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WORKING PAPERS

AEL 2016/03
Academy of European Law
Distinguished Lectures of the Academy

Customary International Law and Human Rights

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EUI Working Paper **AEL** 2016/03

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ISSN 1831-4066

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Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
cadmus.eui.eu

Abstract

The lecture addresses the International Law Commission (ILC)'s work on 'Identification of customary international law', with particular reference to human rights law. In 2016, the ILC adopted 16 draft conclusions, with commentaries. Draft conclusion 2 confirms the two-element approach (a general practice; acceptance as law). It is sometimes asserted that rules of human rights are 'special', and that different criteria for the formation and identification of customary international law in this field are thus in order. In particular, it is sometimes suggested that in the field of international human rights law, one element may suffice in constituting customary international law, namely *opinio juris*. But this cannot be the case as long as we are dealing with what properly may be called "customary international law". There may, however, be a difference in the application of the two-element approach. Among other issues discussed are the role of international organizations; the relationship between customary international law and treaties; the effect of resolutions of international organizations; judicial decisions and teachings; the persistent objector; and particular customary international law.

Keywords

Customary international law; human rights; International Law Commission; practice; *opinio juris*; persistent objector.

In this lecture, I shall describe the current work of the International Law Commission (ILC) on the topic ‘Identification of customary international law’, and I shall do so with particular reference to the international law relating to human rights.¹

First, a word about the ILC’s role and working methods, before turning to its current work on the ‘Identification of customary international law’. As you all know, the ILC is a subsidiary organ of the UN General Assembly composed of thirty-four persons “of recognized competence in international law” and mandated, in fulfilment of Article 13, paragraph 1 of the UN Charter, with promoting the progressive development of international law and its codification.² The Commission usually follows a generally defined method of work for the consideration of the topics on its agenda. Such method of work consists in three stages that may be summed up as follows: (1) organization of work and gathering of relevant materials and precedents, as a preliminary step; (2) work up to and including a first reading of draft articles/conclusions (with commentaries) based on proposals submitted by the Special Rapporteur; and (3) work up to and including a second, final reading of the draft articles/conclusions and commentaries.

This is a particularly good moment to see where the current ILC topic of ‘Identification of customary international law’ is heading. On 2 June this year, the Commission, on first reading, adopted a set of 16 draft conclusions that concern the methodology for identifying rules of customary international law and seek to offer practical guidance on how the existence (or non-existence) of rules of customary international law, and their content, are to be determined.³ The aim is to complete the topic, if possible, in 2018.

The draft conclusions are to be read together with the commentaries. Although not part of the draft conclusions *per se*, the draft commentaries are not separable from them and should be read in combination with them: they provide more detailed explanation on each conclusion as well as the context, wording and interrelation between the conclusions. The draft commentaries often provide concrete examples supporting the points made.

The fourth report on the topic,⁴ presented to the Commission in May 2016, envisages three parts to the final output of the Commission on this topic. First, the conclusions and commentaries; second, a bibliography on the topic; and, finally, a new study of ways and means for making the evidence of customary international law more readily available. So far as the study is concerned, the Commission has requested its Secretariat to prepare a memorandum, which will survey the present state of the evidence of customary international law and make suggestions for its improvement. The Commission looked into this matter some sixty-five years ago,⁵ and thinks revisiting it is appropriate given the “enormous proliferation of the available material on the many aspects of international law and relations ... the rising costs associated with its accumulation, storage, and distribution ... [and the] revolutionary developments in global information technology”.⁶

¹ Since this lecture was given on 27 June 2016, the International Law Commission adopted the 16 draft conclusions on ‘Identification of customary international law’, together with their accompanying commentaries, on 5 and 8 August 2016. They may be found in the ILC’s Report on the Work of its Sixty-Eighth Session (2016), UN Doc. A/71/10, at 79-117, available online at <http://legal.un.org/ilc/reports/2016/>. The talk has been slightly updated to take this into account.

² *Statute of the International Law Commission* (1947, as amended).

³ See UN Doc. A/CN.4/L.872. See *supra* note 1 for the draft conclusions and accompanying commentaries.

⁴ See *Fourth report on identification of customary international law by Michael Wood, Special Rapporteur*, UN Doc. A/CN.4/695 and Add.1.

⁵ See *ibid.*, at paras. 38-44.

⁶ To borrow the words of A. Watts, *The International Law Commission 1949-1998*, Vol. III (Oxford University Press, 1999) 2106.

I will first say a few words about the role of customary international law in the field of international human rights law.

As a general matter, customary international law continues to play a significant role even in highly codified fields.⁷ In both codified and uncodified fields, it has proven itself able to adapt to the ways of modern international life, and it is of course enshrined in Article 38(1) of the Statute of the International Court of Justice, a provision that is widely regarded as setting out the sources of international law and that is currently binding as a treaty provision on 193 States. Customary international law features regularly in the everyday practice of international law; it is frequently invoked before international courts and tribunals, particularly in inter-State disputes, but also, for example, in investment cases. In Meron's words, customary international law "now comes up in almost every international court and tribunal, in almost every case, and frequently has an impact on the outcome."⁸ Among recent cases that have turned, at least in part, on custom, one may find the *Diallo* case, the *Jurisdictional Immunities of the State* case brought by Germany against Italy, and *Territorial and Maritime Dispute (Nicaragua v. Colombia)*.⁹ Other international courts and tribunals, too—even those that principally apply a particular treaty, such as the International Tribunal for the Law of the Sea—frequently resort to customary rules.

Customary international law is increasingly raised in national courts. Recent examples before the English courts include the *Khurts Bat*, *Serdar Mohammad*, and *Freedom and Justice Party* cases.¹⁰ Many domestic constitutional orders recognize customary international law as a source of applicable law. It also regularly features in legal opinions by government legal advisers, diplomatic correspondence, and official statements by States.

It is often considered that international human rights law is essentially treaty law. It is of course the case that there is an impressive body of treaty law in the field, at both the universal and the regional level. And this treaty law is often supported by judicial, quasi-judicial and supervisory bodies. Nevertheless, unwritten law continues to play an important role. There are several ways in which the rules of customary international law are relevant for international human rights law. They include the following.

First, and most obviously, the customary international law of human rights applies to and between States not party to the human rights treaties, as well as between Parties to the treaties and non-parties. While some human rights treaties have widespread participation, few are truly universal. Even the two 1966 Covenants, on economic, social and cultural rights and on civil and political rights, have only 164 and 168 parties, respectively, which means that some 25 to 30 members of the UN are not parties. And the 2006 International Convention for the Protection of All Persons from Enforced Disappearance still has only 53 parties.¹¹ Here, of course, lies the great appeal of customary international law for many of those advocating for human rights: if a rule is said to belong to

⁷ See also O. Sender, M. Wood, 'Custom's Bright Future: The Continuing Importance of Customary International Law', in C. Bradley (ed.), *Custom's Bright Future: International Law in a Changing World* (Cambridge University Press, 2016) 360-369.

⁸ Theodor Meron, 'Customary Humanitarian Law: From the Academy to the Courtroom', in *The Making of International Criminal Justice: A View from the Bench* (Oxford University Press, 2011) 29. See also Theodor Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law', 90 *American Journal of International Law* (1996) 238-249.

⁹ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, *I.C.J. Reports 2007*, p. 582, at pp. 614-616, paras. 87-93; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, *I.C.J. Reports 2012*, p. 99, at pp. 122-145, paras. 54-107; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports 2012*, p. 624, at pp. 666, 673, paras. 114, 137.

¹⁰ See, respectively, [2011] EWHC 2029 (Admin); [2014] EWHC 1369 (QB) (appeal pending before the UK Supreme Court); [2016] EWHC 2010 (Admin).

¹¹ As of 16 November 2016.

customary international law, it is binding on all whether or not they have expressly consented to it by joining the relevant treaty regime.¹²

Second, treaties may themselves refer to rules of customary international law; and such rules may be taken into account in treaty interpretation and application, be they ‘primary’ rules (such as those on the law enforcement measures or on the use of force or on immunities), or ‘secondary’ rules (such as those on State responsibility and the law of treaties). Such rules may be taken into account when interpreting treaties under article 31.3(c) of the Vienna Convention on the Law of Treaties, as “relevant rules of international law”.

Third, in so far as human rights rules at issue may apply to international (intergovernmental) organizations, they will usually apply as customary international law. International financial organizations funding development projects such as the construction of dams or mass transit systems, for example, may wish to know whether a right to resettlement exists as a matter of customary international law.

Fourth, by virtue of the intertemporal law, customary law also applies to acts or matters that took place before the States concerned became parties to the treaties concerned. This may be significant in cases before courts and tribunals dealing with past events.

Fifth, matters *not* regulated by the treaties in question may be governed by rules of customary international law. Such matters as State succession to the application of human rights treaties or their application in time of armed conflict are likely to be governed by customary international law.

And finally, the potential parallel existence, applicable in relations between the same States, of customary international law and human rights treaties should be noted. Even between States Parties to multilateral conventions, customary international law may run in parallel.¹³

Some, however, have suggested that there is really no such thing as a customary international law of human rights, not even deriving from widely accepted treaties. Thirlway, for example, and to some extent Schachter before him, seem to have taken the position that since human rights are a matter between a State and those subject to its jurisdiction, and not really a matter between States, there cannot be a practice “in the traditional sense”, that is, of the kind needed for identifying a rule of CIL.¹⁴ With respect, the premises for such an argument seem wrong; human right obligations do apply between States, even if they concern individuals. And as with other fields of international law, the relevant practice does not have to be ‘on the ground’ or on the international plane; it may well be verbal or internal (e.g., legislation, decisions of national courts, etc.).

Others simply consider that rules of human rights are ‘special’, or of ‘a special nature’, and say that different criteria for the formation and identification of customary international law in this field are thus in order and may be justified.¹⁵ Most often no express explanation is provided as to why, precisely, human rights are ‘special’, and it sometimes seems that ‘special’ means no more than ‘very

¹² This is subject to the possible application of the persistent objector rule. See also R.B. Lillich, ‘The Growing Importance of Customary International Human Rights Law’, 25 *Georgia Journal of International & Comparative Law* (1995/96) 1, 28 (“As long as there is less than universal acceptance of the major human rights treaties—which, after all, do not form a comprehensive code of international human right law and, moreover, permit reservations and allow derogations and limitations to their coverage—there will be a need for a customary international law of human rights, to be used both on the international level and in the domestic context.”).

¹³ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14, at pp. 93-96, paras. 174-179; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of the International Court of Justice, 3 February 2015, para. 88.

¹⁴ H. Thirlway ‘Human Rights in Customary Law: An Attempt to Define Some of the Issues’, 28 *Leiden Journal of International Law* (2015) 495, 497-500; O. Schachter, *International Law in Theory and Practice* (Springer, 1991).

¹⁵ See, for example, L. Henkin, ‘Human Rights and State “Sovereignty”’, 25 *Georgia Journal of International & Comparative Law* (1996) 31, 35-39.

important'. It is worth asking, in this context, whether on the international plane, which is indeed different to any domestic setting, human rights are actually more 'special' than, for example, the rules on the use of force?

Equally, the "human rightists", to use Professor Pellet's expression,¹⁶ sometimes seem to be somewhat uncomfortable with customary international law. They apparently consider it important, and, as said, potentially very useful, but in its 'traditional' garb not really appropriate for their particular field of international law, since in reality often the practice of many States is what they seek to end rather than recognize as law. To them, "theoretical problems inherent in the concept of custom that inhibit its ability to address human rights issues".¹⁷ So they either look to something other than customary international law, for example, 'general international law' (an obscure term that is best avoided unless what is meant in a particular context is clearly explained) or an expanded notion of 'general principles of law'; or they try all kinds of arguments, unconvincing arguments, to avoid looking for 'a general practice accepted as law'. Sometimes they do so by relying on various international documents, for example UNGA resolutions and declarations, as exclusive evidence for customary international law, arguing that these are codifications or embodiments of customary international law without further analysis. Sometimes they also suggest that "if there is a customary law of human rights, its processes of formation, while involving both a factual and a conceptual element, are not necessarily identical with those of [other customary international law]".¹⁸ Thus they advocate some 'modern' version of customary international law that is not really customary international law at all and in fact "does fundamental and irreparable violence to the very concept".¹⁹ For instance, they may seek to undermine the primacy of State practice by suggesting that transnational and non-governmental groups ought to have a legal voice in the creation of customary rules.²⁰ Or they follow a sliding scale approach by which, most often, where there appears to be a strong preference for a rule (a nascent *opinio juris*, perhaps), not much (if any) actual practice in support of such conviction is necessary.²¹

This discomfort with customary international law perhaps results from the fact that many human rights lawyers are campaigners, pursuing a particular cause, seeking to change and push the frontiers of the law. As I have said, where States are reluctant to adopt or become parties to treaties, then customary international law may seem like a good alternative. That is a perfectly legitimate viewpoint, particularly when it is openly acknowledged. But the case they make would be more robust if they sought to apply the standard approach to the identification of customary international law, which is perfectly possible in the field of human rights just as it is in all other fields of international law.

Why did the International Law Commission take up the topic 'Identification of customary international law'? Because there was felt to be a need for some authoritative guidance on the process of identifying customary international law, for all those who are called upon to apply it – not least given the considerable differences of approach amongst writers, many of them indeed writing in the field of human rights. At a time of increasing references to customary international law by numerous

¹⁶ A. Pellet, 'Human Rightism' and International Law Gilberto Amado Lecture, 18 July 2000, <http://pellet.actu.com/wp-content/uploads/2016/02/PELLET-2000-Droit-de-l'homme-et-DI.pdf>, also in 10 *Italian Yearbook of International Law* (2000) 3-16.

¹⁷ I.R. Gunning, 'Modernizing Customary International Law: The Challenge of Human Rights', 31 *Virginia Journal of International Law* (1991) 211, 212.

¹⁸ Thirlway, *supra* note 13, at pp. 499-500.

¹⁹ To borrow the words of the question posted in this context by P. Alston and B. Simma, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', 12 *Australian Yearbook of International Law* (1988-1989) 82, 83.

²⁰ Gunning, *supra* note 16, at 247.

²¹ See F.L. Kirgis, 'Custom on a Sliding Scale', 81 *American Journal of International Law* (1987) 146-151.

legal actors it was thought that the Commission, given its role based in the UN Charter, its privileged relationship with States through the UN General Assembly, and its composition and working methods, might be well placed to offer such guidance.

In deciding to take up the topic, the Commission was well aware of the difficulties inherent in an attempt to “codify the relatively flexible process by which rules of customary international law are formed”.²² But it was also aware of the need for authoritative guidance on how to identify rules of customary international law in concrete cases, especially at a time when “questions of customary international law increasingly fall to be dealt with by those who may not be international law specialists, such as those working in the domestic courts of many countries, those in government Ministries other than Ministries for Foreign Affairs, and those working for non-governmental organizations”.²³

Members of the Commission are agreed that the outcome of the project should be of an essentially practical nature. It is not the aim to seek to resolve largely theoretical controversies. In the words of the Chinese member, “[c]ustomary international law itself is an important issue of international law that is quite controversial...the importance of the topic lies with providing unified and clear guiding principles to international law practitioners, for them to identify and apply customary international law in their practice”.²⁴

In approaching this topic, the first place for the Commission to look for guidance in determining how to identify customary international law was Article 38(1)(b) of the Statute of the ICJ, which in a sense tells you all you need to know, with its now century-old formula: “international custom, as evidence of a general practice accepted as law”. Then there is what States do and say about the methodology, although that is often hard to come by – at least until the Commission commenced work on the topic. Fortunately there is considerable guidance in decisions of the International Court of Justice and – perhaps to a lesser extent – in those of other international courts and tribunals as well as regional courts. We have of course looked at national courts as well, studying carefully the decisions of various courts. And then there is much to be learnt from certain writings on the subject. The Commission’s own past work has shed a good deal of light on the matter, as described in an excellent memorandum by its Secretariat.²⁵

I shall now turn to the recently adopted draft conclusions 1 to 16, and try to highlight aspects that may be particularly significant, indeed helpful, in the field of human rights.

I begin by drawing attention to **draft conclusion 2**, according to which “[t]o 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*).”

The reference to determining the ‘existence and content’ of rules of customary international law reflects the fact that while often the need is to identify both the existence and the content of a rule, in some cases it is accepted that the rule exists but its precise scope is disputed. This may be the case, for

²² Report of the Study Group on the Future Work of the International Law Commission, in M.R. Anderson et al (eds.), *The International Law Commission and the Future of International Law* (British Institute of International and Comparative Law, 1998), 42.

²³ Report of the International Law Commission on its Sixty-Third Session (2011), UN Doc. A/66/10, Annex A, para.3.

²⁴ Summary record of the Commission’s 3185th meeting (24 July 2013), UN Doc. A/CN.4/SR.3185.

²⁵ *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* (A/CN.4/659).

example, where there is disagreement as to whether a particular formulation (usually found in written texts such as treaties or resolutions) does in fact equate to an existing rule of customary international law; think, for example, about the issue of freedom from arbitrary detention, where the International Covenant on Civil and Political Rights and the European Convention on Human Rights formulations are apparently quite different. Instances where the precise content may be disputed also include cases where the question arises whether there are exceptions to a recognized rule of customary international law.

Draft conclusion 2 confirms the two-element approach, which has also been widely endorsed by States in the Sixth Committee of the General Assembly and in abundant international practice. That is already a significant conclusion to be drawn from the Commission's work. Significant, even if not particularly surprising, perhaps. It is important because, as I have said, in recent years there have been calls to abandon the two-element approach, essentially, to abandon custom as we know it. Several writers have called for a reduced role for "acceptance as law", arguing that in most cases widespread and consistent State practice alone is sufficient for constructing customary international law. Others, particularly those working in the field of human rights, have claimed the opposite – reducing the practice requirement to a minimum and concentrating instead on the *opinio juris* element. Yet the two-element approach has withstood both political pressures and the test of time: customary international law continues to require 'a general practice accepted as law'.

A central and related question is whether the methodology for determining the existence or non-existence of a rule of customary international law varies across different fields of international law, in other words, whether there might be different approaches to the identification of rules of customary international law in different fields. It is sometimes suggested that in the field of international human rights law, as also international humanitarian law and international criminal law, among others, much of one element may suffice in constituting customary international law, namely *opinio juris*.

As I have just suggested, this cannot be the case as long as we are dealing with what properly may be called "customary international law". Such a unified approach is confirmed in the practice of States and in the case-law, and is consistent with the unity and coherence of international law, which is a single legal system and is not divided into separate branches, each with its own approach to sources. There may, however, be a difference in the application of the two-element approach by a careful assessment of evidence of the two elements that considers the overall context, the nature of the rule, and the particular circumstances in which the evidence is to be found. This is reflected in the latter part of **draft conclusion 3, paragraph 1**, and implies that account may (and ought to) be taken of the subject-matter that the rule is said to regulate. It also suggests that the type of evidence consulted (and consideration of its availability or otherwise) may be adjusted to the situation, with certain forms of practice and evidence of acceptance as law (*opinio juris*) being of particular significance. This was the case in the *Jurisdictional Immunities of the State* case, where the ICJ said that for purposes of identifying the scope and extent of the customary rule on State immunity,

In the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention. *Opinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States.²⁶

²⁶ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99, at p. 123, para. 55.

Taking account of the particular circumstances and context in which an alleged rule has arisen and operates affords much flexibility, while respecting the essential nature of customary international law as a general practice accepted as law. In other words, the underlying approach is the same: both elements are required. Any other approach would risk artificially dividing international law into separate fields, which would run counter to the systemic nature of international law.

Work on the topic has also shown that several longstanding theoretical controversies related to customary international law, and indeed relevant to the customary international law of human rights, have by now been put to rest. For example, it is no longer contested that verbal acts, and not just physical conduct, may count as “practice.” That is reflected in **draft conclusion 6, paragraph 1**. Nor is it seriously questioned that no particular duration is required for the emergence of a rule of custom (if the practice is general and accepted as law), as is made clear in **draft conclusion 8, paragraph 2**. The draft commentary to draft conclusion 8 further confirms that complete consistency in the practice of States is not required: the relevant practice needs to be virtually or substantially uniform, meaning that some inconsistencies and contradictions are not necessarily fatal to a finding of ‘a general practice’. Perhaps of particular value to ascertaining customary rules of human rights is the explanation, again following the ICJ’s lead in *Military and Paramilitary Activities in and against Nicaragua*,²⁷ that when inconsistency takes the form of breaches of a rule (torture may be an case in point), this does not necessarily prevent a general practice from being established. This is particularly so when the State concerned denies the violation and/or expresses support for the rule.

Another important issue in the context of customary international human rights law is whose practice counts for the purpose of identifying a rule of customary international law and its content. This is dealt with in **draft conclusion 4**, which consists of three paragraphs, dealing with States; with international (intergovernmental) organizations; and with other actors (non-State actors, such as NGOs and individuals). The practice of States, the primary subjects of international law, is self-evidently of paramount importance. Paragraph 2 concerns the practice of international organizations, and indicates that ‘in certain cases’ such practice also contributes to the identification of rules of customary international law. The paragraph deals with practice attributed to international organizations themselves, not that of their member States acting within them (which is to be attributed to the States in question).

International organizations are not States. They are entities established and empowered by States (or by States and/or international organizations) to carry out certain functions, and to that end have been granted international legal personality (that is, they may have their own rights and obligations under international law). Their participation in international relations, when accompanied by acceptance as law (*opinio juris*), may also count as practice that gives rise or attests to rules of customary international law in the fields in which they operate, but only in certain cases.

Most clearly, the practice coming within the scope of paragraph 2 of draft conclusion 4 arises where member States have transferred exclusive competences to the international organization, so that the latter exercises some of the public powers of its member States, and hence the practice of the organization may be equated with the practice of those States. This happens in the case of the European Union, and possibly also with some other international organizations, such as regional international economic organizations. The practice of international organizations may also be of particular relevance with respect to rules of customary international law that are addressed specifically to them, such as those on their international responsibility or relating to treaties to which they are parties.

Practice within the scope of paragraph 2 of draft conclusion 4 may also arise, in certain cases, where member States have not transferred exclusive competences, but have conferred powers upon the international organization that are functionally equivalent to the powers exercised by States. For

²⁷ *Military and Paramilitary Activities in and against Nicaragua*, (*Nicaragua v. United States of America*), *Merits, Judgment*, *I.C.J. Reports 1986*, p. 14, at p. 98, para. 186. See also, for example, *Prosecutor v. Norman*, Special Court for Sierra Leone (Appeals Chamber), Case No. SCSL-2004-14-AR72(E) (31 May 2004), at p. 26, para. 51.

example, the practice of secretariats of international organizations when serving as treaty depositaries, in deploying military forces (e.g. for peace-keeping), or in taking positions on the scope of privileges and immunities for the organization and its officials, might contribute to the formation, or expression, of rules of customary international law in those areas. The acts of international organizations that are not functionally equivalent to the powers exercised by States (which is usually the case with organs composed of individuals serving in their personal capacity) are unlikely to be relevant practice.

At the same time, caution is required in assessing the relevance and weight of such practice. International organizations vary greatly, not just in their powers, but also in their membership and functions. As a general rule, the more directly a practice of an international organization is carried out on behalf of its member States or endorsed by them, and the larger the number of such member States, the greater weight it may have in relation to the formation, or expression, of rules of customary international law. The reaction of member States to such practice is of importance. Among other factors to be considered in weighing the practice are the nature of the organization; the nature of the organ whose conduct is under consideration; the subject-matter of the rule in question and whether the organization itself would be bound by the rule; whether the conduct is ultra vires the organization or the organ; and whether the conduct is consonant with that of the member States of the organization.

Paragraph 3 of draft conclusion 4 provides that the conduct of entities other than States and international organizations – for example, NGOs, non-State armed groups, transnational corporations and private individuals – is neither creative nor expressive of customary international law. As such, such conduct does not serve as direct (primary) evidence of the existence and content of rules of customary international law. The paragraph recognizes, however, that such conduct may have an important indirect role in the identification of customary international law, by stimulating or recording practice and acceptance as law by States (and international organizations). For example, the official statements of the International Committee of the Red Cross (ICRC), such as appeals and memoranda on respect for international humanitarian law, play an important role in shaping the practice of States reacting to such statements; and publications of the ICRC may serve as helpful records of relevant practice. Such activities may contribute to the development and determination of customary international law; but they are not practice as such. The same may be said of Human Rights Watch, Amnesty International and other such organizations. Similarly, although the conduct of non-State armed groups is not practice that may be constitutive or expressive of customary international law, the reaction of States to it may well be.

An issue of particular interest in the field of human rights, is the inter-relationship between customary international law and treaties and resolutions of international organizations, at a time when custom has been “increasingly characterized by the strict relationship between it and written texts”.²⁸ These issues benefit much from the guidance of the International Court of Justice and previous work of the Commission.

The case of treaties is pretty familiar and not particularly controversial. It is dealt with in **draft conclusion 11**, which indicates that (a) a treaty rule may codify a rule existing at the time of the conclusion of the treaty; (b) a treaty rule may have led to the crystallization of a rule that had started to emerge prior to the conclusion of the treaty; and (c) a treaty rule may give rise to a general practice that is accepted as law, thus generating a new rule of customary international law. Each of these processes may happen in the field of human rights, but as the draft conclusion indicates, caution is needed. Treaty texts alone cannot serve as conclusive evidence as to the existence or content of rules of customary international law: in order to establish the existence in customary international law of a rule found in a written text, the rule must find support in external instances of practice coupled with acceptance as law. In the words of the *Libya/Malta* judgment, “[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio*

²⁸ T. Treves, ‘Customary International Law’, in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2006), para. 2.

juris of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them”.²⁹

The role of resolutions adopted by international organizations or at international conferences used to be very controversial. **Draft conclusion 12** deals with this matter and begins with a negative statement, perhaps as word of warning: “A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law”. In other words, the mere adoption of a resolution (or a series of resolutions) purporting to lay down a rule of customary international law does not create such law: it has to be established that the rule set forth in the resolution does in fact correspond to a general practice that is accepted as law. There is no ‘instant custom’ arising out of such resolutions on their own account.

Paragraph 2 of draft conclusion 12 strikes a more positive note. As the International Court of Justice observed in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, resolutions “even if they are not binding ... can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*”.³⁰ This is particularly so when a resolution purports to be declaratory of an existing rule of customary international law, in which case it may serve as evidence of the acceptance as law of such a rule by those States supporting the resolution. In other words, “[t]he effect of consent to the text of such resolutions ... may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution”.³¹ Conversely, negative votes, abstentions, or disassociations from a consensus may be evidence that there is no acceptance as law, and thus that there is no rule.

The next point addressed in the draft conclusions is the role of judicial decisions in relation to customary international law. This covered in **draft conclusion 13**. Article 38 of the ICJ Statute refers to “judicial decisions” and to “teachings of the most highly qualified publicists of the various nations” as “subsidiary means for the determination of rules of international law”. What does “subsidiary” imply here? It indicates that judicial decisions and teachings are not primary sources of law in the same way as international conventions, international custom, and general principles of law. Rather they are secondary means for assisting in determining the law: for interpreting treaties, for identifying the existence of rules of customary international law and their content, and for the determination of general principles of law. Judicial decisions, and the writings of learned authors, may be looked to for guidance as to the law, but are not themselves law. On the other hand, the word “subsidiary” should not be taken as suggesting that they are of no great importance, which is clearly not true, especially for judicial decisions.

What is the position of national courts? It is clear that decisions of national courts may count as State practice and as evidence of the *opinio juris* of States, and thus contribute directly to the formation (and evidence) of customary international law under Article 38(1)(b).³² But may they also be used as a subsidiary means for the determination of rules of customary international law under Article 38(1)(d) in the same way as decisions of international courts and tribunals? There is no reason in principle not to include decisions of national courts within article 38(1)(d) as it relates to customary international law. Such landmark cases as *Paquete Habana* and *McLeod* have contributed greatly to international law. But domestic cases have to be approached with great care, and in context, since they may reflect national legal systems and approaches, not necessarily the position under international law. This is

²⁹ *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p.13, at pp. 29–30, para. 27.

³⁰ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 254-255, para. 70 (referring to UN General Assembly resolutions).

³¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 100, para. 188. See also *The Government of the State of Kuwait v. The American Independent Oil Company (AMINOIL)*, Final Award (24 March 1982), 21 ILM (1982), pp. 976, 1032, at para. 143.

³² See draft conclusions 6(2), and 10(2).

perhaps particularly so with respect to domestic judgments dealing with human rights, which are situated within a particular legal (and political) framework.³³

I come next to teachings, “teachings of the most highly qualified publicists” as the ICJ Statute puts it.³⁴ As with decisions of courts and tribunals, referred to in draft conclusion 13, writings are not themselves a source of customary international law, but may offer guidance for the determination of the existence and content of rules of customary international law. This auxiliary role recognizes the value that they may have in systematically compiling State practice and synthesizing it; in identifying divergences in State practice and the possible absence or development of rules; and in evaluating the law. This is what **draft conclusion 14** seeks to capture. The vast literature on human rights comes easily to mind.

There is a need for caution when drawing upon writings, since their value for determining the existence of a rule of customary international law varies markedly; this is reflected in the words ‘may serve as’. First, and this is often the case with writings on international human rights law, writers may aim not merely to record the state of the law as it is (*lex lata*) but also to advocate its development (*lex ferenda*). In doing so, they do not always distinguish clearly between the law as it is and the law as they consider it ought to be. Second, writings may reflect the national or other individual positions of their authors. Third, writings differ greatly in quality. Assessing the authority of a given work is thus essential; the United States Supreme Court in *Paquete Habana* referred to

the works of jurists and commentators who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.³⁵

Draft Conclusion 15 concerns the persistent objector, and provides that “[w]here 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”. The question arises whether it is possible to be a persistent objector to a rule of customary international human rights law. Here, of course, it is important to keep in mind that objection may only be effective before a rule actually comes into being. Another relevant matter is that of persistent objector and *jus cogens*: it seems to be widely considered that a State cannot be a persistent objector to a *jus cogens* norm (although the Commission has not specifically addressed *jus cogens* under this topic). But not all human rights rules have that status. So presumably it is possible to be a persistent objector at least to some rules of customary international human rights law.

Draft Conclusion 16 concerns ‘particular customary international law’, that is, rules of customary international law, whether regional, local or other, that apply only among a limited number of States. Can there be rules of particular customary international law of human rights? There is no reason why not, in principle, particularly on a regional level, and in fact, and within the overall universality of human rights, different regions in the world are or have been associated with different legal conceptions of human rights. There might, for example, be European customary human rights law paralleling the scope and content of the European Convention of Human Rights.³⁶

³³ See *Identification of customary international law: The role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law. Memorandum by the Secretariat* (A/CN.4/691*)

³⁴ The word ‘publicists’ in the ICJ Statute is a curious one in English. It seems that the French word *publicistes* refers to lawyers qualified in public law, as opposed to those who teach or practice private law.

³⁵ *The Paquete Habana and The Lola*, US Supreme Court 175 US 677 (1900) at 700. See also *The Case of the S.S. “Lotus”*, PCIJ Series A, No. 10 (1927), pp. 26, 31.

³⁶ See, for example, the Swiss Federal Department of Foreign Affairs Advice of 15 December 1993 that *non-refoulement* has evolved to be a rule of regional customary international law in Europe (L. Caflisch, ‘Pratique suisse en matière de droit international public 1993’, 5 *Revue suisse de droit international et de droit européen* (1994), 601-603).

In conclusion, let me say this. I hope that the International Law Commission's work on this topic, which will probably last for a couple more years (until 2018), will continue to attract interest from Governments, international organizations, and academic institutions. That can be very helpful to the Commission in its work. The topic raises important issues, central to the international legal order – those I have just mentioned and many more. As I have said, such issues would benefit from careful analysis within international organizations, in universities and by other bodies.

Perhaps more importantly for our purposes, the draft conclusions should not at all discourage those who wish to see the binding force of customary international law attach to (more and more) human rights. The rejection of one-element theories, or denial of the suggestion that international resolutions can by themselves make customary international law, in particular, do not pose a threat to a genuine attempt to identify rules of customary international human rights law. As I have sought to illustrate, both the two-element approach and the other considerations that relate to the identification of customary international law are flexible enough to encompass the field of customary international human rights law.³⁷ Understanding them, relying on them and utilizing them may thus assist in the creation and identification of international human rights rules that, to everybody's benefit, would secure wide legitimacy and recognition as law.

³⁷ See also J.J. Paust, 'The Complex Nature, Sources and Evidences of Customary Human Rights', 25 *Georgia Journal of International and Comparative Law* (1996) 147-151.

