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Identification of customary international law

Text of the draft conclusions provisionally adopted by the Drafting Committee*

Part One Introduction

Draft conclusion 1

Scope

The present draft conclusions concern the way in which the existence and content of rules of customary international law are to be determined.

Part Two Basic approach

Draft conclusion 2 [3]¹

Two constituent elements

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*).

* The present text contains draft conclusions provisionally adopted by the Drafting Committee during the sixty-sixth (2014), sixty-seventh (2015) and sixty-eight (2016) sessions of the Commission.

¹ The numbers of the draft conclusions, as originally proposed by the Special Rapporteur in his second and third reports, are indicated in square brackets where the numbering is different.



Draft conclusion 3 [4]

Assessment of evidence for the two constituent elements

1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.
2. Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element.

Part Three

A general practice

Draft conclusion 4 [5]

Requirement of practice

1. The requirement, as a constituent element of customary international law, of a general practice means that it is primarily the practice of States that contributes to the formation, or expression, of rules of customary international law.
2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.
3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.

Draft conclusion 5 [6]

Conduct of the State as State practice

State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.

Draft conclusion 6 [7]

Forms of practice

1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.
2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct “on the ground”; legislative and administrative acts; and decisions of national courts.
3. There is no predetermined hierarchy among the various forms of practice.

Draft conclusion 7 [8]

Assessing a State’s practice

1. Account is to be taken of all available practice of a particular State, which is to be assessed as a whole.
2. Where the practice of a particular State varies, the weight to be given to that practice may be reduced.

Draft conclusion 8 [9]***The practice must be general***

1. The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.
2. Provided that the practice is general, no particular duration is required.

Part Four**Accepted as law (*opinio juris*)****Draft conclusion 9 [10]*****Requirement of acceptance as law (opinio juris)***

1. The 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.
2. A general practice that is accepted as law (*opinio juris*) is to be distinguished from mere usage or habit.

Draft conclusion 10 [11]***Forms of evidence of acceptance as law (opinio juris)***

1. Evidence of acceptance as law (*opinio juris*) may take a wide range of forms.
2. Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.
3. Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.

Part Five**Significance of certain materials for the identification of customary international law****Draft conclusion 11 [12]*****Treaties***

1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:
 - (a) codified a rule of customary international law existing at the time when the treaty was concluded;
 - (b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or
 - (c) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law.
2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.

Draft conclusion 12 [13]***Resolutions of international organizations and intergovernmental conferences***

1. A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.
2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for establishing the existence and content of a rule of customary international law, or contribute to its development.
3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).

Draft conclusion 13 [14]***Decisions of courts and tribunals***

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.
2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules.

Draft conclusion 14***Teachings***

Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law.

Part Six**Persistent objector****Draft conclusion 15 [16]*****Persistent objector***

1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.
2. The objection must be clearly expressed, made known to other States, and maintained persistently.

Part Seven**Particular customary international law****Draft conclusion 16 [15]*****Particular customary international law***

1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.

2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*).
