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习惯国际法的形成与证据

国际法委员会以前工作中与本专题特别相关的要素

秘书处的备忘录

摘要

本备忘录是根据国际法委员会在其第六十四届会议上提出的一项要求编写的,目的是尽力确认委员会以前工作中与"习惯国际法的形成与证据"这一专题特别相关的要素。

备忘录在导言里讨论了一些与委员会的法定任务及与其以前在"使习惯国际法的证据更易于查考的方法和手段"这一专题方面工作有关的初步问题后,转而讨论委员会在确认习惯国际法及其形成过程时所采用的方法,重点是: (a) 委员会的一般方法; (b) 国家惯例; (c) 所谓的主观要素(法律必要确信); (d) 国际组织惯例的相关性; 以及(e) 司法声明和公法专家的论著的相关性。

备忘录接着概述了委员会对习惯法在国际法律体系里运作的某些方面的认识。这些方面与习惯国际法规则的约束性和特点有关,包括区域规则、确立普遍适用的义务的规则和绝对法规则,以及与习惯国际法与条约和"一般国际法"的关系有关。







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一. 导言

- 1. 国际法委员会在其第六十三届会议(2011年)上决定将"习惯国际法的形成与证据"这一专题列入其长期工作方案。¹ 委员会在其第六十四届会议(2012年)上将该专题列入当前的工作方案并任命迈克尔·伍德爵士为报告员。² 也在该届会议上,委员会要求秘书处编写一份备忘录,目的是确认委员会以前工作中与该专题特别相关的要素。³ 为落实该要求,秘书处回顾了委员会自 1949 年以来的工作,以便确认与习惯国际法最相关的各个方面。在这方面,秘书处的主要重点是委员会工作中与对认识习惯国际法概念最直接相关的部分、习惯规则出现及应予确认的方式,以及习惯法在国际法律体系中的运作方式。在本文件中,秘书处确认的在委员会工作中与本专题最相关的那些方面见"意见"部分,并视情况需要随附解释性说明。
- 2. 在起草本备忘录时,秘书处参考了在迈克尔·伍德爵士编写的两份初步文件中被确认与该专题相关的问题和议题,⁴ 以及在委员会第六十四届会议上关于该专题的首次辩论。⁵ 备忘录的结构反映了委员会工作中与确认习惯国际法及其形成过程和与习惯法在国际法律体系里的运作有关的各个方面。
- 3. 首先必须指出,下面的意见仅反映了对委员会工作某些内容的系统性回顾。 鉴于委员会的法定任务和工作方法,其工作的很多内容(包括特别报告员的报告和在全会上的一般性辩论)都可能与本备忘录及其专题相关。但为了尽快完成备忘录,秘书处将其回顾对象主要限于委员会就到目前为止所审议的各种专题通过的草案的最后文本,以及随附的评注。6 这些草案的最后文本和评注被认为最能反映委员会对习惯国际法所采用的集体方法。

A. 编纂和逐渐发展

4. 在提出意见之前,最好先简单地提一下与委员会以前关于习惯国际法的工作 有关的一些初步事项。首先,要研究这类工作就免不了会注意到在委员会关于"编 纂"和关于"逐渐发展"的工作之间的区别。

¹ A/66/10, 第 365 至第 367 段。大会在其 2012 年 12 月 9 日第 66/98 号决议中表示注意到已将 该专题列入委员会长期工作方案一事。

² A/67/10, 第 19 段。

³ 同上, 第159 段。

⁴ 见委员会 2011 年报告(A/66/10) 附件 A,以及在委员会第六十四届会议上介绍的特别报告员的说明(A/CN. 4/653)。

⁵ 见 A/67/10, 第 169 至第 202 段。

⁶ 回顾对象还包括在委员会第六十四届会议上一读通过的关于驱逐外国人的条款草案及相关评注。

- 5. 关于编纂,大家已清楚认识到,习惯国际法在委员会的工作中发挥了重要作用。《国际法委员会章程》将"国际法的编纂"定义为:"更精确地制订并系统整理广泛存在国家惯例、判例和学说的国际法规则。""此外,《章程》规定委员会在编纂国际法时,应以条款形式编写草案,并随附"充分说明判例和其他有关资料,包括:条约、司法判决和学说"的评注,以及涉及以下各点的结论:"各国惯例和学说对每项问题的同意程度"和"目前存在的不同意见和争执,以及因主张一种或另一种解决办法而生的争论"。8
- 6. 但是,委员会的法定任务并不局限于编纂现行国际规则。委员会还担负着逐渐发展国际法的任务;《国际法委员会章程》对此项任务的定义是:"就国际尚未订立规章或各国惯例尚未充分发展成法律的各项主题,拟订公约草案"。⁹
- 7. 因此,《章程》把编纂和逐渐发展视作两个不同的概念,虽然《章程》的起草者承认,这两个概念并不一定相互排斥,因为现行法律的系统化工作可能会导致得出如下结论:应建议各国通过一项新规则。¹⁰ 同样,委员会一直在避免把某个专题完全归类为只是编纂方面或只是逐渐发展方面的工作。¹¹ 此外,委员会还表示,"其章程区分这两个概念的做法被证明是不可行的,以后对章程作审查时可消除这种区分"。¹²

^{7《}国际法委员会章程》,第15条。

⁸ 同上, 第 20 条 (a) 和 (b) 款。

⁹ 同上, 第15条。

¹⁰ 见委员会关于国际法的逐渐发展及其编纂的报告,《大会正式记录,第二届会议,第六委员会》, 附件1,第7段。

¹¹ 例如见,《国际法委员会年鉴 1978 年》,第二卷(第二部分),第 16 页,第 72 段("The Commission wishes to indicate that it considers that its work on most-favoured-nation clauses constitutes both codification and progressive development of international law in the sense in which those concepts are defined in article 15 of the Commission's Statute. The articles it has formulated contain elements of both progressive development and of codification of the law and, as in the case of several previous drafts, it is not practicable to determine into which category each provision falls.")。又见,《国际法委员会的工作》,第 8 版,第一卷,第 47 页,2012 年。

^{12 《}国际法委员会年鉴 1996 年》,第二卷(第二部分),第 84 页,第 147(a)段。又见,第 86 和 第 87 页,第 156 至第 159 段,indicating that it is "too simple to suggest that progressive development, as distinct from codification, is particularly associated with the drafting of conventions" and "thus the Commission has inevitably proceeded on the basis of a composite idea of 'codification and progressive development'"。

8. 在不少情况下,在制订具体规则时,委员会明确地区分了其关于国际法编纂的工作和关于国际法逐渐发展的工作。¹³ 然而,在另外许多情况下,委员会并没有表明其对某一特定规则的审议是编纂方面还是逐渐发展方面的工作。¹⁴ 此外,不管委员会是否将其关于某个特定规则的审议确认为属于其中一个类别,委员会往往不采用能使其分析与习惯法明确相关的术语。因此,秘书处采用的方法是,在本备忘录中把委员会工作中看起来是构成想确定或评估习惯国际法某一规则的可能存在或出现的努力的那些要素收录在内。

B. 使习惯国际法的证据更易于查考的方法和手段

9. "习惯国际法的形成与证据"这一专题并不是委员会讨论过的直接与习惯国际法的证据有关的第一个专题。委员会在其第二届会议后根据曼利·哈德逊就该主题编写的一份工作文件,¹⁵ 向大会提交了关于该专题题为"使习惯国际法的证

¹³ 例如见,《国际法委员会年鉴 1978 年》,第二卷(第二部分),第 13 页,第 54 页("The Commission found that the operation of the [most-favoured-nation] clause in the sphere of economic relations, with particular reference to developing countries, was not a matter that lent itself easily to codification of international law in the sense in which that term was used in the [Statute] because the requirements for that process, ... namely, extensive State practice, precedents and doctrine, were not easily discernible."); 对关于外交保护的第 5 条草案的评注第(2) 段, A/61/10, 第 36 页(表明国 家惯例和学说不清楚,因此该规则的起草是作为法律逐渐发展的一项工作); 对关于外交保护 的第8条草案的评注第(2)段, A/61/10, 第48页("第8条草案实乃法律的逐渐发展的体现, 它偏离了……传统规则");以及对关于外交保护的第19条草案的评注第(5)段, A/61/10,第 96 页("如果说习惯国际法还没有达到这样的发展阶段,则第19条草案(a)款必须视为逐渐发 展的一步。"); 对关于对条约的保留的准则 1.1.5 的评注第(1)段, A/66/10/Add. 1, 第 73 页(表 明,该准则"似乎是国际法逐渐发展的一个要素,因为在这方面无明确的先例");对关于驱 逐外国人的第 23 条草案的评注第(5)段, A/67/10, 第 58 页("因此, 第 23 条草案第 2 款在两 方面构成逐渐发展·····");对关于驱逐外国人的第 27 条草案的评注第(1)段,A/67/10,第 71页("第27条草案……属于国际法的逐渐发展。");和对关于驱逐外国人的第29条草案的 评注第(1)段, A/67/10, 第73页("第29条草案承认,作为一种逐渐发展的做法,在符合某 些条件时,因非法驱逐不得不离开一国领土的外国人有权重新进入驱逐国境内。")。又见,对 国际组织的责任的一般性评论第(5)段, A/66/10,第 70页("本条款草案中有好几条所根据的 实践有限,这使得编纂与逐渐发展两者之间的边界朝着后者移动。")。

¹⁴ 事实上,委员会甚至指出,委员会不认为需要确定某一特定规则的法律地位;例如见,关于《海洋法》第 68 条草案的评注,《国际法委员会年鉴 1956 年》,第二卷,第 298 页 ("The Commission does not deem it necessary to expatiate on the question of the nature and legal basis of the sovereign rights attributed to the coastal State [over the continental shelf] ... All these considerations of general utility provide a sufficient basis for the principle of the sovereign rights of the coastal State as now formulated by the Commission.")。

¹⁵ A/CN. 4/16 和 Add. 1。

据更易于查考的方法和手段"的文件。¹⁶ 该报告是对《国际法委员会章程》第 24 条的直接回应。¹⁷

- 10. 委员会对第 24 条的执行在概念上明显有别于当前审议的这个专题。委员会的报告主要关切的与习惯法证据有关的材料的可提供性和可获得性,因此确认了现有的文本集和国际法律材料汇编,并建议秘书处编写某些出版物,以增加与国际惯例可能相关的证据的可提供性。¹⁸
- 11. 但是,委员会的报告确实也简要地考虑了习惯国际法的范围问题。¹⁹ 与当前审议的专题特别相关的是,委员会建议,除其他外,某些国家以公约形式制订国际法的做法往往被用于确立习惯法的存在,并且"必须在各种材料中寻找国家惯例的证据"。²⁰ 下文将作为意见的组成部分再次提及委员会分析报告的这些结论及其他重点。

二. 确认习惯国际法及其形成过程

12. 本节将阐明与委员会在确认习惯国际法规则及导致其形成的过程时所采用的方法有关的意见。本节首先提出关于委员会在确认习惯规则时所采用的一般方法的意见,然后提出与国家惯例、所谓的主观要素(法律必要确信)和与国际组织惯例的相关性及与司法声明和公法专家的论著的相关性有关的意见。

A. 一般方法

意见1

为确认某项习惯国际法规则的存在,委员会往往结合国际法院及法庭的裁决和

¹⁶ 《国际法委员会年鉴 1950 年》,第二卷,第 367 至第 374 页,第 24 至第 94 段。

¹⁷《国际法委员会章程》第 24 条规定:"委员会应研究方式和方法,便利各方利用国际习惯法的依据,如搜集和出版有关国家惯例以及各国法庭和国际法庭作出的国际法问题的判决,并应就此事项向大会提出报告。"

^{18 《}国际法委员会年鉴 1950 年》,第二卷,第 368 至第 374 页。

¹⁹ 同上,第 367 至第 368 页。

²⁰ 同上。

公法专家的论著,对国家一般惯例的所有可用证据,以及各国的态度或立场展 开调查。²¹

13. 对国际水道非航行使用法第5条草案的评注可作为说明委员会的方法的例子:

"一份对所有关于国际水道非航行使用的、已作为法律接受的一般国家惯例的现有材料——包括条约规定、各国在具体争端方面的立场、国际性法院和法庭的裁定、政府间和非政府间机构编写的法律声明、专业性评论员的意见以及国内法院对同类案件的决断等——的调查表明,关于以公平利用作为确定国家在这一领域的权利和义务的法律一般规则的理论,从绝大多数的材料中都可找到依据。"²²

²¹ 在这样做时,委员会依据各种材料,本备忘录第二节 B.2 和第二节 C.2 为此提供了一个示范性 清单。例如又见,对关于国家在条约方面的继承的第 15 条草案的评注,《国际法委员会年鉴 1974年》,第二卷(第一部分),第211至第214页:委员会在审查了各种材料后在第(18)段中 得出结论: "a newly independent State is not, ipso jure, bound to inherit its predecessor's treaties." 委员会有时还依据对逻辑或公正的考虑来确认某些规则; 例如见, 对关于国家在其对国际组织 关系上的代表权的第 36 条草案的评注第(2)段,《国际法委员会年鉴 1971 年》,第二卷(第一部 分),第 308 页 (assessment of relevant practice corroborated by an analogy between the privileges and immunities of diplomatic agents and those of permanent representatives, as well as their respective family members and staff),和对关于国家对国际不法行为的责任的第39条草案的评 注第(2)段,《国际法委员会年鉴 2001》, 第二卷(第二部分), 第 110 页("Article 39 recognizes that the conduct of the injured State, or of any person or entity in relation to whom reparation is sought, should be taken into account in assessing the form and extent of reparation. This is consonant with the principle that full reparation is due for the injury—but nothing more—arising in consequence of the internationally wrongful act. It is also consistent with fairness as between the responsible State and the victim of the breach." (emphasis added)). 在某些情况下,因委员会确定现 有惯例太少而似乎采用了类比的方式;例如见,在对关于国际组织在对待解除行为不法性的情 况的责任的条款草案的一般性评注第(2)段里提出的下列意见, A/66/10, 第 111 页: "同样, 关于解除非法性的情况,涉及国际组织的例子很有限。此外,某些情况对某些、甚至绝大多数 国际组织而言不可能发生。然而,没有理由认为,解除国家行为不法性的情况与国际组织毫不 相关,比如认为只有国家才能援引不可抗力。这并非意味着可以认定国际组织可以援引某一特 定的解除不法性的情况的条件与国家援用的条件完全相同。"

²² 对第 5 条草案的评注第(10)段,《国际法委员会年鉴 1994 年》,第二卷(第二部分),第 98 页。 又见对关于国家对国际不法行为的责任的第 7 条草案的评注第(3)至第(6)段,《国际法委员会 年鉴 2001 年》,第二卷(第二部分),第 45 和第 46 页 (relying on a review of State practice, international jurisprudence and the writings of jurists to find that a rule is established);对关于国家 对国际不法行为的责任的第 10 条草案的评注第(12)至第(14)段,《国际法委员会年鉴 2001 年》, 第二卷(第二部分),第 51 和第 52 页 ("Arbitral decisions, together with State practice and the literature, indicate a general acceptance of the two positive attribution rules in article 10.");对国家 及其财产管辖豁免的第 10 条草案的评注第(24)和第(25)段,《国际法委员会年鉴 1991 年》,第 二卷(第二部分),第 40 页 (determining that the rule formulated in the draft article found precedent in a survey of sources which included judicial decisions, national legislation and treaty practice);对 关于国家在条约方面的继承的第 12 条草案的评注第(10)至第(18)段,《国际法委员会年鉴 1974 年》,第二卷(第一部分),第 199 至第 201 页 (engaging in a review of State practice, boundary disputes and treaty practice to ascertain the existence of a general rule);对关于国家在条约方面的 继承的第 15 条草案的评注第(2)至第(4)段,《国际法委员会年鉴 1974 年》,第二卷(第一部分),

- 14. 上述例子有效说明,委员会在其评注中往往不明确区分用于确认国家一般惯例的材料和用于确认国家对某项规则的态度或立场的材料。²³ 还值得指出的是,委员会承认,在确认习惯国际法规则时提及的各种资料来源并不具有同样的法律价值。²⁴
- 15. 但有时委员会认定某项规则得到国家惯例的支持,但并未在评注里列出系统性调查的证据。 25

第 211 至第 214 页 (reviewing State practice, legal opinion of the Secretariat, practice of depositaries and writings of jurists to establish a general rule); 对关于条约法第 49 条草案的评注第 (1) 至第 (8) 段,《国际法委员会年鉴 1966 年》,第二卷,第 246 和第 247 页 (relying on the Charter of the United Nations and practice of the United Nations, as well as the opinion of a great majority of international lawyers, in discussing a customary rule); 以及对条约法第 25 条草案的评注第 (2) 段,《国际法委员会年鉴 1966 年》,第二卷,第 213 页 ("State practice, the jurisprudence of international tribunals and the writings of jurists appear to support the ... rule which is formulated in the present article.")。

²³ 若需详细查看委员会对国家一般惯例及国家对某项规则的态度或立场的处理情况,请参见下文第二节 B 和第二节 C。又见,对关于国家及其财产管辖豁免的第 16 条草案的评注第(13)段,《国际法委员会年鉴 1991 年》,第二卷(第二部分),第 53 页 (concluding that "the rules enunciated ... are supported by State practice, both judicial, legislative and governmental, as well as by multilateral and bilateral treaties",without engaging in separate analysis in the commentary regarding the practice and attitude of States);对关于国家对国家财产、档案和债务的继承的第 13 条草案的评注第(11)至第(21)段,《国际法委员会年鉴 1981 年》,第二卷(第二部分),第 33 至第 35 页 (providing demonstrative examples and concluding that a rule is grounded in State practice, judicial decisions and legal theory, without distinguishing between materials relied upon to reach its conclusion with respect to State practice, attitudes or positions)。

²⁴ 见对国际水道非航行使用法第 5 条草案的评注第(24)段,《国际法委员会年鉴 1994 年》,第二 卷(第二部分),第 100 页("The foregoing survey of legal materials, although of necessity brief, reflects the tendency of practice and doctrine on this subject. It is recognized that all the sources referred to are not of the same legal value. However, the survey does provide an indication of the wide-ranging and consistent support for the rules contained in article 5.")。

²⁵ 例如见,对海洋法第 22 条草案的评注第(1)段,《国际法委员会年鉴 1956 年》,第二卷,第 276 页 (stating simply that rules "followed the preponderant practice of States", without any further elaboration in the commentary); 对海洋法第 32 条草案的评注,《国际法委员会年鉴 1956 年》,第二卷,第 280 页 (concluding that the principle on the immunity of warships "embodied in paragraph 1 is generally accepted in international law", without providing a survey of evidence); 以及对关于领事关系的第 16 条草案的评注第(1)和第(2)段,《国际法委员会年鉴 1961 年》,第 103 页 (concluding that "according to a very widespread practice, career consuls have precedence over honorary consuls", without referring to any sources in the commentary)。但应指出,在这些例子中的有一些例子里,在委员会的评注里无系统性调查的证据,但在特别报告员的报告或秘书处的研究报告里可看出作过这类调查。

B. 国家惯例

16. 委员会在确认习惯国际法规则时承认,国家惯例发挥了突出的作用。²⁶ 本节的目的是概述委员会在对国家惯例进行特征描述和评估时所用的方式,以及委员会在作分析时所依据的材料。

1. 委员会对国家惯例的特征描述

意见2

委员会一直认为,国家惯例的一致性是确认习惯国际法规则时的一个关键考虑 因素。

17. 委员会好几次发现,只有在存在国家惯例的必要一致性的情况下才能确认某项习惯国际法规则。²⁷ 反过来说,在某些情况下,缺乏一致性被认为是排除了某项习惯国际法规则的存在。²⁸

²⁶ 但应指出,委员会发现,单凭缺乏惯例并不一定能排除一般习惯国际法下的某项权利或权利资格的存在;见,对关于国际组织的责任的第 57 条草案的评注第(2)段,A/66/10,第 157 页("事实上,实践并没有提供非受害国或国际组织针对责任国际组织采取反措施的实例。另一方面,鉴于非受害国或国际组织针对国际组织而采取反措施的例子也很少,与反措施有关的实践缺乏并不能导致人们得到结论认为,非受害国或国际组织采取反措施是不能接受的。")。

²⁷ 见对关于领事关系的第 8 条草案的评注第(1)段,《国际法委员会年鉴 1961 年》,第二卷,第 99 页("At present, the practice of States, as reflected in their domestic law and in international conventions, shows a sufficient degree of uniformity in the use of the four classes set out in article 9 to enable the classes of heads of consular posts to be codified.")和对关于领事关系的第 16 条草案的评注第(1)和第(2)段,《国际法委员会年鉴 1961 年》,第二卷,第 103 页("There would appear to be, as far the Commission has been able to ascertain, a number of uniform practices, which the present article attempts to codify. It would seem that, according to a very widespread practice, career consuls have precedence over honorary consuls.")。又见,对关于对条约的保留的准则 4.5.1 的评注第(8)和第(23)段,A/66/10/Add.1,第 511 和第 517 页("不允许的保留的无效性质绝不属于拟议法的范畴;它已在国家实践中牢牢确立……各国做法虽然多样,但都如出一辙,而且绝非仅限于几个特定国家。")。

²⁸ 例如见,对关于特别使团的第 35 条草案的评注第(4)段,《国际法委员会年鉴 1967 年》,第二卷,第 363 页 ("The Commission noted however, that [consumer] goods are subject to complicated customs regulations which vary from State to State and that there does not appear to be any universal legal rule on the subject."); 对关于外交往来和豁免的第 17 条草案的评注第(2)段,《国际法委员会年鉴 1958 年》,第二卷,第 94 页 ("Usage differs from country to country … It is not possible to lay down a hard-and-fast rule."); 对关于外交往来和豁免的第 36 条草案的评注第(2)段,《国际法委员会年鉴 1958 年》,第二卷,第 101 页 ("It is the general practice to accord to members of the diplomatic staff of a mission the same privileges and immunities as are enjoyed by heads of mission, and it is not disputed that this is a rule of international law. But beyond this there is no uniformity in the practice of States in deciding which members of the staff of a mission shall enjoy privileges and immunities … In these circumstances it cannot be claimed that there is a rule of international law on the subject, apart from that already mentioned."); 海洋法第 3(1)条草案,《国际法委员会年鉴 1956 年》,第二卷,第 265 页 ("The Commission recognizes that international

委员会也一直认为,国家惯例的普遍性是确认习惯国际法的某项规则时的一个关键考虑因素。

18. 委员会好几次发现,只有在存在国家惯例的必要普遍性的情况下才能确认习惯国际法的某项规则。²⁹ 反过来说,缺乏普遍性被认为是排除了某项习惯国际法规则的存在。³⁰ 但在某些情况下,在确认涉及一些数量有限的案件引起的情况的

practice is not uniform as regards the delimitation of the territorial sea.");对海洋法第 4 条草案的 评注第(2)段,《国际法委员会年鉴 1956 年》,第二卷,第 267 页("The traditional expression 'low-water mark' may have different meanings; there is no uniform standard by which States in practice determine this line.");对关于国家对国家财产、档案和债务的继承的第13条草案的评 注第(18)段,《国际法委员会年鉴 1981 年》,第二卷(第二部分),第 41 页("The practice of States relating to currency is not uniform, although it is a firm principle that the privilege of issue belongs to the successor State ...");对关于领事关系的第 11 条的评注第(8)和第(9)段,《国际法委员会 年鉴 1961 年》,第二卷,第 101 页 (indicating that the "universally recognized" right of a receiving State to refuse the exequatur is implicitly recognized in the article, but noting that "in view of the varying and contradictory practice of States, it is not possible to say that there is a rule requiring States to give the reasons for their decisions in such a case."); 对关于驱逐外国人的第 27 条草案 的评注第1段, A/67/10, 第71页("委员会认为, 在这一问题上的国家实践不够统一或一致, 在现有法律上还构不成一般国际法规则的基础,以规定上诉对于驱逐决定具有暂停执行的效 力。");以及对关于驱逐外国人的第29条草案的评注第1段, A/67/10,第73页("尽管可以 发现这种权利在一些国家的立法中,甚至在国际层面得到(基于各种条件的)承认,但是实践似 乎不足以证明实在法中存在着重新准入的权利而且将此权利视为被非法驱逐的外国人的一项 个人权利。")。

例如见,对关于领事关系的第3条草案的评注第(1)段,《国际法委员会年鉴1961年》,第二 卷, 第 94 页("[T]he rule laid down in the present article corresponds to the general practice according to which diplomatic missions exercise consular functions."); 对关于领事关系的第 49 条草案的评注第(1)段,《国际法委员会年鉴 1961 年》, 第二卷, 第 121 页(indicating that evidence of "a very widespread practice ... may be regarded as evidence of an international custom ..."); 对关于对条约的保留的准则 4.5.1 的评注第(8) 和第(23) 段, A/66/10/Add. 1, 第 511 和第 517 页("不允许的保留的无效性质绝不属于拟议法的范畴;它已在国家实践中牢牢确 立 各国做法虽然多样,但都如出一辙,而且绝非仅限于几个特定国家。");对关于外 交往来和豁免的第 32 条草案的评注第(1)段,《国际法委员会年鉴 1958 年》,第二卷,第 100 页 ("In all countries diplomatic agents enjoy exemption from certain dues and taxes; and although the degree of exemption varies from country to country, it may be regarded as a rule of international law that such exemptions exists, subject to certain exceptions."); 对海洋法第 22 条草案的评注第(1) 段,《国际法委员会年鉴 1956 年》,第二卷,第 276 页 ("It considered that these rules followed the preponderant practice of States and it therefore formulated article 22 accordingly."); 以及对得到 《纽伦堡法庭宪章》和《法庭判决》承认的国际法原则的原则四的评注第(105)段,《国际法委 员会年鉴 1950 年》,第二卷,第 375 页 (indicating that a principle is "found in varying degrees in the criminal law of most nations") .

³⁰ 见对关于国家对国际不法行为的责任的第 54 条草案的评注第(3)和第(6)段,《国际法委员会年鉴 2001 年》,第二卷(第二部分),第 137 和第 139 页("Practice on this subject is limited and rather embryonic ... As this review demonstrates, the current State of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States."); 对关于国家及其财产管辖豁免的第 16 条草案的评注第

规则(例如国家继承法)时,委员会在很大程度上依据涉及这些案件的国家的惯例,以确认或制订一项一般规则。³¹

19. 在另外一些情况下,委员会发现,国家行为的特殊性或某个特定情况的特殊性会损害其在确认某项习惯国际法规则方面的证明价值。³²

⁽¹³⁾ 段,《国际法委员会年鉴 1991 年》,第二卷(第二部分),第 53 页(stating that practice found in common-law systems should not be regarded as a "universally applicable practice");以及对关于对条约的保留的准则 2.6.10 的评注第(4) 段, A/66/10/Add. 1,第 265("国家确认反对的相关做法甚少,且无定规可循……")。

³¹ 见对关于国家在条约方面的继承的第 9 条草案的评注第(18) 段,《国际法委员会年鉴 1974 年》,第二卷(第一部分),第 193 页(identifying a rule of general scope on the basis of the practice of certain newly independent States),和对关于国家在条约方面的继承的第 32 条草案的评注第 26 段,《国际法委员会年鉴 1974 年》,第二卷(第一部分),第 258 页(relying on the limited practice of a few unified States to formulate a general rule);又见,对危害人类和平及安全治罪法草案第 5 条草案的评注第 (4) 至第 (6) 段,《国际法委员会年鉴 1996 年》,第二卷(第二部分),第 24 和第 25 页 (relying on limited international tribunal practice to reaffirm an "existing rule of international law"),对关于治罪法草案的第 6 条草案的评注第(1) 至第 (3) 段,《国际法委员会年鉴 1996 年》,第二卷(第二部分),第 25 页 (relying on limited national and international jurisprudence to confirm a principle)。

见对关于国家在条约方面的继承的第21条草案的评注第(7)段,《国际法委员会年鉴1974年》, 第二卷(第一部分), 第 231 页("But the cases of the former British Dominions were very unusual owing both to the circumstances of their emergence to independence and to their special relation to the British crown at the time in question. Accordingly, no general conclusion should be drawn from these cases ..."); 对关于国家在条约方面的继承的第 29 条草案的评注第(7)段, 《国际法委员 会年鉴 1974 年》,第二卷(第一部分),第 250 页 (indicating that the circumstances of a federation were "somewhat special" and thus "not thought to be a useful precedent from which to draw any general conclusions");对关于国家在条约方面的继承的第34条草案的评注第(11)段,《国际 法委员会年鉴 1974 年》,第二卷(第一部分),第 262 页("[T]he facts concerning that extremely ephemeral federation are thought to be too special for it constitute a precedent from which to derive any general rule."); 对关于国家对国家财产、档案和债务的继承的第8条草案的评注第(4)段, 《国际法委员会年鉴 1981 年,第二卷(第二部分),第 25 页(stating that "no generally applicable criteria ... can be deduced from", inter alia, "two General Assembly resolutions, which were adopted in pursuance of a treaty and related exclusively to special situations."); 以及对关于国家对国家财 产、档案和债务的继承的第 13 条草案的评注第(13)段,《国际法委员会年鉴 1981 年》,第二 卷(第二部分),第 33 页(omitting two cases as "not sufficiently illustrative" as their application of a general principle was "due to other causes of a peculiar and specific kind").

委员会在确认国家惯例是否满足一致性或普遍性要求时采用了不同的术语。

20. 这类术语包括: "一致性"或"一致惯例"、³³ "一般惯例"、³⁴ "广泛惯例"、³⁵ 一项"在实践中广被遵守的"规则、³⁶ "健全和普遍惯例"、³⁷ "健全惯例"、³⁸ "明确确立的"惯例、³⁹ "牢固确立的"惯例、⁴⁰ "确立的惯例"、⁴¹ "既定惯例"、⁴² "国家的突出惯例",⁴³ 或者"国家惯例证据的权重"。⁴⁴

³³ 见对关于领事关系的第 8 条草案的评注第(1)段,《国际法委员会年鉴 1961 年》,第二卷,第 99 页 (referring to the "degree of uniformity" in State practice);对关于外交往来和豁免的第 36 条草案的评注第(2)段,《国际法委员会年鉴 1958,第二卷,第 101 页 ("But beyond this there is no uniformity in the practice of States …");对海洋法第 3 条的评注第(2)段,《国际法委员会年鉴 1956 年》,第二卷,第 265 页 ("… international practice was not uniform …");以及对海洋法第 7 条的评注第(3)段,《国际法委员会年鉴 1956 年》,第二卷,第 266 页 ("… international practice was far from uniform")。

³⁴ 见对关于领事关系的第 3 条草案的评注第(1)段,《国际法委员会年鉴 1961 年》,第二卷,第 94页;对关于国家在条约方面的继承的第 22 条草案的评注第(6)段,《国际法委员会年鉴 1974年》,第二卷(第一部分),第 234页;以及对条约法第 52 条草案的评注第 2 段,《国际法委员会年鉴 1966 年》,第二卷,第 250页。

³⁵ 见对关于领事关系的第 49 条草案的评注第(1)段、对第 16 条草案的评注第(2)段和对第 41 条草案的评注第(2)段, 《国际法委员会年鉴 1961 年》,第二卷,第 121、第 103 和第 115 页。

³⁶ 见对关于对条约的保留的准则 2.3 的评注第(2)段, A/66/10/Add. 1, 第 173 页。

³⁷ 见对关于国家在其对国际组织关系上的代表权的第8条草案的评注第(1)段,《国际法委员会年鉴 1971 年》,第二卷(第一部分),第 291 页。

³⁸ 例如见,对关于对条约的保留的准则 1.8 的评注第(3)段,A/66/10/Add.1,第 131页;对关于对条约的保留的准则 3.1.5.3 的评注第(12)段,A/66/10/Add.1,第 373页;以及对关于国家在其对国际组织关系上的代表权的第 50 条草案的评注第(4)段,《国际法委员会年鉴 1971年》,第二卷(第一部分),第 315页。

³⁹ 见对关于国家对国家财产、档案和债务的继承的第 13 条草案的评注第(12)段, 《国际法委员会年鉴 1981 年》,第二卷(第二部分),第 33 页。

⁴⁰ 见对关于对条约的保留的准则 4.5.1 的评注第(8) 段, A/66/10/Add, 1, 第 511 页。

⁴¹ 见对关于国家及其财产管辖豁免的第 21 条草案的评注第 (1) 段,《国际法委员会年鉴 1991 年》, 第二卷 (第二部分),第 61 页。

⁴² 见对关于外交保护的第 19 条草案的评注第(8)段, A/61/10, 第 100 页("虽然国家立法、司法裁决和理论学说在一定程度上支持.....,但这或许并不是一种成型的做法")。

⁴³ 见对海洋法第 22 条草案的评注第(1)段,《国际法委员会年鉴 1956 年》,第二卷,第 276 页。

⁴⁴见对关于国家在条约方面的继承的第 12 条草案的评注第 (17) 段,《国际法委员会年鉴 1974 年》,第二卷 (第一部分),第 201 页 (referencing "the weight of the evidence of State practice" in support of excepting boundary treaties from the fundamental change of circumstances rule)。

虽然国际惯例有一个统一的主线或主题 45 作为其基础,但在实践中的某种变异往往并未使委员会不确认某项习惯国际法规则。46

21. 例如,在对关于国家在条约方面的继承的第 34 条草案的评注中,委员会作出如下结论:

虽然在国家惯例中可能会发现某些差异,但惯例的一致性仍足以支持制订一项规则,在作出必要的限制后,该规则可规定,在一国消亡之日时有效的条约对从该国消亡后新兴的每一个国家在法律上都仍然是有效的。⁴⁷

22. 同样,在其对关于外交往来和豁免的第 32 条草案的评注中,委员会指出: "虽然各国[对某些关税和其他税]的减免程度不尽相同,但可以认为,作为一项 国际法规则,这类减免是存在的,不过存在某些例外。"⁴⁸

⁴⁵ 见对关于国际水道非航行使用的第 5 条草案的评注第 (11) 段,《国际法委员会年鉴 1994 年》,第 二卷 (第二部分),第 98 页,indicating that, although the language and approaches of international agreements reflecting the doctrine of equitable utilization – which was characterized by the Commission as a "general rule of law" – "vary considerably, *their unifying theme* is the recognition of rights of the parties to the use and benefits of the international watercourse or watercourses in question that are equal in principle and correlative in their application".(Emphasis added.)。

⁴⁶ 关于委员会对国家惯例的统一性要求所采取的一般性方法,请参见本备忘录第二节 B. 1 中的意见 2。

⁴⁷ 对关于国家在条约方面的继承的第 34 条草案的评注第(25)段,《国际法委员会年鉴 1974 年》,第二卷(第一部分),第 265 页。

⁴⁸ 对关于外交往来和豁免的第 32 条草案的评注第(1)段,《国际法委员会年鉴 1958 年》,第二 卷,第 100 页。又见,对海洋法第 29 条草案的评注第(3)段,《国际法委员会年鉴 1956 年》, 第二卷, 第 279 页("Existing practice in the various States is too divergent to be governed by the few criteria adopted by the Commission ... The Commission accordingly thought it best to confine itself to enunciating the guiding principle that, before the grant of nationality is generally recognized, there must be a genuine link between the ship and the State granting permission to fly its flag ... [T]he majority of the Commission preferred a vague criterion to no criterion at all.");对关于领事 关系的第30条草案的评注第(8)段,《国际法委员会年鉴1961年》,第二卷,第109和第110 页(affirming the inviolability of the consular premises, noting in particular its recognition in numerous consular conventions, despite "certain exceptions to the rule of inviolability" found in some conventions);对海洋法第13条草案的评注第(3)段,《国际法委员会年鉴1966年》,第 二卷, 第 201 页 (commenting that the Right of Passage case may indicate "the possibility that difficult problems may arise under the rule in special circumstances", but that "the existing rule appears to be well-settled"); 以及对危害人类和平及安全治罪法草案第 11 条草案的评注第 (2) 和第(3)段,《国际法委员会年鉴 1996 年》, 第二卷(第二部分), 第 34 页("Notwithstanding the diversity of procedural and evidentiary rules that govern judicial proceedings in various jurisdictions", every court or tribunal must comply with the "minimum international standard of due process").

随着时间的推移,国家惯例的一致性有时被委员会作为习惯国际法的形成或证据 的相关考虑因素,虽然不一定是决定性因素,加以援引。⁴⁹

2. 委员会在评估国家惯例时所依据的材料

意见 7

委员会在为确认某项习惯国际法规则的目的而评估国家惯例时依据了各种材料。

23. 委员会在其工作中似乎遵循了在其 1950 年提交大会的关于使习惯国际法的证据更易于查考的方法和手段的报告里最初设想的方法。50 一份关于委员会作为

⁴⁹ 例如见,对关于领事关系的第 5 条草案的评注第(18)段,《国际法委员会年鉴 1961 年》,第二 卷, 第 98 页("Paragraph(j)confirms a long-established practice whereby consuls ensure the service on the persons concerned ..."); 对危害人类和平及安全治罪法草案第 5 条草案的评注第(4) 和第 (6) 段, 《国际法委员会年鉴 1996 年》, 第二卷(第二部分), 第 24 和第 25 页 (determining that the article reaffirms an "existing rule of international law" and indicating that "the defence of superior orders has been consistently excluded in the relevant legal instruments adopted since the Charter of the Nürnberg Tribunal ..."); 对危害人类和平及安全治罪法草案第 7 条草案的评注第 (4) 段,《国际法委员会年鉴 1996 年》, 第二卷(第二部分), 第27页("The official position of an individual has been consistently excluded as a possible defence to crimes under international law in the relevant instruments adopted since the Charter of the Nürnberg Tribunal ..."); 以及对关于国家 及其财产管辖豁免的第 6 条草案临时案文的评注第(26)段(which was referred to by the Commission in its commentary to the corresponding article 5 of the final version of the draft articles on the topic as "still generally applicable": 见《国际法委员会年鉴 1991 年》, 第二卷(第二部分), 第 22 和第 23 页),《国际法委员会年鉴 1980 年》,第二卷(第二部分),第 147 和第 148 页("It should be observed ... that the rule of State immunity, which was formulated in the early nineteenth century and was widely accepted in common law countries as well as in a large number of civil law countries in Europe in that century, was later adopted as a general rule of customary international law solidly rooted in the current practice of States. Thus the rule of State immunity continues to be applied, to a lesser or greater extent, in the practice of the countries whose case law in the nineteenth century has already been examined ... Its application seems to be consistently followed in other countries.")。又见,相反的,对关于国家对国际不法行为的责任的第54条草案的评注第(3)段, 《国际法委员会年鉴 2001 年》, 第二卷(第二部分), 第 137 页("Practice on this subject is limited and rather embryonic.").

⁵⁰ 见《国际法委员会年鉴 1950 年》, 第二卷, 第 368 页, 第 31 段 ("Evidence of the practice of States is to be sought in a variety of materials. The reference in article 24 of the Statute of the Commission to 'documents concerning State practice' (documents établissant la pratique des Etats) supplies no criteria for judging the nature of such 'documents'. Nor is it practicable to list all the numerous types of materials which reveal State practice on each of the many problems arising in international relations."). In that report, the Commission provided the following non-exhaustive list of the types of materials that are of potential relevance to the evidence of customary international law:(a)texts of international instruments;(b) decisions of international courts;(c) decisions of national courts;(d) national legislation;(e)diplomatic correspondence;(f)opinions of national legal advisers; and (g)practice of international organizations (《国际法委员会年鉴 1950 年》,第二卷,第 370 页). Notably, the Commission indicated that "national legislation" is "employed in a comprehensive sense; it embraces the constitutions of States, the enactments of their legislative organs, and the regulations

国家惯例的要素所依据的材料的不完整清单可包括国内法、51 国内法院的判决、52

and declarations promulgated by executive and administrative bodies. No form of regulatory disposition effected by a public authority is excluded" (第 370 页 (in sub-section on "national legislation"),第 60 段). In addition, the Commission noted that "the decisions of the national courts of a State are of value as evidence of that State's practice, even if they do not otherwise serve as evidence of customary international law" (第 54 段). The Commission declined, however, to assess "the relative value of national court decisions as compared with other types of evidence of customary international law" (第 54 段) 。

⁵¹ 例如见,对关于国家及其财产管辖豁免的第 10 条草案的评注第(19)段,《国际法委员会年鉴 1991年》,第二卷(第二部分),第 38 和第 39 页 (engaging in a survey of national legislation);对关于外交保护的第 19 条的评注第(8)段,A/61/10,第 100 页 ("虽然国家立法、司法裁决和理论学说在一定程度上支持.....,但这或许并不是一种成型的做法");对关于国家及其财产管辖豁免的第 16 条草案的评注第(13)段和注 164,《国际法委员会年鉴 1991 年》,第二卷(第二部分) (indicating that rules are supported by State practice, including legislative practice);以及对关于国家及其财产管辖豁免的第 6 条草案临时案文的评注第(40)至第(48)段 (which was referred to by the Commission, in its commentary to the corresponding article 5 of the final version of the draft articles on the topic, as "still generally applicable":见《国际法委员会年鉴 1991 年》,第二卷(第二部分),第 22 和第 23 页),《国际法委员会年鉴 1980 年》,第二卷(第二部分),第 152 和第 153 页 (indicating that "national legislation constitutes an important element in the overall concept of State practice" and engaging in a review of relevant internal laws)。

⁵² 见对关于国家及其财产管辖豁免的第 10 条草案的评注第(13)至第(18)段, 《国际法委员会年鉴 1991 年》, 第二卷(第二部分), 第 36 至第 38 页(survey of national judicial practice);对关于国家及其财产管辖豁免的第 16 条草案的评注第(13)段和注 164, 《国际法委员会年鉴 1991 年》, 第二卷(第二部分), 第 52 和第 53 页(indicating that rules are supported by State practice, including judicial practice); 对关于国家及其财产管辖豁免的第 6 条草案临时案文的评注第(7)段(which was referred to by the Commission in its commentary to the corresponding article 5 of the final version of the draft articles on the topic, as "still generally applicable": 见《国际法委员会年鉴1991 年》, 第二卷(第二部分), 第 22 和第 23 页), 《国际法委员会年鉴 1980 年》, 第二卷(第二部分), 第 143 页("The general rule of international law regarding State immunity has developed principally from the judicial practice of States. Municipal courts have been primarily responsible for the growth and progressive development of a body of customary rules governing the relations of nations in this particular connection."); 以及对条约法第 59 条草案的评注第(3)段,《国际法委员会年鉴 1966 年》,第二卷,第 257 页 (referring to the practice of municipal courts)。

行政部门的惯例、53 外交惯例54 和条约惯例。55

24. 此外,委员会还依据其他材料作为关于国家惯例的次要资料来源。这些材料

⁵³ 见对关于国家及其财产管辖豁免的第 6 条草案临时案文的评注第(39)段 (which was referred to by the Commission, in its commentary to the corresponding article 5 of the final version of the draft articles on the topic, as "still generally applicable": 见《国际法委员会年鉴 1991 年》,第二卷(第二部分),第 22 和第 23 页),《国际法委员会年鉴 1980 年》,第二卷(第二部分),第 151 和第 152 页 ("The views of the Government, expressed through its political branch, are highly relevant and indicative of the general trends in the practice of States ... The lead taken by the Government may be decisive in bringing about desirable legal developments through forceful assertion of its position or through the intermediary of the legislature or by way of governmental acceptance of principle contained in an international convention. Conversely, the Government is clearly responsible for its decision to assert a claim of State immunity in respect of itself and its property, or to consent to the exercise of jurisdiction by the court of another state or to waive its sovereign immunity in a given case."); 以及对关于国家及其财产管辖豁免的第 16 条草案的评注第 (13) 段,《国际法委员会年鉴 1991 年》,第二卷 (第二部分),第 53 页 (indicating that rules enunciated in the article are supported by State practice, including governmental practice)。

⁵⁴ 见对关于国家在条约方面的继承的第 18 条草案的评注第(14)至第(17)段, 《国际法委员会年鉴 1974 年》,第二卷(第一部分),第 185 和第 186 页(considering the diplomatic positions, exchanges and practice of States to ascertain whether a general rule exists),和对关于国家在条约方面的继承的第 12 条草案的评注第(11)至第(17)段,《国际法委员会年鉴 1974 年》,第二卷(第一部分),第 200 至第 202 页(analyzing diplomatic exchanges and positions in boundary disputes as evidence of State practice on the question of whether boundary settlements are affected by a succession of States)。又见,《国际法委员会年鉴 1950 年》,第二卷,第 371 页,第 71 段("The diplomatic correspondence between Governments must supply abundant evidence of customary international law.")。

⁵⁵ 见对关于国家及其财产管辖豁免的第 10 条草案的评注第(20)和第(21)段, 《国际法委员会年鉴 1991 年》,第二卷(第二部分),第 39 页 (indicating that the "accumulation of such bilateral treaty practices could combine to corroborate the evidence of the existence of a general practice of States in support of" certain exceptions to State immunity); 对关于国家在条约方面的继承的第 15 条草案的评注第(14)至第(18)段,《国际法委员会年鉴 1974 年》,第二卷(第一部分),第 213 和第 214 页 (considering devolution agreements as evidence of State practice for the purpose of ascertaining the existence of a general rule); 对关于领事关系的第 15 条草案的评注第(1)段和第 19 条草案的评注第(5)段,《国际法委员会年鉴 1961 年》,第二卷,第 103 和第 105 页 (citing consular conventions as evidence of practice of States); 以及对关于领事关系的第 28 条草案的评注第(1)和第(3)段,《国际法委员会年鉴 1961 年》,第二卷,第 108 页 (indicating that the rule is confirmed by numerous consular conventions)。

包括:特别是政府的意见、⁵⁶ 国际组织的出版物 ⁵⁷ 及非政府组织的出版物、⁵⁸ 行政部门的出版物 ⁵⁹ 及国际司法判决和法学家的论著。⁶⁰

25. 委员会还指出了就某一特定法律问题确认和评估与国家惯例相关的例子的 困难之处。⁶¹

⁵⁶ 委员会及其特别报告员通常依据收自各国政府的评论意见作为关于国家惯例的主要资料来源之一。可以在某些评注中看出这类依据情况;例如见,对关于领事关系的第 56 条草案的评注第(1)段,《国际法委员会年鉴 1961年》,第二卷,第 124页("A study of consular regulations has shown, and the comments of governments have confirmed, that some States permit their career consular officials to carry on private gainful occupation.... It was in light of this practice that the Commission ... adopted this article ...");和对关于国家及其财产管辖豁免的第 7 条草案的评注第(5)段,《国际法委员会年鉴 1991年》,第二卷(第二部分),第 26 页("Express reference to absence of consent as a condition *sine qua non* of the application of State immunity is borne out in the practice of States. Some of the answers to the questionnaire circulated to Member States clearly illustrate this link between the absence of consent and the permissible exercise of jurisdiction.")。

⁵⁷ 例如见,对关于国家对国际不法行为的责任的第 23 条草案的评注第(1)段,《国际法委员会年鉴 2001 年》,第二卷(第二部分),第 76 页(citing a study of State practice on force majeure prepared by the Secretariat); 对关于国家及其财产管辖豁免的第 10 条草案的评注第(16)段,《国际法委员会年鉴 1991 年》,第二卷(第二部分),第 36 页(citing State practice of Egypt found in a United Nations publication); 对关于国家在条约方面的继承的第 12 条草案的评注第(27)段,《国际法委员会年鉴 1974 年》,第二卷(第一部分),第 203 页(citing the Nile Waters Agreement of 1929 and other bilateral agreements reproduced in a United Nations publication); 以及对关于国家在条约方面的继承的第 4 条草案的评注第(4)段,《国际法委员会年鉴 1974 年》,第二卷(第一部分),第 223 页(citing a United Nations publication in support of a proposition regarding the practice of successor States)。

⁵⁸ 例如见,对关于国家在条约方面的继承的第 9 条草案的评注第(10)和第(12)段(citing International Law Association materials),对第 23 条草案的评注第(7)段(citing a report of the International Law Association)和对第 30 和第 31 条草案的评注第(17)段(citing a report of the Nigerian Institute for International Affairs),《国际法委员会年鉴 1974 年》,第二卷(第一部分),第 191 和第 192 页、第 237 和 238 页及第 256 页。

⁵⁹ 例如见,对关于国家对国际不法行为的责任的第 24 条草案的评注第(2) 段,《国际法委员会年鉴 2001 年》,第二卷(第二部分),第 79 页(citing diplomatic exchanges reproduced in a publication of the Government of the United States of America);对关于国家对国际不法行为的责任的第 32 条草案的评注第(3) 段,《国际法委员会年鉴 2001 年》,第二卷(第二部分),第 94页(citing State practice found in the *British and Foreign State Papers*, 1919, vol. 112);以及对关于国家在条约方面的继承的第 14 条草案的评注第(4) 段,《国际法委员会年鉴 1974 年》,第 二卷(第一部分),第 208 和第 209 页 (referring to treaty practice found in a publication of the Government of the United Kingdom)。

⁶⁰ 见下文第二节 E。

⁶¹ 见对关于武装冲突对条约的影响的条款草案附件的评注第(4)段(concerning the indicative list of treaties, referred to in article 7, the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict), A/66/10, 第 199 页("……来自各国的大量信息流说明国家实践的证据不多。此外,在这一领域对有关的国家实践很难鉴定")。

C. 所谓的主观要素(法律必要确信)

26. 除了国家惯例之外,委员会在其工作中还频繁提及往往被定义为习惯国际法主观要素的材料。⁶² 本节的目的是概述委员会在对该要素进行特征描述和评估时所用的方式,以及委员会在作分析时所依据的材料。

1. 委员会对主观要素的特征描述

意见8

委员会往往把主观要素的特征定为各国对某项强制性规则的存在或不存在所具有的感觉。⁶³ 虽然在许多情况下委员会会特别依据某项规则的强制性质,⁶⁴ 但

⁶² 例如见,对关于对条约的保留的准则 2.2.1 的评注第(8)段,A/66/10/Add.1,第 167 页(依据惯例和必要法律确念来支持该规则,即在签署时制定的保留需得到确认,同时表明同意受约束);和对关于国家及其财产管辖豁免的第 6 条草案临时案文的评注第(18)段(委员会在其对关于该专题条款草案最后案文相应第 5 条的评注中提及"仍然普遍适用":见《国际法委员会年鉴 1991年》,第二卷(第二部分)第 22 和第 23 页),《国际法委员会年鉴 1980年》,第二卷(第二部分),第 145 页(提及作为国家惯例基础的关于管辖豁免的法律意见)。

⁶³ 在看到"某项强制性规则的存在或不存在"这一词组时应理解到,习惯国际法规则可能既是许 可的(承认国家的权利或酌处权)又是有限制性的(对国家规定了义务)。委员会明确提及许可性 规则的例子包括对关于领事关系的第67条草案的评注第(1)段,《国际法委员会年鉴1961年》, 第二卷, 第 127 页 (rule according to which each State is free to decide whether it will appoint or receive honorary consular officials); 对关于国家及其财产管辖豁免的第7条草案的评注第(11) 段,《国际法委员会年鉴 1991 年》,第二卷(第二部分),第 28 页("Customary international law or international usage recognizes the exercisability of jurisdiction by the court against another State which has expressed its consent in no uncertain terms, but actual exercise of such jurisdiction is exclusively within the discretion or the power of the court, which could require a more rigid rule for the expression of consent."); 对关于国家在条约方面的继承的第15条草案的评注第(7)和第(12) 至第(17)段,《国际法委员会年鉴 1974 年》,第二卷(第一部分),第 212 至第 214 页(evidence of State practice supports the traditional view that a newly independent State is not under any general obligation to take over the treaties of its predecessor; 请特别参见第(12)段: "Here the notion of succession seems to have manifested itself in the recognition of a new State's right to become a party without at the same time seeking to impose upon it an obligation to do so." (emphasis in the original))。

⁶⁴ 见对条约法第 27 条草案 ("General rule of interpretation")和第 28 条草案 ("Supplementary means of interpretation")的评注第 (3) 至第 (5) 段和第 (9) 段,《国际法委员会年鉴 1966 年》,第二卷,第 218 至第 220 页,特别是第 (4) 段 ("recourse to many of these principles is discretionary rather than obligatory" "... But these elements are all of an obligatory legal character");以及对关于外交保护的第 19 条草案的评注第 (8) 段,A/61/10,第 100 页 ("国家对于限制自己对裁定赔偿金的处置自由也不存在任何义务感 ..." (着重号另加)。

在某些情况下,委员会会提及各国对某项规则的必要性的认识。65

意见9

各国对某项可能的习惯国际法规则的立场往往被委员会表述为"普遍承认"或"普遍接受"该项规则。但委员会还采用了其他表述法,例如各国对某一特定规则的存在或内容的"相信"或"态度"。

27. 委员会在其工作中好几次以指出某项规则得到"普遍(或广泛)承认"⁶⁶ 或"普遍接受"的方式暗指了习惯国际法的所谓的主观要素。⁶⁷ 在审议"普遍接受"这一概念时,委员会解释了其对主张和接受之间的动态过程的理解,因为正是这种动态过程导致了习惯国际法某项特定规则的出现。⁶⁸ 在某些情况下,委员会在

美国以《1945 年杜鲁门宣言》向其他国家施加义务或者至少限制它们对美洲大陆架的权利。严格地说,该声明并没有得到别国的承认。尽管如此,如法院强调的,"这一[大陆架]制度提供了一个例证:一个法律学说来自于一个被普遍接受的特殊渊源"[注 978:见墨西哥的情况,A/CN. 4/557,第 132 段。]事实上,其他国家以相似的主张和声明响应了《1945 年杜鲁门公

⁶⁵ 例如见,对条约法第 59 条草案的评注第(6)段,《国际法委员会年鉴 1966 年》,第二卷,第 258 页("...the acceptance of the [rebus sic stantibus] doctrine in international law is so considerable that it seems to indicate a recognition of a need for this safety-valve in the law of treaties"); 和对国际水道非航行使用法第 20 条草案的评注第(9)段,《国际法委员会年鉴 1994 年》,第二卷(第二部分),第 120 页。

⁶⁶ 例如见,对条约法第 30 条草案的评注第(1)段,《国际法委员会年鉴 1966 年》,第二卷,第 226 页 (indicating the existence of "abundant evidence of the recognition of the rule in State practice and in the decisions of international tribunals, as well as in the writings of jurists"); 对关于国家对国际不法行为的责任的第 39 条草案的评注第(4)段,《国际法委员会年鉴 2001 年》,第二卷(第二部分),第 110 页("The relevance of the injured State's contribution to the damage in determining the appropriate reparation is widely recognized in the literature and in State practice."); 对反措施的一般性评注第(2)段,《国际法委员会年鉴 2001 年》,第二卷(第二部分),第 128 页("It is recognized both by Governments and by the decisions of international tribunals that countermeasures are justified under certain circumstances"); 以及对第 51 条草案的评注第(2)段,《国际法委员会年鉴 2001 年》,第二卷(第二部分),第 134 页("Proportionality is a well-established requirement for taking countermeasures, being widely recognized in State practice, doctrine and jurisprudence …")。

⁶⁷ 例如见,对条约法第 15 条草案的评注第(1)段,《国际法委员会年鉴 1966 年》,第二卷,第 202 页(obligation ... "generally accepted"); 对关于防止和惩处侵害外交代表和其他应受国际保护人员的罪行的第 1 条草案的评注第(3)段,《国际法委员会年鉴 1972 年》,第二卷,第 313 页 (indicating that the extension to cabinet officers of the principle of special protection at all times and in all circumstances when in a foreign State "could not be based on any broadly accepted rule of international law..."); 对关于国家在条约方面的继承的第 35 条草案的评注第(12)段,《国际法委员会年鉴 1974 年》,第二卷(第一部分),第 206 页("general acceptance" – together with the "strong indications of a belief"); 以及对关于对条约的保留的准则 4.5.1 的评注第(28)段,A/66/10/Add. 1,第 519 页(国家、法院和条约机构的"普遍同意" 依赖于支持一项关于规定无效的保留不产生任何法律效力的规则)。

⁶⁸ 见对适用于能够产生法律义务的国家单方面声明的指导原则 9 的评注第(2)段, A/61/10, 第 177 页、第 379 和第 380 页:

提及主观要素时采用了不同的术语,例如各国对某项规则的存在或内容的"相信"⁶⁹或"态度"。⁷⁰

意见 10

委员会在某些情况下把某项习惯国际法规则的主观要素与可能生动反映国家行 为或立场的其他考虑因素作了区分。

28. 特别是,委员会在某些情况下发现,除了承认或接受或相信某项法律规则的存在外,其他考虑因素也能生动反映国家的行为或立场。委员会确认的这类其他考虑因素包括:礼遇、⁷¹ 政治上的权宜之计、意愿或妥协、⁷² 预防性措施、⁷³ 意

告》[注 979: 见墨西哥的情况, A/CN. 4/557, 第 132 段),并且不久以后将其纳入 1958 年《日内瓦大陆架公约》第二条。因此,可以说它已经得到普遍接受,并且是脱离习惯程序而在很短期间内形成国际法新规范的一个起点。国际法院就此说,"但是,《杜鲁门宣言》不久即被视为关于这一问题的实在法开端,其阐述的主要理论……优越于所有其他理论,现反映于 1958 年《日内瓦大陆架公约》第二条。"[注 980: 北海大陆架案(德意志联邦共和国诉丹麦,德意志联邦共和国诉荷兰),《1969 年国际法院案例汇编》,第 47 段]。

⁶⁹见对关于国家在条约方面的继承的第12条草案的评注第(35)段,《国际法委员会年鉴1974年》, 第二卷(第一部分), 第206页(alluding to "strong indications of a belief" along with "general acceptance")。

⁷⁰ 见对条约法第 59 条草案的评注第 (4) 段,《国际法委员会年鉴 1966 年》,第二卷,第 257 页 ("The most illuminating indications as to the attitude of States regarding the principle [of rebus sic stantibus] are perhaps statements submitted to the Court …")。

⁷¹ 见对关于特别使团的条款草案第二部分的评注第(1)段, 《国际法委员会年鉴 1967 年》, 第二卷, 第 358 页("Before the Second World War, the question whether the facilities, privileges and immunities of special missions have a basis in law or whether they are accorded merely as a matter of courtesy was discussed in the literature and raised in practice. Since the War, the view that there is a legal basis has prevailed. It is now generally recognized that States are under an obligation to accord the facilities, privileges and immunities in question to special missions and their members."(emphasis added)). 又见,对关于国家在其对国际组织关系上的代表权的条款草案附件的评注第(2)段("matter of courtesy";《国际法委员会年鉴 1971 年》,第二卷(第一部分),第 335 页)。

⁷² 见对关于国家对国家财产、档案和债务的继承的第 25 条草案的评注第(1)、第(8)、第(9)和第(20)段, 《国际法委员会年鉴 1981 年》,第二卷(第二部分),第 54 至第 56 页及第 59 和第 60 页(特别是,"(1)..."political solutions that reflected relationships of strength between victors and vanquished rather than equitable solutions",第 54 页;和"(8)... solutions ... based on a 'given power relationship'",第 55 页);第 35 条草案的评注第(36)段,《国际法委员会年鉴 1981 年》,第二卷(第二部分),第 90 页 (role played by "political considerations or considerations of expediency"; "... there is a strong presumption that that is not a context in which States express their free consent or are inclined to yield to the demands of justice, of equity, or even of law");对同一主题第 36 条草案的评注第(63)段,《国际法委员会年鉴 1981 年》,第二卷(第二部分),第 104页("State practice shows conflicting principles, solutions based on compromise with no explicit recognition of any principles ...");以及对关于国家在条约方面的继承的第 23 条草案的评注第(4)至第(15)段,特别是第(8)、第(12)和第(15)段,《国际法委员会年鉴 1974 年》,第二卷(第一部分),第 238 至第 240 页 (instances of succession to bilateral treaties regarded by the Commission as having an "essentially voluntary character" – para.(12); the Commission did not

图 74 和愿望或偏好 75 的表达。

意见 11

在某些情况下,委员会似乎认为在国家惯例中不存在对某项规则的反对也是很 重要的。⁷⁶

believe that continuity of treaties derives "from a customary legal rule rather than the will of the States concerned" – para.(8)). But see paras.(17)and(18)of commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property(which was referred to by the Commission, in its commentary to the corresponding article 5 of the final version of the draft articles on the topic, as "still generally applicable": 见《国际法委员会年鉴 1991 年》,第二卷(第二部分),第 22 和第 23 页),suggesting that consent does not undermine a customary rule which is supported by usage and *opinio juris*("The principle of State immunity, which was later to become widely accepted in the practice of States, was clearly stated by Chief Justice Marshall: '…This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage." … "In this classic statement of the rule of State immunity, the granting of jurisdictional immunity was based on the consent of the territorial State as tested by common usage and confirmed by the opinio juris underlying that usage." (emphasis added), 《国际法委员会年鉴 1980 年,第二卷(第二部分),第 145 页。

- 73 见对关于对条约的保留的准则 2.6.10("Non-requirement of confirmation of an objection formulated prior to formal confirmation of a reservation")的评注第(4)段, A/66/10/Add. 1, 第 266页(considering that confirmations of objections in such cases as found in State practice "are precautionary measures that are by no means dictated by a sense of legal obligation(*opinio juris*)")。
- ⁷⁴ 见对关于最惠国条款的第 30 条草案的评注第 (7) 段,《国际法委员会年鉴 1978 年》,第二卷 (第二部分),第 73 页 ("While all these developments may show that there might be a tendency among States to promote the trade of developing countries through 'differential treatment', the conclusion of the Commission is that this tendency has not yet crystallized sufficiently to permit it to be embodied in a clear legal rule that could find its place among the general rules on the functioning and application of the most-favoured-nation clause. *All the texts partially quoted above are substantially expressions of intent rather than obligatory rules*. ..."(emphasis added)。
- 75 关于危险活动所致跨界损害的损失分配原则草案,A/61/10,第 141 和第 142 页(委员会在提及《斯德哥尔摩宣言》原则 22 和《里约宣言》原则 13 时指出,"虽然这两项宣言中的这些原则的目的并不是要产生有法律约束力的义务,但它们表明了国际社会的愿望和倾向。")。
- 76 例如见,对关于国家及其财产管辖豁免的第 6 条草案临时案文的评注第(32)段(which was referred to by the Commission, in its commentary to the corresponding article 5 of the final version of the draft articles on the topic, as "still generally applicable": 见《国际法委员会年鉴 1991 年》,第二卷(第二部分),第 22 和第 23 页): "The preceding survey of the judicial practice of common law jurisdictions and civil law systems in the nineteenth century and of other countries in the contemporary period indicates a uniformity in the acceptance of the rule of State immunity. While it would be neither possible nor desirable to review the current case law of all countries, which might uncover some discrepancies in historical developments and actual application of the principle,... it should be observed that, for countries having few or no reported judicial decisions on the subject, there is no indication that the concept of State immunity has been or will be rejected. The conclusion seems warranted that, in the general practice of States as evidence of customary law, there is little doubt that a general rule of State immunity has been firmly established as a norm of customary international law."(emphasis added), 《国际法委员会年鉴 1980 年》,第二卷(第二部分),第 149 页。又见,对关于国家及其财产管辖豁免的第 13 条草案的评注第(2)段,《国际法委员会年鉴

2. 委员会在评估主观要素时所依据的材料

意见 12

委员会为确认某项习惯国际法规则的目的而评估主观要素时依据了各种材料。

29. 一份关于这类材料的不完整清单可包括国家在国际组织的立场(包括书面意见和对问卷的答复)⁷⁷ 或国际会议上的立场、⁷⁸ 国内法院的声明、⁷⁹ 在国际法

¹⁹⁹¹ 年》,第二卷(第二部分),第 46 页: "This exception [from immunity where a State owns, possesses or uses property], which has not encountered any serious opposition in the judicial and governmental practice of States, is formulated in language which has to satisfy the differing views of Governments ..."(emphasis added)。

⁷⁷ 例如见,对条约法第 59 条草案的评注第(5)段,《国际法委员会年鉴 1966 年》,第二卷,第 258 页 (comments in political organs of the United Nations taken as statements of position regarding the acceptance of a rule of international law); 对关于领事关系的第 16 条草案的评注第(4)段,《国际法委员会年鉴 1961 年》,第二卷,第 103 页 (referring to government comments to the Commission's draft articles); 以及对关于对条约的保留的准则 4.5.3 的评注第(19)和第(21)段,A/66/10/Add. 1,第 532 和第 533 页 (referring to the views expressed in the Sixth Committee of the General Assembly and in written comments received from Governments as indicating lack of agreement on the approach to be taken regarding the validity of the consent to be bound expressed by the author of an invalid reservation)。

⁷⁸ 例如见,对关于国家在条约方面的继承的第 12 条草案的评注第(10)段,《国际法委员会年鉴 1974 年》,第二卷(第一部分),第 199 页 (referring to the attitude of States during the United Nations Conference on the Law of Treaties); 对同一条草案的评注第(17)段,《国际法委员会年鉴 1974 年》,第二卷(第一部分),第 201 页 (referring, inter alia, to "the decision of the United Nations Conference on the Law of Treaties to except from the fundamental change of circumstances rule a treaty which established a boundary"); 以及对关于危险活动造成跨界损害的第 8 条草案的评注第(3)段,《国际法委员会年鉴 2001 年》,第二卷(第二部分),第 161 页 (referring, inter alia, to "declarations and resolutions adopted by intergovernmental organizations, conferences and meetings")。

⁷⁹ 例如见,对关于国家对国家财产、档案和债务的继承的第 13 条草案的评注第(18)段,《国际法委员会年鉴 1981 年》,第二卷(第二部分),第 34 页("Courts and other jurisdictions also seem to endorse unreservedly the principle of the devolution of public property in general, and a fortiori of State property, and therefore of immovable property. This is true, in the first place, of national courts."); 和对条约法第 57 条草案的评注第(3)段,《国际法委员会年鉴 1966 年》,第二卷,第 254 页("Municipal courts have not infrequently made pronouncements recognizing the principle that the violation of a treaty may entitle the innocent party to denounce it. But they have nearly always done so in cases where their Government had not in point of fact elected to denounce the treaty, and they have not found it necessary to examine the conditions for the application of the principle at all closely"). 但又见,对关于武装冲突对条约的影响的条款草案附件的评注第(20)段(concerning the indicative list of treaties, referred to in article 7, the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict), A/66/10, 第 204 页("在此特殊背景下,市法院的决定必须被视为一个有问题的来源。首先,这样的法院可能取决于行政机关的指导。其次,市法院可能依赖于与国际法原则没有直接关系的政策要素。尽管如此,可以说国内法院的判例法不是不利于生存原则。")。

院或法庭的声明、⁸⁰ 仲裁协议中的规定、⁸¹ 外交惯例和照会、⁸² 一个国家的实际行为(即相对于其表明的立场)、⁸³ 一个国家的条约惯例、⁸⁴ 多边条约惯例,⁸⁵ 以及各种国际文书等。⁸⁶

so 见对关于国家在条约方面的继承的第 12 条草案的评注第(7)段,《国际法委员会年鉴 1974 年,第二卷(第一部分),第 198 页 (referring to statements before the International Court of Justice regarding succession in respect of a boundary settlement and of treaty provisions ancillary to such settlement); 和对条约法第 59 条草案的评注第(4)段,《国际法委员会年鉴 1966 年》,第二卷,第 257 页 (indicating that "[t]he most illuminating indications as to the attitude of States regarding the principle [of rebus sic stantibus] are perhaps statements submitted to the Court in the cases where the doctrine has been invoked", and referring to the positions of States in several cases before the Permanent Court of International Justice); 对关于国际组织的责任的第 62 条草案的评注第(3)段, A/66/10,第 164 页(提及各国对在有争议的案件里所表示的支持以下观点的立场:不能一般地将国际组织的成员国视为对该组织的国际不法行为负有国际责任。)。

⁸¹ 见对关于国家对国际不法行为的责任的第 13 条草案的评注第 (4) 段,《国际法委员会年鉴 2001 年》,第二卷 (第二部分),第 58 页 (common stipulation in arbitration agreements as confirmation of a "generally recognized principle")。

⁸² 见对关于国家对国际不法行为的责任的第 10 条草案的评注第 (3) 段,《国际法委员会年鉴 2001 年》,第二卷 (第二部分),第 50 页 ("Diplomatic practice is remarkably consistent in recognizing that the conduct of an insurrectional movement cannot be attributed to the State.");对关于国家在条约方面的继承的第 8 条草案的评注第 (17) 段,《国际法委员会年鉴 1974 年,第二卷 (第一部分),第 186 页 (citing correspondence between States);对关于国家在条约方面的继承的第 12 条草案的评注第 (14) 和第 (21) 段,《国际法委员会年鉴 1974 年》,第二卷 (第一部分),第 14 和第 21 页 (referring to diplomatic notes)。

⁸³ 发生过这样的事例:委员会在确定一国的法律立场时依据的是该国的实际行为,即使这种行为与该国就某项特定规则所声明的立场是冲突的;见对国际水道非航行使用法第 5 条草案的评注第 (13)段,《国际法委员会年鉴 1994 年》,第二卷 (第二部分),第 98 和第 99 页 ("A review of the manner in which States have resolved actual controversies pertaining to the non-navigational uses of international watercourses reveals a general acceptance of the entitlement of every water-course State to utilize and benefit from an international watercourse in a reasonable and equitable manner. While some States have, on occasion, asserted the doctrine of absolute sovereignty, these same States have generally resolved the controversies in the context of which such assertions were made by entering into agreements that actually apportioned the water or recognized the rights of other watercourse States.")。

⁸⁴见对关于国家及其财产管辖豁免的第 10 条草案的评注第 (20) 段,《国际法委员会年鉴 1991 年》,第二卷 (第二部分),第 39 页("The attitude or views of a Government can be gathered from its established treaty practice … Thus the treaty practice of the Soviet Union amply demonstrates its willingness to have commercial relations carried on by State enterprises … regulated by competent territorial authorities …")。又见,对关于领事关系的第 15 条草案的评注第 (1) 段,《国际法委员会年鉴 1961 年》,第二卷,第 103 页 (referring, inter alia, to "a very large number of consular conventions"),以及对同一专题第 19 条草案的评注第 (5) 段和对第 28 条草案的评注第 (1) 段 (also referring to consular conventions);对关于国家在条约方面的继承的第 8 条草案的评注第 (3) 至第 (11) 段,《国际法委员会年鉴 1974 年》,第二卷 (第一部分),第 183 和第 184 页 (considering whether devolution agreements "are effective in bringing about a succession to or continuance of the predecessor State's treaties",and "the evidence which they may contain of the views of States concerning the customary law governing the succession of States in respect of treaties");对关于国家在条约方面的继承的第 15 条草案的评注第 (14) 至第 (18) 段,《国际法委

D. 国际组织惯例的相关性

意见 13

在某些情况下,委员会依据国际组织的惯例来确认某项习惯国际法规则的存在。 这类依据与国际组织惯例的各个方面相关,例如其对外关系、其职能的行使, 以及其机构就国际关系的具体情况或一般性事项所采取的立场。⁸⁷

员会年鉴 1974 年》,第二卷(第一部分),第 213 和第 214 页 (considering devolution agreements as evidence of State practice for the purpose of ascertaining the existence of a general rule "in regard to a newly independent State's *obligation* to inherit treaties" and finding that States have not "in their practice acted on the basis that they are in general bound to [a predecessor's] treaties")(emphasis in original)。

⁸⁵ 例如见,对条约法第 49 条草案的评注第(1)和第(5)段,《国际法委员会年鉴 1966 年》,第二卷,第 246 页 (referring to the prohibition of the use of force as laid down in the Charter of the United Nations); 对关于国家及其财产管辖豁免的第 6 条草案临时案文的评注第(51)段 (which was referred to by the Commission, in its commentary to the corresponding article 5 of the final version of the draft articles on the topic, as "still generally applicable": 见《国际法委员会年鉴 1991 年》,第 22 和第 23 页),《国际法委员会年鉴 1980 年》,第二卷(第二部分),第 154 页 ("The current treaty practice of States indicates the application of provisions of several conventions of a universal character dealing with some special aspects of State immunity."); 对危害人类和平及安全治罪法草案第 11 条的评注第(5)段,《国际法委员会年鉴 1996 年》,第二卷(第二部分),第 34 页 (recognition of fair trial guarantees in numerous treaties)。

季员会有时似乎不是根据条约而是根据某些国际文书推断了对某项规则的普遍承认或接受,包括,例如国际组织的决议和宣言。例如见,对关于防止危险活动造成跨界损害的第 8 条草案的评注第(3)段,《国际法委员会年鉴 2001 年》,第二卷(第二部分),第 161 页(mentioning, inter alia, that the principle of the obligation to notify other States of a risk of significant harm "is embodied in a number of international agreements, ... declarations and resolutions adopted by intergovernmental organizations, conferences and meetings ..."; 和对危害人类和平及安全治罪法草案的评注,《国际法委员会年鉴 1996 年》,第二卷(第二部分): 对第 2 条的评注第(16)段,第 22 页 (indicating, inter alia, that the principle of international criminal responsibility for incitement was recognized in the Charter of the Nürnberg Tribunal); 对第 6 条的评注第(1)至第(3)段,第 25 页 (recognition of the principle of command responsibility in treaties and in the statutes of international criminal tribunals); 对第 6 条的评注第(4)段,第 27 页 (express recognition, in the statutes of international criminal tribunals, of the absence of a defence based on the official position of the offender); 以及对 14 条的评注第(5)段,第 39 和第 40 页 (referring to various instruments which do not recognize any defences to those crimes)。

例如见,对关于国家对国际不法行为的责任的第 41 条草案的评注第(7)和第(8)段,《国际法委员会年鉴 2001年》,第二卷(第二部分),第 114 和第 115 页("[7] An example of the practice of non-recognition of acts in breach of peremptory norms is provided by the reaction of the Security Council to the Iraqi invasion of Kuwait in 1990 ... [8] As regards the denial by a State of the right of self-determination of peoples, ... The same obligations are reflected in the resolutions of the Security Council and General Assembly concerning the situation in Rhodesia and the Bantustans in South Africa."); 对关于防止危险活动造成跨界损害的第 8 条草案的评注第(3)段,《国际法委员会年鉴 2001年》,第二卷(第二部分),第 159页 (indicating that the obligation to notify other States of the risk of significant harm is recognized in "declarations adopted by intergovernmental organizations, conferences and meetings"); 对危害人类和平及安全治罪法草案第 17 条草案的评注第(2)段,《国际法委员会年鉴 1996 年》,第二卷(第二部分),第 44页 (indicating that the

委员会有时提及某个国际组织的惯例发展成为该组织特有的习惯的可能性。这 类习惯可能与该组织职能或活动的各方面相关,如某个国际组织的缔约能力或 适用于该组织内通过的条约的那些规则。⁸⁸

E. 司法声明和公法专家的论著的相关性

30. 如前文所述,⁸⁹ 委员会在分析习惯国际法时多次审议了司法声明和公法专家的论著。⁹⁰ 如下文所述,委员会以各种方式依据了这些材料。

General Assembly had affirmed that crimes against humanity and genocide constituted crimes under international law, and had adopted the Convention on the Prevention and Punishment of the Crime of Genocide);《国际法委员会年鉴 1974 年》,第二卷(第一部分),对关于国家在条约方面的继承 的第4条草案的评注第(1)至第(14)段, 第177和第180页(referring to the practice of numerous international organizations, including the United Nations and certain specialized agencies),对第8条 草案的评注第(12)和第(13)段, 第 184 和第 185 页(citing the Secretary-General of the United Nations' practice as depositary of multilateral treaties) 和对关于国家在其对国际组织关系上的代 表权的第 16 条草案的评注第(3) 段,第 215 页(同样);对第 24 条草案的评注第(2) 段,《国际 法委员会年鉴 1971 年》,第二卷(第一部分),第 301 页("The replies of the United Nations and the specialized agencies indicate that the exemption provided for in this article is generally recognized."); 对条约法第 49 条草案的评注第(1)段,《国际法委员会年鉴 1966 年》, 第二卷, 第 246 页("... the clear-cut prohibition of the threat or use of force in Article 2(4)of the Charter of the United Nations, together with the practice of the United Nations itself, have reinforced and consolidated this development in the law."); 以及对得到《纽伦堡法庭宪章》和《法庭判决》承 认的国际法原则的原则六的评注第(112)段,《国际法委员会年鉴 1950 年》,第二卷,第 376 页(referencing a declaration concerning wars of aggression adopted by the Assembly of the League of Nations)。又见,国际法委员会第二届会议工作报告第78段,《国际法委员会年鉴1950年》, 第二卷, 第 372 页("Records of the cumulating practice of international organizations may be regarded as evidence of customary international law with reference to States' relations to the organizations.").

⁸⁸ 见对国家和国际组织间或国际组织相互间条约法第 7 条草案的评注第(14)段,《国际法委员会年鉴 1982 年》,第二卷(第二部分),第 27 页 (referring to the development of a practice into a "rule of the organization" recognizing the competence of the head of the Secretariat to express the consent of the organization to be bound by a treaty, without reference to another organ of the organization; also pointing out that "[i]t is the acquiescence of ['all the other organs of the organization that might have been entitled to claim the competence and did not do so'] which constitutes the practice"); 对关于国家在条约方面的继承的第 4 条草案的评注第(11)至第(13)段, 《国际法委员会年鉴 1974 年》,第二卷(第一部分),第 180 页 (evoking, in general, the possibility that the internal practice of an international organization may give rise to organization-specific customary rules); 以及对关于国家在条约方面的继承的第 22 条草案的评注第(2)段,《国际法委员会年鉴 1974 年》,第二卷(第一部分),第 233 页 (indicating that the International Labour Organization has a particular customary practice with respect to the date from which a newly independent State is regarded as bound to labour conventions)。

⁸⁹ 见本备忘录第二节 A 所载意见 1。

⁹⁰ 与本节可能具有一般相关性的是委员会在其关于使习惯国际法的证据更易于查考的方法和手段的报告第30段中所作的评论:"委员会章程第二十四条将关于国际法问题之司法判决作为国际习惯法资料之一,此举似与国际法院规约第三十八条所规定之分类相左。惟此种变更,在逻

委员会有时会依据国际法院或法庭的裁决作为对某项习惯国际法规则的地位的 权威性说明。⁹¹

意见 16

此外,委员会经常依据司法声明作为支持某项习惯国际法规则的存在或不存在的考虑因素。

31. 当委员会为确认某项习惯国际法规则的存在的目的而进行分析时,司法承认往往构成在支持该规则存在方面的一个相关,如果不是决定性的,考虑因素。在国际法院及法庭的判决和仲裁裁决里可以发现这类承认。⁹²

辑上似有可辩护之余地,盖此类判决,尤其国际法院之判决,可能确立并适用国际习惯法之原则与规则。再者,一国国内法院之判决,足以表明该国之惯例。"(《国际法委员会年鉴 1950年》,第二卷,第 368 页)。

⁹¹ 例如,关于直线基线问题,委员会把国际法院对联合王国和挪威间的渔业案的判决解释为"表达了生效的法律"和"因此根据该判决起草了该条款"(对海洋法第 5 条草案的评注第(1)至第(4)段,《国际法委员会年鉴 1956 年》,第二卷,第 267 和第 268 页)。又见,对第 24 条草案的评注第(3)至第(5)段,(第 277 页) (relying on the judgment of the Court in the *Corfu Channel* case as expressing the customary rule in force with regard to innocent passage through international straits connecting two parts of the high seas)和对关于条约法第 23 条草案的评注第(2)段,《国际法委员会年鉴 1966 年》,第二卷,第 211 页(stating that "there is much authority in the jurisprudence of international tribunals for the proposition that in the present context the principle of good faith is a legal principle which forms an integral part of the rule *pacta sunt servanda*" and referring to decisions of the International Court of Justice, the Permanent Court of International of Justice and arbitral tribunals)。

站 例如见,《国际法委员会年鉴 2001 年》,第二卷(第二部分),对关于国家对国际不法行为的责 任的第 25 条草案的评注第(14)段, 第 83 页("On balance, State practice and judicial decisions support the view that necessity may constitute a circumstance precluding wrongfulness under certain very limited conditions, and this view is embodied in article 25."), 对第 41 条草案的评注第(6)段, 第 114 页 (quoting the Military and Paramilitary Activities in and against Nicaragua case and indicating that "the existence of an obligation of non-recognition in response to serious breaches of obligations arising under peremptory norms already finds support in international practice and in decisions of [the] International Court of Justice")和对第 51 条草案的评注第(2)段,第 134 页 (referring, inter alia, to the Naulilaa case concerning the requirement of proportionality for taking countermeasures),《国际法委员会年鉴 1966 年》,第二卷,对条约法第 16 和第 17 条草案的评 注第(4) 段, 第 203 和第 204 页 (referring to the International Court of Justice pronouncement in the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide case that "[t]he principle of the integrity of the convention, which subjects the admissibility of a reservation to the express or tacit assent of all the contracting parties, does not appear to have been transformed into a rule of law."),对第 27 条草案的评注第(14)和第(15)段,第 221 和第 222 页(relying on the jurisprudence of international courts and tribunals to ascertain established rules of treaty interpretation)和对第 29 条草案的评注第(8)段, 第 225 和第 226 页 (analyzing whether or not the Permanent Court of International of Justice, in its Mavrommatis Palestine Concessions case, intended to lay down a general rule regarding treaty interpretation in cases of divergence between authentic texts); 对关于国家对国家财产、档案和债务的继承的第 8 条草案的评注第(4)段,《国际法委 员会年鉴 1981 年》, 第二卷(第二部分), 第 25 页(referring to several decisions by international

委员会有时还依据国际法院或法庭的判决,包括仲裁裁决,作为用于确认相关国 家惯例的次要材料来源。⁹³

courts and tribunals, including the Franco-Italian Conciliation Commission's pronouncement that "customary international law has not established any autonomous criterion for determining what constitutes State property");对关于国家对国家财产、档案和债务的继承的第13条草案的评注 第(19)段、《国际法委员会年鉴 1981 年》,第二卷(第二部分),第 34 页("Decisions of international jurisdictions confirm this rule.");对关于国家在条约方面的继承的第 12 条草案的评注第(3)至第 (8)段,《国际法委员会年鉴 1974 年》,第二卷(第一部分),第 197 至第 199 页(citing numerous decisions of international courts in its analysis of the question of territorial treaties, and indicating that a Permanent Court of International of Justice pronouncement "is perhaps the most weighty endorsement of the existence of a rule requiring a successor State to respect a territorial treaty affecting the territory to which a succession of States relates."); 对关于国际水道非航行使用的第 3 条草案的评注第(18)段,《国际法委员会年鉴 1994 年》,第二卷(第二部分),第 94 页("[T]he existence of the principle of law requiring consultations among States in dealing with fresh water resources is explicitly supported by the arbitral award in the Lake Lanoux case."); 对危害人类和平 及安全治罪法草案第17条草案的评注第(3)段,《国际法委员会年鉴1996年》,第二卷(第二部 分),第44页("[T]he principles underlying the [Genocide] Convention have been recognized by [the] International Court of Justice as binding on States even without any conventional obligation."); 对危 害人类和平及安全治罪法草案第 18 条草案的评注第 6 段,《国际法委员会年鉴 1996 年》,第二 卷(第二部分),第 48 页("The absence of any requirement of an international armed conflict as a prerequisite for crimes against humanity was also confirmed by the International Tribunal for the Former Yugoslavia."); 以及关于驱逐外国人的第3条草案的评注第(1)段, A/67/10,第22页("驱 逐权尤其是在若干仲裁裁决和索赔委员会决定中以及在各种区域法院和委员会的决定中得到 承认。")。又请参见一般性材料,《国际法委员会年鉴 1950 年》,第二卷,第 369 和第 370 页, 第(42)至第(51)段(reviewing the availability of publications containing decisions and awards of international courts and tribunals in a section entitled "Evidence of customary international law").

⁹³ 见对条约法第 16 和第 17 条草案的评注第(23)段,《国际法委员会年鉴 1966 年》,第二卷,第 208 页 ("That the principle of implying consent to a reservation from absence of objection has been admitted into State practice cannot be doubted; for the [International Court of Justice] itself in *Reservations to the Genocide Convention* case spoke of 'very great allowance' being made in international practice for 'tacit assent to reservations'."); 对关于国际水道非航行使用的第 5 条草案的评注第(10)段,《国际法委员会年鉴 1994 年》,第二卷(第二部分),第 98 页 (including "decisions of international courts and tribunals" in its "survey of all available evidence of the general practice of States, accepted as law")。又见,对关于国家对国际不法行为的责任的第 39 条草案的评注第(4)段,《国际法委员会年鉴 2001 年》,第二卷(第二部分),第 110 页 (relying on the *Delagoa Bay Railway* and the S.S. "*Wimbledon*" cases as evidence of "State practice" with respect to "[t]he relevance of the injured State's contribution to the damage in determining the appropriate reparation")。

委员会在确认习惯国际法规则时经常考虑到法学家的论著和意见。

32. 委员会为确认某项习惯国际法规则的目的而考虑法学家的论著和意见时,有时会全面评估相关意见在支持某项特定规则方面的权重。⁹⁴ 这类评估似乎一直是以定量和定性分析为基础的。⁹⁵

⁹⁴ 例如见,对关于国家在条约方面的继承的第 11 和第 12 条草案的评注第 (2) 段,《国际法委员会年鉴 1974 年》,第二卷 (第一部分),第 197 页 ("The weight of opinion amongst modern writers supports the traditional doctrine ... In general, however the diversity of the opinions of writers makes it difficult to find in them clear guidance as to what extent and upon what precise basis international law recognizes that treaties of a territorial character constitute a special category for the purposes of the law applicable to succession of States.")。

⁹⁵ 见《国际法委员会年鉴 1966 年》,第二卷,对条约法第 49 条草案的评注第(8) 段,第 247 页("[T]he great majority of international lawyers to-day unhesitatingly hold that Article 2, paragraph 4, ..., authoritatively declares the modern customary law regarding the threat or use of force."), 对第 53 条 草案的评注第(2)段,第 251 页("Some juriststake the position that an individual party may denounce or withdraw from a treaty only when such denunciation or withdrawal is provided for in the treaty or consented to by all the other parties. A number of other jurists, however, take the position that a right of denunciation or withdrawal may properly be implied under certain conditions in some types of treaties."), 对第 57 条草案的评注第(1)段,第 253 和第 254 页 ("The great majority of jurists recognize that a violation of a treaty by one party may give rise to a right in the other party ...") 和对第 59 条草案的评注第(1)段, 第 257 页 ("Almost all modern jurists, however reluctantly, admit the existence in international law of the principle with which this article is concerned ..."); 对关于国家对国家财产、档案和债务的继承的第 17 条草案的评注第(9)段,《国 际法委员会年鉴 1981 年》, 第二卷(第二部分), 第 46 页 ("The foregoing rule conforms to the opinions of publicists, who generally take the view that ... "); 对关于国家在条约方面的继承的第 15 条草案的评注第(3)段,《国际法委员会年鉴 1974 年》,第二卷 (第一部分),第 211 页 ("The majority of writers take the view, supported by State practice, ..."); 对关于国家在条约方面的继承 的第 15 条草案的评注第(15)段,《国际法委员会年鉴 1974 年》,第二卷(第一部分),第 213 页 ("Considerable support can be found among writers and in State practice for the view that general international law does impose an obligation ..."); 以及对关于驱逐外国人的第 3 条草案的 评注第(1)段, A/67/10, 第 22 页("[The right to expel] is uncontested in practice as well as in case law and the legal writings.")。又见,对关于国际水道非航行使用的第5条草案的评注第(10)段, 《国际法委员会年鉴 1994 年》,第二卷(第二部分),第 98 页 (referring in general terms to "the views of learned commentators") 和对关于条约法第 32 条草案的评注第(3) 至第(5)段,《国际法 委员会年鉴 1966 年》,第二卷,第 228 和第 229 页 (finding that the division of opinion amongst jurists "was primarily of a doctrinal character" and "would be likely to produce different results only in very exceptional circumstances").

33. 委员会有时也会依据法学家的论著作为国家惯例的次要资料来源。⁹⁶

三. 习惯国际法在国际法律体制里的运作

34. 本节中的意见涉及委员会对习惯国际法规则的约束性和特点及对习惯国际 法与其他国际法律规则的关系的明显认识。

A. 习惯国际法规则的约束性和特点

意见 19

委员会在提及习惯国际法时始终将其视作是对国际法主体具有普遍约束力的一整套规则。⁹⁷ 委员会有时将这类规则与条约规则作对比,因为条约规则按其定义只对相关条约的缔约方有约束力。⁹⁸

⁹⁶ 例如见,对关于国家对国际不法行为的责任的第 32 条草案的评注第(3)段,《国际法委员会年鉴 2001 年》,第二卷(第二部分),第 94 页 (citing an example of relevant State practice found in an article by R. L. Buell in the Political Science Quarterly);对关于国家在条约方面的继承的第 15 条草案的评注第(3)段,《国际法委员会年鉴 1974 年》,第二卷(第一部分),第 211 页 (citing *The Law of Treaties* by A. D. McNair and quoting a statement by the United Kingdom on Finland's position vis-à-vis its predecessor's treaties);对关于外交保护的第 18 条草案的评注第(2)段,A/61/10,第 91 页(citing writings of jurists in support of the proposition that "there is support in the practice of States, in judicial decisions and in the writings of publicists, for the position that the State of nationality ... may seek redress for members of the crew of the ship who do not have its nationality";以及对关于国际水道非航行使用的第 5 条草案的评注第(10)段,《国际法委员会年鉴 1994年》,第二卷(第二部分),第 98 页 (including "the views of learned commentators" in "[a] survey of all available evidence of the general practice of States, accepted as law")。

⁹⁷ 例如见,对条约法第34条草案的评注第(1)至第(4)段,《国际法委员会年鉴 1966年》,第二卷,第230和第231页(excerpts reproduced in note 124 below)和对关于国家在条约方面的继承的第12条草案的评注第(30)段及第15条草案的评注第(8)段,《国际法委员会年鉴 1974年》,第二卷(第一部分),第204页和第212页。又见,上文注 133。在其《对条约的保留的实践指南》中,委员会暗指了所谓的"一贯反对者"的理论;根据该理论,如果一国在某项习惯国际法规则的形成过程中一贯反对该规则,则该规则对该国不产生法律效力:对关于对条约的保留的准则3.1.5.3的评注第(7)段,A/66/10/Add.1,第371页。委员会在这样做时似乎排除了任何这类理论对绝对法规则的运作;见对准则3.1.5.3的评注第(19)段,A/66/10/Add.1,第375页。

⁹⁸ 例如见,对条约法第 34 条草案的评注第(1)至第(4)段,《国际法委员会年鉴 1966 年》,第二卷,第 230 和第 231 页;对关于国家在条约方面的继承的第 5 条草案的评注第(2)段,《国际法委员会年鉴 1974 年》,第二卷(第一部分),第 181 页(referring to "obligations to which [a State] would be subject under international law independently of the treaty");对关于国家在条约方面的继承的第 12 条草案的评注第(30)段,《国际法委员会年鉴 1974 年》,第二卷(第一部分),第 204页("While recognizing that an objective régime may arise from such a treaty, [the Commission] took the view that the objective régime resulted rather from the execution of the treaty and the grafting upon the treaty of an international custom.");以及对关于对条约的保留的准则 3. 1. 5. 3 的评注第(7)段,A/66/10/Add. 1,第 370页("习惯规则对各国有约束力,不管它们对某项条约规则表示同意与否……")。但又请参见,下文关于条约规则与习惯国际法之间关系的第三节 B。

在委员会的工作中提到了区域习惯国际法规则的可能存在。⁹⁹ 在这方面,还暗指了区域习惯法规则对未明确通过或接受该规则的国家是否具有约束力的问题。¹⁰⁰ 此外,委员会提及了关于规范某些海洋区域的划界 ¹⁰¹ 或关于设立某一特定领土、河流或海事制度 ¹⁰² 的特别规则的可能存在,包括习惯规则或历史权利。

意见 21

委员会在某些情况下提及被认为导致产生所谓的"普遍适用的义务"的习惯国际 法规则的存在。¹⁰³

⁹⁹ 见国际法委员会研究组关于国际法不成体系问题的报告,A/CN. 4/L. 682, 第 213 至第 215 页。

¹⁰⁰ 同上,第213段("另外一种更加困难的情况是,一种区域规则(根据条约做法或惯例)在某个国家没有明确通过或接受它的时候,声称对该国具有约束力。国际法院在庇护案(1950年)和阿亚德拉托雷案(1951年)中就涉及到这种主张(尽管毫无结果)。")。

¹⁰¹ 见对海洋法第12条草案的评注第(6)段,《国际法委员会年鉴1956年》,第二卷,第271页 (acknowledging to the possible existence of "special rules" and alluding to the possibility of "differences in customary law" in the field of maritime delimitation)。又见,对海洋法第3条草案的评注第(4)段,《国际法委员会年鉴1956年》,第二卷,第266页("A claim to a territorial sea not exceeding twelve miles in breadth could be sustained *erga omnes*, by any State, if based on historic rights.")。

¹⁰² 见对条约法第 34 条草案的评注第(1)段,《国际法委员会年鉴 1966 年》,第二卷,第 230 和第 231 页("The role played by custom in sometimes extending the application of rules contained in a treaty beyond the contracting States is well recognized. A treaty concluded between certain States may formulate a rule, or establish a territorial, fluvial or maritime regime, which afterwards comes to be generally accepted by other States and becomes binding upon other States by way of custom.")。又见,对关于国家在条约方面的继承的第 12 条草案的评注第(8)段,《国际法委员会年鉴 1974 年》,第二卷(第一部分),第 189 至第 199 页 (referring to the case made in the Right of passage case (*I.C.J. Reports* 1960, p. 6) for the proposition that a territorial right of passage may exist as a local or bilateral custom)。

¹⁰³ 特别参见,对关于国家对国际不法行为的责任的第 48 条草案的评注第(9)段,《国际法委员会年鉴 2001 年》,第二卷(第二部分),第 127 页 ("While taking up the essence of this statement [the dictum of the International Court of Justice in the *Barcelona Traction* case concerning obligations *erga omnes*", which conveys less information than the Court's reference to the international community as a whole and has sometimes been confused with obligations owed to all the parties to a treaty. Nor is it the function of the articles to provide a list of those obligations which under existing international law are owed to the international community as a whole. This would go well beyond the task of codifying the secondary rules of State responsibility, and in any event, such a list would be only of limited value, as the scope of the concept will necessarily evolve over time. The Court itself has given useful guidance: in its 1970 judgment it referred, by way of example, to 'the outlawing of acts of aggression, and of genocide' and to 'the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination'. In its judgment in the East Timor case, the Court added the right of self-determination of peoples to this list.")。又见,对国际组织的责任的第 49 条草案的评注,A/66/10,第 145 至第 148 页。

委员会在不同的情况下提及因其主题事项而具有不可减损性(强制性准则/绝对法)的习惯国际法规则 ¹⁰⁴ 的存在。

35. 委员会表示,"一般国际法的强制性准则概念在国际惯例、国际及国家法院和法庭的判例和在法律学说中得到了承认"。¹⁰⁵ 委员会提出的得到普遍承认的强制性准则的例子包括禁止侵略、¹⁰⁶ 禁止奴役和奴隶贸易、灭绝种族、种族歧视和种族隔离,¹⁰⁷ 以及禁止酷刑和尊重自决权的义务。¹⁰⁸ 但是,委员会强调任何这类清单都是不完整的。¹⁰⁹

36. 应该指出,委员会在其关于条约法的条款草案中提出了若干与绝对法有关的规定。¹¹⁰ 委员会多次声明,与绝对法冲突的条约规则是(或将会是)无效的。¹¹¹

¹⁰⁴ 《维也纳条约法公约》第五十三条对绝对法的定义是"一般国际法强制规律"(着重号另加)。 委员会在对关于对条约的保留的准则 3.1.5.3 的评注第(14)段中表明,一般国际法强制性规范 "几乎在一切情况下都具有习惯性"(A/66/10/Add.1,第 374 页),同时还承认,"1969 年和 1986 年《维也纳公约》第 53 条的措辞不排除条约规则其实可能成为强制性规范的可能性。" (A/66/10/Add.1,注 1712)。

¹⁰⁵ 对关于国家对国际不法行为的责任的第 40 条草案的评注第(2)段,《国际法委员会年鉴 2001 年》,第二卷(第二部分),第 112 页。

¹⁰⁶ 同上,对第40条草案的评注第(4)段。

¹⁰⁷ 同上。

¹⁰⁸ 同上, 第(5)段, 第113页。

^{10&}lt;sup>9</sup> 同上,第(6)段。委员会在同一段中还回顾了新的强制性规范出现的可能性,正如《1969年维也纳条约法公约》第六十四条所设想的。

¹¹⁰ 见条约法第 41(5)、第 50、第 61 和第 67 条草案及其评注;《国际法委员会年鉴 1966 年》,第 二卷,第 238 和第 239 页、第 247 至第 249 页、第 261 页及第 266 和第 267 页。

¹¹¹ 见《国际法委员会年鉴 1966 年》,第二卷,条约法第 50 条草案及其评注,第 247 页 (draft article 50 reads: "A treaty is void if its conflicts with a peremptory norm of general international law..."); 又见,对第 41 条草案的评注第(8)段,第 239 页,和对第 61 条草案的评注第(1)段,第 261 页 ("Manifestly, if a new rule of that character – a new rule of *jus cogens* – emerges, its effect must be to render void not only future but existing treaties.")。至于与一般国际法强制性规范冲突的某项条约的无效或终止,请参见条约法第 67 条草案及其评注(《国际法委员会年鉴 1966 年》,第二卷,第 266 和第 267 页)。同样,委员会在适用于能够产生法律义务的国家单方面声明的指导原则 8 中指出,"与一般国际法强制性规范冲突的单方面声明是无效的" (A/61/10,第 378 页)。

此外,委员会承认,某项习惯国际法规则的强制性质同样影响某些与国际不法行为的责任相关的次要规则的运作。¹¹²

意见 23

委员会表示,强制性准则的形成是整个国际社会广泛接受和承认这类准则具有强制性的一个过程的结果。¹¹³

意见 24

委员会在声明绝对法规则"只能由后来产生的具有同样性质的一般国际法准则加以修订"的同时 ¹¹⁴ 又表示,目前最有可能的做法就是通过一般性多边条约对绝对法规则进行修订。 ¹¹⁵

¹¹² 见关于国家对国际不法行为的责任的第 26 条草案(with regard to *jus cogens* in relation to circumstances precluding wrongfulness)、第 40 和第 41 条草案(Content of the international responsibility in the case of serious breaches of obligations under peremptory norms of general international law)和第 50 条草案(Obligations not affected by countermeasures),以及相关评注;《国际法委员会年鉴 2001 年》,第二卷(第二部分),第 84 和第 85 页、第 112 至第 116 页及第 131 至第 134 页。又见,关于国际组织的责任的第 26、第 41 和第 42 及第 53 条草案,以及相关评注; A/66/10,第 120 和第 121 页、第 133 至第 136 页及第 153 和第 154 页。

¹¹³ 至于普遍接受和承认的实质性要求,请特别参见对关于国家对国际不法行为的责任的第 12 条草 案的评注第(7)段,《国际法委员会年鉴 2001 年》,第二卷(第二部分),第 56 页("Even fundamental principles of the international legal order are not based on any special source of law or specific law-making procedure, in contrast with rules of constitutional character in internal legal systems. In accordance with article 53 of the 1969 Vienna Convention, a peremptory norm of general international law is one which is 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. Article 53 recognizes both that norms of a peremptory character can be created and that the States have a special role in this regard as par excellence the holders of normative authority on behalf of the international community.")。关于这一问题,又见,《国际法委员会年鉴 2001 年》,第二卷(第二部分),对关 于国家对国际不法行为的责任的第26条草案的评注第(5)段,第85页,和对第40条草案的评注 第(6)段, 第113页 (referring to the formation of new peremptory norms through the process of acceptance and recognition by the international community of States as a whole)。应指出, 虽然条约 法第50条草案(《国际法委员会年鉴1966年》,第二卷,第247页)和关于国家和国际组织间或 国际组织相互间条约法的第53条草案(《国际法委员会年鉴1982年》,第二卷(第二部分),第 56 页) 在这种情况下提及"由国家构成的整个国际社会",但关于国家对国际不法行为的责任的 条款草案(第 25、第 33、第 42 和第 48 条草案;《国际法委员会年鉴 2001 年》,第二卷(第二部分)) 和关于国际组织的责任的条款草案则(第 25、第 33、第 43 和第 49 条草案; A/66/10, 第 87 段) 则较一般性地提及"整个国际社会"。

¹¹⁴ 在这方面,请参见条约法第 50 条草案(《国际法委员会年鉴 1966 年》,第二卷,第 247 页)和 关于国家和国际组织间或国际组织相互间条约法的第 53 条草案(《国际法委员会年鉴 1982 年》, 第二卷(第二部分),第 56 页)。1969 年和 1986 年《维也纳公约》第五十三条包含了这条词语。 关于强制法规则的"力量",又见,对关于对条约的保留的准则 4.4.3 的评注第(3)段, A/66/10/Add.1,第 502 页("……无疑,"强制法"规则将继续演变,但是,对于一个具有这种程度约束力的规范,保留似乎不可能起到颠覆作用")。

B. 习惯国际法与条约的关系

37. 关于条约法的第 34 条草案泛泛地论及了习惯国际法与条约的关系问题;该条款作了如下规定:

第 34 条 条约所载规则由于国际习惯而成为有约束力

在第 30 至第 33 条里没有任何文字[与条约和第三国相关的规定]排除条约所载规则作为国际法习惯规则成为对第三国具有约束力。¹¹⁶

- 38. 对该条款草案的评注,除其他外,载有如下意见:
 - "(1) 习惯有时可使条约所载规则扩大适用到缔约国以外,此种作用早经承认。若干国家间缔结的条约可订定一条规则或确立一种领土、河流或海事制度,后来为其他国家普遍接受,成为对其他国家有拘束力的习惯,例如关于陆战规则的海牙公约、瑞士中立协定以及关于国际河川及海道的各种条约。所以,旨在说明现有习惯法规则的编纂性公约亦可视为公认的此种习惯法规则的拟订,甚至为非公约当事国的国家所承认。
 - "(2) 但是,这些情形都不能正当的说是条约对第三国具有法律效力。此种国家不与条约当事国发生任何条约关系,而承认条约内所订规则为具有拘束力的习惯法。总之,对此等国家来说,规则的拘束力量来自习惯,而不是条约。基于此种理由,委员会认为不应将此种情形包括在条款草案内,作为条约对第三国具有法律效力的情形。因此,委员会未为习惯使条约规则扩大适用于缔约国以外一事特别拟定规则。在另一方面,委员会顾及此种情形的重要性及第三十条至第三十三条所载规定的性质,决定在本条内作一笼统保留,载明这几条条文不妨碍因已成为国际习惯法规则而对非当事国具有拘束力的条约规则"。¹¹⁷
- 39. 第 34 条草案的实质在随后的《1969 年条约法公约》第 38 条中得到保留; ¹¹⁸ 在该条款中加入了"公认"一词来限定该条款中所提及的习惯国际法规则。¹¹⁹ 委员会于 1982 年通过的关于国家和国际组织间或国际组织相互间条约法的第 38 条

^{**} 关于这个问题,见对条约法第 50 条草案的评注第(4)段,《国际法委员会年鉴 1966 年》,第二卷,第 248 页:"[I]t would be clearly wrong to regard even rules of *jus cogens* as immutable and incapable of modification in the light of future developments. As a modification of a rule of *jus cogens* would to-day most probably be effected through a general multilateral treaty, the Commission thought it desirable to indicate that such a treaty would fall outside the scope of the article"。

^{116 《}国际法委员会年鉴 1966年》,第二卷,第182页。

¹¹⁷ 同上, 第 230 和第 231 页。

^{118 《}联合国条约系列》,第 1155 卷,第 18232 号。

 $^{^{119}}$ 根据阿拉伯叙利亚共和国的修正案引入了这一新增词语; 见联合国条约法会议 (1968–1969 年),会议文件正式记录,A/CONF. 39/11/Add. 2,第 155 页,第 311 和第 312 页。

(该条款后来成为《1986 年关于国家和国际组织间或国际组织相互间条约法的维也纳公约》第 38 条)¹²⁰ 重申了这一规定,包括在 1969 年维也纳会议上引入的新增词语。¹²¹

40. 在审议其议程上的不同专题时,委员会讨论了同习惯国际法与条约的关系有关的一些方面,下面的意见对此作了小结。

意见 25

委员会认识到条约可对现有的习惯国际法规则进行编纂,¹²² 因此经常把条约称为某项习惯规则存在的可能证据。¹²³

 $^{^{120}}$ 本公约尚未生效;见联合国关于国家和国际组织间或国际组织间的条约法会议正式记录,1986年 2月 18日至 3月 21日,维也纳,第二卷,会议文件(联合国出版物,出售品编号 E. 94. V. 5),A/CONF. 129/15号文件。

^{121 《}国际法委员会年鉴 1982年》,第二卷(第二部分),第 47 和第 48 页。

¹²² 关于一般术语,见《国际法委员会年鉴 1950 年》,第二卷,国际法委员会向大会提交的报告,第 29 段("Perhaps the differentiation between conventional international law and customary international law ought not to be too rigidly insisted upon, however. A principle or rule of customary international law may be embodied in a bipartite or multipartite agreement so as to have, within the stated limits, conventional force for the States parties to the agreement so long as the agreement is in force; yet it would continue to be binding as a principle or rule of customary international law for other States. Indeed, not infrequently conventional formulation by certain States of a practice also followed by other States is relied upon in efforts to establish the existence of a rule of customary international law. Even multipartite conventions signed but not brought into force are frequently regarded as having value as evidence of customary international law. ")。

¹²³ 见本备忘录关于条约作为国家惯例和/或法律意见的证据的第二节 B. 2 和第二节 C. 2。但委员会还指出了传统制度和适用的习惯国际法之间的分歧;见对危害人类和平及安全治罪法草案第 8 条的评注第(8)段,《国际法委员会年鉴 1996 年》,第二卷(第二部分),第 29 页(referring to the crime of genocide as "a crime under international law for which universal jurisdiction existed as a matter of customary law for those States that were not parties to the Convention and therefore not subject to the restriction contained therein [namely in its Article 6 which restricts national court jurisdiction for genocide to the State in whose territory the crime occurred]")。

委员会虽然表示条约本身对第三国无约束力,¹²⁴ 但好几次承认,条约可能有助于习惯国际法规则的形成 ¹²⁵ 或发展。¹²⁶ 但委员会也发现,在国际条约中频繁阐明某项规定并不一定表示该规定已经发展成为一项习惯国际法规则了。¹²⁷

¹²⁴ 特别参见对条约法第 34 条草案的评注第 (1) 至第 (4) 段,《国际法委员会年鉴 1966 年》第二卷,第 230 和第 231 页(in particular, (1)"The role played by custom in sometimes extending the application of rules contained in a treaty beyond the contracting States is well recognized. A treaty concluded between certain States may formulate a rule, or establish a territorial, fluvial or maritime regime, which afterwards comes to be generally accepted by other States and becomes binding upon other States by way of custom ... So too a codifying convention may come to be regarded as the generally accepted formulation of the customary rules in question even by States not parties to the convention ... [2] In none of these cases, however can it properly be said that the treaty itself has legal effects for third States. They are cases where, without establishing any treaty relation between themselves and the parties to the treaty, other States recognize rules formulated in a treaty as binding customary law. In short, for these States the source of the binding force of the rules is custom, not the treaty")(emphasis added) 。对关于国家在条约方面的继承的第 12 条草案的评注第 (30)段和对同一专题第 15 条草案的评注第 (8)段以类似措辞讨论这一问题; 见《国际法委员会年鉴1974 年》,第二卷(第一部分),第 204 页和第 212 页。

¹²⁵ 见对关于对条约的保留的准则 3. 1. 5. 3 的评注第(11)段, A/66/10/Add. 1,第 373 页("……'编纂公约'往往逐渐变得明确,进而成为一般国际法规则,但它们在通过时并不具备这一地位")。

¹²⁶ 例如见,对关于国家在条约方面的继承的第 12 条草案的评注第(34)段,《国际法委员会年鉴 1974 年》,第二卷(第一部分),第 205 页(referring to a right of free passage through the Suez Canal "whether by virtue of the treaty or of the customary regime which developed from it");和对跨界含水层法第 18 条草案的评注第(3)段,A/63/10,第 78 页("['马顿斯条款'],该条款最初被写入 1899 年和 1907 年《海牙公约》序言,随后被写入许多公约和议定书,目前具有一般国际法的地位。")。关于通过一项公约规则对委员会对某项法律事项的看法可能产生影响的例子,参见对关于特别使团的第 11 条草案的评注第(5)段,《国际法委员会年鉴 1967 年》,第二卷,第 353 页("A rule frequently observed in practice is that the receiving State must ensure the possibility of [the local] recruitment [of staff required for special missions], which is often essential for the performance of the special mission's functions. In 1960 the Commission inclined to the view that this rule conferred a genuine privilege on the special mission. In the light of the two Vienna Conventions, however, the Commission changed its opinion and in 1965 adopted the principle stated in article 10, paragraph 2 of this draft [stating that 'Nationals of the receiving State may not be appointed to a special mission except with the consent of that State, which may be withdrawn at any time.']") (emphasis added)。

¹²⁷ 见对关于最惠国条款的第 7 条草案的评注第(3) 段,《国际法委员会年鉴 1978 年》,第二卷(第二部分),第 25 页("Although the grant of most-favoured-nation treatment is frequent in commercial treaties, there is no evidence that it has developed into a rule of customary international law. Hence it is widely held that only treaties are the foundation of most-favoured-nation treatment.")。

委员会暗指了如下可能性:某项新的习惯国际法规则的出现可能会修正某项条约,但取决于具体情况及该条约缔约方的意图。¹²⁸

意见 28

委员会承认,除绝对法准则外,¹²⁹ 国家可通过缔结双边或多边协议来摆脱习惯国际法规则的约束。¹³⁰ 委员会同时强调,除非另有规定,否则对条约的解释和适用必须以现行国际法规则,包括习惯法,为根据。¹³¹

见对条约法第 38 条草案 (Modification of treaties by subsequent practice) 的评注第 (3) 段,《国际法委员会年鉴 1966 年》,第 236 页("As to the case of modification through the emergence of a new rule of customary law, [the Commission] concluded that the question would in any given case depend to a large extent on the particular circumstances and on the intentions of the parties."). This comment was made in relation to the Commission's explanation of its decision to remove, in the final version of the draft article, a subparagraph that appeared in draft article 68 of the 1964 draft and provided that "[a] treaty may be modified ... (ii) by the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties".至于对后一项规定的评注,见《国际法委员会年鉴 1964 年》,第二卷,第 198 页,第 (3) 段。众所周知,《1969 年维也纳公约》未保留所提议的第 38 条草案。

¹²⁹ 见本备忘录第三节 A。

¹³⁰ 例如见,对关于国家对国家财产、档案和债务的继承的第 17 条草案的评注第(15)段,《国际法委员会年鉴 1981 年》,第二卷(第二部分),第 47 页 ("It is obviously within the discretion of States to conclude treaties making exceptions to a principle.")和对海洋法第 30 条草案的评注第(2)段,《国际法委员会年鉴 1956 年》,第二卷,第 289 页 (alluding to the possibility of treaty-based policing rights being granted to warships in respect of foreign ships, thus departing from customary international law)。

¹³¹ 例如见,对海洋法第 60 条草案的评注第 (3) 段,《国际法委员会年鉴 1956 年》,第二卷,第 293 页 ("The existing rule of customary law by which nationals of other States are at liberty to engage in such fishing on the same footing as the nationals of the coastal States should continue to apply. The exercise of other kinds of fishing in such areas must not be hindered except to the extent strictly necessary for the protection of the fisheries contemplated by the present article."); 对条约法第 24 条草案的评注第 (1) 段,《国际法委员会年鉴 1966 年》,第二卷,第 211 页 (referring to the "general rule ... that a treaty is not to be regarded as intended to have retroactive effects unless such an intention is expressed in the treaty or is clearly to be implied from its terms")。

C. 习惯国际法与"一般国际法"的关系

意见 29

委员会在某些情况下采用"一般国际法"这一词组来泛指除条约规则之外的国际法规则。¹³² 同样,在某些情况下,委员会似乎交替使用了"一般国际法"和"习惯国际法"这两个词组。¹³³ 委员会还将"一般国际法"这个词组作为同时包括习惯国际法和一般原则的总称使用。¹³⁴

¹³² 例如见, 对海洋法第 30 条草案的评注第(2)段,《国际法委员会年鉴 1956 年》,第二卷,第 289 页 (indicating that the regulations contained in treaties granting certain policing rights to warships in respect of foreign ships could not yet be regarded as part of "general international law"); 委员会就仲 裁程序示范规则序言内的规定所作的评论,《国际法委员会年鉴 1958 年》,第二卷,第 86 页, 第 24 段 (those provisions ... "govern it as principles of general international law rather than as deriving from the agreement of the parties");关于防止和惩处侵害外交代表和其他应受国际保护 人员的罪行的第 1(b)条草案,《国际法委员会年鉴 1972 年》,第二卷,第 312 页 ("['Internationally protected person' means] [a]ny official of either a State or an international organization who is entitled, pursuant to general international law or an international agreement, to special protection ... " (emphasis added));对该条款草案的评注第(8)段,《国际法委员会年鉴 1972年》,第二卷,第 314 页 ("The expression 'general international law' is used to supplement the reference to 'an international agreement'. ... "); 对跨界含水层法第 18 条草案的评注第(3)段, A/63/10, 第 78 页 ("[The 'Martens clause'], which was originally inserted in the Preamble of the Hague Conventions of 1899 and 1907 and has subsequently been included in a number of conventions and protocols, now has the status of general international law."); 对关于武装冲突对条 约的影响的第 10 条草案的评注第(2)段, A/66/10, 第 191 页; 对关于驱逐外国人的第 14 条草 案的评注第(4)段, A/67/10, 第 42 页("不言而喻,对于拟被驱逐的外国人,驱逐国必须遵守 它所承担的与保护人权有关的所有义务,无论是其加入的国际公约所规定的义务,还是一般国 际法赋予的义务。")以及类似的,对关于驱逐外国人的第25条草案的评注,A/67/10,第62

¹³³ 例如见,对条约法第 49 条草案的评注的下列段落,《国际法委员会年鉴 1966 年》,第二卷,第 246 和第 247 页 ("[1] The endorsement of the criminality of aggressive war in the Charters of the Allied Military Tribunals for the trial of the Axis war criminals, the clear-cut prohibition of the threat or use of force in Article 2(4) of the Charter of the United Nations, together with the practice of the United Nations itself, have reinforced and consolidated this development in the law [5] The principles regarding the threat or use of force laid down in the Charter are, in the opinion of the Commission, rules of general international law which are to-day of universal application ... [8] ... As pointed out in paragraph (1) above, the invalidity of a treaty procured by illegal threat or use of force is a principle which is lex lata ... [T]he great majority of international lawyers today unhesitatingly hold that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force."(emphasis added))。

¹³⁴ 见国际法委员会研究组关于国际法不成体系问题的报告所载的解释,A/CN. 4/L. 682,第 194(2)(a)段("一般国际法(即一般惯例和一般法律原则)可填补特别制度中的空白并为其运作提供解释性指导"(着重号另加))和第 493(3)段("'一般国际法'明显参照了一般习惯法以及《国际法院规约》第 38 条第 1 款(c)项所载的'一般法律原则为文明各国所承认者'。但是,它也可能参照国际法本身的原则以及来自国内法的类似原则,尤其是法律程序原则(必须听取另一方之词、遇有疑义时应遵循从宽方针、禁止反言等等。)。在国际法庭——包括世贸组织的上诉机构、欧洲人权法院和美洲国家人权法院——的实践中,它们经常参照各种类型的原则,这些原则有时出自国内法,有时出自国际惯例,但往往是以一种不具体说明其权力的方式")。

委员会有时提及一般法律原则——也许在《国际法院规约》第三十八条第一款(寅) 项的范畴内 ¹³⁵——或提及所谓的一般国际法原则。¹³⁶ 委员会还表示,这类一般 原则可能为国际条例 ¹³⁷ 其或为整个国际法律体系 ¹³⁸ 提供了特定主题。

138 在这方面请参见委员会就关于国家权利和义务的说明草案所提出的下列意见:

In conclusion it will be observed that the rights and duties set forth in the draft Declaration are formulated in general terms, without restriction or exception, as befits a declaration of basic right and duties. The articles of the draft Declaration enunciate general principles of international law, the

¹³⁵ 例如见,对条约法第 59 条草案的评注第(4)段,《国际法委员会年鉴 1966 年》,第二卷,第 257 页(principle of *rebus sic stantibus*); 对关于国家继承涉及的自然人国籍问题的第 7 条草案的评注第(1)段,《国际法委员会年鉴 1999 年》,第二卷(第二部分),第 30 页("The Commission recognizes that one of the general principles of law is the principle of non-retroactivity of legislation."); 以及对危害人类和平及安全治罪法草案第 14 条的评注第(3)段,《国际法委员会年鉴 1996 年》,第二卷(第二部分),第 39 页(explaining that "the possible defences to crimes covered by the Code [are] those defences that are well-established and widely recognized as admissible with respect to similarly serious crimes under national or international law")。下文脚注 137 载有更多的例子。

¹³⁶ 例如见,《国际法委员会年鉴 1949 年》,第 290 页,第 52 段(explaining that the articles of the draft declaration on the rights and duties of states enunciate "general principles of international law"); 对海洋法第 68 条的评注第(8) 段,《国际法委员会年鉴 1956 年》,第二卷,第 298 页("[The principle of the sovereign rights of the coastal State], which is based on general principles corresponding to the present needs of the international community, is in no way incompatible with the principle of the freedom of the seas.")。又见下列两个脚注。

在这个问题上参照了法律的一般原则和国际法的一般原则。关于法律的一般原则,请特别参见, 对关于国家继承涉及的自然人国籍问题的第7条草案的评注第(1)段,《国际法委员会年鉴1999 年》,第二卷(第二部分),第 30 页(referring to non-retroactivity of legislation as a general principle of law that has "an important role to play" as regards nationality issues); 危害人类和平及安全治罪 法草案第 14 条,《国际法委员会年鉴 1996 年》, 第二卷(第二部分), 第 39 页("The competent court shall determine the admissibility of defences in accordance with the general principles of law, in the light of the character of each crime."); 对关于防止危险活动造成跨界损害的第 3 条草案的 评注第(1)段,《国际法委员会年鉴 2001 年》, 第二卷(第二部分), 第 153 页("Article 3 is based on the fundamental principle sic utere tuo ut alienum non laedas, which is reflected in principle 21 of the Stockholm Declaration ...")(footnote omitted)。关于国际法的一般规则,请特别参见,对海洋 法第3条草案的评注第(8)段,《国际法委员会年鉴 1956年》,第二卷,第266页("It follows from the foregoing that the Commission came out clearly against claims to extend the territorial sea to a breadth which, in its view, jeopardizes the principle that has governed maritime law since Grotius, namely, the freedom of the high seas."); 对海洋法第 27 条草案的评注第 (1) 段,《国际法委员会 年鉴 1956 年》,第二卷,第 278 页("The principle generally accepted in international law that the high seas are open to all nations governs the whole regulation of the subject."); 对关于国家及其财 产管辖豁免的第 6 条草案临时案文的评注(which was referred to by the Commission, in its commentary to the corresponding article 5 of the final version of the draft articles on the topic, as "still generally applicable": 见《国际法委员会年鉴 1991 年》,第二卷(第二部分),第 22 和第 23 页),《国际法委员会年鉴 1980 年》,第二卷(第二部分),第 144 页,第(12)段("That rationale of sovereign immunity appears to rest on a number of basic principles, such as common agreement or usage, international comity or courtesy, the independence, sovereignty and dignity of every sovereign authority, representing a progressive development from the attributes of personal sovereigns to the theory of equality and sovereignty of States and the principle of consent."); 以及《国际法委员会年 鉴 1980 年》,第二卷(第二部分),第 156 页,第 (55) 段 (discussing the "rational bases of State immunity" and referring to "the sovereignty, independence, equality and dignity of States" as notions that "seem to coalesce, together constituting a firm international legal basis for State immunity").

此外,在委员会的工作中,"一般国际法"一词还用于指称一般国际法规则, 以区别与包括,除其他外,人权法、环境法、海洋法等在内的具体领域有关的 规则。¹³⁹

extent and the modalities of the application of which are to be determined by more precise rules. Article 14 of the draft Declaration is a recognition of this fact. It is, indeed, a global provision which dominates the whole draft and, in the view of the Commission, it appropriately serves as a key to other provisions of the draft Declaration in proclaiming "the supremacy of international law". (emphasis added) (《国际法委员会年鉴 1949 年》,第 290 页,第 52 页)。

又见,对关于防止危险活动造成跨界损害的第 4 条草案的评注第(2)段,《国际法委员会年鉴2001年》,第二卷(第二部分),第 156 页(referring to the principle of good faith as covering "the entire structure of international relations" (citing R. Rosenstock, "The declaration of principles of international law concernig friendly relations: a survey", *American Journal of International Law*, vol. 77, No. 1(1983),第 130)); 以及委员会就最惠国条款和不歧视原则所提出的意见,《国际法委员会年鉴 1978年》,第二卷(第二部分),第 11 页,第 48 段("The Commission recognized several years ago that the rule of non-discrimination' is a general rule which follows from the equality of States', and that nondiscrimination is 'a general rule inherent in the sovereign equality of States'…")和第 12 页,第 50 段(referring to "the obvious rule that, while States are bound by the duty arising from the principle of non-discrimination, they are nevertheless free to grant special favours to other States on the ground of some special relationship of a geographic, economic, political or other nature")。

139 请特别参见国际法委员会研究组关于国际法不成体系问题的报告,A/61/10,第 243 段("国际社会界的不成体系具有一定的法律意义,特别是因为伴随着这一现象出现了各种专门的和(相对)自治的规则或规则复合体、法律机构以及法律实践领域。曾经似乎受'一般国际法'管辖的事项现在已经成为'贸易法'、'人权法'、'环境法'、'海洋法'、'欧洲法'等专门法律以及甚至'投资法'或'国际难民法'等具有外来特征和高度专业知识的法律所管辖的领域,每一种法律都有其自己的原则和机构。")。又见,第 251()段,注 1017("'一般国际法'没有公认的定义。但是,为了上述结论的目的,只需提到其合理的对应部分来界定何谓'一般',即:何谓'特别',也就足够了。")。