

IDENTIFYING THE RULES FOR IDENTIFYING CUSTOMARY INTERNATIONAL LAW

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Editor's note: This and the following five entries on *AJIL Unbound* are part of a symposium titled “Reflections on Customary International Law and the International Law Commission's Project, ” which will be followed by an open call for submissions.

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The International Law Commission (ILC) decided in 2012 to add to its agenda a new topic on the “identification of customary international law” and to appoint Sir Michael Wood (United Kingdom) as special rapporteur. That project has reached an important point, with a series of Draft Conclusions having been cleared through the Commission's Drafting Committee, and ready for the Commission's provisional approval (together with commentaries) in 2015. As such, now is a propitious time for governments, international organizations, nongovernmental organizations, scholars, and others to weigh in on the merits of these Draft Conclusions, and additional ones that will be developed in 2015–16.

Background to the Topic

As indicated by its title, the topic is not aimed at canvassing the substantive rules of customary international law but, rather, at the rules regarding how such law is formed and identified. According to Wood, the general objectives of the topic are twofold: to provide greater certainty as to the process of customary international law formation, so as to encourage greater acceptance of such law; and to provide practical guidance to judges and lawyers called upon to apply such law, including within national legal systems.

A First Report on the subject issued in 2013 was preliminary in character, scoping out the contours of the project, indicating a basic road map for its completion, arguing in favor of considerable reliance on the jurisprudence of the International Court of Justice, and providing extensive citations to secondary literature. Only now, with a Second Report¹ issued in May 2014 (UN Doc. A/CN.4/672), has Wood hit full stride, advocating over the course of 74 pages that the Commission adopt eleven Draft Conclusions, with more to come next year.

In July 2014, over the course of a week and sitting in plenary, the Commission debated Wood's Second Report (UN Docs. A/CN.4/SR.3222-SR.3227), and then sent the eleven Draft Conclusions to the Commission's Drafting Committee. After two weeks of revisions, a revised set of eight Draft Conclusions emerged, which in the summer of 2015 may be provisionally adopted by the Commission, along with commentaries to be developed by Wood drawing upon the analysis in his Second Report and the debate in the Commission

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¹ Michael Wood, Special Rapporteur, Second Rep. on Identification of Customary International Law, Int'l Law Comm'n, UN Doc. A/CN.4/672 (May 22, 2014).

and beyond. One Draft Conclusion (on definitions) was set aside for the time being as unnecessary. Two Draft Conclusions (on *opinio juris*) were not addressed by the Drafting Committee due to insufficient time. Moreover, Wood will proceed to draft his Third Report for 2015, which will advance additional Draft Conclusions.

As such, there are three matters on which the views of others would help inform the work of the Commission:

- (1) the merit of the eight Draft Conclusions adopted by the Drafting Committee in August 2014, which may be found in English and French at the end of the report² of that Committee's chair (August 7, 2014);
- (2) the merit of the two Draft Conclusions 10 and 11 by Wood (both on *opinio juris*) that have not yet been considered the Drafting Committee, which may be found in all six U.N. languages at the end of Wood's Second Report); and
- (3) whether additional Draft Conclusions are needed on other issues—and, if so, what they should say—such as on: (a) the role of international organizations in the creation or confirmation of such law; (b) the role of other non-State actors; (c) the effects of treaties on the creation or confirmation of customary international law; (d) the role of “specially affected States”; (e) the “persistent objector” rule; (f) the existence of “special” or “regional” customary international law, as well as “bilateral custom”; and (g) the temporal problem with this source of law (including how States can defect from an existing rule so as to create a new rule, while truly believing that the new rule is already “accepted as law”).

These Draft Conclusions are a work-in-progress, but not indefinitely; it is Wood's aim to complete the entire topic, if possible, by 2016.

August 2014 Draft Conclusions

The report of that Drafting Committee's chair, referred to above, provides an excellent overview of the eight Draft Conclusions adopted in August 2014. In summary, Draft Conclusion 1 sets forth the scope of the project, Draft Conclusion 2 maintains that to determine a rule of customary international law it is necessary to ascertain whether there is a general practice accepted as law, and Draft Conclusion 3 provides that when ascertaining those two elements—general practice and *opinio juris*—regard must be had to the overall context and the particular circumstances.

Draft Conclusions 4–8 then focus on the first of these two elements: general practice. Draft Conclusion 4 asserts that it concerns “primarily” the practice of States, but that in “certain cases the practice of international organizations also contributes to the formation or expression of customary international law.” Draft Conclusion 5 indicates that State practice “consists of conduct of the State, whether in the exercise of executive, legislative, judicial or any other functions of the State.” Draft Conclusion 6 maintains that practice may take many forms, including physical acts, verbal acts, and under certain circumstances even inaction. Further, this conclusion provides an illustrative list of forms of State practice, such as diplomatic acts of the State, acts taken by the State in connection with resolutions adopted by international organizations, and decisions of the State's national courts. At the same time, Draft Conclusion 6 notes that there is no predetermined hierarchy as amongst such forms of practice.

² Gilberto Saboia, Chairman of the Drafting Committee, Statement on the Identification of Customary International Law, Int'l Law Comm'n (Aug. 7, 2014).

When assessing State practice, Draft Conclusion 7 provides that account “is to be taken of all available practice of a particular State, which is to be assessed as a whole.” If that practice varies, then “the weight to be given to that practice may be reduced.” Finally, Draft Conclusion 8 asserts that “the relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent,” but that “no particular duration is required.”

Potential Flash Points

There are many issues that can be debated about the proposed Draft Conclusions. Below are a few that have already arisen or will in the near future.

Two-element Approach

One key issue concerns the basic elements of this source of law. Unlike the approach taken by the International Law Association in its 2000 *Statement of Principles Applicable to the Formation of General Customary International Law*,³ which significantly downplayed the role of *opinio juris*, the Commission appears on track to reassert emphatically the traditional two-element approach. Indeed, the very term “*opinio juris*” was thought so important by members of the Commission that the term is now inserted into the articles in all places where Wood originally proposed simply saying “accepted as law.” Paragraphs 21–17 of Wood’s Second Report defends maintaining the traditional view on this issue.

Who’s Practice?

Whose “practice” is relevant to identifying a “general practice” is also of considerable importance. By asserting that “it is primarily the practice of States,” Draft Conclusion 4 preserves the centrality of States in the formation of such law, but does not give them exclusive domain. The same draft conclusion recognizes that in certain cases, the practice of international organizations is relevant, but leaves unstated (as yet) what those circumstances may be. Given that in past ILC projects relating to treaties concluded by international organizations, to immunities of international organizations and their personnel, and to responsibility of international organizations, the ILC has looked to the practice of international organizations to establish the relevant rules, presumably the practice of international organizations is relevant to customary international law that binds international organizations.

Whether and how international organizations may play a role in the formation or expression of customary international law that does not bind them is less clear; one possibility is that such conduct might be “practice” when States have accorded to the international organization specific functions relevant to State rights and obligations (such as the organization serving as a depositary of a treaty); another possibility is that such conduct is not itself “practice” but is conduct that States react to favorably or unfavorably, thereby generating relevant State practice. As for the practice of other non-State actors, Wood notes in paragraph 45 of his Second Report that it

has sometimes been suggested that the conduct of other ‘non-State actors’ such as non-governmental organizations and even individuals, ought to be acknowledged as contributing to the development of customary international law The better view, however, is that, while individuals and non-governmental organizations can indeed “play important roles in the promotion of international law

³ Int’l Law Ass’n, London Conference, 2000, Final Rep. of Comm. on Formation of Customary (General) International Law, *Statement of Principles Applicable to the Formation of General Customary International Law* (2000).

and in its observance” (for example, by encouraging State practice through bringing international law claims in national courts or by being relevant when assessing such practice), their actions are not “practice” for purposes of the formation or evidencing of customary international law. (footnotes omitted)

Paragraphs 43–46 of Wood’s Second Report sets forth various considerations on this issue, to which he will return in greater depth as a part of his Third Report in 2016.

Treaties and Custom

The effect of treaties on the formation or expression of customary international law will also be a focus of Wood’s Third Report. A major multilateral treaty to which all or virtually all States are parties might be said, over time, to generate collateral customary international law, as the International Court found in the 1986 *Nicaragua v. United States* judgment with respect to rules on the use of force embedded in the U.N. Charter. Less clear is under what conditions a major multilateral treaty to which just a large majority of States has adhered can have the effect of generating customary international law binding upon even non-parties. Might a rule arise if those non-parties by indifference or inaction appear to signal acquiescence? Might a rule be blocked if those non-parties appear to have seriously considered and rejected the treaty? If the treaty has an effect in generating customary international law, does that occur only with respect to the “substantive” rules of the treaty but not its procedural provisions, such as acceptance of compulsory dispute settlement?

“Specially Affected States”

Although Wood’s original proposals included a provision that in “assessing practice, due regard is to be given to the practice of States whose interests are specially affected,” he ultimately recommended that the provision be set aside for the time being by the Drafting Committee and dealt with in the commentary. As Wood notes at paragraph 54 of his Second Report, that concept is most famously associated with the International Court’s 1969 *North Sea Continental Shelf* judgment, where the Court considered it particularly relevant to focus on whether adjacent States that had delimited their continental shelves since 1958, had done so in a manner that suggested that the equidistance rule articulated in the relevant 1958 convention had passed into customary international law. Though the concept is grounded in international jurisprudence and the writings of leading publicists, if not carefully delineated it might be perceived as privileging the role of major powers in the formation of customary international law, rather than simply recognizing that, in certain circumstances, the practice of some States may be more germane to an issue than the practice of others.

Conclusion

In some respects, it is remarkable that the ILC, more than a half-century after its creation, is only now seeking to articulate the basic rules for identifying a key source of international law (though it has of course considered aspects of the matter throughout its work, as is well-described in a 2013 Secretariat Memorandum, UN Doc. A/CN.4/659⁴). Part of the delay no doubt relates to the desire to preserve some of the inherent flexibility of this source of law, which for the most part has functioned well without any need for codification. Yet another reason is likely that customary international law, in recent years, has become an important source of law in national legal systems, as national courts grapple with various civil and criminal

⁴ UN Secretariat, *Formation and Evidence of Customary International Law*: Elements in the Previous Work of the International Law Commission that Could Be Particularly Relevant to the Topic, Memorandum by the Secretariat, Int’l Law Comm’n, UN Doc. A/CN.4/659 (Mar. 14, 2013).

matters where custom plays an interstitial if not central role. Yet dispute settlers in national systems may have no background in international law, a type of law that is difficult to access merely through intuition. As such, the ILC's project may be quite timely in providing a concise, accurate, and authoritative statement as to the widely accepted doctrine for this source of law. Yet to succeed, the ILC must reach the right conclusions, and its likelihood of doing so may turn in part on receiving the views of others as to what parts are correct and what parts could be improved.