ЦЕНТР МЕЖДУНАРОДНЫХ
И СРАВНИТЕЛЬНО-ПРАВОВЫХ ИССЛЕДОВАНИЙ
INTERNATIONAL AND COMPARATIVE
LAW RESEARCH CENTER

ЛЕКЦИИ ЛЕТНЕЙ ШКОЛЫ ПО МЕЖДУНАРОДНОМУ ПУБЛИЧНОМУ ПРАВУ

Обычное международное право

Майкл Вуд

COURSES OF THE SUMMER SCHOOL ON PUBLIC INTERNATIONAL LAW

Customary International Law

Michael Wood

ТОМ 1
VOL. 1

Москва 2020
Moscow 2020

ISSN 2687-105X

Центр международных и сравнительно-правовых исследований
International and Comparative Law Research Center

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УДК 341.1/8
ББК 67.91
Л43

Лекции Летней Школы по международному публичному праву
Л43 = Courses of the Summer School on Public International Law. – Т. I. Обычное международное право = Vol. I. Customary International Law / Майкл Вуд = Michael Wood. – М.: Центр международных и сравнительно-правовых исследований, 2020. – 90 с.

Настоящее издание содержит материалы лекций сэра Майкла Вуда по теме «Обычное международное право», прочитанных им в рамках Летней Школы по международному публичному праву 2018 года.

The present publication contains lectures by Sir Michael Wood on the topic “Customary International Law”, delivered by him within the frames of the 2018 Summer School on Public International Law.

УДК 341.1/8
ББК 67.91

Летняя Школа по международному публичному праву 2018 года
Summer School on Public International Law of 2018

Дорогие друзья!

Центр международных и сравнительно-правовых исследований начинает публикацию лекций, прочитанных в рамках Летней Школы по международному публичному праву.

Летняя Школа – проект Центра, призванный дать возможность тем, кто изучает международное право, занимается или планирует заниматься им, получить дополнительные знания о предмете и стимулировать самостоятельную работу слушателей. Занятия в Летней Школе состоят из лекций и семинаров общего и объединённых рамочной темой специальных курсов, которые проводятся ведущими экспертами по международному праву, а также индивидуальной и коллективной работы слушателей.

Первая Летняя Школа состоялась в 2018 году. Специальные курсы были посвящены источникам международного права. Их прочитали Сэр Майкл Вуд («Обычное международное право»), Туллио Тревес («Источники международного права в международных судах и трибуналах»), Марсело Коэн («Право договоров»), Бахтияр Тузмухамедов («Международное право в конституционной юрисдикции»), Фрэнк Лэтти («Общие принципы права»). Общий курс международного публичного права прочёл Рейн Мюллерсон.

Центр международных и сравнительно-правовых исследований выражает благодарность членам Консультативного Совета Летней Школы – Р.А. Колодкину, Р.А. Мюллерсону, С.М. Пунжину, Л.А. Скотникову, Б.Р. Тузмухамедову – и всем, кто внёс вклад в реализацию этой идеи, в том числе АО «Газпромбанк» за финансовую поддержку проекта.

Dear friends,

International and Comparative Law Research Center is launching a publication of lectures delivered within the Summer School on Public International Law.

The Summer School is a project of the Center aimed at providing those learning international law, working or aspiring to work in the area, with an opportunity to obtain advanced knowledge of the subject and encouraging participants engage in independent research. The Summer School's curriculum is comprised of lectures and seminars of a general and special courses joined under one umbrella theme delivered by leading international law experts, as well as of independent and collective studying.

The first Summer School was held in 2018. The Special Courses were devoted to the topic "Sources of International Law". The courses were delivered by Sir Michael Wood ("Customary International Law"), Tullio Treves ("International Courts and Tribunals and the Sources of International Law"), Marcelo Kohen ("Law of Treaties"), Bakhtiyar Tuzmukhamedov ("Sources of International Law in Constitutional Jurisdiction"), and Franck Latty ("General Principles of Law"). The General Course on public international law was delivered by Rein Müllerson.

International and Comparative Law Research Center wishes to express its appreciation to the members of the Advisory Body – Roman Kolodkin, Rein Müllerson, Sergey Punzhin, Leonid Skotnikov, and Bakhtiyar Tuzmukhamedov, as well as others who helped implement the project, including Gazprombank (JSC) for their financial support for the project.

Сэр Майкл Вуд

Член Комиссии международного права, специальный докладчик Комиссии по теме «Выявление международного обычного права», старший научный сотрудник Центра международного права им. Э. Лаутерпаха, Университет Кембриджа. Как барристер *Twenty Essex Chambers* (Лондон) он практикует в сфере международного публичного права, участвуя в рассмотрении многочисленных дел в международных судах и трибуналах. В 1999-2006 гг. он руководил Правовой службой Министерства иностранных дел и по делам Содружества Великобритании, придя на службу в 1970 году в качестве помощника юрисконсульта. Сэр Майкл Вуд является автором многочисленных книг и статей по различным вопросам международного публичного права.

Sir Michael Wood

Member of the International Law Commission, Special Rapporteur on *Identification of Customary International Law*, Senior Fellow of the Lauterpacht Centre for International Law, University of Cambridge. He is a barrister at *Twenty Essex Chambers*, London, where he practices in the field of public international law, including many cases before international courts and tribunals. He was Legal Adviser to the UK's Foreign and Commonwealth Office between 1999 and 2006, having joined as an Assistant Legal Adviser in 1970. Sir Michael Wood is the author of numerous books and articles on diverse topics of public international law.

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LECTURE 1:

Introductory: Russia and customary international law; Article 38(1)(b) of the Statute of the International Court of Justice; customary international law and treaties, general principles of law

I thank Roman Kolodkin for his kind invitation and applaud his initiative in organising this first Summer School on Public International Law of the International and Comparative Law Research Center here in Moscow. I also wish to thank all those who have helped us, and especially Victoria and Margarita.

The Summer School is an excellent innovation. It enables young international lawyers from across the Russian Federation, and beyond, to meet in a relaxed and extended way with international lawyers from outside Russia. Contacts between international lawyers from all parts of the world are vital for the discipline of international law. The Statute of the International Court of Justice makes this clear, when it provides (at Article 9) that

> 'At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.'

Representation of the main legal systems of the world is also required by the Statute of the United Nations International Law Commission (the 'Commission' or 'ILC'). This is all closely connected with the fact that international law is a universal system, one system of law that applies to all States and throughout the world.

It is also excellent that this first Summer School is devoted to the sources of international law. Without a good understanding – and

I would say, a common understanding – of the sources of public international law, it is very difficult to see, let alone to apply, international law as a universal system. Even for lawyers who are not specialists in international law (for example, most judges in national courts), a basic understanding of the sources is important whenever they are called upon to address any question of international law.

In this first lecture I shall introduce myself and then say a word about customary international law in Russia followed by some preliminary words about customary international law as a source of public international law. In the remaining lectures I propose to cover the following issues: (1) the UN International Law Commission and its role in relation to customary international law; (2) the two constituent elements of customary international law (a general practice, and acceptance as law) which are addressed in the conclusions and commentaries adopted in 2018 by the Commission on the topic *Identification of customary international law*; and (3) some particular areas of customary international law, including the immunity of persons on special missions.

I would also note at the outset that at least two of the other speakers at this Summer School have played an important role in connection with customary international law. Professor Rein Müllerson was Rapporteur of the International Law Association committee which produced in the year 2000 the London Statement of Principles applicable to the formation of (general) customary international law,[1] and has written very helpfully on the subject of customary international law; and Judge Treves who wrote on the topic as well, including the excellent entry on the subject in the Max Planck Encyclopedia of Public International Law,[2] and in two Hague Academy courses.[3]

[1] *London Statement of Principles Applicable to the Formation of General Customary International Law*, with commentary: Resolution 16/2000 (Formation of General Customary International Law), adopted at the sixty-ninth Conference of the International Law Association in London on 29 July 2000.

[2] T. Treves, 'Customary International Law', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2012).

[3] T. Treves, 'Codification du droit international et pratique des États dans le droit de

I hope that you have three documents before you:

(1) The 16 conclusions with commentaries on *Identification of customary international law*, adopted by the International Law Commission on second (and final) reading on 2 and 3 August this year. These are contained in Chapter V of the International Law Commission's 2018 Annual Report to the UN General Assembly.[4]

(2) The text of my 2017 Morelli lecture on 'The International Law Commission and customary international law'. This covers some of the grounds that I will be dealing with in the present lectures.[5]

(3) And, third, the 19 July 2018 judgment of the Court of Appeal of England and Wales in the *Freedom and Justice Party* case[6]. (The Freedom and Justice Party was closely related to the Muslim Brotherhood in Egypt, which briefly formed the government of Egypt a few years ago before President al-Sisi took power). For the seminar on Thursday, we shall examine one particular question of customary international law that is dealt with in this judgment: whether persons on special missions sent by one State to another enjoy inviolability and immunity from criminal jurisdiction.

Allow me now to introduce myself:

- I was a Legal Adviser in the UK Foreign and Commonwealth Office (FCO) between 1970 and 2006. Much of this time was during

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la mer', p. 223 *Recueil des cours* (1990), pp. 9-302; and his 2015 Hague lectures, 'The Expansion of International Law: General Course on Public International Law' (*Recueil des cours*, forthcoming).

[4] The conclusions, together with their accompanying commentaries, may be found in the Report of the Commission on the work of its seventieth session (2018), UN Doc. A/73/10 (2018), pp. 119-156; see also General Assembly resolution 73/203 of 20 December 2018 ('Identification of customary international law'), in which the UN General Assembly took note of the conclusions, the text of which was annexed to the resolution, with the commentaries thereto; brought them to the attention of States and all who may be called upon to identify rules of customary international law; and encouraged their widest distribution.

[5] M. Wood, 'The UN International Law Commission and Customary International Law', Morelli Lecture, 27 May 2017, *Gaetano Morelli Lecture Series* (2019, forthcoming).

[6] *R.* (*on the application of Freedom and Justice Party*) v *Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ. 1719; [2018] WLR(D) 460.

the Cold War, but even then government lawyers (especially foreign ministry lawyers) agreed on many things. We often thought in the same way; and we cooperated on matters such as the law of the sea and the fight against terrorism, perhaps more than nowadays in some ways. But today there is still much common ground. I would draw attention, for example, to the Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law, issued in Beijing on 25 June 2016, which contains statements of law with which, I believe, many international lawyers would not disagree.[7]

- Between 1999 and 2006 I was the principal Legal Adviser to the FCO, a time when the UK was involved in a number of controversial uses of force, including Afghanistan 1999, Kosovo 2001, and Iraq 2003.[8]

- Many of the more interesting things, I was involved in during this rather long period, involved working closely with lawyers from the Soviet Union/Russian Federation. These included:

(1) The Third UN Conference on the Law of the Sea; as major maritime Powers we worked together closely, and on some important issues coordinated positions on a regular basis. My first visit to Moscow was, I think, in 1975, to discuss law of the sea matters.

(2) The day-to-day application of Quadripartite Rights and Responsibilities (QRRs) relating to Berlin and to Germany as a whole (*Deutschland als Ganzes*). This involved close contacts between the Four Powers (France, USSR, UK, USA).

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[7] The Declaration is available at http://www.mid.ru/en/foreign_policy/position_word_order/-/asset_publisher/6S4RuXfeYlKr/content/id/2331698. See, for critiques, I. Wuerth, 'China, Russia and International Law', *Lawfare*, 11 July 2016, available at https://www.lawfareblog.com/china-russia-and-international-law; Lauri Mälksoo in *EJIL Talk*, available at https://www.ejiltalk.org/author/laurim/.

[8] I have written on these matters: see, for example, 'The Iraq Inquiry: Some Personal Reflections', 86 *British Yearbook of International Law* (2016); and my statements before the United Kingdom's Iraq Inquiry, available at https://webarchive.nationalarchives.gov.uk20171123123312 / http://www.iraqinquiry.org.uk/the-evidence/witnesses/w/sir-michael-wood/.

(3) The 2 + 4 negotiations on German Unification, involving the Four Powers and the two German States (the German Democratic Republic – *Deutsche Demokratische Republik*; and the Federal Republic of Germany – *Bundesrepublik Deutschland*). These concluded here in Moscow with the signing of the Treaty on the Final Settlement with Respect to Germany on 12 September 1990. Foreign Minister Shevardnadze signed for Russia, with President Mikhail Gorbachev in attendance: it is an event that I shall never forget, particularly as the lawyers held up signature for an hour or so in order properly to incorporate last-minute corrections into the text.

(4) The resolution of the Cambodia problem (1989/1991), which involved lengthy meetings in Paris, Jakarta and elsewhere among the Cambodian parties (including the Khmer Rouge, Prince Sihanouk and Hun Sen), the ASEAN countries, and the five Permanent Members of the UN Security Council.

(5) As part of the UK delegation to the UN Security Council between 1991 and 1994, I worked closely with the USSR, then Russian delegation, led by the excellent Ambassador Vorontzov; this included the important moment in December 1991 when the nameplate of the State (holding the presidency of the Council as it happened) changed from 'Union of Soviet Socialist Republics' to 'Russian Federation', thus symbolizing the State continuity between the USSR and the Russian Federation.

(6) The various conferences in the 1990s, successful or not, aimed at resolving the various conflicts in the Balkans, especially the Dayton Conference on Bosnia and the Rambouillet Conference on Kosovo.

- Since leaving the FCO I have acted as counsel in quite a few cases before international courts and tribunals, mostly inter-State cases and often involving the 1982 United Nations Convention on the Law of the Sea.

I want to stress at the outset, and this is very relevant to the topic I shall address in the coming days, that I am strongly of the view, perhaps because I am a practitioner and not a theorist, that public international law is a single legal system that applies to all States equally. As a practitioner, I work on the assumption that international

law is international.[9] It makes no sense, to me, to speak of 'comparative international law', at least in the sense of international law applying differently in different places. There is and can be only one system of international law. To suggest otherwise, as some writers appear to do, is to deny the very essence of international law. Such views must be rejected if international law is to continue and succeed: as I have said elsewhere, 'international law is universal – or it is nothing'.[10] It is questionable whether there was or is a Latin American international law, a socialist international law, an African international law, a European international law and so on.[11] Nor does it reflect reality to speak in terms of European or American or Russian approaches to, or 'visions' of, international law. To characterise an approach in this way is often to caricature.

Customary international law is unwritten law deriving from a general practice accepted as law. As one of the two main sources of public international law (the other being treaties), it features regularly in the everyday practice of international law. It is often referred to in legal opinions by government legal advisers, in diplomatic correspondence, and in official statements by States. It also is frequently invoked before international courts and tribunals, be it by States or by others: 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.'[12]

[9] For the questionable suggestion that at least in some ways it is not, see A. Roberts, *Is International Law International?* (Oxford University Press, 2017). And for well-founded critiques of her thesis, see O. Chasapis-Tassinis, 'The Self-seeing Soul and Comparative International Law: Reading Anthea Roberts' *Is International Law International?*' 7 *Cambridge International Law Journal* (2018), pp. 185-194; G. Hernández, 'E Pluribus Unum? A Divisible College? Reflections on the International Legal Profession', 29 *European Journal of International Law* (2018), pp. 1003-1022.

[10] M. Wood, 'A European Vision of International Law: For What Purpose?', in H. Ruiz-Fabri, E. Jouannet and V. Tomkiewicz (eds.), *Select Proceedings of the European Society of International Law*, vol. 1 (2006), (Hart Publishing, 2008), pp. 151, 152.

[11] Quite another matter, as we shall see, is the concept of 'particular customary international law', as opposed to general customary international law.

[12] T. 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), p. 29. See also T. Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law', 90 *American Journal of International Law* (1996), pp. 238-249.

Customary international law is also increasingly raised in national courts, especially where the domestic legal order recognizes customary international law as a source of applicable law.

Indeed, there is no doubt about the continuing importance of customary international law, even in what is sometimes seen as a period where more and more matters are governed by treaties. (One might question that view of treaties, particularly in the last few years and not least in the last year or two, in which withdrawal from such instruments has not been unheard of). Indeed, the 'twilight of customary international law'[13] that some have predicted has not fallen, and 'rumours of [custom's] death'[14] were certainly exaggerated. Far from ceasing to be influential, customary international law has all along retained a central place in international legal discourse, as it continues to do at present. As one author has put it, 'custom lives'.[15]

Russian/USSR views of customary international law

But before going into greater detail about customary international law and its operation as a source of international law, it is interesting to observe, here in Moscow, the change in the Russian view of customary international law from the days of the last Tsars to the present.

Russia was still embroiled in civil wars (in the aftermath of the October Revolution) when the Advisory Committee of Jurists, set up in 1920 by the Council of the League of Nations to prepare a plan for the establishment of the Permanent Court of International Justice,

[13] J.P. Kelly, 'The Twilight of Customary International Law', 40 *Virginia Journal of International Law* (2000), pp. 449-543.

[14] L. Hannikainen, 'The Collective Factor as a Promoter of Customary International Law', 6 *Baltic Yearbook of International Law* (2006), pp. 125.

[15] D.F. Vagts, 'International Relations Looks at Customary International Law: A Traditionalist's Defence', 15 *European Journal of International Law* (2004), pp. 1031, 1040. See also O. Sender and M. Wood, 'Custom's Bright Future: The Continuing Importance of Customary International Law', in C.A. Bradley (ed.), *Custom's Future: International Law in a Changing World* (Cambridge University Press, 2016), pp. 360-369.

listed 'international custom' as one of the sources of international law to be applied by the future World Court. No Russian national was among the ten members of the Advisory Committee of Jurists, the members of which had no difficulty in accepting that 'a large part of international law, except a few points which are regulated by conventional stipulations, is the outcome of custom'.[16] This was consistent with the view published in Russia in 1882 by the jurist and diplomat Fyodor Fyodorovich Martens, according to which customary rules had a significant practical and legal importance in the international legal system, being a form of the consciousness and agreement of civilized nations upon whom all international law was founded.[17]

It soon became clear, however, that for international lawyers in the early years following the Revolution it was treaties – and not customary international law – that were the most important and most appropriate source of international law. Indeed, for Evgeny Korovin, writing in 1923, customary international law was an anachronistic expression of the traditional relations between imperialist States, and thus not a suitable instrument of progress towards a more just and equitable world order.[18] The bilateral treaty, by contrast, was 'an especially suitable means of concretizing, developing, modifying, or creating new norms of international law',[19] in particular at a time when rapid change was observed (and also desired) in all spheres of international life. Korovin soon suggested that in the numerous and varied treaties negotiated between the Soviet Republics and the Western and Eastern nations,

[16] Proces-Verbaux of the proceedings of the Advisory Committee of Jurists (1920), p. 335 (Baron Descamps).

[17] See the reprint: F.F. Martens, *Современное Международное Право Цивилизованных Народов* (Zerkalo, 2008).

[18] See the description of Korovin's 1923 book, International Law of the Transition Period (and citation thereof), in P.G. Staubach, *The Rule of Unwritten International Law: Customary Law, General Principles, and World Order* (Routledge, 2018), p. 1.

[19] G.I. Tunkin, *Theory of International Law* (W.E. Butler (trans.), George Allen & Unwin, 1974), p.134. For a reprinted Russian version see G.I. Tunkin, *Теория Международного Права* (Lomonosov Moscow State University, 2017).

> 'the traditional equilibrium between the common law [i.e. customary international law] and conventional law, displaced in favour of the former during the post-[World War I] period, has been re-established and even accentuated by the practice of the Soviets. Watching each other closely, the two participants, the U.S.S.R. and the 'Capitalist States,' meet on the strictly limited ground of mutual concessions of a conventional character, only to return at once each to his own law and his own principles. The sacred formula so dear to every adherent of international law, namely, that of the "common principles of international law," is only rarely met in the Soviet treaties, most frequently in those with Germany, and is of inconsiderable practical importance'.[20]

Such suspicion toward customary international law was carried over into the period following the Second World War. Vladimir Koretsky, who was the first member of the International Law Commission from the Soviet Union (between 1949 and 1951) and later a judge and Vice-President of the International Court of Justice, observed in 1949 that

> '…at this juncture customary international law was too vague to be important and might moreover be fashioned into a tool to serve certain deplorable tendencies. Custom existed because States were unequal and slavery still prevailed. … customary law had also been used by the counter-revolutionaries to impose a foreign yoke on certain countries, … He personally felt that it should be rooted out in the interests of the world-wide liberation

[20] E.A. Korovin, 'Soviet Treaties and International Law', 22 *American Journal of International Law* (1928), p. 753. Korovin later explained that 'particularly firm is the Soviet word, and no treaties in the world are more stable than the treaty obligations of the USSR. The main reasons for their stability are: 1) Soviet Russia does not have the incentives to violate its international obligations which many other states have, owing to their imperialist nature and policy; 2) Soviet diplomatic practice, as the practice of a truly democratic state, is characterized by utmost clarity and honesty, qualities that are inherent in a truly people's diplomacy; 3) the exceptional stability of Soviet foreign policy, and consequently, of Soviet treaties, follows from the monolithic nature of the Soviet society and state and the absence of antagonistic classes or groups': E.A. Korovin, 'The Second World War and International Law', 40 *American Journal of International Law* (1946), pp. 742, 752.

> of all peoples. The world was now entering a new phase. The Commission should rather study the new documents and treaties which were being drawn up throughout the world; any other procedure would mark a retrogression to the black past'.[21]

This was consistent with the view he had expressed earlier, as a member of the Committee on the Progressive Development of International Law and its Codification, according to which '[t]here could hardly be a more perfect legal form in international law than an international treaty'.[22]

Noting that a number of his colleagues on the International Law Commission seemed to feel that customary international law was the basic source of international law, Mr. Koretsky had no hesitation in stating that

> '[t]hat view was wrong. A correct study of the evolution of international law would show that customary law was bound by tradition, backward and always lagged behind social development. Conventional law, on the other hand, was progressive; in it were crystallized the new principles of law and thus it served to strengthen the development of international law. … treaties, which were the expression of the sovereign will of sovereign States acting jointly, should be considered the principal source of international law and should be studied with a view to extracting the main principles which they embodied, …
>
> Customary law, however, was backward and belonged to the period of the "white man's burden", the period of the domination by a few powerful States who had disregarded the national sovereignty of weaker States. …conventional law, not customary law, was the basic source of international law'.[23]

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[21] *Yearbook of the ILC 1949*, p. 230, para. 99.

[22] A/AC.10/SR.4/Add.1, Summary of the speech by the representative of the Union of Soviet Socialist Republics, Professor V.M. Koretsky, to the Committee on the progressive development of international law and its codification at its fourth meeting, 15 May 1947, pp. 3-4.

[23] *Yearbook of the International Law Commission 1949*, p. 232, paras. 13-14.

At the same time, the very existence of customary international law as a source of international law was not denied by jurists from the Soviet Union, and some did recognize that it could play a significant role in the international legal system. Thus Judge Krylov, in a dissenting opinion that he appended to the 1949 (merits) judgment of the International Court of Justice in its very first case, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, did not deny the role of customary international law in principle. Rather, he found that '[t]he practice of States in [the] matter [of innocent passage by warships belonging to one State through the territorial waters of another State] is far from uniform, and it is impossible to say that an international custom exists in regard to it'.[24] In the same vein, in the later *North Sea Continental Shelf* cases, Vice-President Koretsky limited himself to subtle criticism of customary international law, saying that 'by and large, customary international law turns its face to the past while general international law keeps abreast of the times, conveying a sense of today and the near future by absorbing the basic progressive principles of international law as soon as they are developed'.[25] (This is an interesting, if obscure, distinction between *customary international law* and *general international law*, to which we shall return.)

Yet USSR jurists did seek to limit the 'operative sphere' of customary international law by arguing that, much as with treaties, customary international law was the result of, and required, an agreement among States. With treaties, such agreement was clearly expressed; in the case of customary international law, it was tacit agreement that defined whether or not a State was bound by the rule in question.

Grigory Tunkin, who also served as a member of the ILC (1957-1966) and whose library is here in this building, devoted much

[24] *Corfu Channel case, Judgment of April 9th, 1949*: *ICJ Reports 1949,* p. 4, at p. 74 (Dissenting Opinion).
[25] *North Sea Continental Shelf, Judgment*, *ICJ Reports 1969,* p. 3, at p. 156 (Dissenting Opinion).

thought to customary international law, believing that '[t]he problem of customary norms of international law is one of the most important, as well as one of the most complex problems of international law. The whole concept of international law depends upon whether this problem is solved one way or another'.[26] He, too, did not deny that customary international law plays a significant role in international law, but considered it plagued with practical and theoretical problems.[27] The process by which a customary rule of international law is formed was depicted by him as 'the process of the struggle and cooperation of states. The formulation of a customary rule occurs as a result of the intercourse of states, in which each state strives to consolidate as norms of conduct those rules which would correspond to its interests'.[28]

Tunkin rightly called for a careful distinction between custom and customary international law: in his words, 'the establishment of a custom is a specific stage in the formative process of a customary norm of international law. This process is completed when states recognize a custom as legally binding'.[29] Recognition, the term he used to refer to what 'bourgeois international lawyers' called opinio juris, was indeed 'a necessary and decisive element for the creation of a customary norm of international law'.[30] For Tunkin,

> 'the bonds between a state accepting a customary norm of intonational law and the other states who already have recognized this norm are basically identical with those bonds established among states with the aid of an international treaty … the essence of the process of creating a norm of international law by means of custom consists of agreement between states, which in this case is tacit, and not clearly expressed, as in a treaty'.[31]

[26] G.I. Tunkin, 'Remarks on the Juridical Nature of Customary Norms of International Law', 49 *California Law Review* (1961), p. 419.
[27] Tunkin, *supr*a note 19, at pp. 113-114.
[28] *Ibid.*, at p. 114.
[29] *Ibid*., at pp. 117-118.
[30] *Ibid*., at pp. 119-120.
[31] *Ibid*., at p. 124.

Thus, 'the operative sphere of [a rule of customary international law] [was] limited to relations between states who have recognized it as a norm of international law, that is to say, to relations between those states who are parties to the corresponding tacit agreement'.[32] Tunkin added that '[t]he operative sphere of a principle or customary norm of international law may gradually expand, and it is by this means, as a rule, that customary norms of international law become generally recognized'.[33]

This line of argument led Tunkin and others to suggest that the 'bourgeois thesis' whereby a customary norm of international law recognized by a significant number of states is binding upon all States was 'in blatant contradiction to the fundamental principles of international law, especially the principle of equality of states'.[34] It also afforded them a theoretical foundation for arguing, as regards newly emergent states, that 'legally they have the right not to recognize a particular customary norm of general international law'.[35]

Customary international law continued to be of much interest to Russian jurists in the post-USSR era, some acknowledging that the scepticism expressed by the former USSR with regard to customary

[32] *Ibid*.
[33] *Ibid*., (adding that 'Expansion of the operative sphere of a customary norm is to some extent analogous to that which takes place with regard to conventional norms of international law. In reality, norms of a particular international treaty very frequently are created by only a few of the countries which become parties to this treaty. Those states which subsequently accede to the treaty have not participated in creating the norms of this treaty' [at p. 127]).
[34] *Ibid*., at p. 128 (adding that 'the doctrine that customary norms of international law recognized as such by a significant number of states are binding upon all states not only has no basis in contemporary international law but also conceals a very great danger. This doctrine in essence justifies the attempts of a specific group of states to impose upon new states, socialist or newly emergent states of Asia and Africa, for example, certain customary norms which never have been accepted by the new states and which may be partially or wholly unacceptable to them. Of course, this tendency on the part of the large imperialist powers to dictate norms of international law to other states in contemporary conditions is doomed to failure, but at the same time such attempts undoubtedly may lead to serious international complications' [at p. 131]).
[35] *Ibid*., at p. 129. See also G.M. Danilenko, 'The Theory of International Customary Law', 31 *German Yearbook of International Law* (1988), pp. 9, 43-45.

international law derived from political considerations.[36] Discussion of the so-called 'Western doctrine' of customary international law soon died out, and the Soviet resistance to custom as a source of international law 'has by and large faded away in contemporary Russian theory'.[37] For Igor Lukashuk, among others, treaties were not more important than customary international law; what really mattered was the need to explain the significance of each source as well as their interrelationship.[38] It has also been recognized that a sufficiently widespread and representative practice by a number of States may well give rise to rules of customary international law binding on all States.[39]

Russian acceptance of customary international law as a central source of international law, and of the basic tenets relating to its formation and identification, may also be seen both in the ILC and in the UN General Assembly's Sixth (Legal) Committee, in connection with the Commission's conclusions on the topic 'Identification of customary international law'. That topic, and the Commission's approach to customary international law more generally, will be the subject of the next lecture.

Article 38(1)(b) of the ICJ Statute

The starting point for any discussion of the sources of international law is Article 38, paragraph 1, of the Statute of the International Court

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[36] I.I. Lukashuk, *Международное Право – Общая Часть* (Russian Academy of Sciences, 2005), p. 90.
[37] L. Mälksoo, *Russian Approaches to International Law* (Oxford University Press, 2015), p. 100. See also, more generally, V.L. Tolstykh, 'The Nature of Russian Discourses on International Law: A Contemporary Survey', in P.S. Morris (ed.), *Russian Discourses on International Law: Sociological and Philosophical Phenomenon* (Routledge, forthcoming).
[38] *Supra* note 36. See also, for example, T.D. Matveeva, *Международное Право – Общая Часть* (Jurait, 2015), p. 56 (suggesting that in current international law customary international law is as important as treaties, and the two complement each other).
[39] See, for example, B.M. Shumilov, *Международное Право* (Justitia, 2018), p. 56; E.V. Ermakova, *Правовой Обычай Как Форма Закрепления Правовых Норм в Международном Праве*, in Государство и регионы, Vol. 1(1) (2011), p. 38; B.R. Tuzmukhamedov, *Международное Право* (Norma Infra-M, 2017), p. 98.

of Justice. This is widely regarded as an authoritative statement of the sources of international law. Article 38 reads:

> '1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d.subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
> 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.'

A number of points can be made about Article 38, paragraph 1:

- It is widely regarded as an authoritative statement of the sources of international law. This is sometimes disputed, especially by writers. But the provision has a resonance well beyond the Statute and the Court.

- Subparagraphs a, b and c list three sources of international law (though c is often regarded as supplementary); and then subparagraph d lists two subsidiary means. The distinction is important, and we shall return to it in the course of these lectures.

- It is sometimes questioned whether, having been drafted in 1920, Article 38 still reflects the current sources of international law. I would say that it does.

- Questions are sometimes raised about particular expressions used in the paragraph: e.g., general principles of law 'recognized by civilized nations'. But these have proven themselves workable.

Article 38(1)(b), which refers to customary international law, is identical to Article 38(2) of the Statute of the Permanent Court of International Justice, the draft of which had been prepared for the

Council of the League of Nations by an Advisory Committee of Jurists in 1920.

The Chairman of the Advisory Committee of Jurists, Baron Descamps, had originally proposed the following language: 'international custom, being practice between nations accepted by them as law'.[40] In the 'Root-Phillimore plan', this provision read: 'International custom, as evidence of a common practice in use between nations and accepted by them as law'.[41] There is little recorded discussion of the provision in the Advisory Committee (or later in the Council or Assembly of the League). Ultimately, however, the following text emerged from the Drafting Committee: 'international custom, as evidence of a general practice, which is accepted as law'.[42] This text was submitted to the Council and Assembly of the League of Nations,[43] and adopted with what may be seen as only drafting changes. The provision does not seem to have been discussed during the preparation and adoption of the Statute of the International Court of Justice in 1944/45.[44]

[40] Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), p. 306, Annex No. 3. The United States member of the Advisory Committee, Root, proposed a text that was identical except for the addition of 'recognized' before 'practice' (at p. 344, Annex No. 1). Descamps referred to customary international law as 'a very natural and extremely reliable method of development [of international law] since it results entirely from the constant expression of the legal convictions and of the needs of the nations in their mutual intercourse' (at p. 322).

[41] *Ibid*., at p. 548.

[42] *Ibid*., at p. 567.

[43] *Ibid*., at p. 680. As adopted by the Advisory Committee on first reading, the subparagraph was changed to read: 'International custom, being the recognition of a general practice, accepted as law'. The change was not maintained in the text submitted to the League.

[44] On the negotiating history of article 38(1)(b), see P. Haggenmacher, 'La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale', 90 *Revue générale de droit international public* (RGDIP) (1986) 5, pp. 19-32; A. Pellet, 'Article 38', in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary*, 2nd edition (Oxford University Press, 2012) MN 17-48; and R.D. Kearney, 'Sources of Law and the International Court of Justice', in L. Gross (ed.), *The Future of the International Court of Justice*, Vol. II (Oceana Publications, 1976), pp. 610-723; M. Fitzmaurice, 'The History of Article 38 of the Statute of the International Court of Justice', in: S. Besson, J. d'Aspromont (eds.), *The Oxford Handbook on the Sources of International Law* (2017), pp. 179-199. Looking back at the negotiation in 1950, Manley O. Hudson remarked that the drafters of the Statute 'had no very clear idea as to what constituted international custom': *Yearbook of the International Law Commission 1950*, Vol. I, p. 6, para.

The reference to customary international law in Article 38(1)(b) is often said to be 'badly drafted'.[45] On the other hand, it has been recognized, with regard to the now century-old phrase 'a general practice accepted as law', that '[t]here are two key elements in the formation of a customary international law rule. They are elegantly and succinctly expressed in Article 38 of the ICJ Statute'.[46] Article 38(1), as a whole, has frequently been referred to or reproduced in later instruments. And although in terms it only applies to the International Court, the sources defined in Article 38(1) are, as I have noted, generally regarded as valid for other international courts and tribunals as well, subject to any specific rules in their respective statutes.

The relationship between customary international law and the other sources listed in Article 38 is also of interest. The relationship between customary international law and treaties is particularly interesting. The interplay between these two 'entangled' sources of international law may be highly relevant as it is generally recognized that treaties may reflect pre-existing rules of customary international law; generate new rules and serve as evidence of their existence; or, through their negotiation processes, have a crystallizing effect for emerging rules of customary international law.[47] This is ever more important to comprehend in the light of the fact that 'contemporary

[45] See e.g., J.L. Kunz, 'The Nature of Customary International Law', 47 *American Journal of International Law* (1953), pp. 662, 664; and K. Wolfke, 'Some Persistent Controversies Regarding Customary International Law', 24 *Netherlands Yearbook of International Law* (1993), pp. 1, 3. Villiger has written that '[i]t is notorious that this provision is lacking ... For the Court cannot apply a custom, only customary law; and subpara. 1 (b) reverses the logical order of events, since it is general practice accepted as law which constitutes evidence of a customary rule': M.E. Villiger, *Customary International Law and Treaties: A Manual of the Theory and Practice of the Interrelation of Sources*, 2nd edition (Kluwer Law International, 1997), p. 15.

[46] D.J. Bederman, *The Spirit of International Law* (University of Georgia Press, 2006), pp. 9, 33; see also A.A. Cançado Trindade, *International Law for Humankind: Towards a New* Jus Gentium (Martinus Nijhoff Publishers, 2010), p. 116 ('Article 38 itself of the ICJ Statute duly qualifies international custom in referring to it as "evidence of a general practice accepted as law"').

[47] See in general O. Schachter, 'Entangled Treaty and Custom', in Y. Dinstein (ed.), *International Law in a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff Publishers, 1989), pp. 717-738; B.B. Jia, 'The Relations between Treaties and

customary international law, although unwritten, is increasingly characterized by the strict relationship between it and written texts'.[48]

But it should also be borne in mind that customary international law has an 'existence of its own' even where an identical rule is to be found in a treaty: as the International Court of Justice has explained, a rule of customary international law may continue to exist and be applicable, separately from a treaty, even where the two have the same content and even among parties to the treaty.[49] Indeed, even where there is a treaty in force, the rules of customary international law continue to govern questions not regulated by the treaty and continue to apply in relations with and among non-parties to the treaty. In addition, treaties may refer to rules of customary international law; and such rules may be taken into account in treaty interpretation in accordance with Article 31(3)(c), of the Vienna Convention on the Law of Treaties. Moreover, it may sometimes be necessary to determine the law applicable at the time when certain acts occurred ('the intertemporal law'), which may be customary international law even if a treaty is now in force. We should also keep in mind that some important fields of international law are still governed by customary international law, with few if any applicable treaties. Finally, customary international law remains not only a mechanism of law-creation and 'the principal construction material for general international law' (in the sense of its capability to generally bind all States),[50] but it also underlies the international legal structure as a

Custom', 9 *Chinese Journal of International Law* (2010), pp. 81-109; J.K. Gamble, Jr., 'The Treaty/Custom Dichotomy: An Overview', 16 *Texas International Law Journal* (1981), pp. 305-319; K. Wolfke, 'Treaties and Custom: Aspects of Interrelation', in J. Klabbers and R. Lefeber (eds.), *Essays on the Law of Treaties: A collection of Essays in Honour of Bert Vierdag* (Martinus Nijhoff Publishers, 1998), pp. 31-39; G.L. Scott and C. L. Carr, 'Multilateral Treaties and the Formation of Customary International Law', 25 *Denver Journal of International Law and Policy* (1996), pp. 71-94; and R.R. Baxter, 'Treaties and Custom', p. 129 *Recueil des Cours* (1970), pp. 25-105.

[48] Treves, *supra* note 2, at para. 2.

[49] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment*, *ICJ 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*, *ICJ Reports 2015,* p. 3, at pp. 47–48, para. 88.

[50] V.I. Kuznetsov and B.R. Tuzmukhamedov (W.E. Butler, ed.), *International Law – A Russian Introduction* (Eleven International Publishing, 2009), p. 77.

whole, including the very requirement that treaties be complied with ('pacta sunt servanda').

The distinction between customary international law and 'general principles of law' is also important, but not always clear in the case law or the literature. As we have seen, Article 38(1)(c) lists 'general principles of law recognized by civilized nations' as a source of international law distinct from customary international law. It is sometimes taken to refer not only to general principles common to the various systems of domestic law, but also to general principles of international law. It has been suggested that the International Court may sometimes have recourse to 'general principles' of international law in circumstances when the criteria for customary international law are not present. As one distinguished author has explained:

> 'The relatively frequent reference by the ICJ to principles that are not part of municipal laws is explained, at least in part, by the narrow definition of customary international law that is provided in Article 38(1)(b) ICJ Statute. Should custom be regarded, as stated in that provision, as "evidence of a general practice accepted as law", given the insufficiency of practice, several rules of international law which are not based on treaties would not fit in the definition of custom. Hence, the reference to principles or general principles'.[51]

While it may be difficult to distinguish between customary international law and general principles of law in the abstract, whatever the scope of general principles of law, it remains important to identify those rules which, by their nature, need to be grounded in the actual practice of States.[52]

This brings us to another point. As Tunkin insisted (even if with a different motivation), customary international law is also to

[51] G. Gaja, 'General Principles of Law', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2012), para. 18.
[52] See also J. Crawford (ed.), *Brownlie's Principles of Public International Law*, 8th edition (Oxford University Press, 2012), p. 37.

be distinguished from conduct, even if widespread and consistent, that neither generates a legal right or obligation nor carries such a legal implication. As we shall see when we discuss the element of 'acceptance as law' (opinio juris), not all international acts bear legal significance: acts of comity or courtesy, or mere usage, even if carried out as a matter of tradition, do not contribute to customary international law.

Two additional points of an introductory nature should be made. First, on terminology, which is often important, especially for lawyers. 'Customary international law' and 'rules of customary international law' seem to be the expressions in most common use for the source of international law with which we are concerned. But other terms are also sometimes found, including the expression 'general customary international law', usually used in contradistinction to 'special', 'regional' or 'particular' customary international law. The term 'universal customary international law' may have a similar meaning. The expression 'international customary law' is also found, but I prefer to avoid it since it might suggest a subcategory of 'customary law', and hence a misleading relationship between customary international law and the customary law found in some domestic legal systems. However, I believe that in Russian the most common term, and the one used by the ILC, is международное обычное право ('international customary law'). Perhaps that should be reconsidered! Other terms that are sometimes found in legal instruments, in case law and in scholarly writings include 'custom', 'international custom', 'the law of nations', and 'general international law'. National legal systems may use various terms, perhaps depending on the wording of their constitutions.

The term 'general international law' needs some explanation. States, the International Court of Justice and other international courts, writers, and even the International Law Commission use the term in a variety of contexts and with a range of meanings. Its use to mean only customary international law can be confusing. At times the term seems to be used to mean something broader than general customary international law, such as customary international law

together with general principles of law, and/or together with widely accepted international conventions. It is desirable that the specific meaning intended by the term 'general international law' is made clear whenever the context leaves the meaning unclear (which it often does).

A final general point is this. Customary international law is a matter on which there is a wealth of material, not least scholarly writings. It has rightfully been referred to as 'an evergreen topic in general international law'.[53] A vast (and growing) body of literature has been devoted to the question of how rules of customary international law emerge and are to be identified, with numerous authors attempting to tackle both conceptual and practical difficulties. My recent attempt to produce an up-to-date bibliography[54] get seriously out-of-date very quickly! Being 'connected with ideas about the nature of law in general and of international law in particular',[55] such questions have often divided scholars, some of whom seek – explicitly or otherwise – not to elaborate on this source of law as it is, but to reinterpret the constitutive elements of customary international law and, consequently, to reframe it as a source of international law. Yet the heated theoretical debates on customary international law have not found much resonance among legal practitioners. This may be evident in the work of the International Law Commission on *Identification of customary international law*, to which, among other matters, we shall turn in the next lecture.

[53] By J.H.H. Weiler: https://academic.oup.com/ /ejil/article/doi/10.1093/ejil/chx038/3933344/Editorial-On-My-Way-Out-Advice-to-Young-Scholars-V.
[54] UN doc. A/CN.4/717/Add.1 ('Identification of customary international law: revised bibliography').
[55] Treves, *supra* note 2, at para. 4.

LECTURE 2:

The International Law Commission; customary international law and its identification

As I noted in the previous lecture, customary international law plays a large role in the international legal system. It also plays a large role in the work of the UN International Law Commission. And it is a two-way matter: the ILC needs to identify existing rules of customary international law in its day-to-day work; and its work may well promote the development of rules of customary international law.

In this lecture I plan to speak about the ILC as an institution; and in general terms about its work of progressive development and codification of international law. It is important to know how the Commission works. The basic materials are available on its website;[56] and in the publication The Work of the International Law Commission, which is updated every five years.[57]

The ILC as an institution

The Commission, as I am sure you know, was established seventy years ago by the UN General Assembly, as a subsidiary organ of the General Assembly that operates in accordance with the Assembly's rules of procedure. It is composed of 34 individuals, 'persons of recognized competence in international law' according to the Commission's Statute, who act in their personal capacity, not on instructions from governments or anyone else. The membership consists of practitioners and academics, and includes many current and former Government officials. The balance within the Commission seems to be about two-thirds practitioners and one third academics.

[56] http://legal.un.org/ilc/.
[57] *The Work of the International Law Commission*, 9th edition (United Nations, 2017).

That is only an approximation, as quite a few members are both academics and practitioners.

Elections of the whole Commission take place every five years, the seats being distributed among the five UN regional groups in accordance with a formula laid down by the UN General Assembly. As with all UN elections, political factors play a large role.

Others of great importance to the work of the ILC are the Secretariat, who come from the Codification Division of the UN Office of Legal Affairs. They play an important role in the work of the Commission, not least by preparing in-depth high-quality studies on relevant issues pending before the Commission.

The Commission is mandated, in fulfilment of Article 13(1)(a) of the UN Charter, with 'the promotion of the progressive development of international law and its codification'.[58] It is not a legislature: '[a]t the San Francisco Conference … all attempts to give the GA any power to establish the content of international law with binding force were rejected'.[59]

Nowadays the Commission usually follows a standard procedure for dealing with topics, though this is not exactly what was originally envisaged when the Statute was being drafted or what used to happen in the earlier days of the Commission. First, and crucially, a topic is normally chosen from amongst those proposed or taken up by members of the Commission, and is placed first on the long-term programme of work. If it is decided to proceed, the topic is moved to the current programme of work, and usually a special rapporteur is appointed (often the member who proposed the topic). Sometimes

[58] Statute of the International Law Commission (1947, as amended), Articles 2(1) and 1(1) respectively.

[59] C-A. Fleischhauer, B. Simma, 'Article 13', in B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 3rd edition (Oxford University Press, 2012), p. 301. See also H.W. Briggs, *The International Law Commission* (Cornell University Press, 1965), pp. 4-12; *The Work of the International Law Commission*, 9th edition (United Nations, 2017), p. 4: 'The Governments participating in the drafting of the Charter of the United Nations were overwhelmingly opposed to conferring on the United Nations legislative power to enact binding rules of international law.'

other methods are used, such as a study group. The choice of topics is generally the result of long and careful consideration, but even so it is not easy and not always satisfactory; and once on the current programme of work topics are not easy to discontinue, even if it becomes clear that they are unlikely to lead to useful outcome.

The special rapporteur can be seen as the motor for the Commission in terms of work on his or her topic; without his or her efforts it is difficult for the Commission to make progress. But it is the Commission as a whole which ultimately steers the topic and which affixes it seals to it. Indeed, the Commission's work is very much a collective effort. Through careful study, negotiation and drafting, the Commission usually makes substantial improvements on the proposals of the special rapporteur. At least, that is my experience with the topic for which I was special rapporteur, Identification of customary international law.

The special rapporteur (or, over time, special rapporteurs) produces a series of reports which are first debated in the plenary of the Commission. The proposed texts contained in the reports are then generally (though by no means always) referred to the Drafting Committee, which is where the real negotiation on the text of the provisions (but not their accompanying commentaries) nowadays takes place, having due regard to the debate in plenary. Texts then emerge from the Drafting Committee, often very significantly revised, and are adopted by the plenary, usually without further discussion or amendment. Commentaries are then prepared by the special rapporteur, and these are then considered and adopted by the Commission in plenary, towards the end of the session, as part of the process of adopting the annual report of the Commission to the General Assembly. This is an unsatisfactory procedure, since it does not allow adequate time for the careful consideration which the commentaries, an important element of the Commission's output, merit.[60] Occasionally, where there is time (and particularly in

[60] G. Gaja, 'Interpreting articles adopted by the International Law Commission', 85 *British Yearbook of International Law* (2015), p. 10, at p. 16.

recent years), a working group has reviewed a preliminary draft of the commentaries before the special rapporteur submits them for translation and consideration in plenary.[61]

After the first reading, there is usually a year off, to allow sufficient time for States to submit written comments on the draft adopted by the Commission. Before doing so they may consult others, for example within the Council of Europe.[62] Then a second (final) reading takes place, which usually focuses on the written and oral observations and comments of States. The final product is then submitted to the General Assembly, together with a recommendation from the Commission as to future action (for example, to convene a conference to conclude a convention based on the Commission's text, or to take note of it).

Throughout the process States have an opportunity to comment in the Sixth (Legal) Committee of the General Assembly in the debate on the Commission's annual report, which details the progress, made with regard to each topic. Such input is important for the Commission's work, which is intended to be useful to States, to whom the Commission reports, and who are the ultimate law-makers. However, concern is sometimes expressed that there is not enough time between the report becoming available and the debate in the Sixth Committee for adequate study of the Commission's extensive output.

Some see problems with the ILC's current working methods. Some even criticise it in strong terms, including those who served the Commission long and faithfully.[63] Among the concerns raised are,

[61] This was done with the second reading commentaries on *Responsibility of States for internationally wrongful acts* (2001); the first and second reading commentaries on *Identification of customary international law* (2016, 2018); some of the first reading commentaries on *Provisional application of treaties* (2017); and some of the commentaries on *Protection of the environment in relation to armed conflict* (2018).
[62] Within the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI).
[63] See A. Pellet, 'The ILC Adrift? Some Reflexions from Inside', in M. Pogačnik (ed.), *Challenges of Contemporary International Law and International Relations: Liber Amicorum in Honour of Ernest Petrič* (Evropska Pravna Fakulteta, 2011), pp. 299-312.

first, that there is a lack of sufficient input from States, in particular that not many written statements are submitted to the Commission in reply to its requests for information or comments. But this should not be exaggerated: in the Sixth Committee quite a respectable number of States do comment on the Commission's work, providing substantial observations. Another concern is that there are no more good topics left for the Commission to take up. I do not believe this is so, and suppose it would suffice to say that some very interesting topics are currently under consideration within the Commission, two of which have been put on the long-term programme of work just this year ('Universal criminal jurisdiction' and 'Sea-level rise and international law'). Yet another concern is that nowadays hardly anything coming out of the Commission becomes a convention; the last convention adopted on the basis of draft articles elaborated by the Commission was in 2004 (Jurisdictional Immunities of States and Their Property) and before that the last one was in 1998 (Non-Navigational Uses of Transboundary Watercourses). To this one might respond that the Commission's Statute does not envisage its output as consisting solely of draft articles meant to serve as a basis for multilateral treaties. In any event, States have explicitly encouraged the Commission to present 'guidelines', 'conclusions', and the like, and have indeed welcomed such output. Finally, it has been argued that the Commission's work on some topics takes too much time; but it does take time to do such work properly (especially bearing in mind that the Commission meets for only 10 to 12 weeks each year). It should not be rushed.

Codification and progressive development of international law

In 1947, when the Commission's Statute was adopted, international law was largely uncodified, with a few exceptions, such as the law relating to the use of force and the laws of war.[64] Now the

[64] Primarily in the UN Charter and in the Hague Regulations/Geneva Conventions, respectively. In addition, there were a considerable number of international conventions in various technical fields, such as telecommunications.

position is quite different, and this is in large measure because of texts adopted on the basis of the Commission's work, both treaties and non-treaty instruments, like the articles on State responsibility. Many central fields of modern international law are based on the work of the Commission. This includes the law of the sea; State immunity and diplomatic, consular, special mission and other immunities; the law of treaties (of States and international organizations); and the international responsibility (of States and international organizations).

The movement for the codification of international law has its roots in the 19th century. This movement attached importance to replacing customary international law by lex scripta. Customary international law was considered too uncertain and incomplete, in need of clarification and systemization: writing in 1926, one author said that '[t]he temple of international justice on near inspection appear[ed] to be rather a storehouse filled with lumber of the ages – a medley of things new and old showing as yet little evidence of order or purpose'.[65] More precise law, it was hoped, would promote international stability and cooperation. In the post-WWI era, in particular, in Russia and elsewhere, treaties were perceived as a principal instrument for such purpose, and an international project was launched to reduce much of custom to written codes. Such codification was to push customary international law somewhat into the background.

Nevertheless, as we have already noted, the spectacular rise of treaties from the 1950s on was not accompanied by a significant decline in the importance of customary international law: it still holds true that, as Parry wrote in the early 1960s, '[o]ne can have a very fair idea of international law without having read a single treaty; and one cannot have a very coherent idea of the essence of international law by reading treaties alone'.[66]

[65] R.S. Morris, 'Codification of International Law', 74 *University of Pennsylvania Law Review* (1925-1926), p. 452.

[66] C. Parry, *The Sources and Evidence of International Law* (Manchester University Press, 1965), pp. 34-35, reproduced in A. Parry (ed.), *Collected Papers of Professor Clive*

There has been much debate over the years on the meaning of the terms 'progressive development of international law' and 'codification', terms that we find in Article 13 of the UN Charter and in the Statute of the ILC. 'Progressive' was probably originally intended simply to mean 'gradual/step-by-step' and not to carry a political connotation. Indeed, the League of Nations used the term 'progressive codification'. In Article 15 of the Commission's Statute, the expression 'progressive development of international law' has the following meaning:

> 'the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States'.[67]

Parry (Wildy, Simmons & Hill, 2012). See also J. Crawford, 'Chance, Order, Change: The Course of International Law, General Course on Public International Law', 365 *Recueil des cours* (2013), p. 49 ('international law is a customary law system, despite all the treaties; even the principle of pacta sunt servanda, the obligation to comply with treaties, is a customary law obligation'); C.G. Weeramantry, 'Remarks', in *Proceedings of the ASIL/NVIR Third Joint Conference* (T.M. Asser Institut, 1996), p. 34 ('It is well to remind ourselves that, in a sense, treaty law is the daughter of customary international law. Pacta sunt servanda is, after all, a rule of customary international law, the interpretation of treaties takes place on the basis of customary international law, the validity of treaties is determined on the basis of customary international law. So, it is still a product of customary international law, still heavily dependent upon it. And I do not subscribe to the view that treaties will strangle or diminish the influence of customary international law'); P. Tomka, 'Custom and the International Court of Justice', *Law & Practice of International Courts and Tribunals*, 12 (2013), pp. 195, 215 ('In many ways … Lord Phillimore's observation in 1920 before the Committee of Jurists, that custom "constitutes in the main international law" continues to be relevant'); H.W.A. Thirlway, *International Customary Law and Codification* (Sijthoff, 1972), p. 35 (suggesting that '[i]t would be unwise, in the light of history, to assume or claim that we are witnessing, or are likely to witness in the near future, any sort of total eclipse of custom as a source of law, as a result of the encroachment of the law-making treaty').

[67] Statute of the International Law Commission, Article 15. McRae has pointed to the ambiguity inherent in the word 'progressive' as used in the expression 'progressive development', which could refer to a step-by-step process or to something that is 'forward-looking': D. McRae, 'The Interrelationship of Codification and Progressive Development in the Work of the International Law Commission', 111 *Kokusaihō gaikō zasshi* (2013), pp. 75, 80. For an account of the negotiating history of the relevant provisions of the Charter and the Statute, see J. Crawford, 'The Progressive Development of International Law: History, Theory and Practice', in J. Alland et al. (eds.), *Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy* (Nijhoff, 2014), pp. 1-22.

Article 15 attributes to 'codification of international law' the following meaning:

> '…the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine'.[68]

But attributing a clear meaning to 'codification' of international law has not been free from difficulty. Is codification simply a process of reducing lex non scripta to a written form, or is it the case that, given the desire to eliminate uncertainties and inconsistences found in unwritten law, 'all codification involves as an incidence in the process an element of what is really legislation'?[69] The members of the Committee of Seventeen, which drafted the Commission's Statute, for their part, must have generally referred to codification in its narrower sense. But they did not insist on a strict, abstract distinction between the two methods. On the contrary, they took the view that 'no clear-cut distinction between the formulation of the law as it is and the law as it ought to be could be rigidly maintained in practice'.[70]

This was evident in the Commission's practice right from the beginning, with the Commission opting not to observe the distinction between progressive development and codification in its actual procedures. At the same time, the codification/progressive development debate, that was live during the drafting of the Statute, continued from the very outset of the Commission's work. Underlying the legal arguments at the time were no doubt deeper political divisions, this being the Cold War. As we discussed, the USSR and its friends remained deeply suspicious of unwritten law, in which they considered they had had no hand. Be that as it may, it is widely agreed that the procedural distinction made between codification

[68] Statute of the International Law Commission, Article 15.
[69] J.L. Brierly, 'The Future of Codification', 12 *British Yearbook of International Law* (1931), pp. 1, 2-3.
[70] UN Doc. A/AC.10/51: *Report of the Committee on the Progressive Development of International Law and its Codification on the Methods for Encouraging the Progressive Development of International Law and its Eventual Codification*, para. 10.

and progressive development, 'for convenience', in the Commission's Statute, is not workable in practice. Yet the Commission does on occasion indicate whether it considers its output represents codification or progressive development (or indeed proposals to States for possible new law), especially with regards to particular provisions. An important distinction needs to be made between the terms 'codification' and 'progressive development' on the one hand, and 'lex lata' and 'lex ferenda' on the other. At least as used in the Statute of the Commission, the former refers to the outcome of a process of reducing law to writing; it is inevitably a matter of degree. The latter is a clear-cut distinction: a rule is either existing law (lex lata) or it is not.

Whatever the approach ultimately adopted in a particular topic or provision, it must also be borne in mind that the Commission should always approach a topic by first surveying State practice in order to ascertain whether and which relevant customary rules already exist. Already at the preliminary stage of considering whether or not to add a topic to its work programme, it looks into, inter alia, the question whether the topic is sufficiently advanced in terms of State practice to permit progressive development and codification. In other words, the Commission does – or at least should – seek to identify the lex lata in the strict sense for purposes of assessing the legal situation as part of its work on any particular topic.

In so doing, the Commission has consistently adhered to the definition of customary international law enshrined in the Statute of the International Court of Justice: 'a general practice accepted as law'. Its methodology in seeking to identify rules of customary international law has been described in a memorandum by the Commission's Secretariat, on the basis of a systematic review of the final versions of the various drafts adopted by the Commission over the years:

> 'To identify the existence of a rule of customary international law, the Commission has frequently engaged in a survey of all available evidence of the general practice of States, as well as their

> attitudes or positions, often in conjunction with the decisions of international courts and tribunals, and the writings of jurists.'[71]

The careful and thorough manner of identifying rules of customary international law when the Commission engages in such a task may endow its eventual analysis (output) with much authority. As Watts observed, the Commission's formulations

> '...constitute a reasonable prima facie indication of the "world view" on a particular legal question. They are a convenient articulation of the position in international law, which is what one is always seeking in an essentially customary law regime. By virtue of its global and collegiate basis, the Commission's articulation is not just convenient but authoritative'.[72]

But the Commission, the International Court of Justice and international lawyers are not the only ones called upon to identify and apply customary international law. In our day and time, in particular, questions of customary international law increasingly fall to be dealt with also 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'.[73] The Commission was aware of this reality, and also of the many different theories about customary international law amongst writers, when it considered in 2011 that there was a need for some reasonably authoritative guidance on the process of identifying customary international law. It was thought that the Commission itself, given its role and experience, its privileged relationship with States, and its composition and working methods, might be well placed to offer such

[71] A/CN.4/659: *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* (14 March 2013), p. 7.
[72] A. Watts, *The International Law Commission 1949-1998*, Volume One (Clarendon Press, 1999), p. 15.
[73] Report of the International Law Commission on the work of its sixty-third session (26 April-3 June and 4 July-12 August 2011), Annex I, para. 3 (*Yearbook of the International Law Commission 2011*, Vol. II, Part Two, p. 183).

guidance. The Commission thus included the topic Formation and evidence of customary international law in its long-term programme of work. In 2012 it placed the topic on its current programme of work and appointed a special rapporteur. In 2013, it changed the title of the topic to 'Identification of customary international law' (détermination in French). Members of the Commission agreed that the outcome of the project should be of an essentially practical nature; it was not the aim to seek to resolve theoretical controversies.

Identification of customary international law

This is a good moment to discuss the Commission's work on the topic, given that in August 2018 the Commission adopted, on second and final reading, a set of 16 conclusions that concern, in the words of **conclusion 1**, 'the way in which the existence and content of rules of customary international law are to be determined'.[74] These conclusions – together with their commentaries – seek to offer practical guidance on how the existence of rules of customary international law, and their content, are to be determined. Recognizing that the process for the identification of customary international law is not always susceptible to exact formulations, they aim to offer clear and concise guidance without being overly prescriptive.

The product that emerged from the Commission on this topic is in three parts, a sort of triptych. As the central panel, there are the conclusions, with commentaries. As a first side panel, we have an extensive bibliography on the topic.[75] The second side-panel is a Secretariat memorandum looking again at ways and means for making the evidence of customary international law more readily available.[76]

On 20 December 2018, the UN General Assembly adopted resolution 73/203, in which, having considered the recommendations

[74] *Supra* note 4.
[75] *Supra* note 54.
[76] A/CN.4/710: *Ways and means for making the evidence of customary international law more readily available – Memorandum by the Secretariat*.

in the Commission's report and noted that the subject of identification of customary international law was of major importance in international relations, the Assembly –

> '1. *Welcomes* the conclusion of the work of the International Law Commission on identification of customary international law and its adoption of the draft conclusions and commentaries thereto;
> 2. *Expresses* its appreciation to the International Law Commission for its continuing contribution to the codification and progressive development of international law;
> 3. *Takes* note of the statements in the Sixth Committee on the subject, including those made at the seventy-third session of the General Assembly, after the International Law Commission had completed its consideration of this topic in accordance with its statute;
> 4. *Also takes* note of the conclusions on identification of customary international law, the text of which is annexed to the present resolution, with the commentaries thereto, brings them to the attention of States and all who may be called upon to identify rules of customary international law, and encourages their widest possible dissemination;
> 5. *Acknowledges* the utility of published digests and surveys of practice relating to international law, including those that make legislative, executive and judicial practice widely available, and encourages States to make every effort to support existing publications and libraries specialized in international law'.

In addition, on 22 December 2018 the General Assembly took note of the request of the Commission to the Secretariat to reissue the memorandum on ways and means for making the evidence of customary international law more readily available (A/CN.4/710).[77]

The Commission has long dealt with the sources of international law, and it was not for the first time that, in 2012, it took up a topic

[77] See UN General Assembly resolutions 73/203 of 20 December 2018 (Identification of customary international law) and 73/265 of 22 December 2018 (para. 26).

concerning customary international law. An earlier foray into this field ('Ways and means of making the evidence of customary international law more readily available') was mandated by Article 24 of its Statute,[78] leading the Commission in 1950 to call on States to make evidence of their practice more accessible.[79] In his working paper on this topic, the United States member of the Commission (and former Judge of the PCIJ) Manley O. Hudson thought that 'sub-heading (b) of article 38 of the Statute of the International Court of Justice was not very happily worded',[80] and sought to offer 'a few guiding principles' as to the 'elements which must be present before a principle or rule of customary international law can be found to have become established'.[81] Almost 70 years later, much of his (rather brief) discussion remains highly instructive.

Dealing as they do with the identification of rules of customary international law, the 2018 conclusions do not address, at least not directly, the processes by which customary international law develops over time. But, as the commentary indicates, in practice identification cannot always be considered in isolation from formation; the identification of the existence and content of a rule of customary international law may well involve consideration of the processes by which it has developed. The conclusions thus inevitably refer in places to the formation of rules; they do not, however, deal systematically with how rules emerge, or how they change or terminate.

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[78] Article 24 of the Statute reads: 'The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter'.

[79] A/1316: Report of the International Law Commission covering its second session (5 June - 29 July 1950), *Yearbook of the International Law Commission 1950*, Vol. II, pp. 367–74, especially paras. 90-94. This had also led to a number of important publications that continue today, such as the UN's *Reports of International Arbitral Awards*.

[80] Summary record of the Commission's 40th meeting (6 June 1950), *Yearbook of the International Law Commission 1950*, Vol. I, p. 4, para. 5.

[81] *Ibid*. See also A/CN.4/16: Working Paper by Manley O. Hudson, Special Rapporteur, in *Yearbook of the International Law Commission 1950*, Vol. II, p. 26, para. 10.

Conclusion 2 lies at the heart of the text. It reads:

> '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*)'.[82]

This confirms the 'two-element approach' to the identification of rules of customary international law, which has been widely endorsed by the members of the Commission and 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, if unsurprising. It is important, because in recent years there have been calls to abandon the two-element approach – essentially, to abandon customary international law 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, but also international humanitarian law and international criminal law, have claimed the opposite – reducing the significance of the practice requirement and concentrating instead on *opinio juris*.

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'. The identification of a rule of customary international law, in all fields of international law, requires an inquiry into two distinct, yet related, questions: whether there is a general practice and whether such general practice is accepted as law (that is, accompanied by *opinio juris*).

The reference in conclusion 2 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 contours are disputed. This may be the case, for example, where there

[82] *Supra* note 4, at p. 124.

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. 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.

There may, however, be differences in the application of the two-element approach arising from the need to engage in a careful assessment that considers, in each case, 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 **conclusion 3, paragraph 1**, which, as the commentary indicates, is 'an overarching principle that underlies all of the draft conclusions, namely that the assessment of any and all available evidence must be careful and contextual'.[83] It implies, among other things, 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 being of particular significance.

Taking account of the particular circumstances and context, in which an alleged rule has arisen and operates, affords 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, and would run counter to the systemic nature of international law.

But what precisely do these two constituent elements require? How is their existence to be established in any given case? We shall start to explore these questions in the next lecture, which will be dedicated to the constituent element of 'a general practice'.

[83] *Supra* note 4, at p. 127.

LECTURE 3:

Identification of customary international law (continued) – 'a general practice'

Let us turn to the first constituent element, 'a general practice', often referred to as the 'material' or 'objective' element of customary international law.[84] Practice plays an essential role in the formation and identification of customary international law: it may be seen as the 'raw material' of customary international law, as the latter emerges from practice, which 'both defines and limits it'.[85] Such practice consists of material and detectable acts of subjects of international law, and it is these instances of conduct that may form 'a web of precedents'[86] in which a pattern of conduct may be observed.

It is the practice of States which is of primary importance for the formation and identification of customary international law, and the material element of customary international law is indeed commonly referred to as 'State practice', that is, conduct which is attributable to States. The ICJ has said that '[T]he actual practice of States … is expressive, or creative, of customary rules'.[87] It has also said that

[84] Sometimes also referred to as *usus* (usage), but this may lead to confusion with 'mere usage or habit', that is to be distinguished from customary international law.

[85] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960*: *ICJ Reports 1960,* p. 6, at p. 99 ('The proper way of measuring the nature and extent of any such custom, if established, is to have regard to the practice which itself both defines and limits it. The first element in a custom is a constant and uniform practice which must be determined before a custom can be defined' [Dissenting Opinion of Judge Sir Percy Spender]).

[86] *Barcelona Traction, Light and Power Company, Limited, Judgment*, *ICJ Reports 1970,* p. 3, at p. 329 (Separate Opinion of Judge Ammoun); see also *Corfu Channel case, Judgment of April 9th, 1949: ICJ Reports 1949,* p. 4, at pp. 83 and 99 (Dissenting Opinion of Judge Azevedo) ('Custom is made up of recognized precedents … [Customary international law requires] significant or constant facts which could justify the assumption that States have agreed to recognize a customary [rule]'); *North Sea Continental Shelf, Judgment, ICJ Reports 1969,* p. 3, at p. 175 (Dissenting Opinion of Judge Tanaka) (referring to 'a usage or a continuous repetition of the same kind of acts … It represents a quantitative factor of customary law').

[87] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Judgment, ICJ Reports 1982,* p. 18, at p. 46, para. 43.

it is 'State practice from which customary law is derived'.[88] State practice in this sense may be distinguished from subsequent practice in the application of a treaty within the meaning of Art. 31(3)(b) of the Vienna Convention on the Law of Treaties (1969), and from the common legal principles underlying general principles of law (Article 38(1)(c) of the ICJ Statute).

Being the primary subjects of the international legal system and possessing a general competence, States play a pre-eminent role in the formation of customary international law, and it is principally their practice that has to be examined when identifying it. Indeed, in many cases, it will only be State practice that is relevant for determining the existence and content of rules of customary international law. **Conclusion 4, paragraph 1**, of the Commission's conclusions on the identification of customary international law seeks to capture this.[89]

Other practice that may sometimes be relevant is that of public international organizations. As **paragraph 2 of conclusion 4** indicates, '[i]n certain cases', the practice of international organizations also contributes to the formation and expression of rules of customary international law.[90] While international organizations often serve as arenas or catalysts for the practice of States, the paragraph deals with practice that is attributed to international organizations themselves, not practice of States acting within or in relation to them (which is attributed to the States concerned). This matter proved to be quite controversial within the Commission and among States commenting on its work. Careful attention was paid to the question in an effort to to describe the current state of international law on the matter.

Paragraph 2 reflects, first, the fact that although most international organizations lack a genuinely autonomous law-making power, their contribution to the creation and expression of customary international law seems undeniable in cases where the

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[88] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, ICJ Reports 2012,* p. 99, at p. 143, para. 101.
[89] *Supra* note 4, at p. 130.
[90] *Ibid*.

member States have transferred exclusive competences to them, such that the States themselves do not engage in practice with respect to the issue at hand. In such cases, international organizations exercise some of the public powers of their member States, and their practice may (some would say must) thus be equated with the practice of those States. This is the case with the European Union, and perhaps also with some other international organizations, including regional international economic organizations.

Practice within the scope of paragraph 2 may also arise where member States have not transferred exclusive competences, but have conferred competences upon the international organization that are functionally equivalent to powers exercised by States. Thus the practice of international organizations when concluding treaties, serving as treaty depositaries, in deploying military forces (for example, for peacekeeping), in administering territory, or in taking positions on the scope of the privileges and immunities of the organization and its officials, may contribute to the formation, or expression, of rules of customary international law in those areas.

The practice of international organizations is likely to be of particular relevance with respect to rules of customary international law that fall within the mandate of the organizations, and/or that are addressed specifically to them, such as those on their international responsibility or relating to treaties to which they are parties.

The wording 'a general practice accepted as law', in Article 38(1)(b) of the ICJ Statute, is broad enough to include the practice of international organizations: the suggested Root-Phillimore formulation of 'International custom, as evidence of a common practice in use between nations and accepted by them as law', like Baron Descamps's original reference to international custom as 'being practice between nations accepted by them as law', was for some reason amended so as to omit the word 'nations'. Authors have thus argued that 'custom … [is] not required to be followed or acknowledged "by states" only, as it is actually required [in the Statute] … when referring to conventions. So that, in principle,

practices may emanate from state and non-state actors'.[91] In any case, such contribution by international organizations seems undeniable in today's world, in particular given their separate international legal personality and their competences.

The Commission made sure to emphasise, however, that caution is required in assessing the weight of the practice of an international organization as part of a general practice. As the commentary explains, international organizations vary greatly, not just in their powers, but also in their membership and functions.[92] 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 that may need to be considered in weighing such practice are: the nature of the organization; the nature of the organ whose conduct is under consideration; whether the conduct is ultra vires the organization or organ; and whether the conduct is consonant with that of the member States.

Conclusion 4, **paragraph 3**, states that the conduct of actors other than States and international organizations – for example, non-governmental organizations (NGOs), non-State armed groups, transnational corporations and private individuals – is neither creative nor expressive of customary international law.[93] The conduct of such other entities thus does not serve as direct (primary) evidence of the existence and content of rules of customary international law. Paragraph 3 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).

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[91] J.P. Bohoslavsky, Y. Li and M. Sudreau, 'Emerging Customary International Law in Sovereign Debt Governance?' in 9 *Capital Markets Law Journal* (2013), pp. 55, 63.
[92] *Supra* note 4, at p. 131.
[93] *Supra* note 4, at p. 130.

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 when 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. Similarly, although the conduct of non-State armed groups, or of private fishermen, is not practice that may be constitutive or expressive of customary international law, the reaction of States to it may well be.

This is consistent with the Commission's approach in the context of its work on the topic Subsequent agreements and subsequent practice in relation to the interpretation of treaties: there it was decided that 'Other conduct, including by non-State actors, does not constitute subsequent practice … Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty'.[94]

As mentioned in the previous lecture, one potential significant difficulty is ascertaining the practice of States: the dissemination and location of practice remain an important practical issue in the circumstances of the modern world, notwithstanding (or even because of) the development of technology and information resources. Bearing this in mind, let us try and define what kind of practice may be of relevance.

It has occasionally been suggested that practice should only qualify for the purposes of customary international law when it relates to a type of situation falling within the domain of international relations, or to some actual incident or episode of claim-making (as opposed to assertions in abstracto). This approach is too narrow; it may indeed be said that '[i]n the international system … every act of

[94] Report of the International Law Commission on the work of its Seventieth session (30 April–1 June and 2 July–10 August 2018), UN Doc. A/73/10 (2018), p. 14.

state is potentially a legislative act'.[95] Such acts may comprise both physical and verbal (written and oral) conduct: views to the contrary, according to which 'claims themselves, although they may articulate a legal norm, cannot constitute the material component of custom'[96] are too restrictive. Accepting such views could also be seen as encouraging confrontation leading even, in some cases, to the use of force. In any event, it is difficult to contest the fact that 'the method of communication between States has widened. The beloved "real" acts become less frequent, because international law, and the Charter of the UN in particular, place more and more restraints on States in this respect'.[97]

Moreover, 'the term "practice" (which is what is referred to in Article 38 of the ICJ Statute) is itself general enough — thereby corresponding with the flexibility of customary law itself — to cover any act or behaviour of a State, and it is not made entirely clear in what respect verbal acts originating from a State would be lacking, so that they cannot be attributed to the behaviour of that State'.[98] At the same time, caution is needed in assessing what States (and international organizations) say: words cannot always be taken at face value.

Turning to **conclusions 5 and 6**,[99] we see that the Commission has accepted that practice may indeed take a wide range of forms

[95] A.M. Weisburd, 'Customary international law: the problem of treaties', 21 *Vanderbilt Journal of Transnational Law* (1988), pp. 7, 31; see also I. Brownlie, 'Some problems in the evaluation of the practice of States as an element of custom', in *Studi di diritto internazionale in onore di Gaetano Arangio Ruiz*, vol. I (Editoriale Scientifica, 2004), pp. 313-314 (suggesting, inter alia, that 'the materials not related to sudden crises are more likely to represent a mature and consistent view of the law').

[96] A.A. D'Amato, *The Concept of Custom in International Law* (Cornell University Press, 1971), p. 88 (explaining that 'a state has not done anything when it makes a claim; until it takes enforcement action, the claim has little value as a prediction of what the state will actually do').

[97] K. Zemanek, 'What is "State practice" and who makes it?' in *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht — Festschrift für Rudolf Bernhardt*, U. Beyerlin and others, eds. (Springer, 1995), pp. 289, 306.

[98] M. E. Villiger, *supra* note 45, at p. 21.

[99] *Supra* note 4, at pp. 132, 133.

– including inaction, to which I shall return shortly. This is but one illustration of the fact that the Commission's work on the topic has shown that several longstanding theoretical controversies related to customary international law may now have been put to rest.[100]

Given the inevitability and pace of change, political and technological, the Commission considered that it was neither possible nor desirable to seek to provide an exhaustive list of forms that practice may take. At the same time, it was thought to be helpful to indicate some of the main forms of practice that have been relied upon by States, courts and tribunals, and in writings. The list in conclusion 6 is non-exhaustive.

The order in which the forms of practice are listed in paragraph 2 of conclusion 6 is not intended to be significant. And some of the forms listed overlap, so that a particular example of State practice may well fall under more than one. Each of the forms listed is to be interpreted broadly to reflect the multiple and diverse ways in which States act and react. The expression 'executive conduct', for example, refers comprehensively to any form of executive act, including executive orders, decrees and other measures; official statements on the international plane or before a legislature; and claims before national or international courts and tribunals. The expression 'legislative and administrative acts' similarly embraces the various forms of regulatory disposition effected by a public authority. The term 'operational conduct "on the ground"' includes law enforcement and seizure of property as well as battlefield or other military activity, such as the movement of troops or vessels, or deployment of certain weapons. The words 'conduct in connection with treaties' cover acts related to the negotiation and conclusion of treaties, as well as their implementation; by concluding a treaty a State may be engaging in practice in the domain to which the treaty relates, such as maritime delimitation agreements or host country

[100] See also O. Sender and M. Wood, 'A Mystery No Longer? *Opinio Juris* and Other Theoretical Controversies Associated with Customary International Law', 50 *Israel Law Review* (2017), pp. 299–330.

agreements. The reference to 'conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference' likewise includes acts by States related to the negotiation, adoption and implementation of resolutions, decisions and other acts adopted within international organizations or at intergovernmental conferences, whatever their designation and whether or not they are legally binding.

Decisions of national courts at all levels may count as State practice (though it is likely that greater weight will be given to the higher courts); decisions that have been overruled on the particular point are generally not considered relevant. The role of decisions of national courts as a form of State practice is to be distinguished from their potential roles as evidence of acceptance as law or as a 'subsidiary means' for the determination of rules of customary international law.

Paragraph 1 of conclusion 6 makes clear that inaction may count as practice. The words 'under certain circumstances' seek to caution, however, that only deliberate abstention from acting may serve such a role: the State in question needs to be conscious of refraining from acting in a given situation, and it cannot simply be assumed that abstention from acting is deliberate. Examples of such omissions (sometimes referred to as 'negative practice') may include abstaining from instituting criminal proceedings against foreign State officials; refraining from exercising protection in favour of certain naturalized persons; and abstaining from the use of force. This is different to the role that inaction may serve as evidence of acceptance as law – an issue covered in the follwing lecture.

Whether and how far any of these examples of forms of practice are in fact relevant in a particular case will depend on the specific rule under consideration, and all the relevant circumstances: for example, the International Court drew particular attention to national court decisions when seeking to identify the rules of customary international law on State immunity.[101]

[101] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, ICJ Reports 2012,* p. 99, at p. 55, para. 123.

A State's practice should be 'taken as a whole'. This implies, first, that account has to be taken of all available practice of a particular State. Secondly, it may be the case that the various organs of the State do not speak with one voice. For example, a court, or the legislature, may adopt a position contrary to that of the executive branch, and even within the same branch different positions may be taken. This may be particularly likely with the practice of sub-State organs (for example, in a federal State). As **conclusion 7** suggests,[102] where a State speaks in several voices, its practice may be considered as ambivalent, and this weakens the weight to be given to its practice as part of the general practice that is sought.

This brings us to the question of what the requirement of a general practice means, which **conclusion 8** seeks to answer. To begin with, 'it is of course clear from the explicit terms of Article 38(1)(b), of the Statute of the Court, that the practice from which it is possible to deduce a general custom is that of the generality of States and not of all of them'. Indeed, for a rule of general customary international law to be identified, the practice need not be universal. However, as conclusion 8 explains, it has to be sufficiently widespread and representative. It must also be consistent. In the words of the International Court of Justice in the *North Sea Continental Shelf* cases, the practice in question must be 'both extensive and virtually uniform': it must be a 'settled practice'.[104] Let us look further into these requirements.

The requirement that the practice be 'widespread and representative' does not lend itself to exact formulations, as circumstances may vary greatly from one case to another (for example, the frequency with which circumstances, calling for action, arise). As regards diplomatic relations, for example, in which all States regularly engage, a practice may have to be widely exhibited,

[102] *Supra* note 4, at p. 134.
[103] *Barcelona Traction, Light and Power Company, Limited, Judgment, ICJ Reports 1970,* p. 3, at p. 330 (Separate Opinion of Judge Ammoun).
[104] *North Sea Continental Shelf, Judgment, ICJ Reports 1969,* p. 3, at p. 43, para. 74 and p. 44, para. 77.

while with respect to international canals, of which there are very few, the amount of practice would necessarily be less. At times, therefore, even a 'respectable' number of States adhering to the practice may not necessarily be sufficient; yet in other cases it may well be that only a relatively small number of States engage in a practice, and the inaction of others suffices to create a rule of customary international law. This is captured by the all-important word 'sufficiently', which implies that the necessary number and distribution of States taking part in the relevant practice (like the number of instances of practice) cannot be identified in the abstract. The participating States should include those that had an opportunity or possibility of applying the alleged rule; and it is important that such States are representative, which needs to be assessed in light of all the circumstances, including the various interests at stake and/or the various geographical regions.

It is also clear that, within this framework, due regard should be given to the practice of 'States whose interests [are] specially affected',[105] where such States may be identified. In other words, any assessment of international practice ought to take into account the practice of those States that are 'affected or interested to a higher

[105] *Ibid*., at p. 42, para. 73 ('…With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected'), p. 43, para. 74 ('State practice, including that of States whose interests are specially affected'), and pp. 175-176 (Dissenting Opinion of Judge Tanaka) ('It cannot be denied that the question of repetition is a matter of quantity … What I want to emphasize is that what is important … [is] the meaning which [a number or figure] would imply in the particular circumstances. We cannot evaluate the ratification of the Convention [on the continental shelf] by a large maritime country or the State practice represented by its concluding an agreement on the basis of the equidistance principle, as having exactly the same importance as similar acts by a land-locked country which possesses no particular interest in the delimitation of the continental shelf'). See also *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, ICJ Reports 1974,* p. 3, at p. 90 (Separate Opinion of Judge De Castro) ('For a new rule of international law to be formed, the practice of States, including those whose interests are specially affected, must have been substantially or practically uniform'), and p. 161 (Separate Opinion of Judge Petrén) ('Hence another element which is necessary for the formation of a new rule of customary law is missing, namely its acceptance by those States whose interests it affects').

degree than other states'[106] with regard to the rule in question, and such practice should weigh heavily (to the extent that, in appropriate circumstances, it may prevent a rule from emerging). Which States are 'specially affected' will depend upon the rule under consideration, and indeed not all cases allow a clear identification of 'specially affected' states: in many cases, all States are affected equally. Admittedly, some States may often be 'specially affected'. De Visscher compared the growth of customary international law to the 'formation of a road across vacant land': 'Among the users are some who mark the soil more deeply with their footprints than others, either because of their weight, which is to say their power in the world, or because their interests bring them more frequently this way'.[107] But the principle of sovereign equality mandates that the term 'specially affected States' should not be taken to refer to the relative power of States, but rather, as I have noted and as the Commission sought to make clear in order to prevent abuse, to the degree of involvement in, and particular relevance to, the practice in question.[108]

For a rule of customary international law to come into being, the relevant practice must also be consistent. This means that where the relevant acts are divergent to the extent that no pattern of behaviour can be discerned, no general practice (and thus no corresponding rule of customary international law) can be said to exist. For example, in the Fisheries case, the International Court of Justice found that 'although the ten-mile rule has been adopted by certain States … other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law'.[109] In

[106] W.T. Worster, 'The transformation of quantity into quality: critical mass in the formation of customary international law', 31 *Boston University International Law Journal* (2013), pp. 1, 63.

[107] C. de Visscher, *Theory and Reality in Public International Law* (Princeton University Press, 1968), p. 149.

[108] See also ILA's *London Statement of Principles Applicable to the Formation of General Customary International Law, supra* note 1, at p. 26 ('There is no rule that major powers have to participate in a practice in order for it to become a rule of general customary law. Given the scope of their interests, both geographically and ratione materiae, they often will be "specially affected" by a practice; and to that extent and to that extent alone, their participation is necessary').

[109] *Fisheries case, Judgment of December 18th, 1951: ICJ Reports 1951,* p. 116, at p. 131.

examining whether the practice is consistent it is of course important to consider instances of conduct that are in fact comparable, that is, where the same or similar issues have arisen so that such instances could indeed constitute reliable guides.

At the same time, some inconsistency is not fatal. In other words, complete consistency 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'. As the International Court said, '[i]t is not to be expected that in the practice of States the application of the rules in question should have been perfect ... The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules...'[110]

When inconsistency takes the form of breaches of a rule, this, too, 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. The International Court has clarified that '[i]f a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule'.[111]

A chamber of the International Court of Justice held in the Gulf of Maine case that where the practice demonstrates 'that each specific case is, in the final analysis, different from all the others .... This precludes the possibility of those conditions arising which are necessary for the formation of principles and rules of customary law' (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, ICJ Reports 1984,* p. 246, at p. 290, para. 81). See also, for example, *Colombian-Peruvian asylum case, Judgment of November 20th 1950: ICJ Reports 1950,* p. 266 ('The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum ... that it is not possible to discern in all this any constant and uniform usage ... with regard to the alleged rule of unilateral and definitive qualification of the offence').

[110] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, ICJ Reports 1986,* p. 14, at p. 98, para. 186.

[111] *Ibid*.

What about the length of time required for the formation of a rule of customary international law? This has also been the subject of some disagreement in the past. It has been argued that '[c]ertainly practice over a more or less long period is an essential ingredient of customary law'.[112] The jurisprudence of the International Court, however, has clarified that there is no specific requirement with regard to how long a practice must exist before it can ripen into a rule of customary international law. In the oft-cited words of the North Sea Continental Shelf judgment, 'the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law' where a general practice that is accepted as law may be observed.[113] On the other hand, it is equally clear that, despite some academic fascination with the term, there is no such thing as 'instant custom'. One consideration to take into account in this context is that 'all states which could become bound by their inaction must have the time necessary to avoid implicit acceptance by resisting the rule'.[114]

So much for the constituent element of 'a general practice'. But as we have already discussed, establishing that a certain practice is followed consistently by a sufficiently widespread and representative number of States does not in itself suffice in order to identify a rule of customary international law. Without acceptance as law (opinio juris), a general practice may not be considered as creative, or expressive, of customary international law; it is mere usage or habit. Not all observed regularities of international conduct bear legal significance: diplomatic courtesies, for example, such as the provision of red carpets for visiting heads of State, are not accompanied by any sense of legal obligation and thus could not generate or attest to any legal duty or right to act accordingly. To the significance of the second constituent element of customary international law, and how to ascertain its existence, we shall turn in the next lecture.

[112] R.Y. Jennings, 'The Identification of International Law', in Bin Cheng (ed.), *International Law: Teaching and Practice* (Stevens & Sons 1982), pp. 3, 5.
[113] *North Sea Continental Shelf, Judgment*, *ICJ Reports 1969,* p. 3, at p. 43, para. 74.
[114] H. Meijers, 'How is international law made? — the stages of growth of international law and the use of its customary rules', 9 *Netherlands Yearbook of International Law* (1978), p. 3, pp. 23-24.

LECTURE 4:

Identification of customary international law (continued) – acceptance as law and other issues

Acceptance as law (*opinio juris*)

Having covered the constituent element of 'a general practice', let us now turn to the second constituent element, acceptance as law. Thirlway has memorably described it as the 'philosopher's stone which transmutes the inert mass of accumulated usage into the gold of binding legal rules'.[115]

The element of 'acceptance as law', to closely track the language of the Statute of the International Court of Justice, is commonly referred to as opinio juris, a Latin term that has been treated by various scholars as a conundrum. It may be added here that there is perhaps nothing like Latin to provide a legal concept with an added ring of mystery. Tiersma has suggested that 'a great majority of legal maxims are indeed in Latin, partly for historical reasons, but sometimes also to mask the fact that many of these maxims are self-evident banalities made to seem more impressive by being expressed in a dead language'.[116] With reference to opinio juris in particular, Reisman apparently warns his students 'that if they confront something in Latin, it is usually a signal that jurists are unsure of what they are talking about and are trying to conceal their confusion behind a solemn and pretentious Latin phrase'.[117]

The Commission retained the term opinio juris in its conclusions and commentaries, within brackets after the phrase 'accepted as law'. It explained that this was done 'because of its prevalence in legal

[115] Thirlway, *supra* note 66, at p. 47.
[116] Peter Tiersma, 'The New Black's', 55 *Journal of Legal Education* (2005), pp. 386, 397.
[117] W. Michael Reisman, 'Jonathan I. Charney: An Appreciation', 36 *Vanderbilt Journal of Transnational Law* (2003), p. 23.

discourse (including in the case law of the International Court of Justice), and also because it may capture better the particular nature of the subjective element of customary international law as referring to legal conviction and not to formal consent'.[118] More importantly, however, it treated this element – against the background of substantial accumulated practice – as an identifiable criterion rather than an indiscernible inner feeling. Use of the term 'acceptance as law' also has the benefit of going a large way towards overcoming the opinio juris 'paradox' that authors have described as that 'vicious cycle argument' which questions how a new rule of customary international law can ever emerge if the relevant practice must be accompanied by a conviction that such practice is already law.

The International Court has used various other expressions to refer to the subjective element imported by the words in its Statute 'accepted as law'. These include a 'feeling of legal obligation'; 'a belief that [the] practice is rendered obligatory by the existence of a rule of law requiring it … [a] sense of legal duty'; a 'recognition of necessity'; a 'conviction of necessity'; 'a belief in the respect due to this long-established practice'; 'a deliberate intention … a common awareness reflecting the conviction … as to [a] right'; 'the general feeling … regarding the obligatory character of [the practice]'; an 'actual consciousness of submitting … to a legal obligation' or a 'consciousness of the binding nature of the rule'; 'a conviction that they [the parties] are applying the law'; and 'a conviction, a conviction of law, in the minds of [States], to the effect that they have … accepted the practice as a rule of law, the application whereof they will not thereafter be able to evade'.[119] Other courts and tribunals, as well as States, have likewise drawn upon a rich fund of vocabulary in referring to this 'psychological'/'qualitative'/'immaterial'/'attitudinal' requirement of customary international law. In general, however, all such references appear to express a common meaning: acceptance by States that their conduct or the conduct of others is in accordance with

[118] *Supra* note 4, at p. 123, fn. 665.
[119] See the citations in A/CN.4/672: Second report on identification of customary international law by Michael Wood, Special Rapporteur, pp. 54-55, para. 67.

customary international law. 'Belief, acquiescence, tacit recognition, consent have one thing in common — they all express subjective attitude of states either to their own behaviour or to the behaviour of other states in the light of international law'.[120]

Conclusion 9, paragraph 1, explains that '[t]he 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'.[121] It serves to highlight that it is crucial to establish, in each case, that States (and/or international organizations) have acted in a certain way because they felt or believed themselves legally compelled or entitled to do so by reason of a rule of customary international law. In other words, they must have pursued the practice as a matter of right, or submitted to it as a matter of obligation. As the International Court of Justice stressed in the *North Sea Continental Shelf* judgment:

> 'Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation'.[122]

In the commentary to conclusion 9, the Commission explains that acceptance as law (opinio juris) is to be distinguished from other,

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[120] R. Müllerson, 'The interplay of objective and subjective elements in customary law', in K. Wellens (ed.), *International Law: Theory and Practice — Essays in Honour of Eric Suy* (Martinus Nijhoff, 1998), p. 163.

[121] *Supra* note 4, at p. 138.

[122] *North Sea Continental Shelf, Judgment, ICJ Reports 1969,* p. 3, at p. 44, para. 77; see also paragraph 76 (referring to the requirement that States 'believed themselves to be applying a mandatory rule of customary international law'). The Court has also referred, inter alia, to 'a practice illustrative of belief in a kind of general right for States': *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, ICJ Reports 1986,* p. 14, at p. 108, para. 206.

extra-legal motives for action, such as comity, political expediency or convenience: if the practice in question is motivated solely by such considerations, no rule of customary international law is to be identified. Acceptance as law is not to be confused with considerations of a social or economic nature either, although these may very well be present, especially at the outset of the development of a practice.

Seeking to comply with a treaty obligation as such, much like seeking to comply with domestic law, is not acceptance as law for the purpose of identifying customary international law either: practice undertaken with such intention does not, by itself, lead to an inference as to the existence of a rule of customary international law. A State may of course recognize that it is bound by a certain obligation by force of both customary international law and treaty, but this needs to be proved. On the other hand, when States act in conformity with a treaty provision by which they are not bound, or apply conventional provisions in their relations with non-parties to the treaty, this may evidence the existence of acceptance as law (opinio juris) in the absence of any explanation to the contrary.

Mere adherence to an alleged rule does not generally suffice as evidence of opinio juris: 'such usage does not necessarily prove that actors see themselves as subject to a legal obligation'.[123] In the words of the International Court, 'acting, or agreeing to act in a certain way, does not itself demonstrate anything of a juridical nature'.[124]

Similarly, although some have suggested that a large number of concordant acts, or the fact that such cases have been occurring over a considerable period of time, may suffice to establish the existence

[123] A. M. Weisburd, 'Customary international law: the problem of treaties', 21 *Vanderbilt Journal of Transnational Law* (1988), p. 9; see also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996,* p. 226, at pp. 423-424 (Dissenting Opinion of Judge Shahabuddeen) ('It is also important to have in mind that bare proof of acts or omissions allegedly constituting State practice does not remove the need to interpret such acts or omissions. The fact that States may feel that realities leave them no choice but to do what they do does not suffice to exclude what they do from being classified as part of State practice, provided, however, that what they do is done in the belief that they were acting out of a sense of legal obligation').

[124] *North Sea Continental Shelf, Judgment, ICJ Reports 1969,* p. 3, at p. 44, para. 76.

of opinio juris, this is not so. While these facts may indeed give rise to the acceptance of the practice as law, they do not necessarily attest to such acceptance in and of themselves. As the International Court had observed, 'even if these instances of action … were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the opinio juris … The frequency, or even habitual character of the acts is not in itself enough'.[125]

The Commission thus clarified, in conclusion 3, paragraph 2, that '[e]ach of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element'.[126] This serves to emphasize that the existence of one element may not be deduced merely from the existence of the other, and that a separate inquiry needs to be carried out for each. Nevertheless, the paragraph does not exclude that the same material may be used to ascertain practice and acceptance as law. A decision by a national court, for example, could be relevant practice as well as indicate that its outcome is required under customary international law. Similarly, an official report issued by a State may serve as practice (or contain information as to that State's practice) as well as attest to the legal views underlying it. The important point remains that the material must be examined as part of two distinct inquiries, to ascertain practice and to ascertain acceptance as law.

Acceptance as law is generally to be sought with respect to the interested States, both those that carry out the practice in question and those in a position to react: 'either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it"'.[127] In the modern reality of many multilateral forums such inquiry, into what some refer to as 'individual *opinio juris*', may be complemented or assisted by a search for 'coordinated or general opinio juris', that is,

[125] *Ibid*., at para. 77.
[126] *Supra* note 4, at p. 127.
[127] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986,* p. 14, at p. 109 (citation omitted).

acceptance of a certain practice as law (or otherwise) by a general consensus of States. Much like the convenience afforded by examining practice undertaken jointly by States, this may make it easier to identify whether the members of the international community are indeed in agreement or are divided as to the binding nature of a certain practice.

The non-exhaustive list of potential forms of evidence of acceptance as law offered by the Commission in **conclusion 10** includes public statements made on behalf of States (usually the clearest evidence); official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; and inaction (under certain conditions).[128] Such forms of evidence may also indicate lack of acceptance as law.

Inaction as evidence of acceptance as law requires some explanation. Paragraph 3 of conclusion 10 provides that, under certain conditions, failure by States to react, within a reasonable time, may also, in the words of the International Court of Justice in the Fisheries case, '[bear] witness to the fact that they did not consider … [a certain practice undertaken by others] to be contrary to international law'.[129] Tolerance of a certain practice may indeed serve as evidence of acceptance as law (*opinio juris*) when it represents concurrence in that practice.

For such a lack of open objection or protest to have this probative value, however, two requirements must be satisfied in the circumstances of each case in order to ensure that such inaction does not derive from causes unrelated to the legality of the practice in question. First, it is essential that a reaction to the practice in question would have been called for: this may be the case, for example, where the practice is one that affects — usually unfavourably — the interests or rights of the State failing to react. Second, the reference to a State

[128] *Supra* note 4, at p. 140.
[129] *Fisheries case, Judgment of 18 December 1951, ICJ Reports 1951,* p. 116, at p. 139.

being 'in a position to react' means that the State concerned must have had knowledge of the practice (which includes circumstances where, because of the publicity given to the practice, it may be assumed that the State had such knowledge), and that it must have had sufficient time and the ability to react. Where a State did not or could not have been expected to know of a certain practice, or has not yet had a reasonable time to respond, inaction cannot be attributed to an acknowledgment that such practice was mandated (or permitted) under customary international law. It also needs to be remembered that a State may provide other explanations for its perceived silence.

There is some common ground between the forms of evidence of acceptance as law and the forms of State practice listed in conclusion 6, paragraph 2 above; in part, this reflects the fact that the two elements may at times be found in the same material (but, even then, their identification requires a separate exercise in each case). In any event, statements are more likely to embody the legal conviction of the State, and may often be more usefully regarded as expressions of acceptance as law (or otherwise) rather than instances of practice.

Significance of certain materials

The Commission has recognized in its work on Identification of customary international law that various materials other than primary evidence of practice and opinio juris may be consulted in the process of determining the existence and content of rules of customary international law. These commonly include written texts bearing on legal matters, in particular treaties, resolutions of international organizations and intergovernmental conferences, judicial decisions (of both international and national courts), and scholarly works. Such texts may assist in collecting, synthesizing or interpreting practice relevant to the identification of rules of customary international law, and may offer precise formulations to frame and guide an inquiry into the two constituent elements. In Part Five of its conclusions, the Commission sought to explain the potential significance of the most important of these.

The relevance of treaties to the identification of customary international law is familiar ground. It is dealt with in **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.[130] As the conclusion indicates, caution is needed when establishing whether this is so. 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,

> 'It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio 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'.[131]

Paragraph 2 of conclusion 11 seeks to caution that the existence of similar provisions in a number of bilateral or other treaties, thus establishing similar rights and obligations for a possibly broad array of States, does not necessarily indicate that a rule of customary international law is reflected in such provisions. While it may indeed be the case that such repetition attests to the existence of a corresponding rule of customary international law (or has given rise to it), it 'could equally show the contrary' in the sense that States enter into treaties because of the absence of any rule or in order to derogate from an existing but different rule. Again, an investigation into whether there are instances of practice accepted as law (accompanied by *opinio juris*) that support the written rule is required.

[130] *Supra* note 4, at p. 143.
[131] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, ICJ Reports 1985,* p.13, at pp. 29–30, para. 27.

The role of resolutions adopted by international organizations or at international conferences used to be a very controversial matter in the 1960s and 1970s. **Conclusion 12** deals with this matter and begins with a negative statement in its first paragraph, perhaps itself a 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.[132]

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.

Conclusion 12, paragraph 2, 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*'.[133] 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'.[134] Conversely, negative votes, abstentions, or disassociations from a consensus may be evidence that there is no acceptance as law, and may thus show that there is no rule.

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[132] *Supra* note 4, at p. 147.

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

[134] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, ICJ 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.

Conclusion 12, paragraph 3, as a logical consequence of paragraphs 1 and 2, clarifies that provisions of resolutions adopted by an international organization or at an intergovernmental conference cannot in and of themselves serve as conclusive evidence of the existence and content of rules of customary international law. Thus, a provision in a resolution may reflect a rule of customary international law only if it is established that the provision corresponds to a general practice that is accepted as law.

The next point addressed in the conclusions is the role of judicial decisions. This is dealt with in **conclusion 13**.[135] As is well-known, Article 38(1)(d) 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 treaties, customary international law, and general principles of law recognized by civilized nations. 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 the case, especially as regards judicial decisions.

What is the position of national courts? We have seen 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). 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

[135] *Supra* note 4, at p. 149.

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 the decisions of domestic courts have to be approached with care, and in context, since they may reflect national legal systems and approaches, not necessarily the position under international law. This may, for example, well be the case with respect to domestic judgments dealing with human rights, which are situated within a particular legal (and political) framework.[136]

Next comes another subsidiary means for the determination of rules of international law, the 'teachings of the most highly qualified publicists', as the ICJ Statute puts it.[137] As with decisions of courts and tribunals, referred to in 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 **conclusion 14** seeks to capture.[138]

There is a need for great caution when drawing upon writings. 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, for example, with writings on international human rights law, writers may aim not merely to record the state of the law as it is, but to advocate its development. In doing so, they do not always distinguish clearly between the law as it is and the law as they would like it to be. Second, writings may reflect the

[136] See UN Doc. A/CN.4/691: *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* (2016).
[137] 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.
[138] *Supra* note 4, at p. 150.

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'.[139]

The Commission did not find it easy to describe its own role in relation to the identification of rules of customary international law. Its output undoubtedly merits special consideration because, as may be observed in many decisions of the International Court of Justice and other courts and tribunals, a determination by the Commission, affirming the existence and content of a rule of customary international law, may be given particular weight (as may a conclusion by it that no such rule exists). But does the Commission's output falls within Article 38(1)(d) of the ICJ Statute, as 'teachings of the most highly qualified publicists of the various nations' that may serve as subsidiary means for the determination of customary rules? If not, how is it to be classified? There was a division within the Commission between those that thought there should be a separate conclusion about the role of the Commission or at least an express mention of that role in the conclusions, and those who considered that this might be seen as the Commission blowing its own trumpet. Views were also divided on whether the output of the Commission should be classified as 'teachings', along with other writings, or whether they belonged

[139] *The Paquete Habana and The Lola*, US Supreme Court 175 US 677 (1900), at p. 700. In the same case, Chief Justice Fuller, dissenting, said of writers that '[t]heir lucubrations may be persuasive, but not authoritative'. Compare the remarks of the English Court of Admiralty in the Renard Case (1778): 'A pedantic man in his closet dictates the law of nations; and who shall decide, when doctors disagree? Bynkershoek, as it is natural to every writer or speaker who comes after another, is delighted to contradict Grotius…' (165 *English Law Reports*, p. 51).

to some separate (higher) category. The compromise reached on first reading (and maintained without further debate on second reading) was to include a separate paragraph on the matter in the introductory commentary to Part Five of the conclusions. This reads

> 'The output of the International Law Commission itself merits special consideration in the present context. As has been recognized by the International Court of Justice and other courts and tribunals, a determination by the Commission affirming the existence and content of a rule of customary international law may have particular value, as may a conclusion by it that no such rule exists. This flows from the Commission's unique mandate, as a subsidiary organ of the United Nations General Assembly, to promote the progressive development of international law and its codification; the thoroughness of its procedures (including the consideration of extensive surveys of State practice and opinio juris); and its close relationship with the General Assembly and States (including receiving oral and written comments from States as it proceeds with its work). The weight to be given to the Commission's determinations depends, however, on various factors, including the sources relied upon by the Commission, the stage reached in its work, and above all upon States' reception of its output'.[140]

The persistent objector rule

The Commission's conclusions include a provision on the persistent objector rule, in conclusion 15, according to which a state that objects to a rule of customary international law, while that rule is in the process of formation, is not bound by the rule for as long as it maintains its objection.[141] This is another issue that proved somewhat less contentious than in the past, when it was suggested that the rule

[140] *Supra* note 4, at pp. 142-143, para. (2) of the introductory commentary to Part V (footnotes omitted).
[141] *Ibid*., at p. 152.

played a surprisingly limited role in the actual legal discourse of States. In fact, judicial proceedings, in particular, furnish a number of instances where States have sought to rely on the rule (and courts and tribunals have acknowledged its existence). In addition, there is other State practice in support of the rule, such as official government statements that recognise it explicitly. An initially sceptical author who set out to write a monograph denying the existence of the rule found, as his research progressed, that 'the more I read and the more deeply I delved into state practice, the more support for the rule I found. …the rule does exist and is, moreover, well worth examining'.[142]

While some have suggested that the rule relates more to the application of customary international law rather than to its identification, the Commission (widely supported by States) decided to include a provision in the conclusions, primarily for the reason that application and identification are often joined in practice. In doing so, the Commission highlighted that the application of the rule is subject to stringent conditions. It expressly states (in a new paragraph 3) that the conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*). The Commission is currently considering *jus cogens* as a separate topic.

Particular customary international law

The final conclusion, **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.[143] In line with the case law of the International Court, the conclusion and its commentary explain that the two-element approach also applies in the identification of such rules, but taking into account the special nature of rules of particular customary international law by virtue of their limited reach. The practice must be

[142] J.A. Green, *The Persistent Objector Rule in International Law* (Oxford University Press, 2016), ix.
[143] *Supra* note 4, at p. 154.

general in the sense that it is a consistent practice 'among the States concerned', that is, all the States among which the rule in question applies. Each of these States must have accepted the practice as law among themselves. Particular customary international law cannot, of course, affect the rights or obligations of third States.

Having covered all this ground, you now know much about customary international law, the role it is meant to play in the international legal system, and how it is to be identified. In the last lecture we shall see how this source of international law operates in practice in one or two specific fields of international law.

LECTURE 5:

Customary international law in action – international immunities and other issues

What we have covered in the preceding four lectures is not just theoretical, though it may sometimes seem quite abstract. Customary international law continues to hold a central place in the life of international law. To show its continuing importance, I shall just mention one or two matters I have had to consider in the last few weeks:

(1) Whether certain provisions of the 1982 UN Law of the Sea Convention (UNCLOS) reflect customary international law. This arises in many situations because some important coastal States are not parties to the Convention, and all questions concerning them will be governed by customary international law, unless there is some other applicable treaty (such as one or other of the 1958 Geneva Conventions on the Law of the Sea). States not parties to UNCLOS include Colombia, Israel, Peru, Turkey and the USA. The kind of questions that may arise include how far Article 76 (on the outer limit of the continental shelf, beyond 200 nautical miles), reflects customary international law; and how far Article 33 of the Convention (on the contiguous zone) reflects customary international law. These questions arise in cases currently before the International Court of Justice brought by Nicaragua (which is a party to UNCLOS) against Colombia (which is not a party to UNCLOS).[144] More generally, the customary international law of the sea continues to be of considerable relevance, despite the large success of UNCLOS.[145]

[144] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua* v. *Colombia); Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia).*

[145] For a brief summary, with further references, see M. Wood, 'Le rôle contemporain du droit international coutumier', in M. Forteau, J.-M. Thouvenin (eds.) *Traité de droit international de la mer* (Pedone, 2017), pp. 68-77.

(2) Whether the right to self-determination in customary international law crystallized after 1965/68 or earlier. In this connection there is a series of General Assembly resolutions that may be said to show an evolution of rule over time, each having to be analysed meticulously to ascertain its value as evidence of the existence and content of the rule (and whether it corresponds to State practice). This arises in the Chagos advisory proceedings currently before the International Court.[146]

(3) Another question, soon to be argued before the Appeals Chamber of the International Criminal Court, concerns the immunity of a serving foreign Head of State of a non-State party to the Rome Statute of the International Criminal Court.[147]

(4) And, of course, I have spent a lot of time this year (indeed, over the past six years) on the Commission's topic *Identification of customary international law*. The Commission's output it has already been discussed and applied in writings[148] and in court pleadings and judgments.[149]

[146] *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965 (Request for Advisory Opinion).*

[147] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09. A hearing took place before the ICC Appeals Chamber from 10 to 14 September 2018.

[148] See, for example, the special issue on customary international law in 19 *International Community Law Review* (2017); B.D. Lepard, *Re-examining Customary International Law* (Cambridge University Press, 2017); N. Blokker, 'International organizations and customary international law: is the International Law Commission taking international organizations seriously?', 14 *International Organizations Law Review* (2017), pp. 1–12; M. Fitzmaurice, 'Customary law, general principles, unilateral acts', in E. Sobenes Obregon and B. Samson (eds.), *Nicaragua Before the International Court of Justice: Impacts on International Law* (Springer, 2017), pp. 247–267; C.A. Bradley (ed.), *Custom's Future: International Law in a Changing World* (Cambridge University Press, 2016); L. Kirchmair, 'What came first: the obligation or the belief? A renaissance of consensus theory to make the normative foundations of customary international law more tangible', 59 *German Yearbook of International Law* (2016), pp. 289–319; K. Gastorn, 'Defining the imprecise contours of *jus cogens* in international law', 16 *Chinese Journal of International Law* (2018), pp. 1–20; E. Henry, 'Alleged acquiescence of the international community to revisionist claims of international customary law (with special reference to the jus contra bellum regime)', 18 *Melbourne Journal of International Law* (2017) pp. 260–297; J. d'Aspremont and S. Droubi (eds.), *International Organizations and the Formation of Customary International Law* (Manchester University Press, forthcoming 2019); and the articles comprising the 'Focus on the ILC's Work on the Identification of Customary International Law' in 27 *Italian Yearbook of International Law* (2017).

[149] See, for example, the pleadings of the United States and the United Kingdom in the *Chagos* advisory proceedings before the International Court of Justice; and

Let us now look in a little more detail to a number of other areas in which customary international law continues to dominate much of the international legal discourse. These again show how the issues we have been discussing are of much practical importance. I shall first mention briefly the customary international law on the use of force; then in rather more detail three aspects of the customary international law on international immunities: the immunity of international organizations; the immunity of State officials from foreign criminal jurisdiction; and the immunity of persons on special missions.

The *customary international law on the use of force* is a matter of the highest importance. It was considered at length in the *Military and Paramilitary Activities (Nicaragua v. United States of America)* case,[150] and has been touched on in later cases, and notably in the *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion.[151] At this point I would simply like to draw attention to the fact that this field has been the subject of many interesting studies concerning the correct methodology to be applied for identifying customary international law on the *jus ad bellum*. In particular, this is explored in depth in the writings of Olivier Corten.[152]

Another field where customary international role plays an important role is that of international immunities. This covers several types of immunities that may be invoked before (and ought to be applied by) domestic legal systems.

The *immunity under customary international law of international organizations* rarely comes before the courts: for the most part their immunities are governed by treaty provisions, whether in the constituent instruments or in the various (and varied) multilateral conventions and protocols on the matter and in their headquarters

the judgment of the English courts referred to in this fifth lecture, below.

[150] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986,* p. 14.

[151] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, *ICJ Reports 1996,* p. 226

[152] O. Corten, *Le droit contre la guerre* (2nd ed., 2014), Chapter 1 (Débats et options méthodologiques).

agreements with host States.[153] After careful study, some years ago, I concluded that

> 'While one still comes across assertions, by writers, governments or courts, that international organizations enjoy immunity under customary international law, the authorities relied upon are largely unconvincing. …From [the materials examined in the article], it cannot be said that there is a "general practice accepted as law" establishing a customary rule of immunity'.[154]

Two questions concerning the rules of **customary international law on immunity of State officials** have recently been hotly debated in the International Law Commission. Which officials benefit under customary international law from immunity *ratione personae* by virtue of their high office within the State – only those who are often referred to as the '*troika*', or a somewhat wider circle? And whether under customary international law there are exceptions to the immunity *ratione materiae* of State officials from foreign criminal jurisdiction.[155] These questions both arose under the Commission's topic *Immunity of State officials from foreign criminal jurisdiction*, for which Roman Kolodkin was Special Rapporteur from 2007 to 2011. I should note that the Commission is only part way through its work on the topic (and has not yet concluded a first reading), so any overall assessment would be premature.

Turning first to immunity *ratione personae*, the present text of draft article 3 on the topic entitled 'Persons enjoying immunity *ratione personae*' provides that 'Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from

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[153] See H.G. Schermers, N.M. Blokker, *International Institutional Law*, 6th edition (Brill Nijhoff, 2018), pp. 1610-1612A.

[154] M. Wood, 'Do International Organizations Enjoy Immunity under Customary International Law?', 10 *International Organizations Law Review* (2015), p. 287, at pp. 316-317. (The article is reproduced in N. Blokker, N. Schrijver (eds.), *Immunity of International Organizations* [Brill Nijhoff, 2015]).

[155] M. Wood, Melland Schill lecture, 21 November 2017, 'Lessons from the ILC topic Immunity of State officials', (22 *Max Planck Yearbook of United Nations Law* [2018, forthcoming]).

the exercise of foreign criminal jurisdiction'. There was significant disagreement within the Commission on this issue, both as to what the law is, and as to what it should be.

In her second report in 2013, which dealt with 'normative elements' of immunity *ratione personae*, the current Special Rapporteur, Ms. Escobar Hernández of Spain, recalled her suggested general analytical framework of 'all the norms, principles and values of international law that are relevant to the topic' – though without indicating what these were.[156] She described both what she referred to as 'a strict interpretation that links and restricts immunity ratione personae to Heads of State, Heads of Government and Ministers for Foreign Affairs' and 'a broader interpretation whereby immunity might also be enjoyed by other senior State officials, including, as often suggested, other members of the Government such as ministers of defence, ministers of trade and other ministers whose office requires them to play some role in international relations, either generally or in specific international forums, and who must therefore travel outside the borders of their own country in order to perform their functions'.[157] Then, based on her reading of the Arrest Warrant and Djibouti v. France judgments of the International Court of Justice[158] and of State practice,[159] and by reason of what she referred to as 'the impossibility of drawing up an exhaustive list',[160] the Special Rapporteur 'consider[ed] that the subjective scope of immunity from foreign criminal jurisdiction ratione personae should be limited to Heads of State, Heads of Government and Ministers for Foreign Affairs', and proposed a draft article to that effect.[161]

[156] A/CN.4/661: Second report on the immunity of State officials from foreign criminal jurisdiction By Concepción Escobar Hernández, Special Rapporteur, para. 7(c); see also para. 8 ('some members of the Commission voiced reservations regarding inclusion of the principles and values of current international law as an analytical tool').
[157] *Ibid*, paras. 57-62.
[158] *Ibid*, para. 62.
[159] *Ibid*, para. 63.
[160] *Ibid*, para. 64.
[161] *Ibid*, para. 67 (emphasis added).

In the debate within the Commission on this second report, opinions were very divergent as to which State officials enjoy immunity *ratione personae*. Several members expressed disagreement with the Special Rapporteur's 'restrictive approach', commenting that the relevant practice and case law was not fully or accurately discussed in her report. In particular, attention was drawn to the International Court's pronouncement in the *Arrest Warrant and Certain Questions of Mutual Assistance in Criminal Matters* cases that 'in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, *such as* the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal',[162] and to the significant endorsement of this view by States (including their national courts). Against this background, the Special Rapporteur summarized the debate by stating her understanding that the Commission should approach the matter 'from the dual perspective of *lex lata* and *lege ferenda*'.[163]

Eventually, as I have noted, the Commission provisionally adopted a draft article that specifies that Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction, but does not refer to other holders of high-ranking office in a State.[164] While the debates in the Commission's Drafting Committee are not public, the Statement of the Chairman of the Drafting Committee to the

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[162] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, ICJ Reports 2002,* p. 3, at pp. 20-21, para. 51; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, ICJ Reports 2008,* p. 177, at pp. 236-237, para. 170 (emphasis added).

[163] A/CN.4/SR.3170, p. 3.

[164] Franey wrongly suggests that 'the adoption of [draft article 3] by such an august body crystallizes customary international law on this point'. She immediately qualifies this suggestion by asserting that '[t]he future conduct of states and the development of customary international law will be influenced by this statement restricting state immunity to the head of state, head of government and foreign minister': E.H. Franey, 'Immunity from the Criminal Jurisdiction of National Courts', in: A. Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar, 2015), pp. 205-251, at p. 215.

plenary indicates clearly that the text provisionally adopted by the Drafting Committee (and eventually by the Commission) was the result of a compromise: it did not reflect a consensus as to the content of the existing law on immunity *ratione personae*.[165] This divergence of opinion within the Commission is also clearly described reflected in the commentary to draft article 3.

As for exceptions under customary international law to the immunity ratione materiae of State officials from foreign criminal jurisdiction, this is dealt at present with draft article 7, entitled 'Crimes under international law in respect of which immunity *ratione materiae* shall not apply'. Even more than draft article 3, this draft article remains highly controversial within the Commission and among States. As revised in 2017, it lists six exceptions to immunity *ratione materiae*, as follows:

> '1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:
>
> (a) crime of genocide;
>
> (b) crimes against humanity;
>
> (c) war crimes;
>
> (d) crime of apartheid;
>
> (e) torture;
>
> (f) enforced disappearance.
>
> 2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.'[166]

[165] The Statement describes such disagreement: see Statement of the Chairman of the Drafting Committee, Mr. Dire Tladi (7 June 2013), pp. 11-13 (available online at http://legal.un.org/docs/?path=../ilc/sessions/65/pdfs/immunity_of_state_officials_dc_statement_2013.pdf&lang=E. See also the commentary to draft article 3: A/68/10, pp. 62-63, para. 8).

[166] See A/72/10, pp. 177-178. The annex lists certain multilateral treaties containing definitions of the listed crimes, which definitions are thus incorporated by reference into the draft articles.

Draft article 7 was provisionally adopted by the Commission following much debate and by a recorded vote (21 in favour, 8 against, with 1 abstention). This was striking: voting on core issues is nowadays very exceptional in the Commission.[167] But efforts to reach a consensus were not pursued as far as possible, and this made voting inevitable. In short, several members considered that the Special Rapporteur had not made out a case for the exceptions she proposed to be considered as lex lata, and insisted that her proposal to refer to such exceptions, if kept, be clearly put forward as a suggestion for progressive development of the law. There was also a feeling on the part of some members that the list of crimes in draft article 7 was drawn up without any well-developed criteria and simply reflected the personal preferences of certain members.

Following the adoption of draft article 7 by vote, the Commission proceeded to adopt a lengthy and hotly contested commentary. This draft commentary, like the plenary debate and the votes, indicates clearly the stark differences within the Commission. The Sixth Committee debates in 2017 and 2018 revealed significant opposition among States with regard to draft article 7 as well. It remains to be seen how all this will unfold.

I next turn to the determination of rules of **customary international law on special missions**.[168] Two judgments of the

[167] In the early years of its activity there was fairly frequent recourse to voting, but over time voting as a method for adopting proposed texts had virtually died out. See also I. Sinclair, *The International Law Commission* (Grotius Publications, 1987), p. 34; L.T. Lee, 'The International Law Commission Re-Examined', 59 A*merican Journal of International Law* (1965), pp. 545, 550 ('The recent thawing of the Cold War has also produced an impact upon the Commission. Instead of settling an issue by majority vote, the Commission would devote lengthy sessions to resolve differences so that in the end a Quaker-like spirit for compromise and consensus could prevail. In this task, the Commission is well aided by its Drafting Committee – actually a misnomer, since its activities often concern substance instead of mere form').

[168] See N. Kalb, 'Immunities: Special Missions', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2012); A. Sanger, M. Wood, 'The Immunities of Members of Special Missions', in T. Ruys, N. Angelet, L. Ferro (eds.), *Cambridge Handbook on Immunities and International Law* (forthcoming, 2019); M. Wood, A. Sanger, Council of Europe (eds.), *Immunities of Special Missions* (forthcoming, 2019).

English courts in the Freedom and Justice Party case, handed down in 2016[169] and 2018[170] respectively, illustrate how to apply the methodology for identifying rules of customary international law.[171] The courts had to determine whether there was a rule of customary international law under which persons on special missions were entitled to personal inviolability and immunity from foreign criminal jurisdiction. As you know, special missions are one of the earliest forms of diplomatic intercourse. Unlike permanent diplomatic missions, however, there is no widely-accepted Convention governing the privileges and immunities of their members. The 1969 Convention on Special Missions has, at present, only 39 State Parties: neither Egypt nor the UK are parties, although the UK has signed the Convention. Until quite recently, the paucity of authorities resulted in uncertainty as to whether members of a special mission were entitled to immunity from foreign criminal jurisdiction under customary international law.

The two judgments are exemplary for the care and rigour with which they apply the methodology for the identification of rules of customary international law that we have considered in the earlier lectures, that is, the 'two-element approach'. As we shall see, both courts sought to follow the International Law Commission's 2016 draft conclusions on *Identification of Customary International Law*.[172]

The case was heard first by a Divisional Court of the High Court of England and Wales. Lord Justice Lloyd Jones and Mr. Justice Jay

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[169] Judgment of the Divisional Court of 5 August 2016: *Freedom and Justice Party & Others v FCO and Director of Public Prosecutions (Amnesty International and Redress intervening)* [2016] EWHC 2010 [Admin] [hereafter 'Divisional Court Judgment']). For a case-note, see A. Sanger, 87 *British Yearbook of International Law* (2016) (forthcoming).
[170] Judgment the Court of Appeal of 19 July 2018: *R. (on the application of Freedom and Justice Party v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ. 1719; [2018] WLR(D) 460 (hereafter 'Court of Appeal Judgment'). For a case-note, see A. Sanger, 78 *Cambridge Law Journal* (2019) (forthcoming).
[171] It may be noted that three of the five judges in this case have since become Justices of the Supreme Court of the United Kingdom.
[172] The International Law Commission's 16 conclusions, with commentaries, were finalized in August 2018: *supra* note 4. The final set of conclusions and commentaries were adopted some three weeks after the Court of Appeal judgment. As the Court of Appeal anticipated, the changes from the 2016 first reading draft were minor.

issued their judgment on 5 August 2106, holding that members of special missions were entitled to inviolability and immunity from criminal jurisdiction under customary international law; and that these immunities formed part of English common law.[173]

The Freedom and Justice Party sought leave to appeal to the Court of Appeal. This was refused by the Divisional Court but granted by the Court of Appeal. Following a hearing in March 2018, the Court of Appeal dismissed the appeal (Lady Justice Arden giving the judgment of the Court, to which all members of the Court contributed). In doing so, the Court paid fulsome tribute to the erudition and analysis in the judgment of the Divisional Court.[174]

The facts of the case are set out in the Divisional Court Judgment.[175] In brief, following its victory in the Egyptian elections of 2011/2012, the Freedom and Justice Party (FJP), which had strong links to the Muslim Brotherhood of Egypt, formed the Government of Egypt under President Morsi between June 2012 and July 2013. The FJP and other Claimants alleged that Lt. General Mahmoud Hegazy, as Director of the Egyptian Military Intelligence Service at the time, was responsible for torture during and following the July 2013 military *coup d'état* which overthrew President Morsi.

In 2015, the Foreign and Commonwealth Office (FCO) consented to Lt. General Hegazy's visit to the UK as a member of a special mission, that consent being given in advance in accordance with a more general 'pilot process' announced in March 2013.[176] The FJP had asked the London Metropolitan Police to arrest Lt. General Hegazy on suspicion of acts of torture, contrary to a provision of the UK's

[173] Divisional Court Judgment, para. 180.
[174] Court of Appeal Judgment, para. 10 ('we pay tribute to the erudition and analysis in the judgment, which, despite the fact it extends to 180 paragraphs, plus a substantial annex, was a model of concision and clarity').
[175] Divisional Court Judgment, paras. 6-28.
[176] Written Ministerial Statement by the Foreign Secretary on Special Mission Immunity, given by the Secretary of State for Foreign and Commonwealth Affairs (Mr William Hague) on 4 March 2013, together with a Note addressed to all diplomatic missions and international organisations in London: 84 *British Yearbook of International Law* (2013), pp. 735-7.

Criminal Justice Act 1988 (s. 134, under which it is a criminal offence for anyone to commit torture anywhere in the world). However, advised by the Director of Public Prosecutions/Crown Prosecution Service that members of a special mission were immune from criminal proceedings and arrest, the Metropolitan Police took no action against Hegazy. The appellants then sought, by way of judicial review, a declaration that the advice and the decision not to arrest him were unlawful.

Today I shall focus on the first question addressed by the courts: were persons on special missions entitled under customary international law to personal inviolability and immunity from criminal jurisdiction? This question had earlier been considered by a Divisional Court of the Queen's Bench Division of the High Court in the Khurts Bat judgment of 29 July 2011,[177] which was regarded as an important authority on this matter.[178] In Khurts Bat the Court (Lord Justice Moses and Mr Justice Foskett) stated:

> 'The court had the benefit of submissions from both Sir Elihu Lauterpacht and Sir Michael Wood… It is a pity not to record their submissions in full since they were so illuminating, but it is unnecessary because there was a large measure of agreement. It was agreed that under rules of customary international law Mr Khurts Bat was entitled to inviolability of the person and immunity from suit if he was travelling on a Special Mission sent by Mongolia to the United Kingdom with the prior consent of the United Kingdom. It was agreed that whilst not all the rules of customary international law are what might loosely be described as part of the law of England, English courts should apply the rules of customary law relating to immunities and recognise that those rules are a part of or one of the sources of English law.'[179]

[177] *Khurts Bat v. The Investigating Judge of the German Federal Court* (2011) EWHC 2029 (Admin); (2013) QB 349; 147 *International Law Reports* 633 (hereafter 'Khurts Bat').
[178] For example, in the Written Ministerial Statement of 4 March 2013, *supra* note 176.
[179] *Khurts Bat,* para. 10. This decision has been described by one eminent commentator as 'impeccable': R. O'Keefe, 82 *British Yearbook of International Law* (2011), p. 613, at p. 621.

In the *Freedom and Justice Party* case, however, the Divisional Court held that 'the decision of this court in *Khurts* Bat cannot be considered an authoritative decision on the point because the immunity of a member of a special mission was accepted by the parties.'[180] This was not the case in the *Freedom and Justice Party* proceedings, in which the existence of immunity under customary international law was hotly contested by the parties.

Following extended written and oral argument, the matter was examined by the Divisional Court over some 90 paragraphs of its judgment.[181] Its analysis of customary international law began with some important observations of a general nature:

- As in the case of state immunity and the privileges and immunities of members of permanent diplomatic missions, the question whether and if so to what extent a member of a special mission is entitled to inviolability or immunity is a matter of law as opposed to a mere matter of international comity or courtesy. Such a legal entitlement may be derived from a treaty or from customary international law.[182]

- The burden lies on the party seeking to establish a rule of customary international law to demonstrate both a settled practice and opinio juris (i.e. that the conduct of states reflects their sense of binding legal obligation).[183]

- Evidence of *opinio juris* may sometimes be elusive. It is important to note, however, as Judge Crawford points out, that the ICJ will often infer the existence of opinio juris from a general practice, from scholarly consensus or from its own or other tribunals' previous determinations. (See *Brownlie's Principles of Public International Law,* 8th Ed., at p. 26 and the cases there cited at footnote 33).[184]

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[180] Judgment of the Divisional Court, para. 120. See also paras. 116-117.
[181] *Ibid*., paras. 74-165.
[182] *Ibid*., para. 75.
[183] *Ibid*. para. 75. See also para. 76.
[184] *Ibid*., para. 80.

- Whereas national judges may enjoy a measure of freedom to develop principles of law within their own legal systems, they have no such freedom to develop customary international law. International law is based on the common consent of states and there is, accordingly, a need for a national judge to guard against adopting a rule which might appear a desirable development as opposed to identifying rules which are sufficiently supported by state practice and opinio juris. As Lord Bingham observed in Jones v. Saudi Arabia ([2006] UKHL 26; [2007] 1 AC 270 at [22]), one swallow does not make a rule of international law. The same point was made by Lord Hoffmann in Jones (at [63]):

> 'It is not for a national court to "develop" international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states'.[185]

After these and other general observations, the Divisional Court turned to the question whether there was a rule of customary international law on the immunity of special missions. It proceeded to examine State practice in relation to relevant treaties (including, at some length, the travaux préparatoires of the Special Missions Convention);[186] the decisions of international courts and tribunals;[187] the practice of a considerable number of States, including their responses to a questionnaire circulated by the Council of Europe's Committee of Legal Advisers on Public International Law (CAHDI);[188] and the views of jurists.[189]

The Divisional Court's overall conclusion was as follows:

> 'This survey of State practice, judicial decisions and the views of academic commentators leads us to the firm conclusion that there has emerged a clear rule of customary international law which

[184] *Ibid*., para. 80.
[185] *Ibid*., para. 81. See, to the same effect, Court of Appeal Judgment, para. 19.
[186] *Ibid*., paras. 82-103.
[187] *Ibid*., paras. 104-105.
[188] *Ibid*., paras. 106-147.
[189] *Ibid.*, paras. 147-162.

> requires a State which has agreed to receive a special mission to secure the inviolability and immunity from criminal jurisdiction of the members of the mission during its currency. There is, in our view, ample evidence in judicial decisions and executive practice of widespread and representative State practice sufficient to meet the criteria of general practice. Furthermore, the requirements of opinio juris are satisfied here by State claims to immunity and the acknowledgement of States granting immunity that they do so pursuant to obligations imposed by international law. Moreover, we note the absence of judicial authority, executive practice or legislative provision to the contrary effect.'[190]

The Court of Appeal reached the same conclusion. In doing so it had the benefit not only of the Divisional Court Judgment but of further replies by States to the CAHDI questionnaire (including that of the Russian Federation). I shall not go through the Judgment in detail now, because it will be the main subject of the seminar that is to follow this lecture. In short, the Court of Appeal first made some general observations about the identification of customary international law;[191] then summarised (at some length) the Divisional Court Judgment;[192] reviewed the submissions of the parties;[193] and ended by setting out its own conclusions, looking in turn at the relevant materials in much the same way as the Divisional Court had done.[194]

Among the Court of Appeal's general comments, I would particularly draw attention to the following:

- The Court began by noting the approach to the identification of customary international law of the International Court of Justice[195] and the United Kingdom Supreme Court .[196]

[190] *Ibid*., para. 163.
[191] Court of Appeal Judgment, paras. 15-21.
[192] *Ibid*., paras. 22-43.
[193] *Ibid*., paras. 43-77.
[194] *Ibid*., paras. 78-107.
[195] *Ibid., para. 15.*
[196] *Ibid*., para. 16 (quoting from Lord Sumption's judgment in *Benkharbouche v. Secretary of State for the Foreign and Commonwealth Office* [2017] UKSC 62, [2017] 3 WLR 957 [with which Lady Hale, Lord Neuberger and Lord Clarke agreed]).

- The Court then explained that it had 'sought to follow' the ILC's 16 conclusions on *Identification of customary international law*. It said that the draft conclusions before it (those adopted on first reading in 2016)

> '…are subject to possible further, but likely to be minor, amendment before adoption. We are mindful of that, but also of the fact that they are the writings of some of the most qualified jurists drawn from across the world who have debated the matter most thoroughly between themselves over an extended period of time. We have found them a valuable source of the principles on this subject and, since they are not controversial between the parties, this judgment should be read on the basis that we have sought to follow them in our consideration of this appeal in view of their importance and scholarship. To do so does not appear to create any inconsistency between our approach and that of the Divisional Court. The appellants accept that even in their present form, they carry great weight'.[197]

- The Court explained that the conclusions 'must be read with the commentary published with them'.[198]

The Court of Appeal concluded as follows:

> 'We conclude that the Divisional Court was correct to hold that a rule of customary international law has been identified which now obliges a state to grant to the members of a special mission, which the state accepts and recognises as such, immunity from arrest or detention (i.e. personal inviolability) and immunity from criminal proceedings for the duration of the special mission's visit.'[199]

In short, in the Freedom and Justice Party case, the Divisional Court and the Court of Appeal have clarified the position of special

[197] *Ibid*., para. 18.
[198] *Ibid*., para. 18.
[199] *Ibid*., para. 136.

mission immunity under customary international law (and English law). In doing so, their approach involved the rigorous and systematic application, in an exemplary manner, of the accepted methodology for the identification of rules of customary international law. That approach, consistent with the approach of the English courts in a series of several other recent cases (Benkharbouche, etc.), contributes to the credibility of those decisions and of customary international law more broadly.

That concludes this short series of lectures on customary international law. It has been a great pleasure taking part in this first Summer School on public international law at the International and Comparative Law Research Center here in Moscow. I greatly appreciate the organisers' decision that the subject-matter of this first Summer Scholl should be the sources of international law. A sound understanding of sources is central to any international lawyer's study and career.

Научно-практическое издание

ЛЕКЦИИ ЛЕТНЕЙ ШКОЛЫ
ПО МЕЖДУНАРОДНОМУ ПУБЛИЧНОМУ ПРАВУ

COURSES OF THE SUMMER SCHOOL
ON PUBLIC INTERNATIONAL LAW

ТОМ I / VOL. I

Майкл Вуд / Michael Wood

Обычное международное право
Customary International Law

На английском языке

Корректор *Н.А. Самуэльян*
Верстка *Я. Масри*
Дизайн обложки *Д. Кравец*

ISSN 2687-105X

Подписано в печать 01.06.2020. Формат 60×90 1/16.
Гарнитура PT Sans, PT Serif. Усл. печ. л. 5,6.
Тираж 500 экз.

АНО «Центр международных и сравнительно-правовых исследований»
119017, Россия, г. Москва, Кадашёвская набережная, д. 14, к. 3
info@iclrc.ru

Отпечатано в типографии «OneBook»
ООО «Сам Полиграфист».
109125, г. Москва, Волгоградский проспект, д. 42.
www.onebook.ru

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