SOME OBSERVATIONS ON THE DRAFT CONCLUSIONS ON IDENTIFICATION OF CUSTOMARY LAW PROVISIONALLY ADOPTED BY THE ILC'S DRAFTING COMMITTEE AT THE SIXTY-SIXTH SESSION (2014)

*Bernard H. Oxman**

This Commission project is a useful one. It rests on exemplary work by the Special Rapporteur. I would hope that brief mention of a few matters that may benefit from further reflection at this stage could be of some assistance as work on this matter continues.

Draft Conclusions 1 and 2

It would be helpful to substitute a different term for the word "existence" in the first and second draft conclusions. The word "existence" does not reflect the distinction between the formation of a rule of customary international law and its continuing effect. The question of formation would appear to be the focus of the current project. Standards appropriate to that question of course apply to the formation of a new rule that modifies or replaces a previous rule. But such standards would have very different consequences if applied to the question of whether a rule of customary international law, that has yet to be modified or replaced by a new rule, remains in effect. One consequence could be a temporal gap of uncertain duration. This in turn might heighten concerns about creation of such gaps that could complicate the work of the Commission on other projects.

Draft Conclusion 4

The uncertainties of customary international law are in tension with the objectives of providing guidance for and constraining the range of discretion of the decision-maker, be it a government, a legislature, or a judge. The tension would be increased significantly were an authoritative articulation of the rules regarding the formation of customary international law to succumb to excessive indeterminacy. The legitimacy of appeals to customary international law could itself be prejudiced.

An example of this difficulty is the inclusion of the word "primarily" in the first paragraph of Draft Conclusion 4. It appears to have two potential meanings. One is as a cross-reference to the special question addressed by paragraph 2. The other is as an open-ended qualification of the basic proposition that rules of customary international law emerge from the practice of states.

As a matter of drafting, no qualifying language in paragraph 1 is required to give effect to paragraph 2. Lawyers and judges would read the two together anyway. Moreover, the point of paragraph 2 would not, in itself, appear to be of sufficient generality to warrant any qualifying signal in paragraph 1. Even if that were not so, the possible need for some signal would not justify the selection of a signal that, whatever the expla-

* *Richard A. Hausler Professor of Law at the University of Miami.*

Originally published online 23 Dec. 2014.

nation in the accompanying commentary, could easily be understood as an open-ended reference to practice on behalf of a wide range of entities other than states.

If, as seems unlikely, the object of including the word "primarily" were indeed to signal open-ended flexibility as to sources of practice, then more detail than that word would be required in the text of the conclusions themselves regarding the nature of those sources, buttressed by analysis in the report sufficient to justify such a proposition.

Quite apart from the question of a cross-reference in paragraph 1, the uncertainty regarding the object of paragraph 2 of Draft Conclusion 4 is itself unsettling. The examples proffered do not support the generalization.

There is no question that the practice of states both within an intergovernmental organization and with respect to the interpretation or application of a rule by an organ of the United Nations or any other organization can be relevant to the formation of a rule of customary law. That matter is addressed in paragraph 2 of Draft Conclusion 6. On the other hand, there is reason for caution in considering the proposition that the practices of individuals entrusted with functions under a treaty should be regarded as relevant as such to the formation of a rule of customary international law binding on states or intergovernmental organizations generally, at least absent adequate state practice in that regard. Were governments to become concerned about the legal impact in other contexts, paragraph 2 could introduce a perverse restraining factor on the exercise of those very functions.

Draft Conclusions 5 and 7

Whatever one's views on the relative importance of the consensual element in the assessment of practice regarding the formation of rules of customary international law, that element as such is not reflected in the reference to different state organs in Draft Conclusions 5 and 7. Rectifying this omission ought not be left exclusively to the general language of Draft Conclusion 3. Is the special role accorded heads of state and government and ministers of foreign affairs in international relations, including but not limited to treaties and other special commitments, to be ignored entirely when it comes to evaluating evidence of acceptance of constraints under customary international law? Is the competence and expertise of a state organ relevant to the weight accorded its practice?

The fact that principles of internal law may preclude the political branches of a state from interfering with the execution of a judicial judgment does not mean that the judgment should necessarily be understood, as a matter of internal or international law, to constitute acceptance by the state of a proposition of customary international law articulated in the opinion apart from execution of the particular judgment. The judgment may be an element of practice, but its weight may depend on subsequent practice in other situations by the legislative, executive, and judicial organs of that state and others. That is what distinguishes the enduring contributions of municipal courts to customary international law.

There are a variety of ways in which this difficulty could be mitigated. A simple step would be the insertion of the words "regarding customary international law" in Draft Conclusion 5 following the reference to the conduct of the state. Among other things, this would make clear that relevant practice does not extend to the large number of situations in which state organs, including courts, are acting only with reference to internal law either because of limitations on their powers under internal law or because the question of customary international law did not arise.

Another helpful change would be the omission of paragraph 2 of Draft Conclusion 7. The basic analytical point is made in paragraph 1 of that Draft Conclusion. Application of paragraph 1 in context may, or may not, lead to the specific outcome indicated in the second paragraph. It is not desirable to emphasize the

permissibility of that specific outcome. Such emphasis increases the risk of unintended inferences, for example, that the decision of a single magistrate may reduce the weight to be accorded the long-standing practice of a foreign ministry, or another competent organ of the state with relevant expertise, or, for that matter, a higher court. It takes little imagination to conjure the mischief that paragraph 2 might work with regard to a complex federally organized state or the European Union.

In place of the current paragraph 2, one might consider adding a statement on the particular weight to be accorded the practice of the highest competent organs of the state and those organs with competence and expertise regarding the rule in question.

Draft Conclusion 8

It is not clear why the reference to consistency dangles at the end of paragraph 1 of Draft Conclusion 8. If the point is that it is consistent practice that must be sufficiently widespread and representative, the wording might be adjusted.

Be that as it may, and independently of the further consideration of the question of specially affected states in the third report, Draft Conclusion 8 would benefit from an indication that the determination of whether state practice is sufficiently widespread and representative varies with the substance of the inquiry. For example, the practice of landlocked and transit states would be of considerable importance in determining whether there is consistent practice regarding landlocked state access to the sea that is sufficiently widespread and representative. On the other hand it is unlikely that the practice of the same states regarding territorial boundaries in lakes and rivers would be a significant part of the contemporary calculus regarding delimitation of overlapping coastal state entitlements to the exclusive economic zone or the continental shelf.