 2010), 329-348; and R. Wolfrum, "General International Law (Principles, Rules, and Standards)", in *Max Planck Encyclopedia of Public International Law* (2012).

93 A/CN.4/659, section III C. As was stated in the fragmentation study, "there is no well-articulated or uniform understanding of what [general international law] might mean. 'General international law' clearly refers to general customary law as well as 'general principles of law recognized by civilized nations' under article 38 (1) (c) of the Statute of the International Court

customary international law can be confusing. At times the term is used to mean something broader than general customary international law, such as customary international law together with general principles of law, and/or together with widely accepted international conventions. It is desirable that the specific meaning intended by this term be made clear whenever the context leaves the meaning unclear.

43. Accuracy and consistency in the use of terminology by practitioners and scholars alike could help clarify the treatment of customary international law as a source of law. The Special Rapporteur proposes to use the terms "customary international law" and "rules of customary international law".

44. One obstacle to achieving a consistent use of terms is the different usages in different languages. The establishment of a short lexicon of relevant terms, in the six official languages of the United Nations, to be developed as work on the topic proceeds, could be helpful. In addition to the term "customary international law" it could include "State practice", "practice", "usage", and "*opinio juris sive necessitatis*".

45. The following conclusion is proposed on the use of terms, which can be developed as work on the topic proceeds.

2. *Use of terms*. For the purposes of the present draft conclusions:

(a) "customary international law" or "rules of customary international law" means the rules of international law referred to in Article 38, paragraph 1 (b) of the Statute of the International Court of Justice;

(b) ["State practice" or "practice" …;]

(c) [*"opinio juris"* or *"opinio juris sive necessitatis"* …;]

(d) …

Part four: range of materials to be consulted

46. Part Four describes the range of materials to be consulted in the course of the Commission's work on the present topic, that is, in order to reach conclusions about the process of formation and evidence of rules of customary international law. The purpose is not, at this stage, to propose such conclusions. That is for later.

47. The following materials are described below: those demonstrating the attitudes of States and other intergovernmental actors; the case law of the International Court of Justice and other courts and tribunals; the work of other bodies, such as the International Law Association; and the views of publicists, in particular as to the general approach to the formation and evidence of customary international law.

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of Justice. But it might also refer to principles of international law proper and to analogies from domestic laws, especially principles of the legal process (*audiatur et altera pars*, *in dubio mitius*, estoppel and so on)" (A/CN.4/L.682 and Corr.1 and Add.1), p. 254.

VII. Approach of States and other intergovernmental actors

48. Apart from the domestic court cases (paras. 83-85 below), there seems to be relatively little publicly available material that directly addresses the attitude of States to the formation and evidence of customary international law. Even so, the approach of States may be gleaned from their statements on particular issues, as well as from pleadings before courts and tribunals.

49. The Special Rapporteur continues to seek materials concerning the approach of States. So far there has been only limited response to the Commission's request to States in its 2012 report, set out at paragraph 4 above.[94]

50. The attitude of States to the formation and evidence of customary international law may be seen in their pleadings before international courts and tribunals, though it has to be remembered that here they are in advocacy mode.[95] In such pleadings, States regularly adopt the two-element approach, arguing both on State practice and *opinio juris*, though occasionally they adopt a different approach.[96] They frequently produce much evidence of State practice.

51. States also exchange views among themselves about rules of customary international law, often in a confidential manner, and in doing so they no doubt also reflect on the way such rules emerge and are identified.[97] This may happen at regular meetings of legal advisers within international organizations, such as the United Nations and regional organizations, in smaller groups, or bilaterally.

52. Indications of the approach of States may be found in governmental reactions to codification efforts (not least those of the Commission). The debate provoked by the International Committee of the Red Cross 2005 *Customary International Humanitarian Law Study* (para. 82 below), for example, shed rare light on the attitude of some States to the process of formation and evidence of rules of customary international law, in the particular field of the laws of war. The United States, in a first formal response to the study at governmental level, stated that "[t]here is general agreement that customary international law develops from a general and consistent practice of States followed by them out of a sense of legal obligation, or *opinio juris*", and stressed that evidence for the existence of such law "must in all events relate to State practice".[98] The United Kingdom of Great Britain

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[94] A/67/10, para. 29.

[95] P.-M. Dupuy, "La pratique de l'article 38 du Statut de la Cour internationale de justice dans le cadre des plaidoiries écrites et orales" in *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (United Nations publication, Sales No. E/F/S/99.V.13), 377-94.

[96] See, as a recent example, Belgium's pleadings in *Belgium v. Senegal*, including its supplementary reply to Judge Greenwood, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Questions put to the Parties by Members of the Court at the close of the public hearing held on 16 March 2012: compilation of the oral and written replies and the written comments on those replies, 16 March 2012-4 April 2012, pp. 24-25, paras. 6, 8.

[97] See the *London Statement of Principles*, para. 8: "Much of this [how states go about identifying the law] takes place on a basis of confidentiality and official secrecy, so that it has not always been possible to cite chapter and verse"; D. Bethlehem, "The Secret Life of International Law", *Cambridge Journal of International and Comparative Law*, 23 (2012), 34 (referring to "a whole body of specialist practice that is for the most part utterly invisible to the outside world").

[98] J. B. Bellinger and W. J. Haynes, "A US government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*", *International Review of the*

and Northern Ireland, in turn, said that for the formation of customary international law "[w]hat is required is a 'general practice accepted as law by States'"; and that "[o]verall, identifying a rule of customary international law is a rigorous process".[99]

53. The approach of other intergovernmental actors, in particular international organizations such as the United Nations, may also prove valuable when surveying practice with regard to the formation and identification of customary international law.[100] Two recent examples may be found in the report of the Working Group on Arbitrary Detention to the Human Rights Council (A/HRC/22/44), which referred to "a near universal State practice" accompanied by *opinio juris* as evidence of the "customary nature of the arbitrary deprivation of liberty prohibition";[101] and the report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, which stated, in a section entitled "The Applicable International Legal Principles", that "Custom has the force of law and is binding on States where it reflects the general practice of States, and the recognition by States that this general practice has become law (known as the *opinio juris* requirement)".[102]

VIII. Case law of the International Court of Justice

54. The case law of the International Court of Justice and its predecessor, the Permanent Court of International Justice, will be of great significance for the Commission's work on the present topic. The Court's primary function in relation to customary international law is to identify and apply customary rules as necessary for deciding the cases before it.[103] Its judgments (including separate and dissenting opinions) shed much light on the general approach to the formation and evidence of customary international law (when "[w]hat 'is' becomes what 'must be'"),[104] including on specific aspects of these processes.

55. Examining the Court's frequent application of Article 38.1 (b) of its Statute, by which it "perform[s] its perfectly normal function of assessing the various elements

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Red Cross, 89 (2007), 443, 444.

[99] Legal Adviser of the Foreign and Commonwealth Office, statement at the Meeting of National Committees on International Humanitarian Law of Commonwealth States, Nairobi, 20 July 2005: *British Year Book of International Law*, 76 (2005) 694-5. See also the *Updated European Union Guidelines on promoting compliance with international humanitarian law* (2009/C 303/06), section 7, which define customary international law as a source of international law that "is formed by the practice of States, which they accept as binding upon them".

[100] G. Cahin, *La coutume internationale et les organisations internationales* (Pedone, 2001); and J. Vanhamme, "Formation and enhancement of customary international law: the European Union's contribution", 39 (2008) *Netherlands Yearbook of International Law (NYIL)* 127-154.

[101] A/HRC/22/44, 17-18, para. 43.

[102] Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, appendix I, September 2011, p. 76, para. 3 (references omitted).

[103] It is not the Court's function to develop the law, though that is occasionally what it may have to do in order to avoid pronouncing a *non liquet*. The separate question of the role of international courts and tribunals in the formation of customary international law will be covered in a subsequent report; for a recent article on this issue, see H. Thirlway, "Unacknowledged Legislators: Some Preliminary Reflections on the Limits of Judicial Lawmaking", in R. Wolfrum, I. Gätzschmann (eds.), *International Dispute Settlement: Room for Innovations?* (Springer, 2012), 311-324.

[104] *Case concerning Right of Passage over Indian Territory (Portugal* v. *India) Merits, Judgment of 12 April 1960, I.C.J. Reports 1960*, p. 6, at p. 82 (Dissenting Opinion of Judge Armand-Ugon).

of State practice and legal opinion adduced … as indicating the development of a rule of customary law",[105] affords an overview of the Court's approach to the matter. As the judgments referred to below indicate, the Court has clearly and consistently held — as did its predecessor — that customary international law is formed through State practice accompanied by *opinio juris*.

56. In the *Lotus* case, the Permanent Court of International Justice stated that international law emanates from the free will of States as expressed in conventions or "by usages generally accepted as expressing principles of law".[106] It emphasized the distinction between the two constitutive elements of customary international law, stressing the need for both to be present in order to ground a finding of such law:

> "Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstances ... it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognised themselves as being obliged to do so; for only if such abstentions were based on their being conscious of having a duty to abstain, would it be possible to speak of an international custom."[107]

57. The classic statement of the International Court of Justice on the processes of formation and evidence of rules of customary international law is to be found in the *North Sea Continental Shelf* cases:

> "Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; 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.
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> … The essential point in this connection — and it seems necessary to stress it — is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*; — for in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice [*une pratique constante*, in the French text], but they must also be such or be carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts

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[105] *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 367, para. 112 (Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Arechaga and Waldock).

[106] *The Case of the SS 'Lotus' (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10, p. 18.

[107] Ibid., at p. 28.

> is not in itself enough. There are many international acts, e.g. in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any legal sense of duty."[108]

58. The Court reaffirmed this in *Military and Paramilitary Activities in and against Nicaragua*, where it said that in order to consider what rules of customary international law were applicable it "has to direct its attention to the practice and *opinio juris* of States",[109] and that:

> "… as was observed in the *North Sea Continental Shelf* cases, for a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice' but they must be accompanied by the *opinio juris sive necessitatis*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of *opinio juris sive necessitatis*'."[110]

59. In its judgment in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* the Court referred to "the actual practice of States" as "expressive, or creative, of customary rules".[111] In the *Gulf of Maine* case, a Chamber of the Court observed that customary international law "comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community, together with a set of customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas".[112]

60. When turning to an examination of customary international law in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court said at the outset that "[a]s the Court has stated, the substance of that law must be 'looked for in the actual practice and *opinio juris* of States' (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, pp. 29-30, para. 27)".[113] Later in the Opinion it noted the existence of customary rules that "have been developed by the practice of States".[114]

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[108] *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 3, at pp. 43-44, paras. 74, 77.

[109] *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.

[110] Ibid., at para. 207.

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

[112] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, *Judgment, I.C.J. Reports 1984*, p. 246, at p. 299, para. 111; the Court has not referred to such distinguishable categories of customary international law in later jurisprudence. Treves has suggested that in this statement, "the court would thus seem to distinguish from the normal customary law rules, a category of such rules for which the search for the objective and the subjective elements is not required"; see T. Treves, *supra* note 73, para. 19.

[113] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226 at p. 253, para. 64.

[114] Ibid., p. 256, para. 75.

61. The most recent extended pronouncement of the Court on its basic approach is to be found in *Germany v. Italy*, in which it said:

> "It follows that the Court must determine, in accordance with Article 38 (1) *(b)* of its Statute, the existence of 'international custom, as evidence of a general practice accepted as law' … To do so, it must apply the criteria which it has repeatedly laid down for identifying a rule of customary international law. In particular, as the Court made clear in the *North Sea Continental Shelf* cases, the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris* … Moreover, as the Court has also observed,
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> > "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them. (*Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *Judgment, I.C.J. Reports 1985*, pp. 29-30, para. 27)."[115]

62. At the risk of oversimplification, it may be said that there are two main approaches to the identification of particular rules of customary international law in the case law of the Court. In some cases the Court finds that a rule of customary international law exists (or does not exist) without detailed analysis.[116] This may be because the matter is considered obvious (for example, because it is based on a previous finding of the Court[117] or on what the Court views as unquestioned law). A number of examples may be found in the Court's judgment of 19 November 2012 in *Nicaragua v. Colombia*.[118] In other cases the Court engages in a more detailed

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[115] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 3 February 2012, para. 55.

[116] Meron refers to this approach as the "more relaxed approach to customary international law" compared with the "traditional approach" of a detailed discussion of the evidence: T. Meron, *supra* note 34, at 31.

[117] See, e.g. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, at p. 245, para. 41; *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 38, para. 46; Meron, ibid. ("the ICJ and other international courts are increasingly relying on precedent rather than repeatedly engaging in detailed analysis of the customary status of the same principles in every case"); G. Boas, *supra* note 72, at 84-86, 91-93. The question may be asked (including by the Commission in the context of the present topic) how far the fact that a rule of customary international law has been ascertained by one tribunal at a certain point in time (sometimes decades ago) means that such tribunal or other tribunals may simply rely on such finding in the future; see also note 41 above. For the opinion that "[i]ndirect violation of custom occurs when an international tribunal invokes and applies customary international law, as previously declared by another tribunal, without scrutinizing the basis for such a declaration" see B. Chigara, "International Tribunal for the Law of the Sea and Customary International Law", *Loyola of Los Angeles International and Comparative Law Review*, 22 (2000), 433, 450.

[118] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Judgment of 19 November 2012, para. 37 ("Nicaragua's contention that QS 32 cannot be regarded as an island within the definition established in customary international law, because it is composed of coral debris, is without merit. … The fact that QS 32 is very small does not make any difference, since international law does not prescribe any minimum size which a feature must possess in order to be considered an island."); para. 118 ("The Court considers that the definition of the continental shelf set out in Article 76, paragraph 1, of UNCLOS forms part of customary international law."); para. 138 ("The Parties are … agreed that several of the most important provisions of

analysis of State practice and *opinio juris* in order to determine the existence or otherwise of a rule of customary international law. The Court's judgment of 3 February 2012 in *Germany v. Italy*[119] illustrates this approach. It is particularly these latter cases that are helpful in illustrating the Court's approach to the formation and evidence of customary international law.[120]

63. There is a considerable number of cases in which the Court has addressed specific aspects of the process of formation and identification of rules of customary international law, covering many of the issues that arise under the present topic, chief among them the nature of the State practice and *opinio juris* elements, and the relationship between treaties and customary international law. While such cases do not provide complete answers, they offer valuable guidance. The case law will be considered in detail in subsequent reports, when specific aspects of the topic will be addressed.

64. It is widely recognized in the literature that the International Court, through its jurisprudence, has enhanced the role of customary international law and clarified some of its aspects.[121] At the same time, commentators have suggested that the Court has thus far provided only limited guidance on how a rule of customary international law is formed and is to be ascertained, having "a marked tendency to assert the existence of a customary rule more than to prove it",[122] and ultimately

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UNCLOS reflect customary international law. In particular, they agree that the provisions of Articles 74 and 83, on the delimitation of the exclusive economic zone and the continental shelf, and Article 121, on the legal regime of islands, are to be considered declaratory of customary international law."); para. 139 (The Court therefore considers that the legal regime of islands set out in UNCLOS Article 121 forms an indivisible regime, all of which (as Colombia and Nicaragua recognize) has the status of customary international law."); para. 177 ("international law today sets the breadth of the territorial sea which the coastal State has the right to establish at 12 nautical miles. Article 3 of UNCLOS reflects the current state of customary international law on this point."); para. 182 ("The Court has held that this provision [UNCLOS Article 13 — Low-tide elevations] reflects customary international law (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)*, *Judgment, I.C.J. Reports 2001*, p. 100, para. 201.").

[119] *Supra* note 115.

[120] See also the use of case law to determine the existence of a rule of customary international law, for example, the recent reference by the International Court of Justice to "customary international law reflected in the case law of this Court, the International Tribunal for the Law of the Sea (ITLOS) and international arbitral courts and tribunals": *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012*, para. 114 (and note 117 above). One author has suggested that yet another method exists by which the Court declares the existence of customary international law: implicit recognition, whereby "the Court regard[s] a State practice or a treaty provision as if it were customary but without making an explicit pronouncement about its character" (see A. Alvarez-Jiménez, "Methods for the Identification of Customary International Law in the International Court of Justice's Jurisprudence: 2000-2009", *International and Comparative Law Quarterly*, 60 (2011), 681, 698-703).

[121] See, e.g., Danilenko, *supra* note 10, at 80; A. Cassese, "General Round-Up", in A. Cassese and J. H. H. Weiler (eds.), *Change and Stability in International Law-Making* (Walter de Gruyter, 1988), 166.

[122] A. Pellet, "Shaping the Future of International Law: The Role of the World Court in Law-Making", in M. H. Arsanjani et al. (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff Publishers, 2011), 1065, 1076 (referring to "a mysterious and empirical alchemy which leads the Court to 'discover' a rule before applying it in a concrete case"). See also J. I. Charney, "Universal International Law", *American Journal of International Law*, 87 (1993), 529, 537-38; J. P. Kelly, "The Twilight of Customary International

following a rather flexible approach.[123] It has moreover been observed that the Court has not always been consistent in its use of terminology relating to customary international law, or in distinguishing the latter from general principles of law.[124]

Law", *Virginia Journal of International Law*, 40 (2000), 449, 469; K. Skubiszewski, "Elements of Custom and the Hague Court", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)*, 31 (1971), 810, 853; T. Treves, *supra* note 73, at para. 21; R. H. Geiger, "Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal", in U. Fastenrath et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press, 2011), 673, 692; W. W. Bishop, 147 *Recueil des Cours* (1965), 147, 220; A. D'Amato, "Trashing Customary International Law", *American Journal of International Law*, 81 (1987), 101; G. L. Scott and C. L. Carr, "The International Court of Justice and the Treaty/Custom Dichotomy", *Texas International Law Journal*, 16 (1981), 347, 353; T. Meron, *supra* note 34, at 30; J. Ferrer Lloret, "The unbearable lightness of customary international law in the jurisprudence of the International Court of Justice: the *Jurisdictional Immunities of the State* case", available (in Spanish) at *Revista Electronica de Estudios Internationales* (www.reei.org); M. Hagemann, "Die Gewohnheit als Völkerrechtsquelle in der Rechtssprechung des internationalen Gerichtshofes", *Annuaire Suisse de Droit International*, 10 (1953), 61-88.

[123] E. Jiménez de Aréchaga, "Custom", in A. Cassese and J. H. H. Weiler (eds.), *Change and Stability in International Law-Making* (Walter de Gruyter, 1988), 2-3 ("Personally, I believe that the most important contribution made by the Court to the progressive development of international law is to be found … in the flexibility of the jurisprudential conceptions it adopted on this subject of sources, particularly with respect to customary international law"); E. Benvenisti, "Customary International Law as a Judicial Tool for Promoting Efficiency", in E. Benvenisti and M. Hirsch (eds.), *The Impact of International Law on International Cooperation: Theoretical Perspectives* (Cambridge University Press, 2004), 85-116 (suggesting that the Court's judges, "as the oracles of the mystic 'custom'", at times invent customary international law when "these leaps produce more efficient norms"); F. Orrego Vicuña, *supra* note 48, at 25-6 ("the International Court of Justice has not followed a consistent approach in dealing with customary law … In more recent times … it would seem that far from adhering to a given theory the Court has found a customary rule whenever and wherever it has deemed it necessary or convenient to identify such a rule or to go beyond treaty rules"); I. MacGibbon, "Means for the Identification of International Law: General Assembly Resolutions: Custom, Practice and Mistaken Identity", in B. Cheng (ed.) *International Law: Teaching and Practice* (Stevens, 1982), 21 ("It is difficult to avoid the impression that … the Court, in the realm of international custom, has been painting with a fairly broad and liberal brush."); R. H. Geiger, *supra* note 122, at 673, 674 ("the Court's openly proclaimed standards for establishing specific customary rules are quite different from how the Court really proceeds"); R. B. Baker, *supra* note 48, at 178-79 (saying that it was the Court that "in a set of novel, even revolutionary" opinions in the late 1960 and early 1970 set up the doctrinal basis for "a re-think of the traditional sources of customary international law: state practice and *opinio juris*"); R. Müllerson, "On the Nature and Scope of Customary International Law", *Austrian Review of International and European Law*, 2 (1997), 341, 353 (observing that it is the normative claim which often underlies the Court's decision to recognize customary international law); O. Yasuaki, "Is the International Court of Justice an Emperor Without Clothes?", *International Legal Theory*, 81 (2002), 1, 16 ("the ICJ has used the notion of customary international law in a highly flexible manner … blurred the distinction between state practice and *opinio juris*"); F. L. Kirgis, Jr., "Custom on a Sliding Scale", *American Journal of International Law*, 81 (1987), 146-151 (suggesting that the importance of the norm or the theme matters for the I.C.J. in finding customary rules; when it is destabilizing or morally distasteful, a restrictive custom is indeed proclaimed); B. Schlütter, *supra* note 81, at 122, 168 ("the case law of the I.C.J. on custom is not always consistent and does not always appear to follow an overall concept, as envisaged by the different theories on customary international law … the Court has no single approach to the formation of customary international law").

[124] See, e.g. K. Wolfke, *Custom in Present International Law*, 2nd edition (Martinus Nijhoff

65. The President of the International Court of Justice, addressing the issue of the Court's approach to customary international law, has recently explained:

> "... authors are correct in drawing attention to the prevalent use of general statements of rules in the Court's modern practice, although they take the point too far by insisting on theorizing this development. In fact, the Court has never abandoned its view, firmly rooted in the wording of the Statute, that customary international law is 'general practice accepted as law' — that is, in the words of a recent case, that 'the existence of a rule of customary international law requires that there be a 'settled practice' together with *opinio juris*'. However, in practice, the Court has never found it necessary to undertake such an inquiry for every rule claimed to be customary in a particular case and instead has made use of the best and most expedient evidence available to determine whether a customary rule of this sort exists. Sometimes this entails a direct review of the material elements of custom on their own, while more often it will be sufficient to look to the considered views expressed by States and bodies like the International Law Commission as to whether a rule of customary law exists and what its content is, or at least to use rules that are clearly formulated in a written expression as a focal point to frame and guide an inquiry into the material elements of custom."[125]

IX. Case law of other courts and tribunals

A. Other international courts and tribunals

66. Among the international courts and tribunals whose case law may prove valuable for the present topic are the International Tribunal for the Law of the Sea; international and internationalized criminal tribunals; the World Trade Organization dispute settlement organs; inter-State arbitral tribunals; and other ad hoc tribunals. The case law concerned will be referred to in future reports, when dealing with particular aspects of the formation and evidence of customary international law. For the time being, some examples are given to illustrate the range of courts and

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Publishers, 1993), pp. xv-xvii, 8; H. Lauterpacht, *The Development of International Law by the International Court*, revised edition (Grotius Publications, 1982), 393; K. Skubiszewski, *supra* note 122, at 812; M. Mendelson, "The International Court of Justice and the sources of international law", in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press, 1996), 63, 64 (saying that the Court "quite frequently fails to specify which source it is applying … [unless the rule in question derives its validity directly from a treaty,] the Court often simply asserts that such-and-such is a 'well-recognized rule [or principle] of international law' or employ[s] some other vague phrase, without identifying whether the rule derives from custom, 'general principles of law recognized by civilized nations', some other source, or a combination of sources"); D. Bodansky, "Prologue to a Theory of Non-Treaty Norms", in M.H. Arsanjani et al. (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff Publishers, 2011), 119, 122 ("even the International Court of Justice (I.C.J.), whose statute distinguishes general principles from custom, does not always do so in its decisions").

[125] P. Tomka, in "The Judge and International Custom, CAHDI, Council of Europe — 19-20 September 2012", *The Law and Practice of International Courts and Tribunals*, 12 (2013) (forthcoming).

tribunals concerned, the general approach adopted by them, and the wealth of material to be found in the case law.[126] One thing stands out. Notwithstanding the specific contexts in which these other courts and tribunals work, overall there is substantial reliance on the approach and case law of the International Court of Justice, including the constitutive role attributed to the two elements of State practice and *opinio juris*.

67. The International Tribunal for the Law of the Sea, which may apply (in addition to the United Nations Convention on the Law of the Sea) "other rules of international law not incompatible with [the] Convention",[127] has had only limited recourse to customary international law. In identifying a rule as having achieved the status of customary international law, the Tribunal has mainly relied on pronouncements of the International Court.[128] It has also referred to findings by other international courts and tribunals,[129] and to the work of the International Law Commission.[130] In one case, the Tribunal relied on "a growing number of international treaties and other instruments" to find that a "trend towards making [the precautionary] approach part of customary international law" has been "initiated".[131] The Tribunal has also signalled the relevance of State practice and case law to attempts to find the existence of an applicable "general rule" or the interpretation of a legal concept or rule of law.[132]

68. The ad hoc international criminal tribunals — for the former Yugoslavia and for Rwanda — have often turned to customary international law in establishing their jurisdiction.[133] In doing so they have each held, as shown below, that the formation

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[126] Citation of the cases is for the light they shed on the formation and evidence of customary international law, and should not be taken as endorsement of any particular substantive pronouncements.

[127] United Nations Convention on the Law of the Sea, article 293 (1). The Tribunal had also identified that rules of customary international law are implicitly referred to by a number of the Convention's articles; see e.g. *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, International Tribunal for the Law of the Sea, report for 2012, para. 183.

[128] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10, paras. 133-134; *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion (of the Seabed Disputes Chamber)*, 1 February 2011, International Tribunal for the Law of the Sea, report for 2011, p. 10, paras. 57, 147-148, 169, 178.

[129] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion (of the Seabed Disputes Chamber)*, 1 February 2011, International Tribunal for the Law of the Sea report for 2011, p. 10, paras. 57 (referring to the Arbitral Tribunal on *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* and the World Trade Organization's Appellate Body), 178 (referring to the *Rainbow Warrior* Arbitral Tribunal), 194 (referring to the Permanent Court of International Justice).

[130] Ibid., at paras. 169, 178, 182, 194, 210; *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, International Tribunal for the Law of the Sea report for 1999, p. 10, para. 171

[131] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion (of the Seabed Disputes Chamber)*, 1 February 2011, International Tribunal for the Law of the Sea report for 2011, p. 10, para 135.

[132] See *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, paras. 147, 150; *M/V "SAIGA" (Saint Vincent and the Grenadines v. Guinea)*, Prompt Release, Judgment, International Tribunal for the Law of the Sea report for 1997, p. 16, para. 57.

[133] On customary international law as a source of law in international criminal proceedings in

of a rule of customary international law requires State practice and *opinio juris*, and that identifying such a rule generally requires an inquiry into these two elements. This approach was seen as mandated by the tribunals' obligation to pay due heed to the legality principle (*nullum crimen sine lege*), which required that "customary international law can provide a safe basis for conviction, but only if genuine care is taken to determine that the legal principle was firmly established as custom at the time of the offense so that the offender could have identified the rule he was expected to obey".[134] Nonetheless, some have suggested that "customary international law in the context of international criminal law means something different than customary international law in the context of traditional international law",[135] and that the tribunals' jurisprudence often marks a shift "away from a practice-oriented sort of custom to a more specifically *humanitarian* interpretation of the customary process".[136] Others, however, suggest that "[t]he argument that the jurisprudence of the international criminal tribunals has created a new form of custom, rendering state practice and *opinio juris* as no longer indispensable to the formation of custom, is quite wrong".[137]

69. The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (International Tribunal for the Former Yugoslavia) has frequently resorted to customary international law when identifying the international law relating to the crimes and procedure before it. In doing so, it has indicated on several occasions that both State practice and *opinio juris* must be established in order to find that a particular legal principle enjoyed the status of customary international law. In *Prosecutor v. Hadžihasanović*, for example, the Appeals Chamber noted that "to hold that a principle was part of customary international law, it has to be satisfied that State practice recognized the principle on the basis of supporting *opinio juris*";[138] similarly, in *Prosecutor v. Delalić* the Trial Chamber had expressly referred to "[t]he evidence of the existence of such customary law — State practice and *opinio juris*".[139] Accordingly, for example, in

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general see, for example, D. Akande, "Sources of International Criminal Law", in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009), 41, 49-51; and R. Cryer et al., *An Introduction to Criminal Law and Procedure*, 2nd edition (Cambridge University Press, 2010), 11. When considering the case law of international criminal courts and tribunals — both the International Criminal Court and the ad hoc tribunals — it should be borne in mind that States are rarely directly involved as parties.

[134] T. Meron, "Revival of Customary Humanitarian Law", *American Journal of International Law*, 99 (2005), 817, 821.

[135] W. Schabas, *supra* note 33, at 101; see also R.B. Baker, *supra* note 48, at 175, 184-186; L. van den Herik, "Using Custom to Reconceptualize Crimes Against Humanity", in S. Darcy and J. Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (Oxford University Press, 2010), 80-105; C. Stahn and L. van den Herik, "'Fragmentation', Diversification and '3D' Legal Pluralism: International Criminal Law as the Jack-in-the-Box?", in L. van den Herik and C. Stahn (eds.), *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff Publishers, 2012), 21, 63; B. Van Schaack, "*Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals", *Georgetown Law Journal*, 97 (2008), 119, 165; and I. Bantekas, "Reflections on Some Sources and Methods of International Criminal and Humanitarian Law", *International Criminal Law Review*, 6 (2006), 121-136.

[136] G. Mettraux, *International Crimes and the* Ad Hoc *Tribunals* (Oxford University Press, 2006), 18.

[137] G. Boas, *supra* note 72, at 90.

[138] Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 12.

[139] Case No. IT-96-21-T, Judgment, 16 November 1998, para. 302 (and para. 256). See also, for

Prosecutor v. Aleksovski the Appeals Chamber held that without "evidence of State practice which would indicate the development in customary international law" of a requirement that violations of laws or customs of war require proof of a discriminatory intent, no such rule may be found.[140] In *Prosecutor v. Tadić*, the Appeals Chamber referred to a "careful perusal of the relevant practice" when determining that "a discriminatory intent is not required by customary international law for all crimes against humanity".[141]

70. On some occasions, however, Chambers of the Tribunal have shown willingness to recognize that a rule of customary international law has emerged even where the two elements (in particular State practice) were not firmly established. In *Prosecutor v. Kupreškić* the Trial Chamber explicitly asserted that "principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallizing as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law".[142] In other cases Chambers did not always carry out an extensive analysis of State practice and *opinio juris* (nor differentiated between them),[143] or merely cited previous decisions of the Tribunal.[144]

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example, Judge Shahabuddeen's Declaration in the Appeals Chamber Judgment in *Prosecutor v. Furundžija*, where it was said that "if the question is whether there has emerged in customary international law a norm … it would be necessary to examine the evolution of customary international law on the point, and that inquiry would of course have to be done in accordance with the principles regulating that evolution"; Shahabuddeen referred in this context to "a comparative review designed to show whether a new customary norm has come into being on the basis of general concordance of state practice", and later indicated that such a survey must be "systematic" (Case No. IT-95-17/1-A, 21 July 2000, paras. 257-258, 262). Another example is found in the Joint Separate Opinion of Judges McDonald and Vohrah in *Prosecutor v. Erdemovic*: "For a rule to pass into customary international law, the International Court of Justice has authoritatively restated in the North Sea Continental Shelf cases that there must exist extensive and uniform state practice underpinned by *opinio juris sive necessitatis*" (Case No. IT-96-22-A), Judgment of the Appeals Chamber, 7 October 1997, para. 49.

[140] Case No. IT-95-14/1-A, Judgment, 24 March 2000, para. 23.

[141] Case No. IT-94-1-A, Judgment, 15 July 1999, paras. 287-292. See also *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, Judgment, 3 May 2006, Separate and Partly Dissenting Opinion of Judge Schomburg, para. 15; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgment, 17 December 2004, para. 66; *Prosecutor v. Kunarac et al.*, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002, para. 98 (footnote 114); *Prosecutor v. Galić*, Case No. IT-98-29-A, Judgment, 30 November 2006, paras. 86-98, and the Separate and Partly Dissenting Opinion of Judge Schomburg, paras. 7-21.

[142] Case No. IT-95-16-T, 14 January 2000, para. 527. See also A. Zahar, "Civilizing Civil War: Writing Morality as Law at the ICTY", in B. Swart, A. Zahar and G. Sluiter, *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, 2011), 469-505.

[143] See, e.g., *Tadić*, *supra* note 141, at paras. 109 (fn. 129), 303; *Delalić*, *supra* note 139, at paras. 452-454; *Prosecutor v. Kordić and Čerkez*, *supra* note 141, paras. 52-54; see also *Prosecutor v. Galić*, *supra* note 141, Separate Opinion of Judge Shahabuddeen, para. 5.

[144] See, e.g., *Prosecutor v. Naletilić and Martinović*. Case No. IT-98-34-T, Judgment, 31 March 2003, paras. 228, 250, 336; *Prosecutor v. Blaskić*, Case No. IT-95-14-A, Judgment, 29 July 2004, paras. 145-148, 157; *Prosecutor v. Kunarac et al.*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001, paras. 466-486.

71. The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 (International Criminal Tribunal for Rwanda) has likewise had recourse to customary international law on several occasions, from which it appears that both the Tribunal and the parties arguing before it have recognized that, in the words of the Appeals Chamber in *Rwamakuba v. Prosecutor*, "[n]orms of customary international law are characterized by the two familiar components of state practice and *opinio juris*".[145] In another explicit reference, Judge Shahabuddeen has suggested, when referring to the concept of co-perpetratorship in his Separate Opinion in *Gacumbitsi v. Prosecutor* (Appeals Chamber), that "[s]ince several states adhere to one theory while several other states adhere to the other theory, it is possible that the required state practice and *opinio juris* do not exist so as to make either theory part of customary international law".[146] Judge Meron, in his Partly Dissenting Opinion in *Nahimana et al. v. Prosecutor* (Appeals Chamber), suggests that where a "consensus among states has not crystallized, there is clearly no norm under customary international law".[147] When referring to evidence in ascertaining the existence or otherwise of a rule of customary international law, the Tribunal has generally not specified whether such materials were evidence of State practice or *opinio juris* (or both).[148]

72. In some cases the Tribunal has avoided an extensive analysis when deciding whether a rule of customary international law has emerged, or relied instead on the inquiry and pronouncements of other judicial institutions. In *Nahimana et al. v. Prosecutor*, for example, the Appeals Chamber merely referred to an explanatory statement in the Draft Code of Crimes against the Peace and Security of Mankind of the International Law Commission when stating that the position according to which direct and public incitement to commit genocide is punishable only if the act in fact occurs "does not reflect customary international law on the matter";[149] and in

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[145] Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004, para. 14.

[146] Case No. ICTR-2001-64-A, 7 July 2006, Separate Opinion of Judge Shahabuddeen, para. 51.

[147] Case No. ICTR-99-52-A, 28 November 2007, Partly Dissenting Opinion of Judge Meron, paras. 5-8. Referring to the "number and extent of the reservations [to the relevant provisions relied on by the Trial Chamber as] reveal[ing] that profound disagreement persists in the international community as to whether mere hate speech is or should be prohibited", Judge Meron concluded that no "settled principle" is reflected in such provisions, and found support for this position in the drafting history of the Genocide Convention and the *Kordiü* Trial Judgment of the International Tribunal for the Former Yugoslavia as well.

[148] See, e.g., *Prosecutor v. Bikindi*, Case No. ICTR-01-72-T, 2 December 2008, para. 379; *Prosecutor v. Ntakirutimana and Ntakirutimana*, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, 13 December 2004, paras. 518-519; *Rwamakuba*, *supra* note 145, at para. 14. Another such example may be found in *Prosecutor v. Nahimana et al.* (Trial Chamber), where the Chamber referred to "well-established principles of international and domestic law, and the jurisprudence of the *Streicher* case in 1946 and the many European Court and domestic cases since then" to determine that "hate speech that expresses ethnic and other forms of discrimination violates the norm of customary international law prohibiting discrimination" (Case No. ICTR-99-52-T, 3 December 2003, paras. 1073-1076). See also W. Schabas, *supra* note 33, at 84-85.

[149] *Supra* note 147, at fn. 1614 (para. 678); see also Judge Shahabuddeen's Partly Dissenting Opinion in that case, referring in the context of the definition of the crime of persecution to a

Prosecutor v. Akayesu, the Trial Chamber held that "[t]he Genocide Convention is undeniably considered part of customary international law, as can be seen in the opinion of the International Court of Justice on the provisions of the Genocide Convention, and as was recalled by the United Nations Secretary-General in his Report on the establishment of the International Criminal Tribunal for the former Yugoslavia".[150]

73. Turning to internationalized courts, the Special Court for Sierra Leone, in *Prosecutor v. Norman*, stated that "[t]he formation of custom requires both state practice and a sense of pre-existing obligation (opinio iuris)", adding the borrowed words that "[a]n articulated sense of obligation, without implementing usage, is nothing more than rhetoric. Conversely, state practice, without opinio iuris, is just habit".[151] In deciding that the prohibition on child recruitment to armed forces had crystallized into customary international law, the Court referred to the number of States having legislation that prohibits child recruitment ("almost all states ... (... for a long time)"); and stated that from the significantly large number of States that were parties to the Geneva Conventions (185) or had ratified the Additional Protocol II (133) and the Convention on the Rights of the Child ("all but six states"), it follows that the provisions of these instruments are widely accepted as customary international law (for the latter, "almost at the time of the entry into force").[152] The Court opined that "[w]hen considering the formation of customary international law, 'the number of states taking part in a practice is a more important criterion [...] than the duration of the practice'".[153] It moreover stated that "[c]ustomary law, as its name indicates, derives from custom. Custom takes time to develop".[154]

United States Military Tribunal judgment when saying "That happened in a trial held immediately after World War II. So, in the usual way, the case may be accepted as reflective of customary international law" (at para. 13).

150 Case No. ICTR-96-4-T, 2 September 1998, para. 495; see also *Prosecutor v. Kajelijeli*, where the *Tadić* judgment was cited for a "review of the international practice on this issue" of the customary international law status of the proposition that the standard for attack is "widespread or systematic" (Case No. ICTR-98-44A-T, 1 December 2003, para. 869 and footnote 1076); and the words of Judge Güney in his Partially Dissenting Opinion in *Gacumbitsi v. Prosecutor* (*supra* note 146) that "I am concerned by the fact that the majority in this case offers no discussion whatsoever to show that any of these forms of commission are recognized in customary international law. Indeed, no analysis of customary international law is provided to show that 'committing' goes beyond the physical perpetration of a crime or the participation in a joint criminal enterprise" (para. 6). See also Judgment (Reasons) in *Prosecutor v. Kayishema and Ruzindana* (Case No. ICTR-95-1-A), 1 June 2001, where the Appeals Chamber "recall[ed] that the principle of the right to fair trial is part of customary international law" and referred to its embodiment "in several international instruments, including Article 3 common to the Geneva Conventions", citing to the *Čelebeći* Appeal Judgment (para. 51).

151 SCSL-2004-14-AR72(E) (31 May 2004), p. 13 at para. 17; the quote was cited as originating in E. T. Swaine, "Rational Custom", *Duke Law Journal*, 52 (2002), 559, 567-68.

152 Ibid., at paras. 18, 19.

153 Ibid., at p. 25, para. 49; quoting M. Akehurst, "Custom as a Source of International Law", *British Year Book of International Law*, 47 (1975), 1, 16 (and adding the sentence, by the same author, that "the number of states needed to create a rule of customary law varies according to the amount of practice which conflicts with the rule and that [even] a practice followed by a very small number of states can create a rule of customary law if there is no practice which conflicts with the rule" (p. 18)).

154 Ibid., at para. 50. See also the Dissenting Opinion of Judge Robertson, pp. 14-19.

74. In *Prosecutor v. Fofana and Kondewa*,[155] when deciding that the prohibition against pillage as reflected in customary international law did not include a prohibition against destruction not justified by military necessity, the Appeals Chamber of the Special Court for Sierra Leone referred to the pronouncement by the International Court of Justice in the *North Sea Continental Shelf* cases requiring that State practice be "both extensive and virtually uniform" and demonstrate *opinio juris*.[156] It then conducted an analysis of various materials accordingly, although it did not make clear which of the materials mentioned by it counted as "State practice". When initially stating that prohibitions against pillage and destruction not justified by military necessity both "exist in customary international law applicable to non-international armed conflict at the times relevant to this case" the Court cited in support an Appeals Chamber decision of the International Tribunal for the Former Yugoslavia in *Hadžihasanović*.[157]

75. In a 2010 decision examining the status of joint criminal enterprise under customary international law, the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia first referred to Article 38 (1) of the Statute of the International Court of Justice and the *Fisheries* and *North Sea Continental Shelf* cases, and then said that "[t]he Pre-Trial Chamber recalls that, when determining the state of customary international law in relation to the existence of a crime or a form of individual responsibility, a court shall assess existence of 'common, consistent and concordant' state practice, or *opinio juris*, meaning that what States do and say represents the law. A wealth of state practice does not usually carry with it a presumption that *opinio juris* exists; '[n]ot only must the acts concerned amount to a settled practice, but they must also be such or be carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'".[158] The Chamber then relied on international instruments, international cases and "authoritative pronouncements" in determining that certain forms of joint criminal enterprise (JCE) "were recognized forms of responsibility in customary international law at the time relevant for Case 002". As for JCE III the Pre-Trial Chamber noted that there is no "sufficient evidence of consistent state practice or *opinio juris* [to conclude that it was recognized under customary international law] at the time relevant to Case 002".[159] The Trial Chamber "agree[d] in substance" with these findings,[160] and in undertaking its own analysis of international cases concluded that "the Co-Prosecutors have failed to establish that JCE III formed part of customary international law between 1975 and 1979".[161]

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[155] Case No. SCSL-04-14-A, 28 May 2008.

[156] Ibid., para. 405.

[157] Ibid., para. 390, referring to *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-AR73.3, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98*bis* Motions for Acquittal, 11 March 2005, paras. 30, 38.

[158] Criminal Case No. 002/19-09-2007-EEEC/OICJ (PTC38), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, para. 53.

[159] Ibid., paras. 75-83; here the Pre-Trial Chamber reviewed "the authorities relied on [by the ICTY] in Tadić" and was of the view that "they do not provide sufficient evidence of consistent state practice or *opinio juris* at the time relevant to Case 002".

[160] Case File No. 002/19-09-2007/EEEC/TC, Decision on the Applicability of Joint Criminal Enterprise, 12 September 2011, para. 29.

[161] Ibid., para. 38.

76. The Special Tribunal for Lebanon, in finding that a rule of customary international law "has evolved in the international community concerning terrorism", made it clear that ascertaining such a rule is to be done by "demonstrating the requisite practice and *opinio juris seu necessitatis*, namely the legal view that it is necessary and indeed obligatory to bring to trial and punish the perpetrators of terrorist attacks".[162] Relying on the "notion of international custom as set out by the International Court in the *Continental Shelf* case",[163] the Court began its analysis of relevant materials by stating that "[a]s we shall see, a number of treaties, UN resolutions, and the legislative and judicial practice of States evince the formation of a general *opinio juris* in the international community, accompanied by a practice consistent with such *opinio*, to the effect that a customary rule of international law regarding the international crime of terrorism, at least *in time of peace*, has indeed emerged".[164] It further said that "to establish beyond any shadow of doubt whether a customary rule of international law has crystallised" one must in particular "look to the behaviour of States, as it takes shape through agreement upon international treaties that have an import going beyond their conventional scope or the adoption of resolutions by important intergovernmental bodies such as the United Nations, as well as the enactment by States of specific domestic laws and decisions by national courts".[165] Having considered such "elements" in detail the Court then concluded that "it can be said that there is a settled practice concerning the punishment of acts of terrorism, as commonly defined, at least when committed in time of peace; in addition, this practice is evidence of a belief of States that the punishment of terrorism responds to a social necessity (*opinio necessitatis*) and is hence rendered obligatory by the existence of a rule requiring it (*opinio juris*)".[166]

77. Dispute settlement organs of the World Trade Organization (WTO) have also dealt, albeit infrequently, with the ascertainment of rules of customary international law.[167] It appears from such cases that in determining whether a certain rule of customary international law has or has not emerged, the traditional elements of State

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[162] Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Appeals Chamber), 16 February 2011, para. 104.

[163] Ibid., para. 102.

[164] Ibid., para. 85.

[165] Ibid., para. 87.

[166] Ibid., para. 102.

[167] It is unnecessary, in the present context, to discuss the extent to which WTO dispute settlement organs may apply customary international law, as to which see, for example, *Korea — Measures Affecting Government Procurement* (Panel Report), WT/DS163/R, adopted on 19 June 2000, para. 7.96 (where the Panel said: "To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO"); see also I. Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford University Press, 2009), 13-21; J. Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?", *American Journal of International Law*, 95 (2001), 535, 542-543; S. Mohd Zin and A. H. Sarah Kazi, "The Role of Customary International Law in the World Trade Organisation (WTO) Disputes Settlement Mechanism", *International Journal of Public Law and Policy*, 2 (2012), 229, 245-48; A. Lindroos and M. Mehling, "Dispelling the Chimera of 'Self-Contained Regimes': International Law and the WTO", *European Journal of International Law*, 16 (2006), 857, 869-873; D. Palmeter and P. C. Mavroidis, "The WTO Legal System: Sources of Law", *American Journal of International Law*, 92 (1998), 398-413; and J. Trachtman, "The Jurisdiction of the World Trade Organization" *American Society of International Law (ASIL) Proceedings*, 98 (2004), 139-142.

practice and *opinio juris* have been considered as essential by Panels and the Appellate Body, although they have thus far generally avoided conducting an independent examination of these elements.

(i) In *United States — Standards for Reformulated and Conventional Gasoline*, when stating that the "general rule of interpretation" enumerated in the Vienna Convention on the Law of Treaties has "attained the status of a rule of customary or general international law", the Appellate Body referred to judgements of the International Court of Justice, the European Court of Human Rights and the Inter-American Court of Human Rights, as well as to public international law literature.[168] In *Japan — Taxes on Alcoholic Beverages*, the Appellate Body simply stated that "[t]here can be no doubt that Article 32 of the Vienna Convention, dealing with the role of supplementary means of interpretation, has also attained the same status [of 'a rule of customary or general international law']", and in a footnote referred primarily to case law of the International Court.[169]

(ii) In *EC — Measures Concerning Meat and Meat Products (Hormones)*, when referring to the question of whether the precautionary approach or principle had crystallized into "a principle of general or customary international law" (and ultimately deciding not to take a position on the matter) the Appellate Body noted that "[t]he status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges", and referred in a footnote to writings according to which there was or was not enough State practice that could give rise to customary international law. It further noted that the International Court of Justice had not recognized the principle as a norm that had to be taken into consideration.[170]

(iii) In *Korea — Measures Affecting Government Procurement* (a Panel Report, which was not appealed), the Panel said with regard to Article 48 of the Vienna Convention on the Law of Treaties, that the initial concept of error "has developed in customary international law through the case law of the Permanent International Court of Justice and of the International Court of Justice", and was then codified into the Convention. It concluded that "[s]ince this article has been derived largely from case law of the relevant jurisdiction, the PCIJ and the ICJ, there can be little doubt that it presently represents customary international law".[171] The Panel moreover stated, in a footnote, that article 65 of the Vienna Convention "does not seem to belong to the provisions of the *Vienna Convention* which have become customary international law", but did not

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[168] WTO Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted on 20 May 1996, p. 17.

[169] WTO Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted on 1 November 1996, p. 11.

[170] WTO Appellate Body Report, *EC — Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted on 16 January 1998, para. 123.

[171] *Korea — Measures Affecting Government Procurement*, WT/DS163/R, adopted on 19 June 2000, paras 7.123, 7.126.

provide any reasoning apart from referring a case of the European Court of Justice that makes a similar succinct statement.[172]

78. In other WTO cases a pronouncement about rules of customary international law was made without accompanying analysis or references, for example in *European Communities — Regime for the Importation, Sale and Distribution of Bananas (EC — Bananas III)*, where the Appellate Body had noted that "…nothing in … customary international law or the prevailing practice of international tribunals … prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings".[173]

79. The case law of *inter-State arbitral tribunals*, such as those under annex VII to the United Nations Convention on the Law of the Sea, as well as other ad hoc tribunals such as the Iran-United States Claims Tribunal, the Eritrea-Ethiopia Claims Commission, and tribunals in the field of investment protection,[174] will also need to be examined as the topic proceeds.

B. Regional courts

80. Regional courts have likewise not infrequently determined the existence or otherwise of rules of customary international law, usually in the particular context of interpreting and applying their own specific treaties.

81. In its Advisory Opinion of 2009 regarding the interpretation of article 55 of the American Convention on Human Rights, the Inter-American Court of Human Rights was called on to decide, inter alia, whether a procedural right to appoint judges ad hoc to the Court in contentious cases originating in individual petitions had the status of customary international law. Observing first the definition of international custom in Article 38.1 (b) of the Statute of the International Court of Justice, the Court went on to cite several cases of the International Court and public international law scholarship in saying that "[i]n this regard, the case law of the International Court of Justice, as well as the international doctrine, have indicated that this source of law consists of two formative elements. The first, objective in character, is the existence of a general practice created by the States, and performed constantly and uniformly (*usus* or *diuturnitas*). The second element, of a subjective character, refers to the States' conviction that said practice constitutes a legal norm (*opinio juris sive necessitatis*)".[175]

82. The Court of Justice of the European Union and the European Court of Human Rights have also had occasion to apply customary international law from time to

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[172] Ibid., para. 7.126, footnote 769 (referring to ECJ Case C-162/69, *Racke v. Hauptzollamt Mainz* — 1998 ECR, I-3655, para. 59).

[173] *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted on 25 September 1997, para. 10 (referring to a previous ruling dated 15 July 1997).

[174] See also, for example, C. Congyan, "International investment treaties and the formation, application and transformation of customary international law", *Chinese Journal of International Law*, 7 (2008), 659-679; and E. Milano, "The Investment Arbitration between Italy and Cuba: The Application of Customary International Law under Scrutiny", *The Law and Practice of International Courts and Tribunals*, 11 (2012), 499-524.

[175] Advisory Opinion OC-20/09 (29 September 2009), pp. 54-55, para. 48.

time.[176] For example, in its Decision on Admissibility in *Van Anraat v. The Netherlands*, the European Court of Human Rights, after referring extensively to *North Sea Continental Shelf* and *Nicaragua*,[177] stated that "it is possible for a treaty provision to become customary international law. For this it is necessary that the provision concerned should, at all event potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law; that there be corresponding settled State practice; and that there be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it (*opinio iuris sive necessitatis*)."[178]

C. Domestic courts

83. The Special Rapporteur continues to seek materials concerning the approach of domestic courts to the identification of rules of customary international law. Such information would be useful at any stage, particularly before he prepares his second report, in early 2014. Some valuable information may be found in the extensive writing on the subject.[179]

84. While there may be much to learn from the approach of domestic courts, it should be borne in mind that each domestic court operates within the particular confines of its own domestic (constitutional) position. The extent and manner in which customary international law may be applied by the domestic courts is a function of internal law. Moreover, domestic judges are not necessarily experts or even trained in public international law; and domestic courts may be influenced by their own State's view of whether or not a particular rule of customary international law exists, and are anyway likely to (and perhaps should) adopt a cautious approach to developing the law.[180]

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[176] See the presentations by Judge Malenovský of the Court of Justice of the European Union, and Judge Ziemele of the European Court of Human Rights, in "The Judge and International Custom, CAHDI, Council of Europe — 19-20 September 2012", *The Law and Practice of International Courts and Tribunals*, 12 (2013) (forthcoming).

[177] Application No. 65389/09, Decision on Admissibility, 6 July 2010, paras. 35-36, 87-92.

[178] Ibid., para. 88.

[179] See, e.g., B. Stirn, Président de la section du contentieux du Conseil d'État (France); A. Paulus, Judge, Federal Constitutional Court (Germany), both in "The Judge and International Custom, CAHDI, Council of Europe — 19-20 September 2012", *The Law and Practice of International Courts and Tribunals*, 12 (2013) (forthcoming); and in "Application of customary international law by national courts" (various authors), *Non-State Actors and International Law*, 4 (2004), 1-85; and D. Shelton, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press, 2011).

[180] Lord Hoffman, in his speech in the House of Lords in the *Jones* and *Mitchell* cases, referred to academic comment suggesting that the Italian Supreme Court in *Ferrini* had "given priority to the values embodied in the prohibition of torture over the values and policies of the rules of State immunity", and continued: "if the case had been concerned with domestic law, [this] might have been regarded by some as 'activist' but would have been well within the judicial function ... But the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states." (*Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya; Mitchell and others v. Al-Dali and others and Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* [2006] UKHL 26, at para. 63). Others, on the other hand, have suggested that domestic judges have an important role in the development of

85. It might be worthwhile to refer at this stage to a number of well-known judgements of domestic courts that relate to the present topic. These suggest that in general, domestic courts[181] may largely seek to follow the International Court's approach.

(a) English courts have sought to identify the rules of customary international law on many occasions. While they have tended to follow the approach of the International Court, the judgements do not always go into the matter in depth.[182] In a recent High Court case, the judge accepted (as did the Government) that the prohibition of torture was a rule of *jus cogens*, citing *Belgium v. Senegal* to that effect, but could find no customary rule of international law that prohibited the imposition in domestic law of a rule of limitation in civil actions."[183] In so finding, Judge McCombe referred back to a passage in his earlier judgment in the same case, in which he had stated that "[t]o establish a rule of customary international law (such as that for which the claimant contends) it needs to be shown that the relevant state practice is "both extensive and virtually uniform" (*North Sea Continental Shelf Cases*, (1969) *I.C.J. Reports* p. 3, 44, paragraphs 74 and 77)."[184] In *R v. Jones (Margaret)*, the House of Lords found that, by the end of the twentieth century, the crime of aggression was a crime under customary international law; in reaching this conclusion Lord Bingham had regard to a wide range of materials ("the major milestones"), including draft treaties, resolutions of international organizations, the work of the International Law Commission, the 1986 *Nicaragua* judgment of the International Court of Justice, and the writings of Brownlie.[185]

(b) The Supreme Court of Singapore ruled in *Yong Vui Kong v. Public Prosecutor* (2010) that "there is a lack of extensive and virtually uniform state practice to support … [the] contention that CIL [presently] prohibits the MDP [(mandatory death penalty)] as an inhuman punishment".[186] Referring to the Statute of the International Court and several of the Court's judgments on the approach to ascertaining a rule of customary international law, the Court said that "extensive and virtually uniform practice by all States … together with *opinio juris*, is what is

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customary international law (A. Roberts, "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law", *International and Comparative Law Quarterly*, 60 (2011), 57-92).

[181] L. Wildhaber and S. Breitenmoser, "The relationship between customary international law and municipal law in Western Europe", *ZaöRV*, 48 (1988), 163.

[182] For example, in a case concerning the customary international law on special missions, the Divisional Court considered it sufficient to note that "[i]t was agreed [between the parties] that under rules of customary international law Mr Khurts Bat was entitled to inviolability of the person and immunity from suit if he was travelling on a Special Mission sent by Mongolia to the United Kingdom with the prior consent of the United Kingdom": [2011] EWHC 2029 (Admin); All ER (D) 293; *ILR* 147 (2012), para. 19.

[183] *Mutua and Others v. Foreign and Commonwealth Office* [2012] EWHC 2678 (QB), paras. 154-9.

[184] *Mutua and Others v. Foreign and Commonwealth Office* [2011] EWHC 1913 (QB), para. 87.

[185] [2006] UKHL 16; [2007] 1 AC 136, paras. 13-19. See also R *(European Roma Rights Centre) v. Immigration Officer at Prague Airport* [2004] UKHL 55, para. 23 (Lord Bingham); *Binyam Mohamed* [2009] 1 W.L.R. 2579, at 164 (Lord Bingham).

[186] [2010] 3 S.L.R. 489 [2010] SGCA 20 (Supreme Court of Singapore — Court of Appeal, 14 May 2010), paras. 95-98; referring in detail to an "extensive survey of the status of the death penalty worldwide" the Court explained that "although the majority of States in the international community do not impose the MDP for drug trafficking, this does not make the prohibition against the MDP a rule of CIL. Observance of a particular rule by a majority of States is not equivalent to extensive and virtually uniform practice by all States".

needed for the rule in question to become a rule of CIL".[187] It further explained that judicial decisions and expert opinions may serve as "subsidiary means for determining the existence or otherwise of rules of CIL".[188]

(c) In *Winicjusz v. Federal Republic of Germany* (2010),[189] when determining whether there was in customary international law an exception to State immunity for tortuous acts committed by armed forces on the territory of the forum State, the Polish Supreme Court stated that the content of customary international law was to be determined according to Article 38.1 (b) of the Statute of the International Court of Justice, and that this required establishing two conditions: "(1) the widespread repetition by states of similar international acts over time (state practice) and (2) with a sense of legal obligation (*opinio juris*)". It further noted that "[t]he relevant legal materials, which may be used in the above determination, include the provisions of the European convention on state immunity ('Basle Convention') and U.N. conventions, case law of international courts, decisions of national courts, foreign law and legal literature". Relying on voluminous information, the Court concluded that a rule of customary international law providing for exemption from State immunity in cases of serious violations of human rights (including in the course of armed conflicts) has not yet emerged as "this practice is by no means universal"; it moreover found, on the basis of some State practice, that such a new exception was possibly in the process of formation.[190]

(d) In South Africa, the Constitutional Court in *Kaunda and Others v. President of the Republic of South Africa and Others* (2004) relied on a report of the International Law Commission to conclude that "presently this is not the general practice of states" that diplomatic protection is recognized as a human right, and that no such rule of customary international law may thus be said to exist.[191] Judge Ngcobo added, in a separate opinion, that "[o]ne of the greatest ironies of customary international law is that its recognition is dependent upon the practice of states evincing it. Yet at times states refuse to recognise the existence of a rule of customary international law on the basis that state practice is insufficient for a particular practice to ripen into a rule of customary international law. In so doing, the states deny the practice from ripening into a rule of customary international law. The practice of imposing a legal duty to exercise diplomatic protection for an injured national or a national threatened by an injury by a foreign state, upon the national's request, is a victim of this irony. Despite numerous countries which impose this legal duty in their constitutions, there is still a reluctance to recognise this practice as a rule of customary international law. It remains a matter of an exercise in the progressive development of international law."[192]

(e) The *Paquete Habana* case of 1900 remains the foundational United States Supreme Court case with regard to the types of materials that are relevant for conducting an analysis as to whether a rule of customary international law exists.[193] In order to reach the conclusion in that case that "[b]y an ancient usage among

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[187] Ibid., paras. 96-98.

[188] Ibid., para. 97.

[189] *Winicjusz N. v. Republika Federalna Niemiec — Federalny Urząd Kanclerski w Berlinie*, Supreme Court (Civil Chamber), case No. CSK 465/09, 29 October 2010; see also *Polish Yearbook of International Law*, 30 (2010), 299-303.

[190] Ibid., pp. 28-29.

[191] Case CCT 34/04 (4 August 2004), paras. 25-29.

[192] Ibid., paras. 148-149.

[193] The *Paquete Habana*, 175 U.S. 677 (1900).

civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war", the Court sought to "trace the history of the rule, from the earliest accessible sources, through the increasing recognition of it, with occasional setbacks, to what we may now justly consider as its final establishment".[194] It thus surveyed acts of governments (such as orders, treaties and judgments), as well as "the works of jurists and commentators, who by years of labour, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat ... for trustworthy evidence of what the law really is",[195] and made its determination following this "review of the precedents and authorities on the subject".[196]

(f) In El Salvador, the Supreme Court of Justice referred to the formation of customary international law in a 2007 constitutional case that dealt with the constitutionality of an article in the country's Labour Code (*Código de Trabajo*) in the light of the right to a minimum wage. When discussing the legal significance of an international declaration as opposed to an international treaty, the Court noted that "international declarations perform an indirect normative function, in the sense that they propose a non-binding but desirable conduct. ... Declarations anticipate an *opinio juris* (a sense of obligation) which states must adhere to with a view to crystallizing an international custom in the medium or long term … international declarations, even if not binding, contribute significantly to the formation of binding sources of international law, whether by anticipating the binding character of a certain State practice, or by promoting the conclusion of a treaty based on certain recommendations [included in such declarations]".[197]

(g) The Special Supreme Court of Greece has stated in *Federal Republic of Germany v. Margellos and Others* (2002) that "[i]n determining the existence of such rules [i.e. generally accepted rules of international law] it is necessary to establish the existence of generalized practice in the international community [*sic*] acknowledging the acceptance that the rule has been formulated as a binding legal rule", referring in this context to Article 38.1 of the Statute of the International Court of Justice.[198] It further noted that "[i]n determining the existence of such a rule, recourse may be had to appropriate evidence such as international conventions, the records and correspondence of international organizations, judgments of international and national tribunals, legislative texts by States, diplomatic correspondence, written legal opinions by legal advisers of international organizations and States, as well as codified texts of international organizations, international committees and institutes of international law. Such data should be examined both individually and as a whole".[199] Taking into consideration information brought before it by the Hellenic Institute of International and Foreign Law, as well as judgments of the European Court of Human Rights and the

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[194] Ibid., at 686.
[195] Ibid., at 700.
[196] Ibid., at 708.
[197] Corte Suprema de Justicia, Case No. 26-2006 (12 March 2007), p. 14-15 (Part VI.2.A).
[198] Judgment No. 6/2002, 17 September 2002 (2007) 129 *ILR* 525, 528, para. 9 (the term "international community" does not accurately translate the original text; the proper translation should be "international legal order").
[199] Ibid., para. 9.

International Court, international instruments including texts produced by the Commission, national case law and legislation, and writings of experts, the Court then found that the state of development of international law at that time afforded Germany State immunity in proceedings relating to tortuous liability arising from acts of the German armed forces (in this case, those allegedly committed in a Greek village in 1944).[200]

(h) The German Federal Constitutional Court, when called upon to decide in the *Argentine Bonds* case (2007) whether there was a "general rule of international law"[201] that entitled a State temporarily to refuse to meet private-law payment claims due towards private individuals by invoking state necessity declared because of inability to pay, stated first that "[w]hether a rule is one of customary international law, or whether it is a general legal principle, emerges from international law itself, which provides the criteria for the sources of international law".[202] It then declared that "[i]nvocation of state necessity is recognised in customary international law in those legal relationships which are exclusively subject to international law; by contrast, there is no evidence for a state practice based on the necessary legal conviction (*opinio juris sive necessitatis*) to extend the legal justification for the invocation of state necessity to relationships under private law involving private creditors", with both propositions supported by reference to national and international legal materials. These included the Commission's work on State responsibility (in particular Article 25 of the Articles on State Responsibility that was described as "now generally recognised in legal literature and in the view of international courts and tribunals ... [as] constitut[ing] applicable customary international law"), judgments of the International Court of Justice and other international tribunals, national case law and scholarly literature.[203] The Court made clear that sufficient (uniform) State practice must be identified in order to establish that a rule of customary international law indeed exists.[204]

X. The work of other bodies

86. Like the International Law Commission, the Institute of International Law (*Institut de droit international*) and the International Law Association, both founded

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[200] Ibid., paras. 12-15; according to the operative paragraph of the judgment: "In the present state of the development of international law, there continues to exist a generally accepted rule of international law according to which proceedings cannot be brought against a foreign State before the courts of another State for compensation for an alleged tort committed in the forum State in which the armed forces of the defendant State allegedly participated [the original adds "in any way"] either in a time of war or in a time of peace" (p. 533).

[201] "General rules of international law" is a term used in article 25 of the Basic Law of the Federal Republic of Germany, which encompasses customary international law and general principles of law.

[202] Order of the Second Senate of 8 May 2007, 2 BvM 1-5/03, 1, 2/06, para. 34; 138 *ILR* 1.

[203] Ibid., paras. 37-65. For the finding that an "inspection of national case-law on the question of state necessity also fails for lack of agreement to suggest that the recognition of state necessity impacting on private-law relationships is established in customary law" the Court relied on an expert report which evaluated the practice of national courts on the matter, instead of conducting its own analysis.

[204] Ibid., paras. 51, 65. Reference to the centrality of State practice is also found in the dissenting opinion of Judge Lubbe-Wolff (see para. 86: "Evidence from state practice, from which the plea of necessity's validity under customary law follows …").

in 1887, have each addressed the formation of customary international law in the course of their work on various topics. But like the Commission itself, given their respective functions, they have — with the notable exception of the Association's work between 1984 and 1986 and 2000 (see paras. 89-91 below) — not often had to face squarely the issues raised by this topic.

87. The Institute's purpose, as set out in its Statutes, is "to promote the progress of international law".[205] Among the topics that have recently been considered by the Institute is one concerning problems arising from a succession of codification conventions, including "questions pertaining to the relationship between treaty and custom". *Conclusion 2 (Effect of Codification Provisions)* reads:

> "A codification convention may contain provisions (hereinafter referred to as 'codification provisions') which are declaratory of customary law, or which serve to crystallise rules of customary law, or which may contribute to the generation of new rules of customary law in accordance with the criteria laid down by the International Court of Justice."[206]

88. Another topic considered by the Institute concerned the elaboration of general multilateral conventions and of non-contractual instruments.[207] The conclusions are of considerable interest to the present topic as regards the "normative function or objective" of General Assembly resolutions.

89. The work of the International Law Association, between 1984/85 and 2000, culminated in the adoption in 2000 of the *London Statement of Principles Applicable to the Formation of (General) Customary International Law* (with commentary).[208] The Association's work, which consists of 33 principles with commentaries, has received both support and criticism, including at the time of its adoption in 2000.[209]

90. The Association's Committee had a distinguished composition. It was chaired successively by Professor Zemanek (Austria) and — from 1993 — Professor Mendelson (United Kingdom); the latter had previously been Rapporteur. The First Report of the Rapporteur (1986) set out a list of topics, which remains valuable, suggested an approach to "modes of custom-formation", and contained an appendix by Professor Mendelson on "Formation of International Law and the Observational

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[205] Article 1 of the Statute of the Institute provides in part that the purpose of the Institute is "to promote the progress of international law ["*favoriser le progrès du droit international*"]: (a) by striving to formulate the general principles of the subject, in such a way as to correspond to the legal conscience of the civilized world; (b) by lending its cooperation in any serious endeavour for the gradual and progressive codification of international law; (c) by seeking official endorsement of the principles recognized as in harmony with the needs of modern societies; ..." (English translation of original French).

[206] *Problems Arising from a Succession of Codification Conventions on a Particular Subject*, resolution adopted on 1 September 1995, Session of Lisbon — 1995; see also Conclusions 10, 12 and 13, and the reports of the First Commission, Rapporteur Sir Ian Sinclair.

[207] *The Elaboration of General Multilateral Conventions and of Non-contractual Instruments Having a Normative Function or Objective*, resolution adopted on 17 September 1987, Session of Cairo — 1987; see also the reports of the Thirteenth Commission, Rapporteur Krzysztof Skubiszewski.

[208] *London Statement of Principles*; see *Report of the Sixty-ninth Conference, 2000*, pp. 39, 712-777. For the plenary debate, see 922-926.

[209] See the Working Session of the Committee on 28 July 2000: ibid., 778-790.

Standpoint".[210] The Second Report of the Rapporteur (1988) had an appendix on terminology, which included discussion of the expression "(general) customary international law".[211] The Third and Fourth Reports dealt respectively with the subjective and the objective elements in customary international law.[212]

91. The Final Report of the Committee begins by mentioning "inherent serious difficulties in setting out rules on this subject". There then follow 33 principles (some subdivided) and associated commentary, forming the *London Statement of Principles*. The Statement was divided into five parts, entitled respectively: I, Definitions; II, The Objective Element (State Practice); III, The Subjective Element; IV, The Role of Treaties in the Formation of Customary International Law; and V, The Role of Resolutions of the UN General Assembly and of International Conferences in the Formation of Customary International Law. The matters covered in the Statement include use of terms; what types of acts constitute State practice; the "State" for the purpose of identifying State practice; the practice of intergovernmental organizations; density of practice; the subjective element (*opinio juris*); the role of treaties; and the role of General Assembly resolutions and resolutions of international conferences. The relevant principles and commentary included in the Statement of Principles, and reactions thereto, will be referred to by the Special Rapporteur, as appropriate, in future reports.

92. The International Committee of the Red Cross (ICRC) project on customary international humanitarian law, which began in 1995, led to the publication, nearly a decade later and after widespread research and various consultations, of the study entitled *Customary International Humanitarian Law*.[213] One of its authors has explained that "[t]he approach taken in the study to determine whether a rule of general customary international law exists was a classic one, set out by the International Court of Justice, in particular in the *North Sea Continental Shelf cases*", with relevant State practice selected and compiled, and then assessed together in light of the requirement of *opinio juris*.[214] The study has been much discussed;[215] its publication provoked some strong reactions, both private[216] and

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[210] *International Law Association, Report of the Sixty-third Conference (1988)*, 936.

[211] Ibid., at 950. See also the debate in the Working Session of the Committee on 26 August 1988, in which many spoke for or against including the word "general" in the title of the topic (p. 960).

[212] Third interim report of the Committee, *International Law Association, Report of the Sixty-seventh Conference, 1996*, 623-646; Fourth interim report of the Committee, *International Law Association, Report of the Sixty-eighth Conference, 1998*, 321-335. The Fifth and Sixth interim reports were incorporated into the Final Report.

[213] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Vol. I (Rules), Vol. II (Practice)* (Cambridge University Press, 2005).

[214] J.-M. Henckaerts, "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict", *International Review of the Red Cross*, 87 (2005), 175, 178; see also the introduction to the study, ibid., at pp. xxxi-lvii.

[215] E. Wilmshurst, S. Breau, *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, 2007); L. Maybee, B. Chakka (eds.), *Custom as a Source of International Humanitarian Law: Proceedings of a Conference to Mark the Publication of the ICRC Study, New Delhi* (ICRC, 2006); P. Tavernier, J.-M. Henckaerts (eds.), *Droit international humanitaire coutumier: enjeux et défis* (Bruylant, 2008).

[216] See, e.g., T. Meron, *supra* note 134, at 833-34; G. H. Aldrich, "Customary International Humanitarian Law — An Interpretation on behalf of the International Committee of the Red Cross", *British Yearbook of International Law*, 76 (2005), 503-524; Y. Dinstein, "The ICRC Customary International Humanitarian Law Study", *Israel Yearbook on Human Rights*, 36 (2006), 1-15; M. Bothe, "Customary international humanitarian law", *Yearbook of International*

governmental,[217] some criticizing it for not actually identifying custom in accordance with its stated methodology.[218] It was robustly defended by the authors.[219] The Committee continues, through a partnership with the British Red Cross, to update its database of relevant national practice from some ninety States.[220]

93. The American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States of 1987[221] distinguishes between "Sources of international law" (Section 102) and "Evidence of international law" (Section 103). Section 102 (2) states that:

> "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation".

Comments b, c, d and e to section 102 contain concise elaborations of the relevant basic propositions, as do reporters notes 2 to 5.

XI. Writings

94. There is extensive writing on the formation and evidence of customary international law,[222] both monographs on the topic in general, as well as on

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Humanitarian Law, 8 (2005), 143-178; M. MacLaren and F. Schwendimann, "An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law", *German Law Journal*, 6 (2005), 1217-1242; R. Cryer, "Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study", *Journal of Conflict and Security*, 11 (2006), 239-263; and D. Fleck, "Die IKRK-Gewohnheitsrechtsstudie", *Humanitäres Völkerrecht*, 22 (2009), 120-124.

[217] See section VII above.

[218] See, e.g., *supra* notes 98, 99.

[219] J.-M. Henckaerts, "Customary International Humanitarian Law — A Rejoinder to Judge Aldrich", *British Yearbook of International Law*, 76 (2005), 525-532; J.-M. Henckaerts, "The ICRC Customary International Humanitarian Law Study — A Rejoinder to Professor Dinstein", *Israel Yearbook on Human Rights*, 37 (2007), 259; J.-M. Henckaerts, "Customary International Humanitarian Law — A Response to US Comments", *International Review of the Red Cross*, 89 (2007), 473-488.

[220] See www.icrc.org/customary-ihl/eng/docs/Home.

[221] See D. B. Massey, "How the American Law Institute influences customary law: the reasonableness requirement of the restatement of foreign relations law", *Yale Journal of International Law*, 22 (1997), 419-445.

[222] The Library at the United Nations Office at Geneva has prepared a helpful bibliography on customary international law, available at http://libraryresources.unog.ch/legal/ILC. The Special Rapporteur likewise intends to prepare a select bibliography, based initially on that contained in annex A to the Commission's 2011 Report (A/66/10), to be added to and updated as the topic proceeds. Among the general textbooks with extensive bibliographies are: P. Dailler, M. Forteau and A. Pellet, *supra* note 44, at 353-379; M. Diez de Velasco, *Instituciones de derecho internacional público*, C. Escobar Hernández (ed.), 18th edition (Tecnos, 2012), 136-149; A. Clapham, *supra* note 87, at 57-63; J. Crawford, *supra* note 48, at 23-30; M. N. Shaw, *supra* note 50, at 72-92; V. I. Kuznetsov and B. R. Tuzmukhamedov (W. E. Butler, ed.), *International Law — A Russian Introduction* (Eleven International, 2009), 70-79; A. Cassese, *International Law*, 2nd edition (Oxford University Press, 2005), 153-169; G. von Glahn and J. L. Taulbee, *Law Among Nations: An Introduction to Public International Law*, 10th edition (Pearson, 2012), 53-61; S. Sur, *supra* note 67, at 165-177; B. Conforti and A. Labella, *An Introduction to International Law* (Martinus Nijhoff Publishers, 2012), 31-51; S. D. Murphy, *supra* note 55, at 92-101; J. Verhoeven, *Droit international public* (Larcier, 2000), 318-346; D. Alland (ed.), *Droit*

particular aspects and articles. In addition, general textbooks on public international law invariably deal with the topic, if only briefly. The aim of the present section of the report is simply to indicate the variety and richness of the writings in this field, without taking a position on the theories put forward.

95. It is interesting to note that various approaches have been proposed in the literature, since the time of classical authorities such as Suarez and Grotius, with regard to how rules of customary international law are generated and how they are to be identified. These have sometimes been labelled "traditional" and "modern" approaches, and they have often been considered to be in sharp opposition.

96. The "traditional" approach, reflected in Article 38.1 (b) of the Statute of the International Court of Justice, has been widely understood as requiring two components for the formation of a rule of customary international law: (a) general State practice and (b) acceptance of such practice as law. The former is sometimes referred to as the "objective" (material) element and concerns the consistency and uniformity of practice over time; the latter (also known as *opinio juris sive necessitatis*, "an opinion of law or necessity") is referred to as the "subjective" (psychological) element and relates to the motives behind such behaviour of States.[223] This approach, recognized as the "dominant position in the mainstream theory of customary international law",[224] regards each of the two elements as

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international public (Presses Universitaires de France, 2000), 268-297; P.-M. Dupuy and Y. Kerrat, *Droit international public*, 10th edition (Dalloz, 2010), 360-372; D. Carreau and F. Marrella, *Droit international public*, 11th edition (Pedone, 2012), 301-324; J. Combacau and S. Sur, *Droit international public*, 10th edition (Montchrestien, 2012), 54-75.

[223] See, e.g., H. Thirlway, "The Sources of International Law", in M. D. Evans (ed.), *International Law*, 3rd edition (Oxford University Press, 2010) 102 ("The traditional doctrine is that the mere fact of consistent international practice in a particular sense is not enough, in itself, to create a rule of law in the sense of the practice; an additional element is required. Thus classical international law sees customary rules as resulting from the combination of two elements: an established, widespread, and consistent practice on the part of States; and a psychological element known as the *opinio juris sive necessitatis* (opinion as to law or necessity), usually abbreviated to *opinio juris*"); M. O. Hudson, *The Permanent Court of International Justice, 1920-1942: A Treatise* (The Macmillan Company, 1943), 609 ("The elements necessary are the concordant and recurring action of numerous States in the domain of international relations, the conception in each case that such action was enjoined by law, and the failure of other States to challenge that conception at the time"); A. T. Guzman, *How International Law Works* (Oxford University Press, 2008), 184 ("The traditional definition of CIL is strictly doctrinal, in the sense that a particular norm is said to be a rule of CIL if it satisfies a two-part doctrinal test. The most commonly cited version of this definition is provided by article 38 of the Statute of the I.C.J."); B. Conforti and A. Labella, *supra* note 222, at 31; S. Sur, *supra* note 67, at 174; G. von Glahn and J. L. Taulbee, *supra* note 222, at 54-55; S. Rosenne, *Practice and Methods of International Law* (Oceana Publications, 1984), 55; J. Crawford, *supra* note 48, at 23; D. Bederman, "Acquiescence, Objection and the Death of Customary International Law", *Duke Journal of Comparative and International Law*, 21 (2010), 31, 44; B. Stern, "Custom at the Heart of International Law", *Duke Journal of Comparative & International Law*, 11 (2001), 89, 91; and A. Boyle and C. Chinkin, *The Making of International Law* (Oxford University Press, 2007), 41.

[224] E. Voyiakis, "Customary International Law and the Place of Normative Considerations", *American Journal of Jurisprudence*, 55 (2010), 163, 169; see also, for example, G. M. Danilenko, *supra* note 10, at 81 ("although many aspects of custom formation in international law remain controversial, there is almost unanimous agreement that a legitimate customary law-making process requires the presence of two basic elements: practice and acceptance of this practice as law"); Y. Iwasawa, *International Law, Human Rights, and Japanese Law* (Clarendon Press, 1998), 35 ("In accordance with the view dominant in international law, Japanese courts

indispensable; at the same time, within this bipartite conception it seems to award primacy to State practice, in the sense that "custom begins with 'acts' that become a 'settled practice'; that practice may then give rise to the belief that it had become obligatory".[225] In other words, "we must look at what states actually do in their relations with one another, and attempt to understand why they do it, and in particular whether they recognize an obligation to adopt a certain course".[226] Indeed, this approach remains loyal to a classical understanding of customary law formation as an empirical, decentralized, and bottom-up process;[227] when situated

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maintain that both general practice of states and *opinio juris* are necessary for a rule to become customary international law"); R. Bernhardt, "Principles and Characteristics of Customary International Law", 205 *Recueil des cours* (1987), 247, 265 ("Some legal writers have expressed the view that only practice is important, others have occasionally taken the position that 'instant law' can be created without former practice. But the prevailing view is that practice and *opinio iuris* remain the two essential elements of customary law"); C. A. Bradley and M. Gulati, *supra* note 50, at 209 ("The standard definition of CIL is that it arises from the practices of nations followed out of a sense of legal obligation. Under this account, there are two elements to CIL … This is the conventional definition"); B. Simma and P. Alston, *supra* note 81, at 98 (calling the traditional approach "the established concept"); T. Treves, *supra* note 73, at para. 8 (referring to the traditional approach as the "prevailing view"); R. Kolb, "Selected Problems in the Theory of Customary International Law", *Netherlands International Law Review*, 50 (2003), 119, 123 ("the dominant view still constructs custom around the safe havens of the two elements, being ready only to modulate somewhat their relation to one another and their way of operating").

225 O. Schachter, "New Custom: Power, *Opinio Juris* and Contrary Practice", in J. Makarczyk (ed.) *Theory of International Law at the Threshold of the 21st Century* (Kluwer Law International, 1996), 531 (describing the "generally accepted view of the relation of practice and *opinio juris*"). See also, for example, B. Simma and P. Alston, *supra* note 81, at 88 ("According to the traditional understanding of international custom, the emphasis was clearly on the material, or objective, of its two elements, namely State *practice* … practice had priority over *opinio juris*; deeds were what counted, not just words"); G. Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law", *British Yearbook of International Law*, 30 (1953), 1, 68 ("it is believed to be a sound principle that, in the long run, it is only the actions of States that build up practice, just as it is only practice ('constant and uniform', as the Court has said) that constitutes a usage or custom, and builds up eventually a rule of customary international law"); M. E. Villiger, *supra* note 46, at 16 ("State practice is the raw material of customary law"); R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th edition (Oxford University Press, 2008) 25 ("the formulation in the [International Court of Justice] statute serves to emphasise that the substance of this source of international law is to be found in the practice of States"); A. D'Amato, *supra* note 122, at 102; K. Wolfke, *supra* note 124, at 53; M. Akehurst, *supra* note 153, at 53; G. I. Tunkin, *supra* note 84, at 421; A. E. Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation", *American Journal of International Law*, 95 (2001), 757, 758; G. M. Danilenko, "The Theory of International Customary Law", *German Yearbook of International Law*, 31 (1988), 9, 19-20; and N. Petersen, *supra* note 81, at 278. But see J. L. Kunz, *supra* note 65, at 665 ("International custom is, therefore, a procedure for the creation of norms of general international law. It is international law which lays down the conditions under which the procedure of custom creates valid norms of general international law. These conditions are two: usage and *opinio juris*; they have equal importance. This is admitted overwhelmingly by the writers, and proved by the practice of states and of international tribunals and courts").

226 A. Clapham, *supra* note 87, at 57.

227 See, e.g., L. Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd edition (Columbia University Press, 1979), 34 ("the process of making customary law is informal, haphazard, not deliberate, even partly unintentional and fortuitous … unstructured and slow"); T. Stein discussing "Custom and Treaties", in A. Cassese and J. H. H. Weiler (eds.), *Change and Stability in International Law-Making* (Walter de Gruyter, 1988), 12 (describing the classical process for generating universal rules of international law as "unwritten … unconscious … accreted, it was

on the international plane, customary international law is to be ascertained through inductive reasoning[228] that is both State-centred[229] and devoid of independent normative considerations. It is said that awarding legal force only to actual behaviours and expectations that enjoy a wide degree of acceptance within the international community assures the stability, reliability, and legitimacy of customary international law.[230]

97. Some, however, have challenged the "traditional" approach, arguing that it is doctrinally incoherent and riddled with "inner mysteries"[231] that make it difficult, if not impossible, to apply in practice.[232] Other critics have stressed that customary

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generated over time through the accumulation of discrete instances … always generated through bilateral exchanges … generated through processes that were not influences by the procedures of any established forum"); and J. D'Aspremont, *Formalism and the Sources of International Law* (Oxford University Press, 2011), 162 ("according to traditional views, customary international rules are identified on the basis of a bottom-up crystallization process that necessitates a concurring and constant behaviour of a significant amount of States accompanied by their belief (or intent) that such a process corresponds with an obligatory command of international law").

[228] See, e.g., L. Condorelli, "Customary International Law: The Yesterday, Today, and Tomorrow of General International Law", in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012), 147, 148 ("these wise, though approximate and indicative, formulas, are seeking in essence to explain what 'induction' means: it is the operation that consists in gathering evidence to prove the social effect of the rules in question").

[229] See, e.g., H. Thirlway, *International Customary Law and Codification* (Sijthoff, 1972) 58 ("The substance of the practice requirement is that States have done, or abstained from doing, certain things in the international field"); P. E. Benson, "François Gény's Doctrine of Customary Law", *Canadian Yearbook of International Law*, 20 (1982), 267, 268 ("Custom is now understood in terms of the process of its creation, and this process is explained from the wholly internal and fully autonomous standpoint of the states which themselves bring into existence and recognize as binding, authoritative customary rules"); M. E. Villiger, *supra* note 46, at 16-17 ("these instances of practice have to be attributable to States, for which reason the practice of international organizations or individuals is excluded"); R. B. Baker, *Legal Recursivity and International Law: Rethinking The Customary Element* (15 September 2012), available at Social Science Research Network (SSRN): http://ssrn.com/abstract=2147036, p. 5 ("Customary international law is said to depend upon the consent of nation states — and is thus, at least in the traditional understanding explained here, very state-centric"); and A. M. Weisburd, "Customary International Law: The Problem of Treaties", *Vanderbilt Journal of Transnational Law*, 21 (1988), 1, 5.

[230] See, e.g., C. De Visscher, *Theory and Reality in Public International Law* (P. E. Corbett, trans.) (Princeton University Press, 1957), 155 ("What gives international custom its special value and its superiority over conventional institutions, is the fact that, developing by spontaneous practice, it reflects a deeply felt community of law. Hence the density and stability of its rules"); B. Simma and P. Alston, *supra* note 81, at 88-89 ("Rules of customary law thus firmly established through inductive reasoning based on deeds rather than words … had, and continue to have, several undoubted advantages. They are hard and solid; they have been carefully hammered out of the anvil of actual, tangible interaction among States; and they allow reasonably reliable predictions as to future State behaviour"); H. Thirlway, *supra* note 229, at 76 ("Custom … grows slowly — though not always as slowly as heretofore — but it grows through the actual practice of States and therefore tends to reflect accurately the balance of their conflicting interests and to represent their considered intentions"); and D. J. Bederman, *Custom As a Source of Law* (Cambridge University Press, 2010), 162.

[231] R. Y. Jennings, *supra* note 67, at 4-6.

[232] See, e.g., L. Henkin, *International Law: Politics and Values* (Martinus Nijhoff Publishers, 1995), 29 ("The definition is easy to state but not easy to interpret and apply, and it continues to raise difficult questions, some 'operational', some conceptual-jurisprudential"); J. L. Goldsmith

international law so constructed "is of too slow growth to keep pace with the changing relations of the states which it endeavors to regulate",[233] as well as fundamentally inefficient in doing so.[234] It is further claimed that the "traditional" doctrine embodies a severe democratic deficit,[235] that its positivistic nature does not

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and E. A. Posner, "Notes Toward a Theory of Customary International Law", *American Society of International Law Proceedings*, 92 (1998), 53 ("the standard definition of CIL … raises perennial, and largely unanswered, questions"); M. Byers, *Custom, Power, and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press, 1999), 130-131 ("One problem with the traditional bipartite conception of customary international law is that it involves the apparent chronological paradox that States creating new customary rules must believe that those rules already exist, and that their practice, therefore, *is* in accordance with law"); A. T. Guzman and T. L. Meyer, "Customary International Law in the 21st Century", in R. A. Miller and R. M. Bratspies (eds.), *Progress in International Law* (Martinus Nijhoff Publishers, 2008), 199 ("Traditional critics of CIL have pointed out that the definition of CIL is circular, that rules of CIL are vague and thus difficult to apply, and that we lack standards by which we can judge whether the two requirements for a rule of CIL have been met"); R. Kolb, *supra* note 224, at 137-141; and A. D'Amato, *supra* note 48, at 7-10, 73-74.

[233] C. G. Fenwick, "The Sources of International Law", *Michigan Law Review*, 16 (1918), 393, 397. See also, for example, G. J. H. van Hoof, *supra* note 49, at 115 ("Customary international law simply is to[o] slow to provide the quick regulation required in the new areas which international law now has to cover"); C. De Visscher, "Reflections on the Present Prospects of International Adjudication", *American Journal of International Law*, 50 (1956), 467, 472 ("It cannot be denied that the traditional development of custom is ill suited to the present pace of international relations"); R. Kolb, *supra* note 224, at 124-125 (referring to the traditional approach when saying that "customary law is often too burdensome or simply not forthcoming at a given moment [when there is] an urgency of creating general norms of international law"); and W. Friedmann (ed.), *The Changing Structure of International Law* (Steven & Sons, 1964) 121-124.

[234] See, e.g., W. M. Reisman, "The Cult of Custom in the Late 20th Century", *California Western International Law Journal*, 17 (1987), 133, 134, 142-3 (suggesting that custom is "an anachronism and an atavism", asking "If purposive legislation is so important an instrument for clarifying and implementing policy in an industrial and science-based civilization such as ours, how can we dispense with it in the much more complicated and varied global civilization?", and concluding that "customary processes of lawmaking cannot deal with the enormous problems facing the world"); J. O. McGinnis, "The Comparative Disadvantage of Customary International Law", *Harvard Journal of Law and Public Policy*, 30 (2006), 7, 11-12 (arguing that customary international law "is not well designed to maximize the welfare of people" because it is created by nations, rather than by people, and that it is "not likely to generate efficient norms even for nations" due to the heterogeneity of nations composing the international community); S. Estreicher, "Rethinking the Binding Effect of Customary International Law", *Virginia Journal of International Law*, 44 (2003), 5, 9, 11, 14 (arguing that "on purely functional grounds, the case for CIL in a Westphalian world is difficult to sustain", and that absent any significant incremental gains, customary international law's costs outweigh its benefits); C. G. Fenwick, *supra* note 233, at 398 ("A further defect of custom as a source of international law is its inability to reorganize a system which is defective as a whole, or even to amend certain parts of it along progressive lines looking into the future"); E. Kontorovich, "Inefficient Customs in International Law", *William and Mary Law Review*, 48 (2006), 859, 921 ("international customs develop in a context lacking the features that direct the development of group norms towards efficiency"); V. Fon and F. Parisi, "International Customary Law and Articulation Theories: An Economic Analysis", *International Law and Management Review*, 2 (2006), 201, 202 (explaining that "outcomes resulting from reliance on traditional customary norms may systematically fall short of what might be obtainable through articulated norms"); and G. Palmer, "New Ways to Make International Environmental Law", *American Journal of International Law*, 86 (1992), 259, 266.

[235] Such arguments may relate to different aspects of the democratic process in different contexts (for example, international versus national); see. e.g., S. Wheatley, *The Democratic Legitimacy*

allow the identification of customary international law to have due regard to the values of the international community, and, moreover, that it might make customary international law incommensurable with basic human rights.[236] Finally, some writers have gone as far as to claim that the "traditional" theory is mere fiction.[237]

98. It is against this backdrop that other approaches to customary international law, sometimes referred to as "modern", have sought to reinterpret the constitutive elements of customary international law and, consequently, to reframe it as a source of international law. Such deviations from the "traditional" doctrine were for some

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of International Law (Hart Publishing, 2010), 150 ("Custom creates particular problems in terms of democratic legitimacy, as there is no requirement that a particular state consents to the emergence of a new customary norm, or that a majority of states participate in its formation, or that only democratic states participate, or that the practices of states accord with the wills of their respective peoples … Moreover, as customary norms are, by definition, not authoritatively written down, the task of identifying and interpreting, and by implication 'applying', customary obligations often falls to non-state actors, judges, academics, etc, with no requirement to take into account the attitude of the state against whom the norms are opposed"); O. Schachter, *supra* note 225, at 536 ("As a historical fact, the great body of customary international law was made by remarkably few States"); O. Yasuaki, *supra* note 123, at 20; J. O. McGinnis, *supra* note 234, at 8 ("A glaring problem with customary international law … is that it has a democratic deficit built into its very definition"); and W. S. Dodge, "Customary International Law and the Question of Legitimacy", *Harvard Law Review Forum*, 120 (2007), 19, 26 (focusing on the United States legal system but perhaps relevant elsewhere as well when arguing that "Essentially, this legitimacy critique consists of two interrelated points: that the power to apply customary international law gives too much discretion to federal judges — discretion to smuggle into American law whatever '*they regard as* norms of international law' — and that customary international law is not made through a democratically accountable political system").

[236] See, e.g., J. Klabbers, "The Curious Condition of Custom", *International Legal Theory*, 8 (2002), 29, 34 ("with respect to prescriptions of moral relevance (think in particular of human rights), the traditional concept of custom has lost plausibility"); A. Pellet, "'Droits-de-l'Hommisme' et Droit International", *Droits Fondamentaux*, 1 (2001), 167, 171-2; J. Wouters and C. Ryngaert, "Impact on the Process of the Formation of Customary International Law", in M. T. Kamminga and M. Scheinin (eds.), *The Impact of Human Rights Law on General International Law* (Oxford University Press, 2009), 111, 129, 130 ("The classical positivist approach may … pose serious difficulties for the legal protection and promotion of human rights"); H. Charlesworth, *supra* note 46, at 192 ("international custom in its traditional form gives priority to state consent as the source of the law over normative concepts"); J. Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Routledge, 2011), 72 (referring to the traditional approach to customary international law when saying: "This method of creation being archaic, however, has consequences, for customary law is limited in scope and cannot be used as a legal-political tool. Also, because the basis of customary law is usage, there are limits to the type of norms that can be created"); and M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 1989), 41.

[237] See, e.g., N. C. H. Dunbar, "The Myth of Customary International Law", *Australian Yearbook of International Law*, 8 (1978/80), 1, 8, 18 ("The myth is in assuming that universal state practice *ipso facto* creates law. Law can only be created by legislation or by the judgment of a court, or, in the case of international law, by a treaty"); S. Estreicher, *supra* note 234, at 8 (saying that the traditional account "is, of course, a legal fiction. Consent drawn from silence is a dubious form of consent"); and J. P. Kelly, *supra* note 122, at 460, 469, 472 ("The premise of CIL is that nations, despite lacking a consensus on values, can nevertheless accept and thereby create binding legal norms without a formal process to determine acceptance. This premise is doubtful … There is no methodology that will assure an accurate measure of the normative attitudes of states. The means currently in use reduce *opinio juris* to a mere fiction … Moreover, the entire enterprise of using state practice to construct norms is suspect").

writers an intellectual attempt to "supply the missing theory of custom",[238] while for others a conscious effort "to align our conception of customary law-making with the increased urgency of the substantive concerns that international law needs to address";[239] in either case suggestions were made to replace the strictly additive (two-element) model of custom formation with a single-element theory, mostly by de-emphasizing one of the two standard requirements or by displacing them altogether. Several writers have called for a reduced role for *opinio juris*, arguing that in most cases widespread and consistent State practice alone is sufficient for constructing customary international law.[240] Others, straying even further from the ordinary notion of customary law, have claimed the opposite — relaxing the practice requirement to a minimum and concentrating instead on the *opinio juris* element,[241]

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[238] To borrow the words of A. D'Amato in "Trashing Customary International Law", *supra* note 122, at 101. Some have suggested that it is the "loose" application of the traditional definition that led to "a new, modern definition [emerging] in the literature": H. E. Chodosh, "Neither Treaty not Custom: The Emergence of Declarative International Law", *Texas International Law Journal*, 26 (1991), 87, 88; see also R. B. Baker, *supra* note 229.

[239] E. Voyiakis, *A Theory of Customary International Law* (25 January 2008), available at SSRN: http://ssrn.com/abstract=895462, page 6; see also F. Orrego Vicuña, *supra* note 48, at 38 ("It was soon discovered that if customary law could be taken to mean something different from what it had traditionally meant, this was a much easier way to attain the desired goals"); and A. E. Roberts, *supra* note 225, at 766 ("Modern custom evinces a desire to create general international laws that can bind all states on important moral issues").

[240] See, e.g., A. D'Amato, "Customary International Law: A Reformulation", *International Legal Theory*, 4 (1998), 1 ("My work was considered radical by other scholars; with the passage of time I have reluctantly concluded that it may not have been radical enough. Instead of trying to work within the notion of *opinio juris*, I should have discarded it entirely"); L. Kopelmanas, "Custom as a Means of the Creation of International Law", *British Yearbook of International Law*, 18 (1937), 127, 129-130 ("The first of these [two] conditions [referring to the material and psychological factors in the formation of custom] is in truth the substance of the question which we have put [what is the special process of development which produces custom] … we shall at the same time endeavour to examine the point whether international custom arises only from an activity which is exercised under the impression that it is required by law. There are some very good reasons for doubt on this point"); H. Kelsen, "Théorie du Droit International Coutumier", *Revue Internationale de la Théorie du Droit*, 1 (1939), 253, 263 (stating a position that he later abandoned, according to which "[c]ette théorie selon laquelle les actes constituant la coutume doivent être exécutés dans l'intention d'accomplir une obligation juridique ou d'exercer un droit […] est évidemment fausse"); and P. Guggenheim, "Les deux éléments de la coutume en droit international", in C. Rousseau (ed.), *La Technique et les Principes du Droit Public: Etudes en l'Honneur de Georges Scelle* (L.G.D.J, 1950), 275, 280 ("… il est impossible de prouver l'existence de cet élément [subjectif]. Il y a donc lieu de renoncer à l'élément subjectif,"); M. H. Mendelson, *supra* note 41, at 250, 289.

[241] See, e.g., B. Cheng, "Epilogue", in B. Cheng (ed.) *International Law: Teaching and Practic*e (Stevens & Sons, 1982) 223 ("The main thing, therefore, is to recognise that usage (*consuetude*) is only evidential, and not constitutive, of what is commonly called 'international customary law', however else one may wish to label it"); A. T. Guzman, "Saving Customary International Law", *Michigan Journal of International Law*, 27 (2005), 115, 153 ("CIL is really about the *opinio juris* requirement and not the practice requirement … A rational choice approach, then, leaves no room for a state practice requirement other than as an evidentiary touchstone to reveal *opinio juris*. Practice can shed light on whether a particular norm is regarded as obligatory, but it does not by itself make it so"); R. Bernhardt, *supra* note 224, at 266 ("I would even accept that in exceptional circumstances no practice is necessary if a certain rule according to which a certain behaviour is either necessary or prohibited has been universally approved. In so far I would accept the possibility of 'instant law'"); and B. D. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press, 2010).

as manifested predominantly in statements made in international fora.[242] This latter approach, which stands at the core of "modern custom" as the term is presently understood, ultimately turns the ascertainment of "new customary international law" into a normative exercise rather than a strictly empirical one. Employing a deductive methodology,[243] it attempts to make customary international law a more rapid and flexible source of international law, one that is able to fulfil a "utopian potential" and "compensate for the rigidity of treaty law",[244] particularly in the fields of human rights and humanitarian and environmental law.[245] Indeed, "[a] focus on

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[242] See, e.g., B. Cheng, "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?", *Indian Journal of International Law*, 5 (1965), 23, 37 ("there is no reason why an *opinio juris communis* may not grow up in a very short period of time among all or simply some Members of the United Nations with the result that a new rule of international customary law comes into being among them. And there is also no reason why they may not use an Assembly resolution to 'positivize' their new common *opinio juris*"); and L. Sohn, "'Generally Accepted' International Rules", *Washington Law Review*, 61 (1986), 1073, 1074.

[243] See also I. I. Lukashuk, "Customary Norms in Contemporary International Law", in Jerzy Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century* (Kluwer Law International, 1996), 488, 493 ("What these norms have in common with traditional customary norms consists of unwritten form and *opinio juris*. What distinguishes them is that they do not solidify an already existing practice, but are called upon to launch one. In comparison with norms of the first type, they attach greater relative weight to what ought to be than to what is"); A. E. Roberts, *supra* note 225, at 763 ("Modern custom derives norms primarily from abstract statements of *opinio juris* — working from theory to practice"); R. Kolb, *supra* note 224, at 126 ("This deductive custom is therefore something of a 'contra-factual' custom, a concept very far indeed from the classical conception of customary law"); and B. Simma and P. Alston, *supra* note 81, at 89 ("The process of customary law-making is thus turned into a self-contained exercise in rhetoric. The approach now used is *deductive*").

[244] Words of H. Charlesworth, "The Unbearable Lightness of Customary International Law", *American Society of International Law Proceedings*, 92 (1998), 44. See also, for example, M. P. Scharf, "Seizing the 'Grotian Moment': Accelerated Formation of Customary International Law in times of Fundamental Change", *Cornell International Law Journal*, 43 (2010), 439, 450, 467-468 ("In periods of fundamental change — whether by technological advances, the commission of new forms of crimes against humanity, or the development of new means of warfare or terrorism — rapidly developing customary international law as crystallized in General Assembly resolutions may be necessary for international law to keep up with the pace of other developments … the 'Grotian Moment' minimizes the extent and duration of the state practice that is necessary during such transformative times, provided there is an especially clear and widespread expression of *opinio juris*"); and O. Schachter, *supra* note 225, at 533 (depicting "new CIL" as a response to a demand "in the contemporary international milieu" of "governments [that] have felt the need for new law which, for one reason or another, could not be fully realized through multilateral treaties").

[245] See, e.g., J. Kammerhofer, "Orthodox Generalists and Political Activists in International Legal Scholarship", in M. Happold (ed.), *International Law in a Multipolar World* (Routledge, 2012), 138, 147 ("Because of the perceived incommensurability of what is regarded as traditional or orthodox methods of customary international lawmaking with the humanist goals espoused by the activist scholars, an influential part of human rights and humanitarian legal scholarship has developed a new approach to customary international law for these areas of international law over the past decade"); J. Wouters and C. Ryngaert, *supra* note 236 ("It is often argued, especially by human rights-oriented lawyers, that the method of customary law formation in the field of human rights and international humanitarian law is structurally different from the traditional method of customary law formation in public international law … Classical methods of law formation based on state consent and extensive and uniform state practice may be relaxed somewhat if 'the stakes are high' … Put differently, state practice is selectively used to justify a customary norm that is not morally neutral"); D. Hunter, J. Salzman and D. Zaelke, *International Environmental Law and Policy*, 2nd edition (Foundation Press, 2002), 312-313

opinio juris is appealing to those who want to expand the set of norms that are considered CIL. If one can ignore or downplay the practice requirement, it is possible to argue for the inclusion of any number of moral rights on the roster of CIL rules".[246] Such "conceptual stretching",[247] celebrated as the "new vitality of custom",[248] has also encouraged calls for opening the process of customary law creation to non-State actors, namely, international organizations and their agencies,[249] as well as individuals.[250]

("As the number of international treaties, declarations and resolutions announcing principles of environmental protection has increased over time, scholars have begun to debate whether customary rules of international environmental law are emerging or have already emerged … These and prospective customary norms face a particular difficulty when subjected to the standard test of customary norms (i.e. consistent State practice and the existence of *opinio juris*) … Nevertheless, these principles are increasingly being recognized in judicial opinions and elsewhere as customary law, perhaps reflecting changing notions of how customary law is made"); H. Hohmann, *Precautionary Legal Duties and Principles of Modern International Environmental Law* (1994), 335; D. Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press, 2010) 191-204; and R. Jennings, "Customary Law and General Principles of Law as Sources of Space Law", in K-H. Böckstiegel (ed.), *Environmental Aspects of Activities in Outer Space: State of the Law and Measures of Protection* (Carl Heymanns Verlag, 1990), 149, 151.

246 A. T. Guzman, *supra* note 223, at 186. See also B. Simma and P. Alston, *supra* note 81, at 83 ("There is a strong temptation to turn to customary law as the formal source which provides, in a relatively straight-forward fashion, the desired answers. In particular, if customary law can be constructed or approached in such a way as to supply the relatively comprehensive package of norms which are applicable to all States, then the debate over the sources of international human rights law can be resolved without much further ado. Given the fundamental importance of the human rights component of a just world order, the temptation to adapt or re-interpret the concept of customary law in such a way as to ensure that it provides the 'right' answers is strong, and at least to some, irresistible"); and T. Meron, "International Law in the Age of Human Rights", 301 *Recueil des Cours* (2004), 377.

247 R. B. Baker, *supra* note 229, at 31 (employing a term "coined by the social scientist Giovanni Sartori to describe the distortions that result when established concepts are introduced to new cases without the required accompanying adaption"); see also R. Kolb, *supra* note 224, at 123 (referring to "increasing conceptual softness"); L. Henkin, *supra* note 232, at 37 ("The purposive creation of custom is a radical innovation, and indeed reflects a radical conception. Whereas law was made by treaty but grew by custom, now there is some tendency to treat custom as a means, alternative to treaty-making, for deliberate legislation. Using the concept of custom for that purpose brings with it the traditional definition, but now practice sometimes means activity designed to create the norm rather than to reflect it"); and A. Seibert-Fohr, "Modern Concepts of Customary International Law as a Manifestation of a Value-Based International Order", in A. Zimmerman and R. Hofmann (eds.), *Unity and Diversity in International Law* (Duncker & Humblat, 2006), 257, 273 ("The relevance of customary international law ultimately depends on how strict the standards for the assumption of customary international law are applied").

248 A term mentioned in A. Cassese, *supra* note 121, at 165; see also R. Müllerson, *supra* note 123, at 359.

249 See, e.g., I. Gunning, "Modernizing Customary International Law: The Challenge of Human Rights", *Virginia Journal of International Law*, 31 (1991), 211, 212-213 ("In particular, by questioning the comprehensiveness of traditional formulations of national sovereignty, this Article will explore the prospect of permitting transnational and non-governmental groups to have a legal voice in the creation of custom"); H. Meijers, "On International Customary Law in the Netherlands", in I. F. Dekker and H. H. G. Post (eds.), *On the Foundations and Sources of International Law* (T. M. C. Asser Press, 2003), 77, 80, 125 ("Like a rule of treaty law, a rule of international customary law is formed in two stages. During the first stage the subjects of international law in particular states, and — sometimes — international organisations, develop

99. The attempts "to revise or 'up-date' custom"[251] have met some fierce criticisms of their own, chiefly among them the claim that "modern custom" is, in fact, not customary international law at all.[252] Adherents of the "traditional"

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the rule. During the second stage the rule is transformed into a rule of law … [these] two stages … often overlap"); and N. Arajärvi, *From State-Centricism to Where?: The Formation of (Customary) International Law and Non-State Actors* (3 May 2010), available at SSRN: http://ssrn.com/abstract=1599679, 23 ("non-state actors do shape the international law-making, not only indirectly by influencing states, but by having a direct bearing on the development of customary rules through their own actions and statements").

[250] See, e.g., L.-C. Chen, *An Introduction to Contemporary International Law: A Policy-Oriented Perspective*, 2nd edition (Yale University Press, 2000), 342, 346; C. Ochoa, *supra* note 90, at 164; and D. J. Bederman, *supra* note 230, at 162-3.

[251] As referred to by B. Simma and P. Alston, *supra* note 81, at 83.

[252] See, e.g., P. Weil, "Towards Relative Normativity in International Law?", *American Journal of International Law*, 77 (1983), 413, 435 ("This is no mere acceleration of the custom-formation process, but a veritable revolution in the theory of custom"); K. Wolfke, *supra* note 41, at 2 ("At the outset … In particular, it should be stressed that international custom, like any custom, is based on a regularity of conduct. Customary international law not based on 'custom' (*consuetudo*) in the traditional and literal meaning of this word, would simply be a misnomer"); R. Jennings, "What is International Law and How Do We Tell It When We See It", *The Cambridge Tilburg Lectures* (Kluwer, 1983), 11 ("Perhaps it is time to face squarely the fact that the orthodox tests of custom — practice and *opinio juris* — are often not only inadequate but even irrelevant for the identification of much new law today. And the reason is not far to seek: much of this new law is not custom at all, and does not even resemble custom. It is recent, it is innovatory, it involves topical policy decisions, and it is often the focus of contention. Anything less like custom in the ordinary meaning of that term would be difficult to imagine"); G. J. H. van Hoof, *supra* note 49, at 86 ("customary law and instantaneousness are irreconcilable concepts. Furthermore, it is detrimental to the effective functioning of international law, as an ordering and regulating device, to water down the meaning of its sources to almost the vanishing point"); G. Abi-Saab discussing "Custom and Treaties", in A. Cassese and J. H. H. Weiler (eds.), *Change and Stability in International Law-Making* (Walter de Gruyter, 1988), 10 ("We are calling different things custom, we are keeping the name but *expanding the phenomenon* … In fact we have a new wine, but we are trying to put it in the old bottle of custom. At some point this qualitative change will have to be taken into consideration, and we will have to recognize that we are no longer speaking of the same source, but that we are in the presence of a very new type of law-making"); J. P. Kelly, *supra* note 122, at 492 ("In redefining state practice and *opinio juris*, 'new CIL' theorists are attempting to create a new process of lawmaking rather than utilizing the methodology of customary law"); R. Kolb, *supra* note 224, at 123 ("the heading 'custom' may have become too narrow and too misleading as applied to a series of phenomena of modern law-creation in international society, which are subdued under this heading only for lack of another — new — accepted basis of law-making outside of treaty law"); J. Kammerhofer, *supra* note 245, at 152, 157 ("activist scholars fudge the law to further goals which are not expressed as positive international law … international legal scholarship as practiced in the current climate tends to 'give in' to external pressure in a way which falsifies our view of positive international law by importing external elements"); N. Petersen, *supra* note 81, at 282, 284 ("By its very notion custom requires a *consuetudo*, the existence of state practice … Customary law without custom is difficult to imagine); M. Koskenniemi, "Introduction", in M. Koskenniemi (ed.), *Sources of International Law* (Ashgate Dartmouth, 2000), xxi ("In practice, 'custom' has become a generic category for practically all binding non-treaty standards … 'Custom' seems both more legitimate in origin and more tangible in application — even if the various standards thus classified as 'custom' cannot easily be fitted within the standard theory about the emergence and ascertainment of customary law"); A. M. Weisburd, *supra* note 229, at 46 ("Assertions that state practice is legally irrelevant are, in effect, assertions that there is an easier way of creating international law than that of generating a genuine consensus among states. There is no easier way, and respect for truth demands that we acknowledge the fact"); J. I. Charney, *supra* note 122, at 543, 546 (referring to the recent "more

approach have further stressed that promoting a "new species" of customary international law undermines the authoritative force and persuasiveness of custom as a source of international law,[253] as well as that of international law in its entirety.[254] Some have added that the "non-traditional" approaches are themselves analytically unstable,[255] and that they stand for a "dubious operation"[256] that can be said to suffer from a significant democratic deficit just as well.[257]

100. While some authors have portrayed the "traditional" and "non-traditional" approaches to customary international law as "a set of paired opposites",[258] others

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structured method" of creating customary law when saying that this process "differs significantly from the traditional understanding of the customary lawmaking process as requiring general practice over time. It may thus be more accurate to call it *general* international law"); and B. Cheng, "Custom: The Future of General State Practice in a Divided World", in R. S. J. Macdonald and D. M. Johnson (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1983), 513, 548.

253 See, e.g., S. Estreicher, *supra* note 234, at 15 ("as we move to an era of top-down, publicist-inspired, policy-laden, and virtually instantaneous CIL, the legitimacy of such automatic absorption [into national law] becomes especially problematic"); A. D'Amato, *supra* note 122, at 101-105; and R. Y. Jennings, *supra* note 67, at 6.

254 See, e.g., H. E. Chodosh, *supra* note 238, at 99; G. J. H. van Hoof, *supra* note 49, at 107; J. P. Kelly, *supra* note 122, at 540; P. Weil, *supra* note 252, at 441 ("this relativization of normativity … may eventually disable international law from fulfilling what have always been its proper functions").

255 See, e.g., G. J. Postema, "Custom in International Law: A Normative Practice Account", in A. Perreau-Saussine and J. B. Murphy (eds.), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge University Press, 2007), 279, 281-282.

256 B. Simma and P. Alston, *supra* note 81, at 107; see also I. D. de Lupis, *The Concept of International Law* (Norstedts, 1987), 13, 116 ("In this work … the notion of 'customary law' is dismissed as a nebulous fiction … It is only strange that so many writers still accept the vague contours and floating contents of the notion 'customary' law. For outside the realm of territorial claims by prescription it has no foundation or justification in modern public International Law. It has become the carpet under which any unidentified act or rule is swept, often with ensuing conviction that because the carpet now covers it, it must be valid 'law'").

257 See, e.g., D. J. Bederman, *supra* note 230, at 145 ("The key defect of modern custom is that in lauding ideal standards of state conduct, it has become detached from actual state practice. If legitimacy and transparency matter as metrics for customary international law … then the traditional view of CIL — even as imperfectly captured in Article 38 (1) (b)'s formulation — should continue to be embraced"); F. Orrego Vicuña, *supra* note 48, at 37 (arguing that 'modern' customary international law is "[a] new authoritarianism through the non rule of law"); J. L. Goldsmith and E.A. Posner, "Understanding the Resemblance Between Modern and Traditional Customary International Law", *Virginia Journal of International Law*, 40 (2000), 639, 667 (arguing that modern customary international law "lacks a proper pedigree in the consent of states. The content of the new CIL is vague. Moreover, the new CIL is invoked and employed opportunistically"); H. E. Chodosh, *supra* note 238, at 104-105 (depicting an undemocratic process since the few make rules for the many); S. Estreicher, *supra* note 234, at 7 (describing "modern" customary international law as an attempt by "'highly qualified publicists of the various nations' … and other international law activists to expand the reach of customary law so as to help advance the particular political, ideological, or humanitarian aims of the writer"); and J. P. Kelly, *supra* note 122, at 520 (arguing that new customary international law methodology "does not solve the 'democracy deficit'. While states may consent to general, abstract resolutions that are merely recommendations, they neither consent to binding norms, nor play a role in determination of which, if any, norms in a resolution are to be transformed into binding customary obligations … Democratic legitimacy requires either full participation or actual assent [and neither is the case]").

258 T. Stein, *supra* note 227; see also, for example, M. Koskenniemi, *supra* note 236, at 388; J. A. Beckett, *The End of Customary International Law?: A Purposive Analysis of Structural*

have sought to synthesize and reconcile them in an attempt to produce a common conception or an overall theory of custom.[259] Convincing as such attempts may be, the ongoing doctrinal disputes and the inherent difficulties associated with customary international law have prompted several international lawyers to proclaim it a "troubled concept",[260] an "essentially contested" one suffering at this time from an "identity crisis".[261] The lack of a shared notion of customary international law has moreover contributed to the criticism of customary international law as an uncertain law.[262] Some authors have even argued that "traditional" or "modern" customary international law remains a highly problematic, if not illegitimate, source of international law, which should perhaps be discarded altogether.[263]

Indeterminacy (PhD thesis, University of Glasgow, 2008), 238-258; and R. B. Baker, *supra* note 229, at 10.

[259] See, e.g., A. E. Roberts, *supra* note 225, at 767; I.I. Lukashuk, *supra* note 243; A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, 2008) 100; A. Seibert-Fohr, *supra* note 247, at 272-277; L. Condorelli, *supra* note 228, at 148; J. Tasioulas, "Customary International Law and the Quest for Global Justice", in A. Perreau-Saussine and J. B. Murphy (eds.), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge University Press, 2007), 307, 320; J. L. Goldsmith and E. A. Posner, *supra* note 257, at 672; E. Voyiakis, *supra* note 239, at 15, 16; J. D'Aspremont, *supra* note 227, at 145; R. Kolb, *supra* note 224, at 122; and W.T. Worster, *The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches* (6 January 2013), available at SSRN: http://ssrn.com/abstract=2197104.

[260] G. J. Postema, *supra* note 255, at 279.

[261] B. Simma and P. Alston, *supra* note 81, at 88. See also K. Wolfke, *supra* note 41, at 2; and J. Kammerhofer, *supra* note 85, at 551.

[262] Arguments relating to uncertainty generally refer either to the difficulty in determining whether a rule of customary international law had emerged or to the difficulty in defining precisely what its specific content is (or both). See, e.g., J. Kammerhofer, *supra* note 85, at 536 ("we can neither adequately know the rules of custom-formation nor how those rules come about"); L.-C. Chen, *supra* note 250, at 351; A. T. Guzman, *supra* note 241, at 128; J. L. Goldsmith and E. A. Posner, *supra* note 232; K. Wolfke, *supra* note 124, at xiii; C. L. Rozakis, *The Concept of* Jus Cogens *in the Law of Treaties* (North-Holland Publishing Company, 1976), 63; and G. Mettraux, *supra* note 136, at 14.

[263] See, e.g., J. L. Goldsmith and E. A. Posner, *supra* note 257, at 640-641, 672 ("The faulty promise is that CIL — either the traditional or the new — influences national behavior. In our view, the new CIL is no less coherent or legitimate than the old … We deny that modern CIL differs from old CIL in an important way. The essential difference is content: old CIL focused on commercial and military relationships between states; modern CIL focuses on human rights … Modern CIL is mostly aspirational, just as old CIL was"); A. Boyle and C. Chinkin, *supra* note 223, at 21 ("Despite assertions of 'instant' customary law, this mode of informal and unwritten law-making is inherently conservative and backward-looking because of its reliance upon existing state practice. Uncertainties about the existence and content of rules of customary law allow opportunistic claims lacking any content in state practice or *opinio juris*. Customary international law allows states to reject treaty regulation while claiming the benefits of those parts of an unratified treaty they perceive as desirable"); J. O. McGinnis, "The Appropriate Hierarchy of Global Multilateralism and Customary International Law: The Example of the WTO", *Virginia Journal of International Law*, 44 (2003), 229-284 (referring to customary international law as a body of law that could potentially unravel the careful compromises struck in multilateral treaties); and J. P. Kelly, *supra* note 122, at 456, 500 ("the substantive norms of both traditional CIL and 'new CIL' are non-empirical forms of CIL deduced from subjective principles" and as such "lack [] the authority of the international community … Controversy is inevitable because the elements of CIL legal theory are empty vessels in which to pour one's own normative theory of international law").

101. Yet customary international law has also been widely recognized in the literature as "the principal construction material for general international law",[264] and persistently defended as having a prominent and undeniable role in international regulation.[265] Several authors stress that it is precisely its flexibility that makes it a valuable source of international law,[266] and suggest that difficulties in law-finding are not unique to customary international law.[267] Scholars continue to debate customary international law. Such debates will doubtless continue.[268]

Part five: future work

XII. Future programme of work

102. In his second report, in 2014, the Special Rapporteur proposes to commence the discussion of the two elements of customary international law, State practice and *opinio juris*, and the relationship between them. Among the matters to be considered will be the effects of treaties on customary international law and the role of international organizations. The third report, in 2015, will continue this discussion in the light of progress with the topic, as well as address in more detail certain

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[264] V. I. Kuznetsov and B. R. Tuzmukhamedov, *supra* note 222, at 77.

[265] D. F. Vagts, "International Relations Looks at Customary International Law: A Traditionalist's Defence", *European Journal of International Law*, 15 (2004), 1031-1040; S. Sur, *supra* note 67, at 167; G. Norman and J. P. Trachtman, "The Customary International Law Game", *American Journal of International Law*, 99 (2005), 541; E. T. Swaine, *supra* note 151, at 562; H. Bokor-Szegő, remarks on the "Contemporary Role of Customary International Law", in *Proceedings of the ASIL/NVIR Third Joint Conference* (1995), 18; J. Dugard SC, *International Law: A South African Perspective*, 4th edition (Juta & Co., 2011), 26; B. Chiagara, *Legitimacy Deficit in Custom: A Deconstructionist Critique* (Ashgate Dartmouth, 2001) 48; W. W. Bishop, "Sources of international law", in General course of public international law, Collected Courses of the Hague Academy of International Law (Martinus Nijhoff Publishers, 1965) 115, 220, 230; J. L. Kunz, *supra* note 65, at 665; T. Treves, *supra* note 73, at para. 91; A. Perreau-Saussine and J. B. Murphy, "The Character of Customary Law: An Introduction", in A. Perreau-Saussine and J. B. Murphy (eds.), The Nature of Customary Law: Legal, Historical and Philosophical Perspectives (Cambridge University Press, 2007), 8; A. T. Guzman and T. L. Meyer, *supra* note 232, at 197; A. T. Guzman, *supra* note 241, at 116, 119-121, 175; R. Bernhardt, *supra* note 224, at 265; A. Seibert-Fohr, *supra* note 247, at 271; M. H. Mendelson, *supra* note 41, at 169; G. Schwarzenberger, "International *Jus Cogens*?", *Texas Law Review*, 43 (1965), 455, 476; and F. Orrego Vicuña, *supra* note 48, at 38.

[266] See, e.g., J. Pearce, "Customary International Law: Not Merely Fiction or Myth", *2003 Australian International Law Journal* (2003), 125; D. Bederman, *supra* note 223, at 41, 42-43. Such a position was also voiced at the Commission's sixty-fourth session by Mr. Murase, who said that "Ambiguity was of the essence and, probably, the *raison d'être* of customary international law, which was useful because it was ambiguous" (A/CN.4/SR.3148, p. 7).

[267] See, e.g., I. Brownlie, in A. Cassese and J. H. H. Weiler (eds.), *Change and Stability in International Law-Making* (Walter de Gruyter, 1988), 68 ("I think the main problem at the moment is the old one that law-finding is always difficult. Even when you have a treaty, it is necessary to find out what a particular text means; you may have a treaty which has been in existence for 20 years, but if it has not been much interpreted by courts the law-finding remains to be done. There is a curious tendency for people to think that if we can only find the right formula, the right rule, then the business of law-finding is suddenly going to be made more easy for us. I think that is rather unrealistic").

[268] See, e.g., J. Klabbers, *supra* note 236, at 37; D. P. Fidler, "Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law", *German Yearbook of International Law*, 39 (1996), 198, 199; and R. Kolb, *supra* note 224, at 119.

particular aspects, such as the “persistent objector” rule, and “special” or “regional” customary international law. The second and third reports will each propose a series of draft conclusions for consideration by the Commission. The Special Rapporteur aims to prepare a final report in 2016, with revised draft conclusions and commentaries taking account of the discussions in the Commission, the debates in the Sixth Committee and other reactions to the work as it progresses.