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Indeed, inaction may lead to other legal consequences than formation of a custom, such as leading to an *estoppel.* Inaction must also be studied in relation to the relevant rule at state or to a particular right invoked (for example, in the *Malaysia/Singapore dispute,* inaction may have referred to a claim of sovereignty). In this sense, we see that the formula "provided that the circumstances call for some reaction" needs further clarification. We welcome the suggestion made during the debates of the Commission to specify criteria or circumstances under which inaction is relevant.

A supplementary question might be asked in relation to inaction: if a State invokes a general custom against another State, is the participation in the practice (or action) of the latter State necessary? The answer would be no. Thus, the inaction of the latter State may be sufficient for its "acceptance" of the custom

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The judicial decisions and writings are now included in the draft conclusion 14. However, we share the view that they should be treated separately because they have a different weight and significance.

As to the future programme of work on this topic, we hope to have a full set of first reading draft conclusions and commentaries by end of 2016 sessions as envisaged by the Special Rapporteur.

We welcome the considerations related to “particular custom”. We agree that they fall within the scope of this topic. Indeed, we welcome emphasis on the practice and acceptance of *each* of the State concerned (as opposed to the “general” custom).

We consider that the inclusion of the persistent objector rule is correct and reflects a largely accepted view. However, difficulties may arise as to the thin difference between the case when a custom exists, but is not binding for one or more States that objected in a persistent manner, and the situation when a number of “persistent objectors” lead in fact to non-uniform practice. It can be recalled that in both *Asylum* and *Fisheries* cases, the persistent objector argument was subsequent to the non-existence of the custom.

Chapter VII Crimes against humanity

The Romanian delegation would like to commend the International Law Commission for its work on the topic of "*Crimes against humanity*" and would like

provisions of article 7 of the Rome Statute of the International Criminal Court, which enjoy broad consensus.

The Romanian side shares the view taken by the Commission and illustrated in the formulation of Article 4 paragraph 1 letter (a), which covers situations in which a state exercises *de jure* as well as *de facto* jurisdiction.

We are also favorable to the inclusion of the non-derogation provision, inspired by similar provisions of other multilateral treaties.

Chapter VIII

Subsequent agreements and subsequent practice in relation to the interpretation of treaties

Romania congratulates the Special Rapporteur, Mr. Georg Nolte, for the third report, offering a comprehensive analysis of the role of subsequent agreements and subsequent practice in relation to treaties that are constituent instruments of international organizations. We welcome the draft conclusion 11 and the commentaries attached thereto.

Romania would like to emphasize the very thin line between paragraphs 2 and 3 of draft conclusion 11. The difference, that paragraph 2 deals with practice *of States parties*, while paragraph 3 deals with the "own practice" of the organizations "as such", is clarified only after a thorough reading of the commentaries. Therefore, for better clarity, we may ask whether it would be appropriate to place the words "subsequent agreements or subsequent practice

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of the Parties" in paragraph 2, and "practice of the international organization *as such*" in paragraph 3.

On the substance, the difference between the two paragraphs is also very thin. Romania agrees with the idea expressed in paragraph 15 of the commentaries that subsequent practice of States may arise from their reactions to the practice of an international organization. Similarly, we agree to the conclusion in paragraph 34 of the commentaries, that the "own practice" of the organizations is "relevant for the determination of the object and purpose of the treaty, under article 31 (1)". However, the reactions of States to such "own practice" matter. In this sense, Romania suggests that the relation between paragraph 2 and 3, on one side, and draft conclusion 9 paragraph 2, referring to silence that may constitute acceptance, on the other side, should be further explored.

I thank you for your attention.

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