

The Formation of Customary International Law: An Analysis of Governments' Opinions Regarding the Deliberations of the United Nations International Law Commission

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Abstract

In discussing the meta-norms which dictate the formation of customary international law (CIL), academics have relied mainly on methods for identifying (or not identifying) customary rules before international courts such as the International Court of Justice. However, in exploring the meta-norms surrounding the formation of CIL, we need to consider not only international courts' identification methods regarding CIL, but also to what extent States have reflected these methods in the meta-norms. This question has not been sufficiently explored in the literature. This may be because it is difficult to discern each State's view of the meta-norms. Given this difficulty, we should consider the opinions States expressed in forming the United Nations International Law Commission's conclusions on 'Identification of customary international law'. Based on this idea, this paper first examines the opinions which States expressed regarding the formation and identification of CIL. This examination clearly indicates that governments emphasise the specific and definite wills of States. This paper then considers two theoretical questions—on the universal validity of general CIL and on elements for particular CIL—which will arise when we discuss the formation of CIL based on government's opinions.

1 Introduction

Under what conditions is customary international law (CIL) formed? This is one of the most fundamental questions in international law. In discussing the meta-norms which dictate the formation of CIL, academics have relied mainly on methods for identifying (or not identifying) rules of CIL before international courts and tribunals, especially the International Court of Justice (ICJ) and its predecessor, the Permanent Court of International Justice (PCIJ). Specifically, these academics have often relied on the examples of the *SS Lotus* case in the PCIJ, the *North Sea Continental Shelf* case, the *Nicaragua* case, the *Gabčíkovo-Nagymaros Project* case, the *Arrest Warrant of 11 April 2000* case, and the *Jurisdictional Immunities of the State* case in the ICJ. Academics who advocate new and more liberal theories regarding the formation of CIL also insist that their theories have empirical foundations because these

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theories are consistent with the ICJ's methods.¹⁾

However, given the function of international courts, relying on the decisions of courts—including the ICJ—to shape academic discussions regarding the formation of CIL has limitations. Since the primary function of international courts has, traditionally, been to settle disputes, courts' identification of law is a means to this end.²⁾ Thus, international courts' focus on settling disputes affects how, why, and whether they identify laws; for example, courts tend to boldly identify a putative norm as a rule of CIL when both parties concerned agree about it. The ICJ's identification of an alleged norm as CIL therefore does not necessarily ensure that the norm has really developed as CIL.³⁾ A number of academics have focused on an epistemological question—the ICJ's methods for identifying CIL—and distinguished it from an ontological question—the very formation and existence of CIL in international society.⁴⁾

To date, international courts have had diverse functions, including law-making.⁵⁾ CIL identifying can be entangled with CIL making⁶⁾; there are examples where norms that international courts identified as CIL have afterwards become the rules of CIL. However, we should not overestimate the legitimacy of decisions made by a small number of judges who are appointed according to their personal qualifications, given that primary subjects in the international legal system are still sovereign States. In his article 'The Formation of Customary International Law', Mendelson stated that 'we should be cautious about attaching too much weight to the [ICJ]'s pronouncements' because the ICJ was 'not the sole, or even the central, decision-maker in the international legal system'.⁷⁾ As Matsui writes,

Decisions of international courts could contribute to the development of international law *through the process of screening of States' wills*. This is consistent with the current situations of international society where, while various actors other than States have emerged, the basic constituent is still States. ... Although we tend to make a fetish of courts' decisions, we need to change this attitude and consider more seriously to what extent these decisions have been accepted by international society.⁸⁾

Thus, a putative norm identified by a court has not become a rule of CIL until actors, especially States, other than the parties concerned have accepted it. Accordingly, we need to consider States' views in discussing the formation of specific rules of CIL and also in discussing the meta-norms surrounding the formation of CIL. Although the extent to which States' views would affect the meta-norms is not entirely clear due to uncertainty of the norms' status,⁹⁾ Mendelson asserts that 'the rules about [the formation of CIL] are to be sought inductively from the practice of States'.¹⁰⁾ Therefore, in exploring the meta-norms, we need to consider not only international courts' methods of identifying CIL, but to what extent States have reflected these methods in the meta-norms.

Yet, this question has not been sufficiently explored in the literature. This may be because it is difficult to discern each State's view of the meta-norms surrounding the formation of CIL—although States often assert the existence of a specific rule of CIL, they rarely mention the meta-norms surrounding the formation of the rule explicitly.¹¹⁾

Given this difficulty, we should consider the opinions which States expressed in forming the United Nations International Law Commission (ILC)'s conclusions on 'Identification of customary international law'¹²⁾ (for its texts, see Appendix) because these States expressed their views on the meta-norms surrounding the formation of CIL. To definitively confirm a State's views on this question, we also need to

examine the views which that State has adopted in specific cases where the existence (or not) of a rule of CIL matters. The opinions expressed by a State regarding the ILC must nevertheless be a necessary, if not sufficient, part of materials for the study of that State's genuine views regarding the formation of CIL.

Based on this idea, this paper first examines the opinions which States expressed regarding the deliberations of the ILC. It then considers some theoretical questions which will emerge when we discuss the formation of CIL based on the government's opinions.

2 Governments' opinions regarding the deliberations of the ILC

In the process of deliberating and creating the ILC's conclusions, 61 countries expressed their opinions in the Sixth Committee of the UN General Assembly or in their written comments submitted to the UN Secretary-General. In this section, I will examine the countries' opinions on each issue. In doing so, I emphasise opinions which indicate each State's position on each issue rather than technical comments regarding the draft conclusions and their wording.

2.1. Overall approach

Some academics consider values such as ethics or morality when discussing the formation of CIL.¹³⁾ Paragraph 5 of the commentary to Conclusion 2—while basically adopting an inductive approach by which rules are ascertained by empirical evidence of a general practice and its acceptance as law (*opinio juris*)—does not preclude the possibility of a deductive approach.¹⁴⁾

However, in 2014, the US delegation stated to the Sixth Committee that, given the basic principle that States generally could not be bound to legal obligations without their consent, the creation of CIL should not be inferred lightly.¹⁵⁾ The US continued to express similar opinions.¹⁶⁾ Even after the ILC adopted draft conclusions, the draft conclusions and commentaries, the US emphasised, should not be read to imply that CIL was easily formed because otherwise it would impose outcomes not reflecting the policy choices of citizens expressed through respective State practices.¹⁷⁾ In other words, taking account of the consent-based binding force and the democratic legitimacy of CIL, the US required a strict identification of CIL and supported an inductive rather than deductive approach. This means that values such as ethics or morality are not directly taken into account. With a few exceptions,¹⁸⁾ this same strictness and inductive approach to the identification of CIL have also been emphasised by States such as Israel,¹⁹⁾ China,²⁰⁾ and Vietnam.²¹⁾

2.2. Constituent elements of CIL (Conclusions 2 & 3)

Regarding the constituent elements of CIL, some academics are sceptical of the two-element theory,²²⁾ and others argue that practice and *opinio juris* should operate together (e.g. the 'sliding scale' theory).²³⁾

The Chinese delegation however stated that the two constituent elements of rules of CIL—practice and *opinio juris*—must be considered in a balanced manner; the argument that, in the fields of international human rights law and international humanitarian law, the element of *opinio juris* alone sufficed to establish rules of CIL was not supported by international practice, and the formation of rules of CIL was not possible without practice.²⁴⁾ Here, both of the elements of practice and *opinio juris*, China indicated, are required in every field of international law. Likewise, In the French delegation's opinion, the view that a single element, namely, *opinio juris*, can suffice to establish a rule of CIL has not been

supported either by State practice or by the case law of the ICJ.²⁵⁾ Each of the two elements, France added, must be separately ascertained.²⁶⁾

The above opinions that the two elements are required in every field and each of them must be separately ascertained have been supported by an overwhelming majority of countries, including Slovakia,²⁷⁾ Israel,²⁸⁾ Russia,²⁹⁾ Austria,³⁰⁾ Norway,³¹⁾ the UK,³²⁾ Belarus,³³⁾ the Czech Republic,³⁴⁾ Japan,³⁵⁾ Germany,³⁶⁾ South Africa,³⁷⁾ Spain,³⁸⁾ India,³⁹⁾ Iran,⁴⁰⁾ the US,⁴¹⁾ Jamaica,⁴²⁾ Indonesia,⁴³⁾ South Korea,⁴⁴⁾ Sudan,⁴⁵⁾ Australia,⁴⁶⁾ Turkey,⁴⁷⁾ Slovenia,⁴⁸⁾ Vietnam,⁴⁹⁾ Indonesia,⁵⁰⁾ Ireland,⁵¹⁾ and Thailand.^{52, 53)}

2.3. What range of countries need to join in practice? (Conclusions 4.1 & 8.1)

What range of countries need to join in practice for it to be considered a practice which will contribute to the formation of CIL?

2.3.1. *No need for the participation of all States*

The Austrian delegation recommended that draft conclusion 15 ('Persistent objector') should be interpreted to mean that a single State was not in a position to prevent the creation of a rule of CIL.⁵⁴⁾ This means that the formation of CIL does not require the practice of all States.

2.3.2. *Need for the participation of representative States*

Instead, the Chinese delegation said that the identification of CIL called for not only the study of the practice of legal systems and States with significant influence in international law, but also a comprehensive study of the practice of States representing other major civilisations and legal systems of the world.⁵⁵⁾ Developing countries' practice, China added, should be given due attention and regarded as an important source of evidence of the formation of CIL.⁵⁶⁾ The Indian delegation also stated that participating States should be representative of the various geographical regions.⁵⁷⁾ These delegations insist that the practices of the countries which have traditionally contributed to the development of international law—likely, European and North American countries—should not dominate discussions of CIL. Instead, they expect that the practice of myriad States—including developing countries, which represent various regions, civilisations, and legal traditions—be taken into account.

In this light, the Dutch delegation noted the contributions of countries which do not speak a major international language, saying that some correspondence and exchanges on legal matters between the Netherlands and some of its neighbours did not take place in any of the UN languages, but they might contribute to the creation of CIL. In its view, the limitation of only relying on easily available practice or *opinio juris* in mainstream languages is frequently overlooked when discussing CIL.⁵⁸⁾

2.3.3. *Importance of the practice of 'specially affected States'*

On the other hand, the Chinese delegation said that the practice of any country, big or small, rich or poor, or strong or weak, should receive full consideration, provided that that country has a concrete interest in and actual influence over the formation of rules in a specific arena. As 'specially affected States', such countries can play a role in the formulation of rules of CIL.⁵⁹⁾ The practice of specially affected States have also been considered important by Israel,⁶⁰⁾ the Netherlands,⁶¹⁾ and the US.⁶²⁾ South Africa shares the Chinese view that the power of a given State is not relevant in determining whether the State is

specially affected.⁶³⁾

Some countries pointed out a theoretical problem in emphasising specially affected States. The Jamaican delegation, while admitting that this approach is consistent with the position taken by the ICJ in the *North Sea Continental Shelf* case, found it difficult to reconcile the approach with the idea of the sovereign equality of States.⁶⁴⁾ Indonesia also commented on this conflict.⁶⁵⁾ This same conflict may have prompted Trinidad and Tobago to say that the concept of specially affected States has 'little basis in law'.⁶⁶⁾

The emphasis on the practice of specially affected States, however, was generally supported. For example, the delegation of South Korea understood the concerns as to the irreconcilability of the concept of 'specially affected States' with the sovereign equality of States, but nevertheless considered the concept to be useful in determining certain rules of CIL in certain fields.⁶⁷⁾

2.4. May the conduct of international organisations (IOs) constitute practice? (Conclusion 4.2)

The ILC also addressed whether conduct of non-State actors can or should be counted as practice that contributes to the formation of CIL.⁶⁸⁾ Most opinions expressed on this front concerned the conduct of international organisations (IOs).

2.4.1. Negative or cautious opinions

In the US delegation's opinion, the case law or the views expressed by States has not recognised that the conduct of IOs as such—as distinct from the practice of their member States—contributes directly to the formation of CIL.⁶⁹⁾ Likewise, the Malaysian delegation disagreed that the conduct of an IO might serve as practice.⁷⁰⁾ Israel also expressed a negative stance on this issue.⁷¹⁾

Furthermore, while not expressing negative views, Australia⁷²⁾ and Vietnam⁷³⁾ stated that the role of IOs in directly forming CIL must be approached with caution. Several States, including Russia,⁷⁴⁾ Iran,⁷⁵⁾ Belarus,⁷⁶⁾ Indonesia,⁷⁷⁾ Mexico,⁷⁸⁾ and Singapore,⁷⁹⁾ have proposed to consider the conduct of IOs as evidence of the practice of their member States only.

2.4.2. Affirmative opinions

In contrast, while admitting that the practice of States primarily attested to the existence of rules of CIL, the French delegation stated the practice of IOs could also contribute to the creation of such rules.⁸⁰⁾ The activities of IOs, the Spanish delegation also stated, must be taken into consideration when identifying rules of CIL, including in such areas as privileges and immunities.⁸¹⁾ Austria shared the Spanish view.⁸²⁾ Accordingly, in these States' views, the conduct of IOs can be counted as practice which contributes to the formation of CIL.⁸³⁾

2.4.3. Conditional affirmation

(a) Condition 1 – Conduct falling within the competences transferred by member States

The UK delegation stated that when the action of the European Union (EU) replaced the action of its member States, such practice should be equated with the practice of States; otherwise, member States would be deprived of their ability to contribute to State practice.⁸⁴⁾ Here, in the UK's view, the conduct of IOs such as the EU can be counted as practice only when they fall within the competences transferred to the organisations by member States.⁸⁵⁾ Similar opinions were expressed by Norway,⁸⁶⁾ Portugal,⁸⁷⁾

Romania,⁸⁸⁾ Argentina,⁸⁹⁾ Estonia,⁹⁰⁾ and the EU.^{91, 92)}

(b) Condition 2 – External acts

The practice of IOs, the Argentinian delegation said, can contribute to the formation of rules of CIL when such practice was external to the organisation, but not when it was internal.⁹³⁾

(c) Condition 3 – International organisations' practice as inferior to State practice

In the Slovenian delegation's opinion, given the increasing importance of IOs, their role should be fully addressed, without prejudice to the primacy of the practice of States.⁹⁴⁾ This statement about the primacy of State practice is supported by Sudan⁹⁵⁾ and Slovakia.⁹⁶⁾

2.4.4. *Doubts about the generalisation of (conditional) affirmation*

As demonstrated above, despite a number of negative or cautious opinions, there are a considerable number of affirmative or conditionally affirmative opinions regarding whether the conduct of IOs can be counted as practice. However, many of these (conditionally) affirmative opinions were expressed by EU member States and the EU delegation itself, which joined the deliberations as an observer. Thus, States expressing (conditionally) affirmative opinions may have had the EU in mind. In fact, the French delegation said that the question of the weight to be given to the practice of IOs was of particular concern to the States members of the EU as they had assigned to it exclusive jurisdiction in some areas.⁹⁷⁾ Under these circumstances,⁹⁸⁾ it is unclear how many countries with (conditionally) affirmative opinions intended to generalise their position regarding IOs other than the EU. In fact, New Zealand was cautious about attempts to identify general conclusions from the example of the EU.⁹⁹⁾

2.5. What conduct may constitute practice? (Conclusions 5 & 6)

What conduct constitutes practice that will contribute to the formation of CIL? Here, most deliberations concerned States' inaction.

2.5.1. *Inaction (Conclusion 6.1)*

The majority of countries, while not denying that inaction may be practice, called for a careful consideration of the conditions surrounding such inaction (e.g. Norway¹⁰⁰⁾ and Indonesia¹⁰¹⁾). In answering under what conditions inaction can constitute practice, the Greek delegation said that it was the 'conscious' or 'deliberate' inaction of an interested State with regard to the practice in question, often considered in relation to an act, proposal, or assertion of another State calling for a reaction, that might be relevant. It is not just any form of inaction.¹⁰²⁾ This view is also supported by Israel,¹⁰³⁾ El Salvador,¹⁰⁴⁾ Chile,¹⁰⁵⁾ Mexico,¹⁰⁶⁾ Ireland,¹⁰⁷⁾ Argentina,¹⁰⁸⁾ Israel,¹⁰⁹⁾ the Netherlands,¹¹⁰⁾ New Zealand,¹¹¹⁾ Singapore,¹¹²⁾ the US,¹¹³⁾ and Estonia.^{114, 115)}

2.5.2. *Verbal acts (Conclusion 6.1)*

Regarding verbal acts, the Dutch delegation put them in the category of, not practice, but *opinio juris*.¹¹⁶⁾ Yet, on the whole, such opinions were in the minority. Countries such as Slovakia¹¹⁷⁾ and Russia¹¹⁸⁾ suggested that verbal acts may constitute State practice.

The Jamaican delegation however stated that, although verbal acts may constitute practice, they were

considered less relevant than actual and concrete conduct on the ground.¹¹⁹⁾ The US maintains this same position.¹²⁰⁾

2.5.3. *Decisions of national courts (Conclusion 6.2)*

Regarding the decisions of national courts, the Dutch delegation stated that the reference to decisions of national courts should be qualified, because it was difficult to see how case law could contribute to practice in States like the Netherlands whose judiciary was traditionally barred from applying CIL.¹²¹⁾ Likewise, the Iranian delegation said that the decisions of national courts merited further consideration by the ILC, given that there were wide gaps between different legal systems, notably between common law and Romano-Germanic systems: some national courts have dealt with matters involving international law, while others have not touched on them at all. It therefore concluded that the decisions of the national courts of the latter States could not constitute generally accepted practice for the purpose of the formation of CIL.¹²²⁾

According to these opinions, only when CIL may be directly applied in the domestic courts of a State may their decisions constitute the practice of that State.

2.5.4. *Hierarchy of State organs*

Are there any differences in importance among the different organs of a State? The hierarchy of State bodies and their mandates, the Slovenian delegation claimed, should also be taken into account regarding the formation of CIL.¹²³⁾ More specifically, the Polish delegation stated that the activities of organs constitutionally empowered to represent the State in international relations would seem to be more important than those of other agencies; similarly, the jurisprudence of constitutional courts and supreme judicial organs would seem to be more important than the decisions of lower courts whose judges were less familiar with the application of international law in general, and CIL in particular.¹²⁴⁾ Israel added that acts (laws, judgements, etc.) must be final and conclusive in order to qualify as evidence of CIL. Therefore, only final and definitive decisions of higher courts which, generally speaking, are more likely to have expertise in international law than lower ones, should be considered reflective of the judicial view of the State in question.¹²⁵⁾ New Zealand also expressed the same opinion.¹²⁶⁾

Accordingly, among the conduct of State organs, the conduct of organs empowered to represent the State and, as far as court decisions are concerned, higher courts' final and definitive decisions are considered particularly important.¹²⁷⁾

2.5.5. *Must practice be known to the public?*

Does the conduct of a State have to be known by other States in order for it to constitute practice that may contribute to the formation of CIL?

(a) Negative opinions

In the US's view, given that most legal advice within the executive branches of governments is provided on a confidential basis, the fact that a practice might not be publicly available or known to some would not preclude its relevance to the formation of CIL.¹²⁸⁾

(b) Affirmative opinions

Conversely, the Spanish delegation said that practice must be publicly available or at least known to other States 'in order to give them the opportunity to object'.¹²⁹⁾ Likewise, the Chilean delegation agreed with the point made in paragraph (5) of the commentary to Conclusion 5¹³⁰⁾ that the practice must be publicly available or at least known to other States.¹³¹⁾ Moreover, Russia¹³²⁾ and Belarus¹³³⁾ expressed the same opinions. In sum, many countries hold an affirmative view on this question.

2.6. *Opinio juris* (Conclusions 9 & 10)

So far, we have discussed practice as one of the constituent elements of CIL. There were also various opinions on *opinio juris* as the other constitutive element.

2.6.1. Equality of each State

Which countries' beliefs may contribute to the formation of CIL? Regarding this question, the Iranian delegation said that *opinio juris* should consist of the practice of all States and all legal systems rather than the practice of affected States.¹³⁴⁾ This means that different criteria are applied when considering practice and *opinio juris*: on the one hand, as discussed above, conduct of specially affected States is considered important in examining practice; on the other hand, in examining *opinio juris*, the beliefs of all States should be considered equally without emphasising the beliefs of specially affected States. Sudan holds a similar opinion.¹³⁵⁾

2.6.2. May opinio juris be presumed?

However, as the Dutch delegation said, given that governments do not generally release confidential correspondence, a large quantity of *opinio juris* went unpublished.¹³⁶⁾ Thus, there are more difficulties in identifying *opinio juris* than in identifying practice. The Indian delegation also stated that, although Draft conclusion 10 referred to governments' legal opinions as a form of evidence of *opinio juris*, it might be difficult to identify the opinions that were rarely published.¹³⁷⁾ This reality will raise the following question: may *opinio juris* be presumed from the existence of general practice? Indeed, some academics support the presumption of *opinio juris* based on the existence of general practice.¹³⁸⁾ However, for instance, the Jamaican delegation declined it,¹³⁹⁾ saying that no presumption in favour of the existence of *opinio juris* might be drawn from the existence of general practice alone.¹⁴⁰⁾

2.6.3. May the failure to react to a practice serve as evidence of opinio juris? (Conclusion 10.3)

As far as *opinio juris* is concerned, many states expressed opinions regarding Conclusion 10.3, which admits that, under certain conditions, a State's failure to react to the practice of another State may serve as evidence of *opinio juris* of the former State.¹⁴¹⁾

The Iranian delegation expressed a negative opinion, however. In its view, the inaction of a State with regard to the violation of a rule of international law by another State cannot be considered relevant practice because inaction—which is almost always based on political considerations—cannot have the effect of eroding the validity of an existing rule of international law.¹⁴²⁾ Here, although mentioning 'relevant practice', Iran clearly intends to focus on the negation of *opinio juris* because it points out that inaction is 'based on political considerations'. Similarly, New Zealand's delegation expressed the cautious opinion that a failure to react may, in some circumstances, imply *opinio juris*, but this cannot be

presumed because there are many legitimate—but political—reasons why a State may not publicly react to the actions of another State.¹⁴³⁾ Likewise, the Portuguese delegation stated that extreme caution should be used in considering the failure to react as evidence of *opinio juris* because doing so might impose an excessive burden on States that did not have the means to react to certain measures, which might foster inequality between States with different resources.¹⁴⁴⁾ Here, Portugal is concerned about discrepancies in States due to difference in the ability to react. Cautious opinions regarding this issue have also been expressed by the Netherlands,¹⁴⁵⁾ Sudan¹⁴⁶⁾, Peru,¹⁴⁷⁾ Australia,¹⁴⁸⁾ Japan,¹⁴⁹⁾ Chile,¹⁵⁰⁾ Slovenia,¹⁵¹⁾ China,¹⁵²⁾ the Czech Republic,¹⁵³⁾ Russia,¹⁵⁴⁾ Israel,¹⁵⁵⁾ the US,¹⁵⁶⁾ and Sri Lanka.¹⁵⁷⁾

Accordingly, many states have expressed negative or cautious opinions regarding whether a State's failure to react to the practice of another State may serve as evidence of *opinio juris* in light of the fact that, in many cases, States have not reacted due to political considerations.

2.7. Materials for the identification of CIL

Many States also discussed materials which would likely constitute evidence for identifying CIL.

2.7.1. *Treaties (Conclusion 11)*

According to the survey of some academics, treaties are the dominant form of evidence used in determinations of CIL in international courts.¹⁵⁸⁾ The Chinese delegation nevertheless does not treat treaties specially, stating that the investigation as to whether a treaty provision reflects a rule of CIL should be based strictly on general practice and *opinio juris* regarding the rule. In its view, non-party States should not arbitrarily determine which treaty provisions are rules of CIL based on their narrow national interests, because such tactics of expediency are tantamount to utilitarianism or double standards.¹⁵⁹⁾ Ireland¹⁶⁰⁾ and the US¹⁶¹⁾ share this strict view that rules set forth in treaties may not become CIL until practice and *opinio juris* have been established.

2.7.2. *Resolutions of IOs (Conclusion 12)*

(a) Affirmative opinions

With respect to the evidentiary value of the resolutions of IOs, the Spanish delegation said that the practice of IOs had the potential to influence the process of establishing CIL.¹⁶²⁾ Greece¹⁶³⁾ and Poland¹⁶⁴⁾ share similar views.¹⁶⁵⁾

(b) Negative or cautious opinions

The Iranian delegation, on the other hand, believed that the evidentiary basis of resolutions of IOs remained open to question since such resolutions were at times adopted by political organs, were political rather than legal in nature, and did not reflect the *opinio juris* of member States.¹⁶⁶⁾ Similarly negative or cautious views were also expressed by Turkey,¹⁶⁷⁾ Vietnam,¹⁶⁸⁾ and the US.¹⁶⁹⁾ Japan¹⁷⁰⁾ and Indonesia¹⁷¹⁾ denied the evidentiary value of resolutions unless such resolutions were supported by practice and *opinio juris*.

(c) The evidentiary value of the resolutions of the UN General Assembly

As demonstrated, there are conflicting opinions with respect to the evidentiary value of the resolutions of IOs. However, even Iran, which has generally expressed negative opinions regarding the resolutions of

IOs, stated that resolutions of the UN General Assembly could under certain circumstances provide evidence for the existence of a rule or the emergence of an *opinio juris*.¹⁷²⁾ The Argentinian delegation, for its part, considered that the General Assembly was the only IO organ that should have a normative role in the development of CIL because it was 'uniquely democratic and representative of the international community'.¹⁷³⁾ Algeria,¹⁷⁴⁾ Egypt,¹⁷⁵⁾ and (indirectly) Russia¹⁷⁶⁾ have also accepted this view.¹⁷⁷⁾

2.7.3. *Decisions of courts and tribunals (Conclusion 13)*

(a) International courts and tribunals

(1) Greater weight than national courts

In regards to the evidentiary value of decisions of international courts and tribunals, the Greek delegation said that, while these decisions as to the existence of rules of CIL did not constitute general practice, they had an indirect but decisive normative influence.¹⁷⁸⁾ Judgments of international courts and tribunals, the Estonian delegation said, should be given greater weight than those of national courts because the latter might lack expertise in international law and might have reached their decisions without hearing arguments by States.¹⁷⁹⁾ Belarus shares this view.¹⁸⁰⁾

(2) The particular weight of the ICJ

Additionally, the Iranian delegation stated that a distinction should be made between decisions of the ICJ and those of other international courts: the former's decisions are of pivotal significance and cannot be considered as having the same weight as the latter's decisions.¹⁸¹⁾ Iran thus gives more evidentiary value to the decisions of the ICJ than those of other courts. This belief is supported by Japan,¹⁸²⁾ Russia,¹⁸³⁾ and Belarus.¹⁸⁴⁾

(3) A restrictive view

The Israeli delegation, on the other hand, said that the jurisprudence of international courts should be relied upon as a subsidiary means of identification of CIL only when it included a comprehensive review and analysis of State practice.¹⁸⁵⁾ Likewise, according to the US's written comments, States may choose to assert that rules are customary in nature for reasons of litigation strategy rather than out of a thorough assessment: in one case, a tribunal might accept without analysis that a rule is customary based on nothing more than the absence of a dispute between the parties, while in another case, a tribunal might carefully consider the issue after robust argument by parties and *amici*.¹⁸⁶⁾ In these views, evidentiary value may only be given to the decisions of international courts and tribunals which have comprehensively analysed State practice or carefully considered genuine arguments of the party states (i.e. arguments that are not affected by States' litigation strategies).

(b) National courts

States also deliberated whether decisions of national courts may have evidentiary value.

(1) Affirmative opinions

The Spanish delegation accepted the evidentiary value of decisions of national courts because they should be included within the 'judicial decisions' category under ICJ Statute 38(1) (d): for example, in

areas such as the immunities of foreign States—which concerns the exercise of jurisdiction by such courts—the consideration of national judicial decisions is unavoidable.¹⁸⁷⁾

(2) Cautious opinions

The Chinese delegation however said that decisions of national courts simply reflected the legal system of the State in question and therefore had limited relevance to international law.¹⁸⁸⁾ Caution is needed, the Vietnamese delegation also stated, in addressing the role of national courts' decisions in view of country-specific constitutional constraints and the doctrine of precedent in domestic law.¹⁸⁹⁾ Thus, similar to the Netherlands' aforementioned concern regarding whether the decisions of national courts may constitute practice (*see* 2.5.3),¹⁹⁰⁾ the evidentiary value of national courts' decisions should be limited because there are differences between States' legal systems due to constitutional constraints on the application of CIL in courts and constrained discretion by the doctrine of precedent.¹⁹¹⁾

(3) Negative opinions

More strictly, the Iranian delegation rejects the evidentiary value of national courts, stating that decisions of national courts which necessarily reflect the legal system of the State in question cannot be considered as subsidiary evidence for the identification of CIL.¹⁹²⁾

As demonstrated, there are conflicting opinions regarding the evidentiary value of national courts' decisions, and these conflicting opinions are rooted in differences between States' legal systems.

2.8. Persistent objector (Conclusion 15)

Up until the previous section, this paper has examined States' opinions on the formation or identification of CIL. Since Conclusion 15 addressed the persistent objector rule—which would restrict the application of already established CIL—many States expressed opinions regarding this rule. These opinions are discussed below.

2.8.1. *Negative opinions*

The South Korean delegation was concerned at the provisional adoption of draft conclusion 15, bearing in mind that the persistent objector rule is one of the most controversial issues in the theory of CIL.¹⁹³⁾ In its view, the rule, which can lead to the fragmentation of international law, is not supported by sufficient State practice and jurisprudence.¹⁹⁴⁾ Similar negative views have been expressed by Cyprus,¹⁹⁵⁾ Nicaragua,¹⁹⁶⁾ and Sri Lanka.¹⁹⁷⁾

2.8.2. *Affirmative opinions*

On the contrary, the persistent objector rule, the Iranian delegation said, is one of the manifestations of the principle of equal sovereignty and the fundamental right of all States to be excluded from the scope of a given emerging rule. In other words, the rule is an aspect of the 'centrality of States' approach to the process of the formation of CIL and a natural consequence of the essentially consensual nature of CIL.¹⁹⁸⁾ Likewise, the Indonesian delegation stated that the rule, which had been supported by judicial decisions and State practice, was important in order to preserve the consensual nature of CIL.¹⁹⁹⁾ The Dutch delegation also agreed that the rule was included in the ILC's conclusions.²⁰⁰⁾ In short, these States

support the persistent objector rule to the extent that the validity of international law is based on States' consent. The United States,²⁰¹⁾ Singapore,²⁰²⁾ Israel,²⁰³⁾ Turkey,²⁰⁴⁾ Ireland,²⁰⁵⁾ and South Africa²⁰⁶⁾ also support this rule. Accordingly, the majority of states are in favour of the rule.²⁰⁷⁾

At the same time, the Greek delegation reiterated its doubts about the applicability of the rule in relation to *jus cogens* rules as well as the broader category of the general principles of international law whose applicability did not depend on States' consent. In its view, the specific character of those general principles justifies their exclusion from the scope of application of the rule because it would be odd that a State would not be bound by rules having a fundamental character for the international community.²⁰⁸⁾ The exclusion of the application to *jus cogens* is also supported (or at least suggested) by Portugal,²⁰⁹⁾ Chile,²¹⁰⁾ Spain,²¹¹⁾ Brazil,²¹²⁾ Mexico,²¹³⁾ Denmark (and Finland, Iceland, Norway, and Sweden),²¹⁴⁾ El Salvador,²¹⁵⁾ and New Zealand. Additionally, according to Australia²¹⁶⁾ and Slovenia,²¹⁷⁾ the application of the rule should also be excluded from obligations *erga omnes*.²¹⁸⁾

2.9. Particular CIL (Conclusion 16)

Not only regarding general CIL which this paper has so far discussed, but States expressed opinions regarding particular CIL, as set forth in Conclusion 16.

2.9.1. Does particular CIL exist?

(a) Negative or cautious opinions

On the question of whether particular CIL has existed, the Slovenian delegation has a negative view, stating that the existence of multiple 'regional legal orders' with their own rules can lead to the excessive fragmentation of CIL.²¹⁹⁾ Israel expresses a similarly cautious view.²²⁰⁾

(b) Affirmative opinions

The Indonesian delegation, on the other hand, admits the existence of particular CIL.²²¹⁾ The existence is supported by the majority of other countries, including Ireland²²²⁾ and El Salvador.²²³⁾ Rather, States mostly focused on the requirements for the formation of particular CIL, which are examined below.

2.9.2. May particular CIL develop among States having no geographical nexus?

Paragraph 5 of the commentary to Conclusion 16 includes debate on whether a rule of particular CIL could develop among States linked by 'a common cause, interest or activity'.²²⁴⁾

(a) Affirmative opinions

Particular CIL, the Australian delegation acknowledged, might also develop among States linked by a common cause, interest, or activity. Specifically, it proposed to include a few examples in the commentary, such as the development of an understanding that the death penalty and the use of nuclear weapons were already prohibited by particular CIL.²²⁵⁾ Similar affirmative views have been expressed by Belarus,²²⁶⁾ Chile,²²⁷⁾ and the UK.²²⁸⁾

(b) Negative opinions

The Vietnamese delegation, on the other hand, is unwilling to encourage the recognition and promotion of particular CIL among States having no geographical nexus, because that risks further fragmenting

international law.²²⁹⁾ Similarly negative views have been expressed by Slovakia,²³⁰⁾ the Czech Republic,²³¹⁾ and the US.²³²⁾

In short, there are conflicting opinions on the question whether particular CIL may develop among States linked by factors other than geography.

2.9.3. Are the two elements applied in a different manner than general custom?

The requirement for evidence of particular CIL, the Belarussian delegation stated, should be higher than for other rules of general international law: a rule of particular CIL should be adopted in a clearly expressed form by all of the affected States.²³³⁾ Also, the Romanian delegation welcomed the emphasis on the practice and acceptance of each State concerned in considering particular CIL, as opposed to the general custom.²³⁴⁾ In these States' views, the two-element approach should be applied in a more strict manner for the formation of a rule of particular CIL—i.e. there must be clear evidence of practice and *opinio juris* of all the States which would be bound by the rule. This position²³⁵⁾ is supported by Portugal,²³⁶⁾ Vietnam,²³⁷⁾ the Czech Republic,²³⁸⁾ and New Zealand.²³⁹⁾ Support for the opposite view—i.e. that the two-element approach should be applied in the completely same manner as general CIL—cannot be found.²⁴⁰⁾

3 Concluding observations

This paper has examined opinions expressed by governments during the ILC's deliberations. They are summarised below.

3.1. A summary of governments' opinions

First, as an overall approach, taking account of the consent-based binding force and the democratic legitimacy of CIL, several States have required a strict identification of CIL and supported an inductive rather than deductive approach. This means that, unlike new and liberal theories of some academics, values such as ethics or morality are not directly taken into account.

Second, regarding the constituent elements of CIL an overwhelming majority of States, in contrast to dissent from some academics, have supported the idea that the two elements are required in every field, and each of them must be separately ascertained.

Third, regarding what range of countries need to join in practice for it to be considered practice, States have considered the practice of States representing various regions, civilisations, and legal systems, instead of the practice of all States. This should include the practice of developing countries and countries that do not speak a major international language. At the same time, the States do not demote the importance of specially affected States' practice.

Fourth, regarding whether the conduct of non-State actors—especially IOs—can be counted as practice which contributes to the formation of CIL, opinion has been divided. In any event, it is unclear how many countries with (conditionally) affirmative opinions have intended to generalise their position to IOs other than the EU.

Fifth, what conduct may constitute practice? Only deliberate or conscious inaction may count as practice. Some States have argued that verbal acts may constitute practice, but that verbal acts should

be considered less relevant than actual and concrete conduct. Several States have felt that national courts' decisions may constitute the practice of the State only when CIL may be directly applied in the courts of the State. The conduct of organs empowered to represent the State and, as far as court decisions are concerned, higher courts' final and definitive decisions have been considered particularly important. Many States have held that practice must be known to the public to be valid.

Sixth, in examining *opinio juris*, the beliefs (as opposed to practice) of all States should be equally considered without emphasising those of specially affected States. Although there are more difficulties in identifying *opinio juris* than in identifying practice, and some academics support the presumption of *opinio juris* based on the existence of general practice, States have criticised such presumption. Regarding whether the failure to react to a practice may serve as evidence of *opinio juris*—which was the most controversial question with respect to *opinio juris*—there have been many negative or cautious opinions.

Seventh, what materials may be evidence for identifying CIL? Treaty provisions, although international courts have used them as a dominant form of evidence in determining CIL, are not treated specially to the extent that they may not become CIL until practice and *opinio juris* have been established. While there are conflicting opinions with respect to the evidentiary value of IOs' resolutions, many States have accepted the value of the UN General Assembly resolutions. The decisions of international courts and tribunals should hold more weight as evidence than those of domestic courts, and that the ICJ's decisions have more evidentiary value still; in some States' views, however, the decisions of international courts only have evidentiary value when they have comprehensively analysed State practice or carefully considered the genuine arguments of the party States. Regarding the evidentiary value of national courts' decisions, there have been conflicting opinions owing to different legal systems between States.

Eighth, with several exceptions, the majority of States have expressed favourable opinions of the persistent objector rule, provided it is not applicable to fundamental rules such as *jus cogens*.

Ninth, the majority of states have supported the existence of particular CIL. In their views, the two-element approach should be applied more strictly for the formation of particular CIL than for general CIL. However, States have held conflicting opinions regarding whether particular CIL may develop among States linked by factors other than geography.

3.2. Consideration of some theoretical questions

In this section, this paper considers some theoretical questions which arise when we discuss the formation of CIL based on the forgoing opinions.

3.2.1. How can CIL be universally valid?

These governments' opinions clearly indicate great emphasis on the specific and definite wills of States—namely the consent-based notion of CIL. This reminds us of the following theoretical question which academics have discussed: how can we emphasise States' wills on the one hand and explain the grounds for CIL being binding on all States except persistent objectors—the universal validity of CIL—on the other?²⁴¹ This question is even more difficult to answer if we discuss it based on the governments' opinions: although many academics have explained the grounds for the universality of CIL by adopting the consensus-based notion of CIL under which abstract and common, not specific, wills of

States suffice,²⁴²⁾ we cannot find any support to that notion in the governments' opinions.²⁴³⁾

Of course, we can explain the universal validity of a rule when we can, with scrupulous honesty, establish practice and *opinio juris* of all States regarding the rule. Indeed, we find among governments' opinions several requirements which would help pursue the universality of practice and *opinio juris*: considering the practice of States representing various regions, civilisations, and legal systems including developing and minor language countries; counting inaction and verbal acts as practice, which would necessarily increase the number of countries that could join in practice; considering beliefs of all States equally in examining *opinio juris*, without emphasising those of specially affected States; and admitting the special evidentiary value of resolutions of the UN General Assembly which is, as the Argentinian delegation put it, 'uniquely democratic and representative of the international community'. Among the governments' opinions, however, there are several limitations which would not be compatible with pursuing the perfect universality of practice and *opinio juris*: not requiring the participation of all nations in practice, but emphasising the practice of specially affected States; counting only deliberate or conscious inaction as practice; considering verbal acts less relevant than actual and concrete conduct; and rejecting the presumption of *opinio juris*.

How can they explain the universality of CIL without ensuring the perfect universality of practice and *opinio juris*? To solve this problem, we should pay attention to one requirement many States have supported: practice must be known to the public in order to be valid. Given the governments' persistent emphasis on the specific and definite wills of States for the formation of CIL, this requirement looks odd: what is relevant for respecting a State's will should be whether the State's practice in question reflects its genuine will, not whether the practice is known to the public. The fact that many States nevertheless require practice being public appears to imply that they also emphasise a factor other than States' wills. In this respect, we should refer to Mendelson's view:

[B]ehaviour [of a State] does not count as State practice if it not communicated to another State. If we think of the customary process as one of (express or tacit) claim and response, the reason is clear: secret conduct is incapable of constituting either a claim or a response. Thus, the secret 'bugging' of an embassy is not a tacit claim to be entitled to do so. Neither is the confidential advice of a legal adviser or secret instructions to armed forces.²⁴⁴⁾

Here, Mendelson requires practice being public because secret conduct, he believes, could not constitute a claim nor a response. This view is based on the following idea regarding the validity of CIL:

I would prefer to formulate the *grundnorm* [of international law] along the following lines: 'States should comply with the legitimate expectations of the international community'. ... The proposed basic norm also explains the binding force of CIL: if the generality of States has regularly behaved in certain ways—for instance, by according immunities to diplomats—then a legitimate expectation arises that they will continue to do so.²⁴⁵⁾

When uniform conduct has appeared through States' claims and other States' responses, it would cause 'the legitimate expectations of the international community' that States would continue to conduct themselves in the same manner. The *grundnorm* that States must comply with such expectations is, in

Mendelson's view, grounds for the validity of CIL. However, as secret conduct cannot constitute a claim nor a response, it cannot contribute to uniform conduct or 'the legitimate expectations of the international community'. Therefore, it is the logical and inevitable outcome of the grounds for the validity of CIL that practice must be known to the public.

Given this view, the fact that many States require practice to be known to the public indicates that they believe the universal validity of CIL should, at least partly, be grounded on the legitimate expectations of the international community. Spain's statement that practice should be known to other States 'in order to give them the opportunity to object' (*see 2.5.5(b)*) corresponds to Mendelson's view.

Thus, so long as we rely on the above-mentioned government opinions, we could draw the following explanation regarding the universal validity of a rule of CIL. States are divided into three categories: States in favour of the rule, States against the rule, and other States. The first category of States is bound by the rule based on their specific and definite wills. The second category of States—persistent objectors—is not bound by the rule. The third category of States—usually expected to be the largest—is bound by the rule based not on their specific wills, but on the legitimate expectations of the international community that they behave in the same manner as the generality of States regularly do. In other words, the unavoidable limits to the universal validity of CIL would be supplemented by the notion of the legitimate expectations of the international community.

3.2.2. *More strict elements for particular CIL?*

The foregoing discussion has made clear that the two-element approach should be applied more strictly regarding the formation of particular CIL. However, there are no clear theoretical grounds for requiring clear practice and *opinio juris* of all of the States concerned. That is because, if the participation of all the States concerned was necessary, it would be virtually the same as founding particular CIL on the individual consent of the States concerned. In examining the ICJ's jurisprudence regarding particular CIL, Haggenmacher states that,

In [the ICJ's] view, the regional custom is only a local custom extended by way of individual consent. ... [I]t should be stressed that this 'custom' resembles closely to a tacit agreement and that its voluntarist component ... does not reflect the concept of *opinio juris*, which is not limited to contractual consent. Consequently, none of the cases examined provides us with a real illustration of the dominant doctrine relating to CIL and its two elements.²⁴⁶⁾

Haggenmacher's analysis could apply to the governments' opinions examined in this paper: if they require the individual consent of all of the States concerned, there would be no real need for practice because practice would become only one of the means to express individual consent. The need to refer to the concept of *opinio juris* would also be shaken, as individual consent is no more than contractual consent. Thus, we would not need to refer to 'customary' law any longer. This would make it more difficult to explain the grounds for excluding States linked by factors other than geography.

Therefore, the aforementioned governments' views would, as far as they refer to particular 'customary' international law, entail the theoretical problems: their views lack sufficient theoretical grounds, apparently being stemmed solely from the future, and uncertain, concern about the fragmentation of international law.

Appendix: The text of the ILC's conclusions on the *Identification of customary international law****Part One Introduction****Conclusion 1: Scope*

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

Part Two Basic approach*Conclusion 2: Two constituent elements*

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

Conclusion 3: Assessment of evidence for the two constituent elements

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

Part Three A general practice*Conclusion 4: Requirement of practice*

1. The requirement of a general practice, as a constituent element of customary international law, refers primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law.
2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.
3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.

Conclusion 5: Conduct of the State as State practice

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

Conclusion 6: Forms of practice

1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.
2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct 'on the ground'; legislative and administrative acts; and decisions of national courts.
3. There is no predetermined hierarchy among the various forms of practice.

Conclusion 7: Assessing a State's practice

1. Account is to be taken of all available practice of a particular State, which is to be assessed as a whole.
2. Where the practice of a particular State varies, the weight to be given to that practice may, depending on the circumstances, be reduced.

Conclusion 8: The practice must be general

1. The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.
2. Provided that the practice is general, no particular duration is required.

Part Four Accepted as law (*opinio juris*)

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

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

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

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

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

Conclusion 11: Treaties

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

Conclusion 12: Resolutions of international organizations and intergovernmental conferences

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

Conclusion 13: Decisions of courts and tribunals

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

Conclusion 14: Teachings

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

Part Six Persistent objector

Conclusion 15: Persistent objector

1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.

2. The objection must be clearly expressed, made known to other States, and maintained persistently.
3. The present draft conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).

Part Seven Particular customary international law

Conclusion 16: Particular customary international law

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

References

- 1) See, for example, Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (2010), p. 373.
- 2) Takane Sugihara [杉原高嶺], 'The Status and Function of the ICJ [国際司法裁判の地位と機能]', in Kazuya Hirobe [広部和也] & Tadashi Tanaka [田中忠] (eds.), *International Law and Domestic Law [国際法と国内法]* (1991), pp. 511, 526.
- 3) See Fernando R. Tesón, 'Fake custom', in Brian D. Lepard (ed.), *Reexamining Customary International Law* (2017), pp. 86–87.
- 4) For an elaborate and insightful analysis of the factors affecting how the ICJ identifies CIL, see Niels Petersen, 'The International Court of Justice and the Judicial Politics of Identifying Customary International Law', *European Journal of International Law*, Vol. 28 (2017), pp. 357–385. See also, Rudolf H Geiger, 'Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal', in Ulrich Fastenrath *et al.* (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011), pp. 673–694; Peter Tomka, 'Custom and the International Court of Justice', *The Law & Practice of International Courts and Tribunals*, Vol. 12 (2013), pp. 195–216; Christian Tams, 'Meta-Custom and the Court: A Study in Judicial Law-Making', *The Law & Practice of International Courts and Tribunals*, Vol. 14 (2015), pp. 51–79; Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion', *European Journal of International Law*, Vol. 26 (2015), pp. 417–443; Stephen J. Choi and Mitu Gulati, 'Customary International Law: How Do Courts Do It?', in Curtis A. Bradley (ed.), *Custom's Future: International Law in a Changing World* (2016), pp. 117–147.
- 5) See José E Alvarez, 'What are International Judges For?: The Main Functions of International Adjudication', in Cesare P. R. Romano, Karen J. Alter, & Yuval Shany (eds.), *The Oxford Handbook of International Adjudication* (2014), pp. 168–170; Armin von Bogdandy and Ingo Venzke, 'The Spell of Precedents: Lawmaking by International Courts and Tribunals', *ibid.*, p. 519; Gleider I. Hernández, 'International Judicial Lawmaking', in Catherine Brölmann & Yannick Radi (eds.), *Research Handbook on the Theory and Practice of International Law-Making* (2016), pp. 200–221; Hironobu Sakai [酒井啓亘], 'The ICJ and "International Law-Making" [国際司法裁判所と「国際立法」]' *Houritsu Jihou* [法律時報], No. 1116 [Sep 2017] (2017), pp. 29–30.
- 6) See Monica Hakimi, 'Custom's Method and Process: Lessons from Humanitarian Law', in Bradley, *supra* note 4, p. 153.
- 7) Maurice H. Mendelson, 'The Formation of Customary International Law', *Recueil des cours de l'Académie de droit international de la Haye*, Vol. 272 (1998), p. 253. See also J. Patrick Kelly, 'The Twilight of Customary International Law', *Virginia Journal of International Law*, Vol. 40 (2000), pp. 529–530: 'In an international society of literally thousands of cultures and limited common values and interests, the few international judges or the lone appointed international arbitrator cannot fairly represent the rich diversity of international society. ... Judges, even the highly qualified judges of the ICJ, can neither represent, nor even necessarily appreciate the perspectives of the many parts of international society. ... In the international legal order the allocation of lawmaking authority to a court or tribunal seriously undermines the democratic legitimation of law. There is no legislature or other effective means of overturning judge-made law and of making court or tribunal decisions accountable to the popular will of states or their people.'
- 8) Yoshiro Matsui [松井芳郎], 'Dynamics of Dispute Settlement in the Contemporary World: Interplay between

- Law Application and Law Creation [現代世界における紛争処理のダイナミクス], *Yearbook of World Law* [世界法年報], No. 25 (2006), pp. 26, 28-29. For more of the same view, see Alan Boyle & Christine Chinkin, *The Making of International Law* (2007), p. 311; Sakai, *supra* note 5, p. 32.
- 9) See Jörg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems', *European Journal of International Law*, Vol. 15 (2004), pp. 538-540.
- 10) Mendelson, *supra* note 7, pp. 180-181.
- 11) Omri Sender and Michael Wood, 'The Emergence of Customary International Law: Between Theory and Practice', in Brölmann & Radi, *supra* note 5, p. 146.
- 12) A/RES/73/203 (11 January 2019). For commentary, see the *Report of the International Law Commission*, 70th session (30 April-1 June and 2 July-10 August 2018), General Assembly, Official Records, 73rd Session, Supplement No. 10, A/73/10 (2018), pp. 117-156.
- 13) E.g., Lepard, *supra* note 1, pp. 77-94, 140-150 (discussing the role of fundamental ethical principles in ascertaining *opinio juris*); Frederic L. Kirgis, 'Custom on a Sliding Scale', *American Journal of International Law*, Vol. 81 (1987), p. 149 (considering the reasonableness of an asserted customary rule); Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', *American Journal of International Law*, Vol. 95 (2001), p. 764 (distinguishing 'facilitative' and 'moral' customs).
- 14) Report of the ILC, *supra* note 12, p.126.
- 15) A/C.6/69/SR.27 (2014), para. 19.
- 16) A/C.6/70/SR.22 (2015), para.40; A/C.6/71/SR.20 (2016), para.58; A/CN.4/716 (2018), pp. 8, 10.
- 17) A/C.6/73/SR.29 (2018), paras. 15-17 (esp. 16).
- 18) France stated that the draft conclusions 'should ... be used flexibly'. A/C.6/73/SR.20 (2018), para. 74.
- 19) A/CN.4/716 (2018), pp. 6, 9.
- 20) A/CN.4/716 (2018), pp. 10-11.
- 21) A/C.6/73/SR.24 (2018), para. 4.
- 22) E.g., Peter Haggenmacher, « La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale », *Revue générale de droit international public*, tome 90 (1986), pp. 5-125. Lepard practically adopts one-element approach as he considers State practice to be one of the evidences of *opinio juris*. Lepard, *supra* note 1, pp. 122-139.
- 23) Kirgis, *supra* note 13, pp. 146-151; Mendelson, *supra* note 7, p. 291.
- 24) A/C.6/69/SR.20 (2014), para. 27.
- 25) A/C.6/69/SR.22 (2014), para. 29.
- 26) A/C.6/70/SR.20 (2015), para. 16.
- 27) A/C.6/69/SR.23 (2014), para. 88; A/C.6/71/SR.23 (2016), para. 24.
- 28) A/C.6/69/SR.25 (2014), para. 81.
- 29) A/C.6/69/SR.25 (2014), para. 92; A/C.6/71/SR.21 (2016), para. 48.
- 30) A/C.6/69/SR.25 (2014), para. 107.
- 31) A/C.6/69/SR.25 (2014), para. 127.
- 32) A/C.6/69/SR.26 (2014), para. 13; A/C.6/71/SR.21 (2016), para. 84.
- 33) A/C.6/69/SR.26 (2014), para. 19; A/C.6/70/SR.21 (2015), para. 26.
- 34) A/C.6/69/SR.26 (2014), para. 43; A/C.6/71/SR.21 (2016), para. 7; A/C.6/73/SR.21 (2018), para. 12.
- 35) A/C.6/69/SR.26 (2014), para. 75; A/C.6/71/SR.22 (2016), para. 62.
- 36) A/C.6/69/SR.26 (2014), para. 78; A/C.6/70/SR.22 (2015), para. 9.
- 37) A/C.6/69/SR.26 (2014), para. 93; A/C.6/73/SR.23 (2018), para. 7.
- 38) A/C.6/69/SR.26 (2014), para. 100.
- 39) A/C.6/69/SR.26 (2014), para. 109.
- 40) A/C.6/69/SR.27 (2014), para. 8.
- 41) A/C.6/69/SR.27 (2014), para. 14.
- 42) A/C.6/69/SR.27 (2014), para. 34.
- 43) A/C.6/69/SR.27 (2014), para. 65.
- 44) A/C.6/70/SR.22 (2015), para. 48; A/C.6/71/SR.21 (2016), para. 14.
- 45) A/C.6/70/SR.23 (2015), para. 24; A/C.6/71/SR.24 (2016), para. 10.
- 46) A/C.6/70/SR.23 (2015), para. 39; A/C.6/71/SR.22 (2016), para. 34.
- 47) A/C.6/70/SR.22 (2015), para. 108.

- 48) A/C.6/70/SR.23 (2015), para. 15; A/C.6/71/SR.22 (2016), para. 50.
- 49) A/C.6/70/SR.23 (2015), para. 2.
- 50) A/C.6/69/SR.27 (2014), para. 70.
- 51) A/C.6/70/SR.21 (2015), para. 84; A/C.6/71/SR.21 (2016), para. 137; A/C.6/73/SR.21 (2018), para. 30.
- 52) A/C.6/71/SR.22 (2016), para. 44.
- 53) On the other hand, some States indicated the possibility of a different approach. The Greek delegation, while admitting that the two-element approach was generally applicable, stated that 'the variations in the relative weight of the two elements in some specific fields of international law, such as human rights law, should be further analysed'. A/C.6/69/SR.26 (2014), para. 29. This possibility of the variations was also indicated by Portugal (A/C.6/69/SR.26 (2014), para. 2; A/C.6/70/SR.22 (2015), para. 56), Poland (A/C.6/69/SR.26 (2014), para. 56), and Romania (A/C.6/69/SR.26 (2014), para. 83).
- 54) A/C.6/71/SR.21 (2016), para. 75.
- 55) A/C.6/69/SR.20 (2014), para. 28. *See also* A/C.6/73/SR.20 (2018), para. 66.
- 56) A/C.6/71/SR.20 (2016), para. 65.
- 57) A/C.6/71/SR.24 (2016), para. 17. Moreover, to facilitate the investigation of the practice of developing countries, India proposed: 'developing States should receive encouragement and assistance in producing digests of their State practice, including case law and statements before international and regional forums'. A/C.6/69/SR.26 (2014), para. 109. For the almost same statement by India, A/C.6/70/SR.21 (2015), para. 63.
- 58) A/C.6/71/SR.21 (2016), paras. 129-130. Sudan supported this statement. A/C.6/71/SR.21 (2016), para. 139.
- 59) A/CN.4/716 (2018), p. 31. For the China's same view, *see* A/C.6/69/SR.20 (2014), para. 28.
- 60) A/C.6/69/SR.25 (2014), para. 82.
- 61) A/C.6/69/SR.26 (2014), para. 51; A/CN.4/716 (2018), p. 33.
- 62) A/C.6/69/SR.27 (2014), para. 16; A/CN.4/716 (2018), pp. 34-35.
- 63) A/C.6/73/SR.23 (2018), para. 12. Paragraph 4 of the commentary to Conclusion 8 also says: "the term "specially affected States" should not be taken to refer to the relative power of States". Report of the ILC, *supra* note 12, p. 137.
- 64) A/C.6/69/SR.27 (2014), para. 40.
- 65) A/C.6/69/SR.27 (2014), para. 66.
- 66) A/C.6/69/SR.26 (2014), para. 117.
- 67) A/C.6/69/SR.27 (2014), para. 72.
- 68) Supportive countries include Austria (A/C.6/69/SR.25 (2014), para. 107), and Spain (A/C.6/70/SR.22 (2015), para. 91). Poland (A/C.6/69/SR.26 (2014), para. 57) and Greece (A/C.6/70/SR.20 (2015), para. 43) admit the possibility that the conduct of non-State actors except international organizations might be counted as practice. Negative opinions include those of Turkey (A/C.6/70/SR.22 (2015), para. 108), and the US (A/CN.4/716 (2018), pp. 18-19). Japan (A/C.6/69/SR.26 (2014), para. 75), and Germany (A/C.6/69/SR.26 (2014), para. 79) expressed cautious but not negative opinions.
- 69) A/C.6/70/SR.22 (2015), para. 36. *See also* A/C.6/71/SR.20 (2016), paras. 56-57; A/CN.4/716 (2018), pp. 10, 18-23; A/C.6/73/SR.29 (2018), paras. 18, 20.
- 70) A/C.6/69/SR.27 (2014), para. 44.
- 71) A/C.6/71/SR.22 (2016), para. 39; A/CN.4/716 (2018), p. 15. However, after the ILC adopted the draft conclusions, Israel changed its position into express conditional affirmation. A/C.6/73/SR.23 (2018), para. 23.
- 72) A/C.6/70/SR.22 (2015), para. 50; A/C.6/71/SR.21 (2016), para. 16.
- 73) A/C.6/71/SR.22 (2016), para. 50.
- 74) A/C.6/69/SR.25 (2014), para. 93.
- 75) A/C.6/69/SR.27 (2014), para. 9; A/C.6/70/SR.23 (2015), para. 61; A/C.6/71/SR.23 (2016), para. 15; A/C.6/73/SR.24 (2018), para. 24.
- 76) A/C.6/70/SR.21 (2015), para. 27. *See also* A/CN.4/716 (2018), p. 23.
- 77) A/C.6/70/SR.23 (2015), para. 25.
- 78) A/C.6/71/SR.22 (2016), para. 22. Cf. A/C.6/70/SR.21 (2015), para. 49.
- 79) A/CN.4/716 (2018), p. 18. *See also* A/C.6/69/SR.26 (2014), para. 65; A/C.6/71/SR.22 (2016), para. 40.
- 80) A/C.6/69/SR.22 (2014), para. 30.
- 81) A/C.6/69/SR.26 (2014), para. 102.
- 82) A/CN.4/716 (2018), p. 13. *See also* A/C.6/69/SR.25 (2014), para. 106.
- 83) The observer for the Council of Europe also stated that practice developed within the framework of an

- international organization could be useful in the identification of CIL. A/C.6/71/SR.24 (2016), para. 20. On the other hand, the Netherlands, while admitting the role of international organizations in the development of CIL, was concerned about how the *opinio juris* of international organizations was established. A/C.6/69/SR.26 (2014), para. 50.
- 84) A/C.6/70/SR.23 (2015), para. 34.
- 85) For the same view, see Paragraph 6 of the commentary to Conclusion 4. Report of the ILC, *supra* note 12, p. 131.
- 86) A/C.6/69/SR.25 (2014), para. 130.
- 87) A/C.6/69/SR.26 (2014), para. 3.
- 88) A/C.6/69/SR.26 (2014), para. 85; A/C.6/71/SR.21 (2016), para. 63.
- 89) A/C.6/70/SR.23 (2015), para. 70.
- 90) A/C.6/73/SR.21 (2018), para. 55.
- 91) A/C.6/70/SR.19 (2015), para. 83. See also A/C.6/69/SR.25 (2014), para. 79; A/C.6/71/SR.20 (2016), para. 45; A/C.6/73/SR.20 (2018), para. 49.
- 92) See also Paragraph 7 of the commentary to Conclusion 4. Report of the ILC, *supra* note 12, p. 131.
- 93) A/C.6/73/SR.21 (2018), para. 105. For the similar opinion of Argentina, see A/C.6/71/SR.22 (2016), para. 75.
- 94) A/C.6/69/SR.20 (2014), para. 42.
- 95) A/C.6/73/SR.21 (2018), para. 31.
- 96) A/C.6/69/SR.23 (2014), para. 88.
- 97) A/C.6/69/SR.22 (2014), para. 31.
- 98) Germany also welcomed the specific reference to the EU in the commentary to Conclusion 4.2. A/C.6/71/SR.21 (2016), para. 116.
- 99) A/CN.4/716 (2018), p. 17.
- 100) A/C.6/69/SR.25 (2014), para. 129; A/C.6/70/SR.20 (2015), para. 16.
- 101) A/C.6/71/SR.24 (2016), para. 11.
- 102) A/C.6/69/SR.26 (2014), para. 29; A/C.6/71/SR.22 (2016), paras. 7–8.
- 103) A/C.6/70/SR.21 (2015), para. 71.
- 104) A/C.6/71/SR.21 (2016), para. 27. See also A/C.6/70/SR.22 (2015), para. 101.
- 105) A/C.6/71/SR.21 (2016), para. 100.
- 106) A/C.6/71/SR.22 (2016), para. 24.
- 107) A/C.6/71/SR.22 (2016), para. 34. See also A/C.6/70/SR.23 (2015), para. 40.
- 108) A/C.6/71/SR.22 (2016), para. 75.
- 109) A/CN.4/716 (2018), p. 24.
- 110) A/CN.4/716 (2018), p. 26.
- 111) A/CN.4/716 (2018), p. 26.
- 112) A/CN.4/716 (2018), p. 27.
- 113) A/CN.4/716 (2018), p. 28.
- 114) A/C.6/73/SR.21 (2018), para. 56.
- 115) According to Paragraph 3 of the commentary to Conclusion 6, the words ‘under certain circumstances’ implies that the State in question needs to be conscious of refraining from acting, and it cannot simply be assumed that abstention from acting is deliberate. Report of the ILC, *supra* note 12, p. 133. Yet, the view that only deliberate or conscious inaction may count as practice might confuse the concept of practice with that of *opinio juris*, since we need to consider a psychological element in the context of practice. This confusion appears to be what happened with Romania (A/C.6/69/SR.26 (2014), para. 84; A/C.6/70/SR.21 (2015), para. 75), Israel (A/CN.4/716 (2018), p. 24), and El Salvador (A/C.6/73/SR.24 (2018), para. 36).
- 116) A/C.6/69/SR.26 (2014), para. 48. This view is shared by Israel. A/CN.4/716 (2018), pp. 11–12, 25.
- 117) A/C.6/69/SR.23 (2014), para. 88.
- 118) A/C.6/69/SR.25 (2014), para. 92.
- 119) A/C.6/69/SR.27 (2014), para. 38. This cautious attitude appears in Paragraph 5 of the commentary to Conclusion 3. Report of the ILC, *supra* note 12, p. 128.
- 120) A/CN.4/716 (2018), p. 29.
- 121) A/C.6/69/SR.26 (2014), para. 49.
- 122) A/C.6/70/SR.23 (2015), para. 65.
- 123) A/C.6/69/SR.20 (2014), para. 43.

- 124) A/C.6/69/SR.26 (2014), para. 59.
- 125) A/CN.4/716 (2018), pp. 6, 25.
- 126) A/CN.4/716 (2018), p. 26.
- 127) See Paragraph 6 of the commentary to Conclusion 6. Report of the ILC, *supra* note 12, p. 134.
- 128) A/CN.4/716 (2018), pp. 23, 43.
- 129) A/C.6/71/SR.21 (2016), para. 106.
- 130) Report of the ILC, *supra* note 12, p. 133.
- 131) A/C.6/71/SR.21 (2016), para. 99.
- 132) A/C.6/69/SR.25 (2014), para. 92.
- 133) A/CN.4/716 (2018), p. 23.
- 134) A/C.6/73/SR.24 (2018), para. 25.
- 135) A/C.6/71/SR.21 (2016), para. 138.
- 136) A/C.6/69/SR.26 (2014), para. 47.
- 137) A/C.6/71/SR.24 (2016), para. 18. For the same opinion of India, *see* A/C.6/70/SR.21 (2015), para. 64.
- 138) Kirgis, *supra* note 13, p. 149; Mendelson, *supra* note 7, pp. 289-291, 293.
- 139) See Paragraph 7 of the commentary of Conclusion 3. Report of the ILC, *supra* note 12, p. 129.
- 140) A/C.6/69/SR.27 (2014), para. 42.
- 141) According to Paragraph 8 of the commentary to Conclusion 10, failure to react to another State's practice may serve evidence of *opinio juris* when two requirements are satisfied: first, a reaction to the practice would have been called for (e.g. where the practice affects the interests or rights of the State failing to act); second, the State concerned must have had knowledge of the practice (which includes circumstances where, because of the publicity given to the practice, it must be assumed that the State had such knowledge), and it must have had sufficient time and ability to act. Report of the ILC, *supra* note 12, p. 142.
- 142) A/C.6/70/SR.23 (2015), para. 62.
- 143) A/CN.4/716 (2018), p. 41.
- 144) A/C.6/73/SR.21 (2018), para. 6.
- 145) A/C.6/70/SR.21 (2015), para. 38. For the similarly cautious view of the Netherlands, *see* A/CN.4/716 (2018), p. 41.
- 146) A/C.6/70/SR.21 (2015), para. 85. For Sudan's similar view, *see* A/C.6/73/SR.21 (2018), para. 32.
- 147) A/C.6/70/SR.21 (2015), para. 90.
- 148) A/C.6/70/SR.22 (2015), para. 49. For Australia's similarly cautious view, *see* A/C.6/71/SR.21 (2016), para. 17.
- 149) A/C.6/70/SR.22 (2015), para. 125.
- 150) A/C.6/70/SR.22 (2015), para. 83.
- 151) A/C.6/70/SR.23 (2015), para. 3.
- 152) A/C.6/71/SR.20 (2016), para. 67.
- 153) A/C.6/71/SR.21 (2016), para. 8. For the Czech Republic's similar concern regarding Conclusion 10.3, *see* A/CN.4/716 (2018), p. 39; A/C.6/73/SR.21 (2018), para. 13.
- 154) A/C.6/71/SR.21 (2016), para. 55.
- 155) A/CN.4/716 (2018), pp. 39-40. For Israel's similar view, *see* A/C.6/73/SR.23 (2018), para. 24.
- 156) A/CN.4/716 (2018), p. 42.
- 157) A/C.6/73/SR.22 (2018), para. 29.
- 158) Choi & Gulati, *supra* note 4, p. 135; Petersen, *supra* note 4, p. 368.
- 159) A/C.6/70/SR.22 (2015), para. 69.
- 160) A/C.6/70/SR.23 (2015), para. 41.
- 161) A/CN.4/716 (2018), p. 45.
- 162) A/C.6/73/SR.21 (2018), para. 90.
- 163) A/C.6/69/SR.26 (2014), para. 31.
- 164) A/C.6/71/SR.22 (2016), para. 31.
- 165) The observer for the Council of Europe also expressed an affirmative opinion. A/C.6/73/SR.24 (2018), para. 58.
- 166) A/C.6/73/SR.24 (2018), para. 27. As the same view of Iran, *see* A/C.6/71/SR.23 (2016), para. 15.
- 167) A/C.6/70/SR.22 (2015), para. 109.
- 168) A/C.6/71/SR.22 (2016), para. 50.
- 169) A/CN.4/716 (2018), p. 48.

- 170) A/C.6/70/SR.22 (2015), para. 127.
- 171) A/C.6/71/SR.24 (2016), para. 10.
- 172) A/C.6/69/SR.27 (2014), para. 9.
- 173) A/C.6/73/SR.21 (2018), para. 105.
- 174) A/C.6/71/SR.23 (2016), para. 30.
- 175) A/C.6/71/SR.23 (2016), para. 41.
- 176) A/C.6/71/SR.21 (2016), para. 57.
- 177) Paragraph 2 of the commentary to Conclusion 12 also says that special attention should be paid to resolution of the UN General Assembly. Report of the ILC, *supra* note 12, p. 147.
- 178) A/C.6/69/SR.26 (2014), para. 31.
- 179) A/C.6/73/SR.21 (2018), para. 57.
- 180) A/C.6/73/SR.21 (2018), para. 98.
- 181) A/C.6/73/SR.24 (2018), para. 28.
- 182) A/C.6/70/SR.22 (2015), para. 127.
- 183) A/C.6/71/SR.21 (2016), para. 58.
- 184) A/CN.4/716 (2018), p. 4.
- 185) A/C.6/69/SR.25 (2014), para. 83. As the same view of Israel, *see* A/C.6/70/SR.21 (2015), para. 72.
- 186) A/CN.4/716 (2018), p. 50.
- 187) A/C.6/70/SR.22 (2015), para. 93.
- 188) A/C.6/71/SR.20 (2016), para. 68.
- 189) A/C.6/70/SR.23 (2015), para. 16. As the same view of Vietnam, *see* A/C.6/71/SR.22 (2016), para. 51.
- 190) According to Paragraph 1 of the commentary to Conclusion 13 and Paragraph 6 of the commentary to Conclusion 6, decisions of national courts may serve a dual role: first, practice as well as evidence of *opinio juris* of the forum State, and second, a subsidiary means for determination of CIL. Report of the ILC, *supra* note 12, pp. 134, 149. The Greek delegation however points out that the distinction is not obvious and is difficult to implement in practice. A/C.6/71/SR.22 (2016), para. 9. In fact, the Israeli delegation, when it was going to make a statement on the latter rule, acknowledged the former role, saying that national judicial decisions were to be treated as evidence of States' beliefs in regard to existing international law. A/C.6/70/SR.21 (2015), para. 72.
- 191) *See also* Paragraph 7 of the commentary to Conclusion 13, Report of the ILC, *supra* note 12, p. 150.
- 192) A/C.6/73/SR.24 (2018), para. 28.
- 193) For the criticism from academics, e.g., Jonathan I. Charney, 'The Persistent Objector Rule and the Development of Customary International Law', *British Yearbook of International Law*, Vol. 56 (1985), pp. 1-24; Akiho Shibata, [柴田明穂] 'The Doctrine of "Persistent Objector" Reconsidered: Towards a Theory of Legitimate Process in International Law-Making' [「一貫した反対国」の法理再考], *Okayama Law Journal* [岡山大学法学会雑誌], Vol. 46, No. 2 (1997), pp.111-183.
- 194) A/C.6/70/SR.23 (2015), para. 54. For the same view of South Korea, *see* A/C.6/71/SR.23 (2016), para. 12; A/CN.4/716 (2018), p. 55.
- 195) A/C.6/71/SR.22 (2016), para. 53; A/C.6/73/SR.23 (2018), paras. 43, 45-46.
- 196) A/C.6/73/SR.20 (2018), para. 91.
- 197) A/C.6/73/SR.22 (2018), para. 30.
- 198) A/C.6/70/SR.23 (2015), para. 66.
- 199) A/C.6/70/SR.23 (2015), para. 28. For the same view of Indonesia, *see* A/C.6/71/SR.24 (2016), para. 11; A/C.6/73/SR.24 (2018), para. 63.
- 200) A/C.6/70/SR.21 (2015), para. 40. For the same view of the Netherlands, *see* A/CN.4/716 (2018), p. 54. Given the essentially consensual nature of CIL, in the Netherlands' view, a State has no obligation to maintain its objection persistently, once the State make it sufficiently clear that it does not wish to be bound by an emerging customary rule. This view is shared by Russia (A/C.6/71/SR.21 (2016), para. 59), China (A/CN.4/716 (2018), p. 51), Israel (A/CN.4/716 (2018), p. 53), and Iran (A/C.6/73/SR.24 (2018), para. 29). *See also* Paragraph 9 of the commentary to Conclusion 15. Report of the ILC, *supra* note 12, pp. 153-154.
- 201) A/C.6/69/SR.27 (2014), para. 16.
- 202) A/C.6/70/SR.21 (2015), para. 58; A/CN.4/716 (2018), p. 55.
- 203) A/C.6/70/SR.21 (2015), para. 72.
- 204) A/C.6/70/SR.22 (2015), para. 110; A/C.6/71/SR.21 (2016), para. 23.

- 205) A/C.6/70/SR.23 (2015), para. 42.
- 206) A/C.6/73/SR.23 (2018), para. 13.
- 207) Nevertheless, while approving of the rule itself, Romania (A/C.6/70/SR.21 (2015), para. 77) and Vietnam (A/C.6/73/SR.24 (2018), para. 6) consider that difficulties might arise when the specific timing for a customary rule to arise is disputable.
- 208) A/C.6/73/SR.21 (2018), para. 66; A/C.6/69/SR.26 (2014), para. 30; A/C.6/70/SR.20 (2015), para. 45; A/C.6/71/SR.22 (2016), paras. 10–11.
- 209) A/C.6/70/SR.22 (2015), para. 58.
- 210) A/C.6/71/SR.21 (2016), para. 102.
- 211) A/C.6/71/SR.21 (2016), para. 111; A/C.6/73/SR.21 (2018), para. 91.
- 212) A/C.6/71/SR.22 (2016), para. 18.
- 213) A/C.6/71/SR.22 (2016), para. 25.
- 214) A/CN.4/716 (2018), p. 52.
- 215) A/CN.4/716 (2018), p. 52.
- 216) A/C.6/70/SR.20 (2015), para. 29.
- 217) A/C.6/70/SR.23 (2015), para. 3.
- 218) *See also* A/CN.4/716 (2018), p. 51 (Belarus).
- 219) A/C.6/70/SR.23 (2015), para. 3.
- 220) A/C.6/69/SR.25 (2014), para. 84.
- 221) A/C.6/70/SR.23 (2015), para. 28.
- 222) A/C.6/70/SR.23 (2015), para. 42.
- 223) A/C.6/71/SR.21 (2016), para. 31; A/C.6/73/SR.24 (2018), para. 37.
- 224) Report of the ILC, *supra* note 12, p. 155.
- 225) A/C.6/71/SR.21 (2016), para. 76.
- 226) A/C.6/70/SR.21 (2015), para. 28.
- 227) A/C.6/71/SR.21 (2016), para. 103.
- 228) A/C.6/73/SR.22 (2018), para. 84.
- 229) A/C.6/70/SR.23 (2015), para. 15.
- 230) A/C.6/71/SR.23 (2016), para. 24; A/C.6/73/SR.21 (2018), para. 25.
- 231) A/CN.4/716 (2018), pp. 56–57; A/C.6/73/SR.21 (2018), para. 13.
- 232) A/CN.4/716 (2018), pp. 58–59.
- 233) A/C.6/70/SR.21 (2015), para. 28. As the same view of Belarus, *see* A/CN.4/716 (2018), p. 56.
- 234) A/C.6/70/SR.21 (2015), para. 77.
- 235) Paragraph 7 of the commentary to Conclusion 16 also supports this view. Report of the ILC, *supra* note 12, p. 156.
- 236) A/C.6/70/SR.22 (2015), para. 59.
- 237) A/C.6/70/SR.23 (2015), para. 15.
- 238) A/CN.4/716 (2018), p. 57.
- 239) A/CN.4/716 (2018), p. 58.
- 240) However, distinguishing between particular CIL that derogates from already established rules and novel particular CIL, Greece states that the standard of proof of the two elements should be even stricter in the former case because such derogations cannot be easily presumed. A/C.6/70/SR.20 (2015), para. 46; A/C.6/71/SR.22 (2016), para. 12; A/C.6/73/SR.21 (2018), para. 67.
- 241) *See* Teruo Komori [小森光夫], ‘The Effect of Treaties upon Third States and the Theory of Customary International Law [条約の第三者効と慣習法の理論] (1)–(3)’, *The Journal of Law and Economics (Chiba University)* [千葉大学法経研究], Vol. 9, pp. 53–95, Vol. 10, pp. 79–138, and Vol. 12, pp. 43–92 (1980–82); Hisakazu Fujita [藤田久一], ‘The Source of Contemporary International Law [現代国際法の法源]’, in Ryuichi Nagao [長尾龍一] *et al.* (eds.), *The Contemporary Legal Philosophy: The Basic Theories of Positive Law* [現代法哲学：実定法の基礎理論] (1983), pp. 292–296; Yasuaki Onuma, *International Law in a Transcivilizational World* (2017), pp. 156–157.
- 242) Thus, Dinstein states that the CIL is formed based on the presence of ‘communal *opinio juris*’ which is distinguished from ‘individual *opinio juris*’. Yoram Dinstein, ‘The Interaction between Customary International Law and Treaties’, *Recueil des cours de l’Académie de droit international de la Haye*, Vol. 322[2006] (2007), p. 297. Byers, who analyses the customary process from the perspective of the international relations theories, defines

opinio juris as a diffuse consensus – a general set of shared understandings among States as to the legal relevance of different kinds of behaviour in different situations. Michael Byers, Custom, *Power and the Power of Rules: International Relations and Customary International Law* (1999), p. 19. See also Brian D. Lepard, 'Concluding Reflections', in Lepard, *supra* note 3, p. 383.

243) Some academics have also criticized abstracting the concept of a State will for explaining the grounds for the universal validity of CIL. E.g., Naoya Kasai-Okuwaki [河西（奥脇）直也], 'The Basis of International Law-Making in the United Nations Legal System [国連法体系における国際立法の存在基盤]', in Yasuaki Onuma [大沼保昭] (ed.), *International Law, the United Nations, and Japan* [国際法、国際連合と日本] (1987), pp. 95, 97, & 112. See also Naoya Kasai-Okuwaki [河西（奥脇）直也], 'Two-Tier Structure of the Consensual Base of Contemporary International Law: Law-Making and Order-Creation in the UN System [現代国際法における合意基盤の二層性]', *St. Paul's Review of Law and Politics* [立教法学], No. 33 (1989), pp. 99-100.

244) Mendelson, *supra* note 7, p. 204.

245) *Ibid.*, pp. 184-186.

246) Original: « La coutume régionale n'est à ses yeux qu'une coutume locale étendue par voie de consentement individuel. ... [I]l faut souligner que cette « coutume » ressemble, à s'y méprendre, à un accord tacite et que sa composante volontariste ... ne reflète guère le concept d'*opinio juris*, qui ne se réduit précisément pas à un consentement de nature contractuelle. Aucune des affaires examinées ne nous livre par conséquent une véritable illustration de la doctrine dominante relative au droit coutumier et ses deux éléments. » Haggemacher, *supra* note 22, pp. 63-64.