



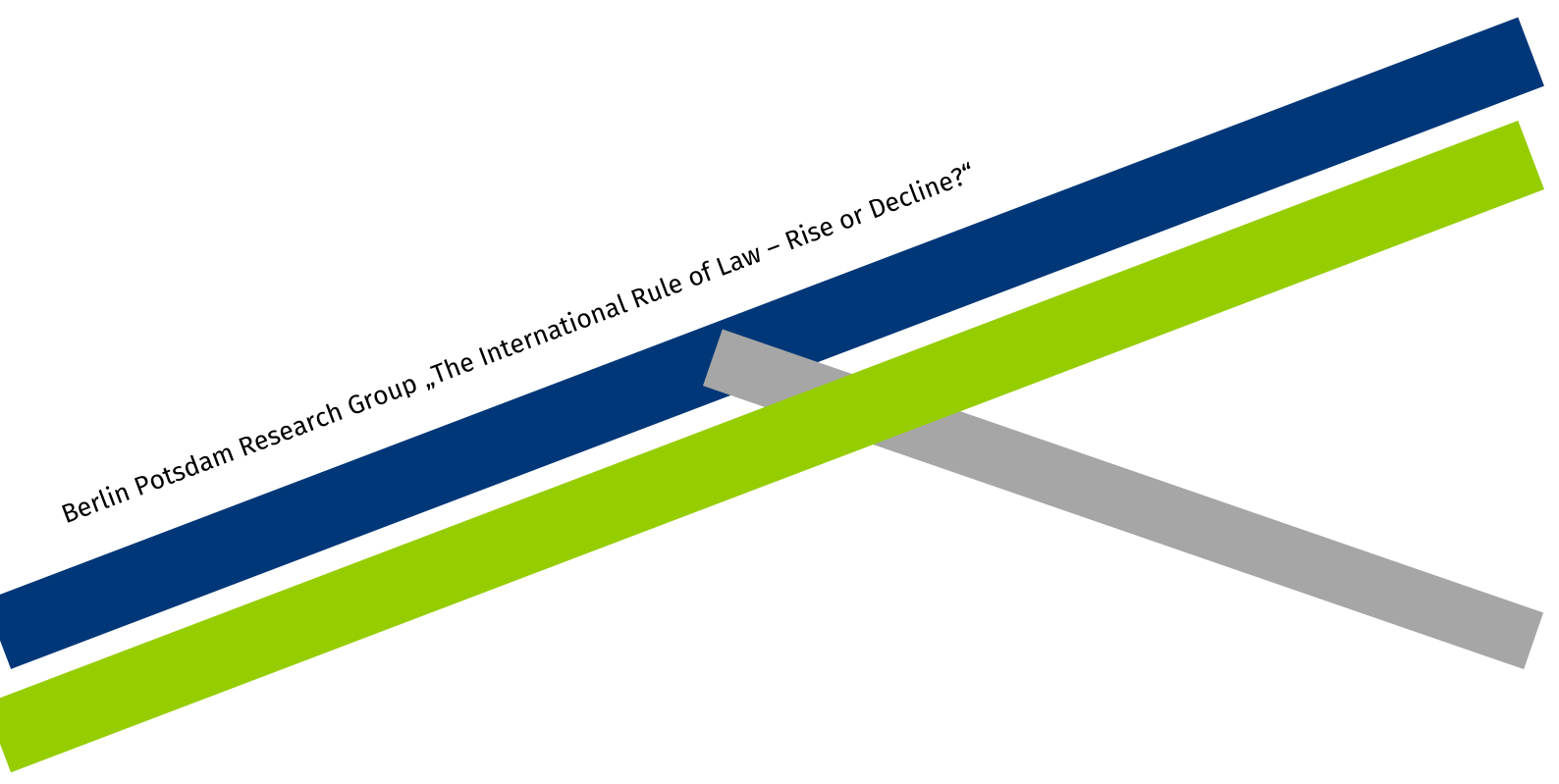
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Noora Arajärvi

**The Requisite Rigour in the Identification of Customary International Law:**

**A Look at the Reports of the Special Rapporteur of the International Law Commission**



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## **The Requisite Rigour in the Identification of Customary International Law: A Look at the Reports of the Special Rapporteur of the International Law Commission**

Noora Arajärvi<sup>1</sup>

*This is a pre-peer-review version of a paper for publication in: 19(2) International  
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### **Abstract:**

*Over the last few decades, the methodology for the identification of customary international law (CIL) has been changing. Both elements of CIL – practice and opinio juris – have assumed novel and broader forms, as noted in the Reports of the Special Rapporteur of the International Law Commission (2013, 2014, 2015, 2016). This paper discusses these Reports and the draft conclusions, and reaction by States in the Sixth Committee of the United Nations General Assembly (UNGA), highlighting the areas of consensus and contestation. This ties to the analysis of the main doctrinal positions, with special attention being given to the two elements of CIL, and the role of the UNGA resolutions. The underlying motivation is to assess the real or perceived crisis of CIL, and the author develops the broader argument maintaining that in order to retain unity within international law, the internal limits of CIL must be carefully asserted.*

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*“Perhaps it is time to face squarely the fact that the orthodox tests of custom – practice and opinio juris – are often not only inadequate but even irrelevant for the identification of much new law today”.<sup>2</sup>*

## 1. Introduction

Over recent decades, the methodology for the identification and interpretation of customary international law (“CIL”) has been perceived by scholars and judicial practice as undergoing a change. Both elements of CIL – practice and *opinio juris* – have assumed novel and broader forms beyond the traditional understanding of Article 38 (1) (b) of the Statute of the International Court of Justice.<sup>3</sup> Practice has been found not only in the actual conduct but also in verbal acts of States and, with some limitations, other actors such as international organizations. *Opinio juris* has been interpreted in a broader sense including not only the sense of legal obligation and the belief in the legally binding nature of the practice but also as the “requirements of humanity and the dictates of public conscience”<sup>4</sup>. Moreover, on occasions, CIL has been identified with reliance solely on legal instruments, case-law or even non-binding documents, by deducing practice and *opinio juris* from the same evidence, rather than applying the two-element test and ascertaining each of the elements separately.

These developments have been noted in the Reports of the Special Rapporteur of the International Law Commission (2013, 2014, 2015, 2016) (“Reports”).<sup>5</sup> This paper discusses the Reports and the draft conclusions, and the reactions by States as delivered in the Sixth Committee of the United Nations General Assembly (“UNGA”) in the 70<sup>th</sup> session in 2015, especially as they pertain to the interrelationship between *opinio juris* and practice.<sup>6</sup>

<sup>2</sup> Robert Y. Jennings, “The Identification of International Law”, in Bin Cheng, *International Law: Teaching and Practice* (1982) 3 at 5.

<sup>3</sup> “International custom, as evidence of a general practice accepted as law”, Article 38 (1) (b), Statute of the International Court of Justice, 16 June 1945, 3 Bevens 1179. See also *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, 1969 I.C.J. Reports 3, para. 77: “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.” See also *Jurisdictional Immunities of the State Case*, where the court noted, with a reference to its previous case law, that “the existence of a rule of customary international law requires that there be ‘a settled practice’ together with *opinio juris*.” *Jurisdictional Immunities of the State Case (Germany v. Italy)*, Judgment of 3 February 2012, 2012 I.C.J. Reports 99, 122.

<sup>4</sup> For instance, by the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Kupreškić*, 14 January 2000, IT-95-16-T, para 527. But see *South West Africa case*, I.C.J. Reports 1966, 3, at 34: “it has been suggested [...] that humanitarian considerations are sufficient in themselves to generate legal rights and obligations [...] The Court does not think so. It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form.”

<sup>5</sup> International Law Commission, “First report on formation and evidence of customary international law by Michael Wood,” 65th Session (2013), U.N. Doc. A/CN.4/663 (May 2013); “Second report on identification of customary international law by Michael Wood,” 66th Session (2014) U.N. Doc. A/CN.4/672 (May 2014); “Third report on identification of customary international law by Michael Wood,” U.N. Doc. A/CN.4/682 (March 2015); “Fourth report on identification of customary international law by Michael Wood,” U.N. Doc. A/CN.4/695 (March 2016).

<sup>6</sup> In the 71<sup>st</sup> session of the UNGA in 2016, most delegations did not discuss the substance of the draft conclusions or the Fourth Report in the same detail as in 2015.

The real or perceived crisis of CIL<sup>7</sup> – as articulated in the opening quotation by Robert Y. Jennings – is at the cornerstone of the analysis, and the way this is reflected in the Reports of the International Law Commission (“ILC”) Special Rapporteur Sir Michael Wood on the Identification of CIL, and the reception of these Reports by States. The aim is not to assess substantive rules of CIL but rather the general theory of its formation and identification, in other words, the secondary rules. Analysis here focuses on selected issues of these secondary rules of CIL, and does not intend to perform an exhaustive discussion or a detailed overview of the Reports, which reflect on the whole breadth of CIL.

The first part focuses on the process of drafting and the content of the Reports and the draft conclusions. The second part discusses the reaction of States to these draft conclusions, and highlights the areas of consensus and contestation. This also illustrates the lack of shared understanding on the parameters of the formation and identification of CIL. On one hand, the work of the ILC and many statements delivered by States in the Sixth Committee reflect a largely consolidated conservative approach to the identification of CIL and its elements. On the other, a number of judicial decisions of international courts and tribunals, and opinions expressed by some scholars, point to the need and preference of more flexible criteria in the identification of custom, often centred on *opinio juris*. This dichotomy is addressed in the third part, which briefly revisits the main doctrinal positions, with special attention being given to the two elements of CIL, and the role of the UNGA resolutions in the formation and identification of CIL. These are two areas that have also attracted much of the attention by States in response to the ILC Reports. The approaches to the legal value of the UNGA resolutions in the identification of CIL further highlight some of the ambiguities in the assessment of practice and *opinio juris*.

The broader argument developed here focuses on the internal limits of CIL, which must be carefully assessed in order to retain, or regain, unity within international law. When a source of law (here, CIL) is identified and applied in a flexible and dynamic manner, it may capture a wider range of activities. At the same time, the flex methodology in identifying CIL can undermine and dilute its normative authority and result in inconsistent interpretations, and erode the theory of sources of international law in general. Thus, caution is necessary in the methodology of identifying and application of CIL. The ILC’s work contributes in a positive manner to this call for cautiousness and rigour.

## **2. Overview of the Reports of the Special Rapporteur**

### **a) The topic and the process**

In 2012, ILC added the topic of CIL into its agenda and appointed Sir Michael Wood as a Special Rapporteur. This marked the start of a long overdue process for the ILC to assess one of the more complex issues in international law.<sup>8</sup> Some have suggested it may have been brought on by the

<sup>7</sup> Eg, Bruno Simma and Philip Alston, “The Sources of Human Rights Law: Custom, *Jus Cogens* and General Principles”, 12 *Australian Yearbook of International Law* (1988-1989) 82 (“a profound identity crisis”, p. 88); Luigi Condorelli, “Custom”, in Mohammed Bedjaoui, *International Law: Achievements and Prospects* (1991) 179 ([...] present crisis in customary international law: a broad social consensus no longer upholds numerous long-established rules [...]) p. 181); Ben Chigara, *Legitimacy Deficit in Custom: Towards a Deconstructionist Theory* (2001) (“legitimacy crisis”); Mario Prost, *The Concept of Unity in Public International Law* (2012) 97-102 (“CIL remains a fundamentally contested terrain”, p. 100).

<sup>8</sup> Of course, the ILC has more than touched upon the formation of CIL in the past, most explicitly in the 1950 Report based on a working paper by Manley O. Hudson, “Ways and means for making the evidence of

increased application of CIL by national courts, and, certainly, by the need for clarity on the methodology of identifying those rules.<sup>9</sup>

The topic was discussed and endorsed at the Sixth Committee of the UN General Assembly in 2012,<sup>10</sup> and the first introductory Report was released in May 2013, setting out the scope and methodology of the project, materials to be consulted, and the future work to be carried out on the topic. The ILC also requested States to “provide information on their practice relating to the formation of customary international law and the types of evidence suitable for establishing such law in a given situation, as set out in: (a) Official statements before legislatures, courts and international organizations; and (b) Decisions of national, regional and subregional courts.”<sup>11</sup>

Whilst the topic was first introduced as “Formation and evidence of customary international law”, and then in 2013 amended to the “Identification of customary international law” for the Second Report, some of the issues addressed admittedly go beyond mere identification or formation, and relate rather to the application of CIL.<sup>12</sup> It has, however, often been recognised that it is difficult, if not impossible, to draw a clear distinction between the formation, identification, and application of the law in the customary process.<sup>13</sup> The discovery, or the moment of identification, of custom, may be the pinnacle in the process of the formation that finally establishes the customary norm as a legal rule. Anthony D’Amato has described this as follows: “States are aware that their actions have legal consequences – that their conduct is the raw material of custom and precedent – within a system in which it is generally accepted that their actions *ought* to have legal consequences. Thus there is an interrelation between law-formation and law-interpretation [...]”.<sup>14</sup> Moreover, this identification (and even formation<sup>15</sup>) of a customary rule is often carried out in the context of the application of law by a court. Indeed, due to the ‘fluid’ nature of CIL, it would seem counterintuitive

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customary international law more readily available”, Report of the International Law Commission, *Yearbook of the International Law Commission*, 1950, vol. II. For a detailed overview of ILC’s work on CIL, see Memorandum by the Secretariat, “Formation and evidence of customary international law: The Elements in the previous work of the International Law Commission that could be particularly relevant to the topic”, 14 March 2013, A/CN.4/659. See also the First Report, para. 10.

<sup>9</sup> Sean Murphy notes that CIL “has become an important source of law in national legal systems, as national courts grapple with various civil and criminal matters where custom plays an interstitial if not central role.” Sean D. Murphy, “Identifying the Rules for Identifying Customary International Law”, *AJIL Unbound*, 23 December 2014, available at <https://www.asil.org/blogs/identifying-rules-identifying-customary-international-law>.

<sup>10</sup> General Assembly resolution 67/92 of 14 December 2012, A/RES/67/92, paras. 4 and 7.

<sup>11</sup> First Report, para. 4.

<sup>12</sup> As pointed out, for example, in the AALCO Report (2015), para. 25: “[The persistent objector rule] really concerns the scope of application of a customary international law rule or its ‘opposability’.” In the statement delivered in the Sixth Committee, Belarus noted that to separate these stages is virtually impossible, and the analysis of the formation of rules is an essential element of its detection.

<sup>13</sup> Maurice H. Mendelson, “The Formation of Customary International Law”, 272 *Collected Courses of The Hague Academy of International Law* (1998) 165.

<sup>14</sup> Anthony D’Amato, “The Neo-Positivist Concept of International Law”, 59 *American Journal of International Law* (1965) 321, p. 323. Emphasis in the original text.

<sup>15</sup> See for instance Mario Prost, *The Concept of Unity in Public International Law* (2012), p. 95: “[...] judicial decisions are a primary form of law-making and their influence is far deeper than what article 38 [of the ICJ Statute] suggests”.

to require categorical separation of formation, identification, and application in the customary process.

The Second Report of the Special Rapporteur focuses on the nature and role of the two constituent elements of custom and their identification. It recognises the close relationship between practice and its acceptance – *opinio juris*. The subsequent debate in the ILC confirmed the general support of the two-element-approach, meaning that in order for CIL to crystallise both practice and *opinio juris* must be present. This approach was further supported by the Member States discussing the Second Report in the Sixth Committee. The Second Report proposes 11 draft conclusions, eight of which were provisionally adopted by the ILC Drafting Committee in 2014. The Special Rapporteur did not submit supplementary commentaries at the same time with the draft conclusions – quite an unusual diversion from practice at the ILC – and short commentaries were adopted by the ILC in August 2016.<sup>16</sup>

The Third Report of the Special Rapporteur further addresses the assessment of and the relationship between the two elements of CIL. It commences the analysis by noting that CIL is “formed by, and manifests itself in, instances of conduct that are coupled with *opinio juris*”<sup>17</sup>, and continues to reaffirm that “the essential nature of customary international law as a general practice accepted as law must not be distorted”<sup>18</sup>. It also completes the set of draft conclusions: part one comprised of the introduction; part two setting out the basic approach; part three looking at the general practice; part four examining *opinio juris*; part five addressing the significance of certain materials for the identification of customary international law; part six focusing on the persistent objector principle; and part seven on particular customary international law. This brings the total number of draft conclusions to 16 in the Third Report.

The Fourth Report of the Special Rapporteur, first, outlines the discussion in the Sixth Committee<sup>19</sup>, second, proposes slight changes to the language of some of the draft conclusions<sup>20</sup>, and finally, suggests practical means of enhancing the availability of materials for determining practice and *opinio juris*<sup>21</sup>. Addendum to the Fourth Report provides a bibliography on the topic.<sup>22</sup> In May 2016, the ILC referred the amendments proposed in the Fourth Report to the Drafting Committee.

In support of the work by the Special Rapporteur, the ILC had requested the United Nations Secretariat to draft a memorandum on the role of the decisions of national courts in the case-law of international courts and tribunals in their determination of CIL, which was submitted in February

<sup>16</sup> Report of the International Law Commission, sixty-eight session (2 May-10 June and 4 July-12 August 2016), A/71/10, para. 59.

<sup>17</sup> Third Report, para. 13.

<sup>18</sup> *Ibid.*, para. 17.

<sup>19</sup> Fourth Report, paras. 11-29.

<sup>20</sup> *Ibid.*, paras. 30-37.

<sup>21</sup> *Ibid.*, paras. 38-49.

<sup>22</sup> Addendum to the Fourth Report, A/CN.4/695/Add.1, 25 May 2016.



2016.<sup>23</sup> In May 2016, the ILC set up an open-ended working group to assist the Special Rapporteur in the preparation of the draft commentaries.<sup>24</sup>

The draft conclusions were provisionally adopted by the ILC Drafting Committee during the sixty-sixth (2014), sixty-seventh (2015) and sixty-eighth (2016) sessions.<sup>25</sup> In June 2016, the ILC considered and adopted a Report of the Drafting Committee on draft conclusions 1 to 16, bringing to a successful completion the first reading of the draft conclusions.<sup>26</sup> The ILC decided to transmit them, through the Secretary-General, to Governments for comments, to be submitted by 1 January 2018.<sup>27</sup> In August 2016, as noted above, also short commentaries to the draft conclusions were adopted by the ILC.<sup>28</sup> The second and final reading to complete the project is expected to take place in 2018.<sup>29</sup>

In response to the Reports, the Asian-African Legal Consultative Organization (AALCO) set up a Working Group on Customary International Law to draft comments and a Report on the ILC Project on “Identification of Customary International Law”.<sup>30</sup> This AALCO Report, drafted by Professor Sienho Yee, was published in March 2015. It takes on a conservative view of the formation and identification of CIL and emphasises the centrality of States, and the need for a qualifying approach in this endeavour.<sup>31</sup> It is an important contribution, and has been referenced by a number of States (China, India, Malaysia) in the Sixth Committee debate in 2015. As noted in the AALCO Report, it is to date the only regional organization addressing the work of the ILC on CIL<sup>32</sup>, and that has established a Working Group on the topic.

## **b) Customary international law and the two-element approach**

Article 38 (1) of the ICJ Statute is generally accepted as setting out the sources of international law. The Reports of the Special Rapporteur refer to Article 38 (1) on a number of levels. First, undeniably, it is noted that CIL is a source of international law as set out in Article 38 (1) (b).<sup>33</sup> Secondly, the Reports discuss the relationship and interplay between CIL and treaties<sup>34</sup>, and to a

<sup>23</sup> Memorandum by the Secretariat, “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”, U.N. Doc. A/CN.4/691 (February 2016). See also, provisional summary record of the 3288<sup>th</sup> meeting of the ILC, 6 August 2015, A/CN.4/SR.3288, p. 10.

<sup>24</sup> Provisional summary record of the 3291<sup>st</sup> meeting, 2 May 2016, A/CN.4/SR.3291, pp. 4-5.

<sup>25</sup> Text of the draft conclusions provisionally adopted by the Drafting Committee, A/CN.4/L.872, 30 May 2016; see also the Statement by Chairman of the International Law Commission, Mr. Singh, A/C6/70/SR19, para. 55.

<sup>26</sup> Report of the International Law Commission (2016), para. 57.

<sup>27</sup> *Ibid.*, para. 60.

<sup>28</sup> *Ibid.*, para. 59.

<sup>29</sup> Fourth Report, para. 51; see also Sean D. Murphy, “The Identification of Customary International Law and Other Topics: The Sixty-Seventh Session of the International Law Commission”, 109 (4) *American Journal of International* (2015) 822.

<sup>30</sup> Sienho Yee, “Report on the ILC Project on Identification of Customary International Law”, 20 March 2015.

<sup>31</sup> AALCO Report, para. 20: “[...] the promotion of the quality in decision-making in the identification process, the reliance on only the quality exercise of State functions, and the representativeness of the State practice and *opinio juris* at issue.” The AALCO Report also suggests to add the requirement of “a rigorous and systematic approach” to draft conclusion 2, para. 28.

<sup>32</sup> “[...] there is no African Union approach, as such. [...] Neither is there an ASEAN approach, as such.” AALCO Report, para. 9. European Union has consistently delivered a joint statement of its position in the Sixth Committee, in addition to the statements by many of its Member States.

<sup>33</sup> First Report, paras. 29-32; Second Report, para. 17.

<sup>34</sup> First Report, para. 34; Second Report, para. 3.4.

lesser extent, between CIL and general principles<sup>35</sup>. Finally, the Reports derive evidence of practice and *opinio juris* from other sources listed in Article 38 (1) for the purposes of identifying rules of CIL. This approach is also endorsed in the draft conclusions: for instance, draft conclusion 11 on treaties, draft conclusion 13 on decisions of courts and tribunals, and draft conclusion 14 on teachings of the most highly qualified publicists.<sup>36</sup> General principles of law, in the spirit of Article 38 (1) (c), is not explicitly spelled out in the draft conclusions but it is clear from draft conclusion 6 (paragraph 2) on the forms of practice, and draft conclusion 10 (paragraph 2) on the forms of *opinio juris*, that the same evidence creating general principles – “expressions of national legal systems”<sup>37</sup> – may contribute to the formation and identification of CIL. These expressions include “executive conduct, including operational conduct “on the ground”; legislative and administrative acts; and decisions of national courts” (draft conclusion 6) and “official publications; government legal opinions; [...] decisions of national courts” (draft conclusion 10).<sup>38</sup>

As discussed above, the close relationship between practice and *opinio juris* is addressed in the Second and Third Reports, which recognise that both elements must be considered and verified separately. Therefore, “double-counting” (deducing practice and *opinio juris* from the same evidence) is generally not acceptable.<sup>39</sup> In 2014, the Drafting Committee provisionally adopted the draft conclusion 4 (renumbered as draft conclusion 3 in the Third Report), which, in the 2016 version of the text of the draft conclusions, is entitled “Assessment of evidence for the two constituent elements”.<sup>40</sup> In 2015, an additional paragraph was added to this, slightly amended in 2016, and the draft conclusion 3 now reads:

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.

<sup>35</sup> First Report, para. 36; Second Report, para. 3.4. Para. 14 of the Second Report, however, notes that “It will also be important, as work on the topic proceeds, to avoid entering upon matters relating to other sources of international law, including general principles of law [...]” In the 2015 ILC debate, however, Mr. Park suggested that the Commission might wish to consider also the relationship between general principles of law and CIL. ILC debate on the Third Report, ILC 67<sup>th</sup> session, provisional summary record of the 3251st meeting, A/CN.4/SR.3251.

<sup>36</sup> Interestingly, in the statement in the Sixth Committee, the Netherlands “wonder[ed] if further clarification could be provided as to how this discussion is related to Article 38 (1) (d) of the ICJ Statute where these writings are called ‘teachings’ and are referred to as subsidiary means for the determination of rules of law.” Statement of the Netherlands, UNGA, Sixth Committee, Agenda item 83, 4 November 2015.

<sup>37</sup> As articulated by Professor Bassiouni: see M. Cherif Bassiouni, “A Functional Approach to “General Principles of International Law””, 11 *Michigan Journal of International Law* (1989-1990) 768. He also suggests that general principles can be drawn also from “expressions of other unperfected sources of international law”, which means that the same evidence may count towards CIL and general principles of international law, when the customary rule in question has not (yet) crystallised. *Ibid.* See also Giorgio Gaja, “General Principles of Law”, *Max Planck Encyclopedia of Public International Law* (2013).

<sup>38</sup> See also the First Report, para. 36: “While it may be difficult to distinguish between customary international law and general principles in the abstract, whatever the scope of general principles it remains important to identify those rules which, by their nature, need to be grounded in the actual practice of States.”

<sup>39</sup> Third report, paras. 14-15.

<sup>40</sup> Text of the draft conclusions provisionally adopted by the Drafting Committee, A/CN.4/L.872, 30 May 2016.

This draft conclusion highlights the need for two elements, which, in identifying CIL, must be ascertained separately, whilst “the existence of one element cannot be deduced from the existence of the other”.<sup>41</sup> It might denounce “double-counting”, but the Drafting Committee was in agreement that “in some cases, the same material might be used to ascertain practice and *opinio juris*; but the important point remains that, even in such cases, the material will be examined for different purposes.”<sup>42</sup>

While the traditional understanding of CIL endorses practice as the bedrock of custom, the Third Report recognises the possibility of *opinio juris* developing before the practice.<sup>43</sup> On a footnote, the Report notes: “Of course, *opinio juris*, as strictly defined, cannot precede the practice which it is meant to accompany: rather, there may be a view that a rule should exist (or a mistaken view that it exists).”<sup>44</sup> In other words, *opinio juris* is analogised to *lex ferenda*, and even to “a mistaken view that [a rule] exists”<sup>45</sup>. So, *opinio juris* (or possibly, in retrospect, mere *opinio*) as a constitutive element of CIL may be reduced to the “view” that a certain rule *should* exist, or to the erroneous interpretation that it in fact does exist. Conceptually, this raises questions, especially when read in light of some decisions of the international courts and tribunals, where a rule has been announced to be part of CIL with little supporting evidence of the requisite elements. When a court – erroneously – holds that a rule has crystallised as CIL when there is not sufficient evidence of practice, *opinio juris*, or both, it may be articulating *lex ferenda*. This may, intentionally or not, create a sort of “self-fulfilling prophecy” as has been argued elsewhere.<sup>46</sup> The past misinterpretation of a rule – identifying and applying a norm as CIL when in fact there is not sufficient practice and/or *opinio juris* – does not necessarily taint its future normative validity, if it is accepted and followed by States (and other entities).<sup>47</sup> In other words, even if the rule was not customary at the initial point, the subsequent practice overrides the initial faulty interpretation as the norm gains wider usage in practice.<sup>48</sup>

### 3. Reactions and Responses of States to the Third Report

The First and Second Report were discussed in the Sixth Committee in the preceding years but the analysis here focuses on the debate around the Third Report that took place in the Sixth

<sup>41</sup> Statement of the Chairman of the Drafting Committee, Mr. Mathias Forteau, 67<sup>th</sup> Session of the International Law Commission, 29 July 2015, p. 3. Available at [http://legal.un.org/docs/index.asp?path=../ilc/documentation/english/statements/2015\\_dc\\_chairman\\_statement\\_cil.pdf&lang=EF&referer=http://legal.un.org/ilc/](http://legal.un.org/docs/index.asp?path=../ilc/documentation/english/statements/2015_dc_chairman_statement_cil.pdf&lang=EF&referer=http://legal.un.org/ilc/).

<sup>42</sup> *Ibid.* p. 4.

<sup>43</sup> Third report, para. 16.

<sup>44</sup> *Ibid.*, footnote 28.

<sup>45</sup> *Ibid.*

<sup>46</sup> Noora Arajärvi, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals*, (2014) pp. 150-151.

<sup>47</sup> “Once a customary rule has become established, States will naturally have a belief in its existence: but this does not necessarily prove that the subjective element needs to be present during the *formation* of the rule”, International Law Association Committee on Formation of Customary International Law, *Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law*, London Conference 2000, p. 7.

<sup>48</sup> As Patrick Norton quotes Junius in his paper, “One precedent creates another. They soon accumulate and constitute law. What yesterday was fact, today is doctrine,” in Patrick M. Norton, “A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation”, 85 *American Journal of International Law* (1991) 474.

Committee in November 2015, and looks at selected areas that attracted the attention of States.<sup>49</sup> The 2015 debate allowed States to comment on the full set of draft conclusions and address the work of the Special Rapporteur in a more comprehensive manner, albeit still without the commentaries on the draft conclusions. Some States, Russia being the most articulate, announced that they would comment on the draft conclusions only after the accompanying commentaries had been submitted by the Special Rapporteur.<sup>50</sup> While a number of States from all regions participated in the Sixth Committee debate, Sudan was the only African State to deliver a statement on this topic.<sup>51</sup> In the 71<sup>st</sup> session of the UNGA in 2016, most delegations – with a few vocal exceptions – did not discuss the substance of the draft conclusions or the Fourth Report but rather commended the completion of the first reading and affirmed the importance of submitting their comments and observations by 1 January 2018. A few States called for further detailed consideration of selected draft conclusions before the second hearing.<sup>52</sup>

#### **a) Two-element approach**

States generally welcomed and supported the approach adopted by the Special Rapporteur on clearly distinguishing between the two elements of CIL, “even in cases where it may be the same fact or action which provides evidence of both State practice and *opinio juris*” (Germany). El Salvador, however, called for an amendment to the title of draft conclusion 3, from “assessment of evidence for the two elements” to “assessment of the existence of the two elements” or “means to identify the two elements”, in order to opt for a more general description of the content of that draft conclusion.

The Czech Republic and Indonesia raised concern about the first sentence of paragraph 2 in draft conclusion 3, which requires each of the two elements to be ascertained separately, claiming that it introduces too much rigidity to the process of identifying CIL: “a rigid separation of the way the existing evidence is being evaluated might undermine the existing circumstances relevant as evidence for both elements” (Indonesia). They recommended this be addressed in the commentary. The Czech Republic called for further elaboration on “the nature of rule” which must be taken into account in assessing the evidence and relative weight of the two elements of custom. Slovakia, on the other hand, highlighted the core issue in CIL, namely that it is comprised of two elements, stating that “extensive presence of one element cannot compensate for the lack of the other”.

In a similar vein to the Czech Republic, Greece called for the Special Rapporteur to highlight in the commentary that “in some cases the weighing between the two elements of custom and/or their time sequence may follow a differentiated path”. Greece noted that the Report in fact already lists cases where *opinio juris* precedes practice, and hence, “it can be argued that *opinio juris* has played a prominent role in the process of generation of the new customary rule.” Israel stated that

<sup>49</sup> Most statements by the delegations are available in PaperSmart, Agenda item 83: <https://papersmart.unmeetings.org/ga/sixth/70th-session/statements/>. For an executive summary, see the Summary records of the Sixth Committee meetings, A/C.6/70/SR.17-A/C.6/70/SR.25.

<sup>50</sup> The commentaries were published in August 2016, and the Russian delegation addressed the draft conclusions, together with commentaries, in the Sixth Committee on 25 October 2016.

<sup>51</sup> See the Summary records of the Sixth Committee meetings, A/C.6/70/SR.17-A/C.6/70/SR.25. The records from previous years show a similar trend of lack of African participation, with a few exceptions (eg. South Africa in 2014).

<sup>52</sup> For instance, Russia, Sudan, Australia, Austria and Cyprus.

“what is important is the presence of both elements, not their chronological order [...]”,<sup>53</sup> and Portugal noted, in reference to practice and *opinio juris* that “[...] there is no necessary sequence between them”. The irrelevance of temporal order of the two elements has not been, however, met with unequivocal acceptance. For instance, in the ILC debate, the Special Rapporteur on the expulsion of aliens, Maurice Kamto, stated that the interpretation that *opinio juris* could precede practice goes against the spirit of Article 38 (1) (b) of the Statute of the ICJ.<sup>54</sup>

In response to paragraph 2 of draft conclusion 7 on the assessment of state practice, Germany submitted that the wording raises questions. It reads “where the practice of a particular State varies, the weight to be given to that practice may be reduced.” In the view of Germany, this may result in “less weight being given to the practice of countries with an open and pluralistic society, where the independence of the judiciary and the juxtaposition of government and parliament may lead to different views, or at least different nuances being expressed. This should not automatically diminish the influence of the practice and *opinio juris* of such States”.

Iran emphasised that consideration of CIL by the ILC “should be based on the centrality of States, meaning that the general practice of States as main actors in international relations constitutes the main criteria in identification of customary international law”. China noted with reference to the AALCO Report that “whether a treaty provision reflects a rule of customary international law, the criteria of objectivity and impartiality should be applied, and the investigation should be based strictly on general practice and *opinion* [sic] *juris*.” India stated that the practice of States from all regions should be taken into account in identifying CIL, and called for encouragement and assistance for developing States to publish digests of their State practice.

Whilst draft conclusions 6 (on forms of practice) and 10 (on forms of *opinio juris*) both include the “decisions of national courts” as forms of evidence, draft conclusion 13 states that the decisions of international courts and tribunals “are a subsidiary means for the determination of such rules”. China called for a more comprehensive assessment of judicial decisions in identifying custom, asking the Commission to focus not only on international judicial decisions and decisions from a few national jurisdictions “while ignoring those from other national courts”. Similar concerns were raised by Iran. India and Slovakia highlighted the importance of judicial decisions (draft conclusion 13) and teachings of publicists (draft conclusion 14) in the identification of CIL, and noted that separate and dissenting opinions of Judges could also be relevant in identifying rules of CIL and may also contain useful evidence of such rules. The assessment of national and international judicial decisions in identifying CIL continued to attract some discussion in the Sixth Committee also in 2016, and is likely to be further debated prior to the second reading in 2018.

### **b) Inaction contributing to CIL**

While most of the States that addressed draft conclusion 10 on the forms of evidence of *opinio juris*, were supportive of the view adopted in the Report – that is, the acceptance that *opinio juris* may be found in a broad variety of forms, a considerable number of States (Chile, France,

<sup>53</sup> Israel echoed the statement South Africa had made the previous year (“what mattered was that both elements should be present, rather than their temporal order”), and the statements of Mr. Park, Mr. Murase and Mr. Nolte in the ILC debate in 2014. See Third Report, para. 16, and the accompanying footnote 29.

<sup>54</sup> “[...] L’*opinio juris* est la conviction qu’une pratique est rendue obligatoire, non qu’une pratique future sera ou pourra être rendue obligatoire.” Summary of the statement by Maurice Kamto, ILC debate on the Third Report, ILC 67<sup>th</sup> session, provisional summary record of the 3252<sup>nd</sup> meeting, A/CN.4/SR.3252(Prov.).

Indonesia, Ireland, the Republic of Korea, Romania, Slovakia, Slovenia, Spain, Turkey) called for clarification of the requirements of inaction for the purposes of CIL formation. This somewhat controversial issue is set out in paragraph 3 of draft conclusion 10: “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.”

Japan expressed caution in viewing inaction as evidence of *opinio juris* due to the practical difficulty of distinguishing the inaction that contributes to CIL from all other kinds of non-actions. The Netherlands, similarly, called for cautiousness while being supportive of the paragraph in general. Greece and Israel welcomed the separation of general inaction from inaction in a situation calling for action, and recognised that only the latter may qualify as evidence of *opinio juris*. Likewise, Sudan noted the importance of ascertaining whether the State was effectively aware of the practice in question, and that the circumstances called for a response on the part of the State. Spain suggested that it would be interesting to consider inaction as evidence of the dissolution of existing *opinio juris*, “when a conduct in principle against customary international law does not prompt reaction from those who could invoke the violated rule, one could infer that its acceptance as law has diminished.”

In addition to inaction as possible evidence of *opinio juris* under draft conclusion 10, paragraph 1 of draft conclusion 6 notes that “[practice] may, under certain circumstances, include inaction.” Iran explicitly stated – and drew the example of the use of force in defiance of UN Charter – that “inaction of States in respect of a violation of a rule of international law cannot be seen as relevant practice [...]”. El Salvador asked for a number of clarifications and limiting criteria on the content of inaction as evidence of CIL. In a similar vein, Mexico called for distinctive assessment and further analysis of inaction as a subjective and objective element of CIL. Peru shared the view set out in the Report<sup>55</sup> that States cannot be expected to react to every instance of the practice of other States, and that the circumstances must be carefully weighed before determining whether such inaction or omission has legal consequences.

### **c) International organizations and other non-state actors**

Sir Michael Wood has noted the important difference between “state practice and *opinio juris* in connection with the activities of international organization”, on one hand, and “the contribution of international organizations themselves to the formation and determination of rules of customary international law”, on the other.<sup>56</sup> The former falls under draft conclusions 6 and 10 (forms of evidence of practice and *opinio juris*), whereas the latter is addressed under draft conclusion 12. In statements by States, however, these two points became occasionally intertwined.

Paragraph 1 of draft conclusion 12, welcomed by many (Chile, Czech Republic, Indonesia, Iran, Ireland, Japan, Slovakia), states that a resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law. Poland, taking a progressive stance, stated that “[...] draft conclusion 12 is too far-reaching in restraining the role of international organizations in creating customary rules”. Portugal, however, called for the deletion of this paragraph, calling it “too categorical” and suggested that

<sup>55</sup> Third Report, para. 22.

<sup>56</sup> Sir Michael Wood, “International Organizations and Customary International Law”, 48 (3) *Vanderbilt Journal of Transnational Law* (2015) 609, pp. 615-616.

“paragraphs 2 and 3 are sufficient to characterize the significance that resolutions of international organizations have for the identification of customary international law.” Paragraph 2 states that resolutions may provide evidence for CIL, or contribute to its development, and paragraph 3 notes that a provision in a resolution may reflect CIL if it is established that the provision corresponds to a general practice that is accepted as law.

Iran underlined that the role of international organizations “should be regarded in light of the centrality of States” and Sudan asserted that the role of international organizations could not be assimilated to that of States. Similarly, Belarus noted that the activities of international organizations should be considered only to the extent that the practice of States can be found in those activities, and not in the context of the functioning of, for instance, the secretariats of treaty bodies. India stated that, in their view, only those provisions of resolutions, as well as treaties, that are of a “fundamentally norm creating character” can generate CIL. This was echoed by Sudan, calling for the context and means of adoption of the resolution to be taken into account in assessing its legal value. Israel maintained that “resolutions as a rule constitute ‘soft law’, are prone to politicization, and tend to not accurately reflect binding customary international law”.<sup>57</sup>

Australia, the Republic of Korea, Singapore, Sweden and Turkey called for “great caution” in the assessment of the evidentiary importance of the resolutions of international organizations, with Slovakia proposing that the only correct approach is to consider resolutions on a case-by-case basis. Also the AALCO Report calls for a clear rule on how these resolutions are to be utilised, in order to respect the sovereignty of States and “reduce to a minimum the irony involved in using resolutions of a political nature as constituent material for legally binding rules under customary international law.”<sup>58</sup>

The EU focused its statement solely on the role of international organizations in the identification of CIL, and highlighted the need to recognize the great diversity of international organizations, which, through their functions and powers, impact their contributions to the formation of CIL. In relation to state practice and *opinio juris*, in connection with the activities of international organizations, the EU called for further clarification on the forms of practice of international organizations, when competencies have been transferred to those institutions by their Member States.<sup>59</sup> This approach – and the exceptionalism of the EU in this regard (as long as it is not acting *ultra vires*) – was echoed by Germany, Poland, United Kingdom and Sweden on behalf of the Nordic countries, which stated that “such practice and *opinio juris* should be taken into account in the same way as if the member states would have continued to exercise this competence at the national level” (Germany). The United Kingdom argued that “[w]here the European Union acts in an

<sup>57</sup> Similarly, in the ILC debate on the topic, Special Rapporteur on crimes against humanity, Sean Murphy, welcomed “the centrality States in the formation of customary international law” in relation to the role played by international organizations, and proposed a set of limitations on deducing CIL from the practice of international organizations. ILC 67<sup>th</sup> session, provisional summary record of the 3251<sup>st</sup> meeting, A/CN.4/SR.3251.

<sup>58</sup> AALCO Comment L, p. 5. AALCO has also called for a cautious approach to the role of international organizations in relation to CIL: “the practice of an international organization can count toward the formation or expression of customary international law only if it reflects the practice and positions of its member States and can be counted only with due regard to the strength of the support of its membership and the representativeness of the practice vs. the generality of States in the international community.” AALCO Commentary, comment E, p. 3.

<sup>59</sup> Sean D. Murphy, “The Identification of Customary International Law and Other Topics”, p. 830. He also raised this issue at the ILC debate on the Third Report, ILC 67<sup>th</sup> session, provisional summary record of the 3251<sup>st</sup> meeting, A/CN.4/SR.3251.

area that supplants Member State action [...] such action should be equated with the practice of States” and Sweden that “[...] in certain instances the practice of international organizations can in itself contribute to the creation, or be the expression, of rules of customary international law”. The United States recognised that the conduct of the EU “and perhaps other organizations that may now or in the future exercise similar competencies” may constitute practice similar to state practice. This approach has been already spelled out in the Second Report.<sup>60</sup>

Some delegations flagged the issue of the possible weight given to the inaction or silence of international organizations in the formation and identification of CIL, which has not been directly addressed in the Reports.<sup>61</sup> USA noted that it may be useful to consider “whether the practice of one or more international organizations could result in the creation of a new customary rule despite there being insufficient State practice, or whether the practice of international organizations could block the creation of a customary rule even when State practice in favour is otherwise sufficient”. Mexico raised the question of the possible value of action or inaction of collective conduct, which in principle corresponds to state practice but is not or could not be performed by States acting alone (for example, the conduct of foreign policy – collective use of force, or joint regulation of a specific economic activity).

Greece and Spain presented a broad view on the forms of practice that may contribute to CIL, calling for a more nuanced approach and arguing that, in certain scenarios, the practice of non-state actors may contribute to the formation of CIL even if it cannot be equated with State practice (for instance, armed groups in internal conflict; private military companies applying a mix of policy guidelines and CIL).<sup>62</sup> Australia stated that the conduct of non-state actors may work as a catalyst for State action but does not directly contribute to the formation of CIL.

India called for more clarity on the notion “conduct of other actors”, and Indonesia, Israel, Singapore and Turkey welcomed paragraph 3 of draft conclusion 4, which states that “conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law”, as an exclusionary clause. India and Belarus reiterated this (“the conduct by other non-State actors is not practice for the purposes of formation or identification of customary international law”), and Singapore called this “an important reflection of the centrality of States in the customary process.”

Austria and France expressed a view that the contributions of the ILC should be afforded special importance in the identification of CIL, and that this should be spelled out in the draft conclusions or in the commentary. This is for the reason that unlike ordinary writings or teachings of publicists, the work of the ILC usually leads to GA resolutions. This was also raised at the ILC debate.<sup>63</sup> Chile, among others, echoed this with slight reservations, noting that the ILC draft articles remain proposals with prepositive value and are not binding on States.

<sup>60</sup> Second Report, para. 44: “The practice of those international organizations (such as the European Union) to which Member States sometimes have transferred exclusive competences, may be equated with that of States, since in particular fields such organizations act in place of the Member States.”

<sup>61</sup> This was raised by Jamaica, Malaysia, and Norway on behalf of the Nordic countries in the Sixth Committee debate in 2014, as noted by Sean Murphy, “The Identification of Customary International Law and Other Topics”, p. 832.

<sup>62</sup> This issue was also discussed in the ILC debate, see in particular the summary of the statement of Marie Jacobsson, ILC 67<sup>th</sup> session, provisional summary record of the 3254<sup>th</sup> meeting, A/CN.4/SR.3254.

<sup>63</sup> Summary of the statements of Mathias Forteau and Georg Nolte, ILC 67<sup>th</sup> session, provisional summary record of the 3251<sup>st</sup> meeting, A/CN.4/SR.3251; and the 3253<sup>rd</sup> meeting, A/CN.4/SR.3253.



Austria and Germany highlighted that certain other non-state actors, in particular the International Committee of the Red Cross, may provide further evidence of the existence of rules of customary international law, and should not be deemed “irrelevant” in the assessment of international practice.<sup>64</sup> In response to this, the Czech Republic noted that “the ICRC example does not justify generalization of something which is rather exceptional and not typical for the large and diversified category of ‘other actors’”.

#### **d) Persistent objector rule**

One of the most debated topics of the Reports and the draft conclusions – as noted also in the ILC debate<sup>65</sup> – was encapsulated in the statement of the Republic of Korea: “the concept of persistent objector is one of the most controversial issues in the theory of customary international law.” Paragraph 1 of draft conclusion 15 reads:

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.

While many States (Chile, Czech Republic, Indonesia, Iran, the Netherlands, Romania, Singapore, Slovakia, Sweden on behalf of the Nordic countries) generally welcomed and supported draft conclusion 15 on the persistent objector rule, Cyprus, Greece and Ireland expressed serious concern that acknowledging such a rule could lead to the fragmentation of international law. Cyprus and Greece, furthermore, took the view that the persistent objector rule should not be included in the draft conclusions, as it is a “controversial theory, without sufficient support by State practice and international jurisprudence” and “it dynamites that essence of Customary International Law” (Cyprus), whereas “it would be advisable to consider in the commentary whether a persistent objection may stand up to the test of time” (Greece). They also noted that the restriction of the persistent objection rule should not be limited to norms of a *jus cogens* nature but it should include a broader category of general principles of international law, if it were to be included in the draft conclusions at all.

On the contrary, Iran, Israel, Slovakia and Turkey exclaimed strong support for the persistent objector rule, being “convinced that the principle is sufficiently supported in current international law” (Slovakia) and calling it “one of the main institutions in the process of formation of customary international law”, “one of the manifestations of principle of equal sovereignty”, “a fundamental right of all States” (Iran) and a safeguard of “the autonomy of individual States” (Israel). AALCO, as noted by many of its Member States at the Sixth Committee, has articulated its support for the inclusion of the persistent objector rule in the draft conclusions, as long as the customary rule in question has not attained the status of *jus cogens*.<sup>66</sup> These strong positions in favour of the

<sup>64</sup> Also noted in the ILC debate, for instance, by Donald McRae and Georg Nolte, ILC 67<sup>th</sup> session, provisional summary record of the 3253<sup>rd</sup> meeting, A/CN.4/SR.3253.

<sup>65</sup> Even though Marcelo Vázquez-Bermúdez stated that “there did not appear to be any general resistance from States to the persistent objector rule”, apparently referring to the previous debates at the Sixth Committee (2012, 2013, 2014), ILC 67<sup>th</sup> session, provisional summary record of the 3253<sup>rd</sup> meeting, A/CN.4/SR.3253. Similarly, the Fourth Report makes the claim that “The inclusion of a draft conclusion on the persistent objector rule was supported by almost all delegations who addressed the matter in the Sixth Committee, indicating widespread agreement that the rule does form part of the corpus of international law.” Fourth Report, para. 27.

<sup>66</sup> AALCO Comment K, p. 5.

persistent objector rule highlight the desire by many to preserve the traditional and consensualist approaches to international law.

Japan, Portugal, El Salvador and Sudan, adopting an intermediate position on this contested topic, called for “clarification and practical examples detailing the conditions that must be met in order for a State to be deemed a persistent objector” (Sudan), “concrete examples of general practice in order to substantiate the rule” (Japan), and specification that “the ‘persistent objector’ status is not compatible with norms that have a *jus cogens* character” (Portugal, echoed by El Salvador). Poland stated that the draft conclusion 15 should indicate that the objection to a rule “should be manifested not only in verbal but also in physical acts.”

#### **e) Other issues**

While draft conclusion 11 on the role of treaties was discussed among Member States, it did not invoke a large amount of contention. Turkey noted that the geographical distribution of the parties to a treaty should not serve as evidence of the general character of the practice.<sup>67</sup>

Austria raised concerns – in relation to the writings of publicists – over the reference to *lex ferenda* in the ILC’s Report on the work of the sixty-seventh session<sup>68</sup> with a view that the wording relates to “law *in statu nascendi*, to emerging law”. Austria pointed out that *lex ferenda* “is not law beginning to be formed, but simply the political wish that new legal rules be adopted.” Similarly, concerning *lex ferenda*, Greece called for caution in using scholarly writings as (subsidiary) means for the identification of CIL, “given that in some of them the distinction between what the law is or what the law should be, is sometimes blurred.”

#### **f) Practical objectives of the conclusions**

There were many calls by the delegations in the Sixth Committee to make the draft conclusions user- or layman -friendly rather than a technical legal exercise, calling for “a practical guide” (Peru) and “a set of simple but clear conclusions” (Slovakia). The United Kingdom also welcomed this approach and the idea that the conclusions, with commentaries, will be the authoritative point of reference for the identification of CIL, helping national courts in their application of customary rules. Portugal noted that a set of practical and simple conclusions, together with commentaries, was the right way to proceed but acknowledged, with reference to the comments made in the ILC debate, the dangers of oversimplification. It also referred to the original title of the topic “Formation and evidence of customary international law”, and stated that “more emphasis should be given to the aspect of formation, namely with regard to the two elements of practice and *opinio juris*”, as this would better assist in identifying a methodology for the identification of CIL.

Marcelo Vázquez-Bermúdez, a member of the ILC, noted at the ILC debate that “the draft conclusions should not be overly prescriptive, in view of the inherently flexible nature of the

<sup>67</sup> This issue was also raised in the ILC debate, see summary of the statement of Juan Manuel Gómez-Robledo: “De même, la répartition géographique des États parties à un traité ne pourrait-elle pas servir à déterminer la représentativité ou la généralité de la pratique?” ILC 67<sup>th</sup> session, provisional summary record of the 3254<sup>th</sup> meeting, ILC 67<sup>th</sup> session, provisional summary record of the 3253<sup>rd</sup> meeting, A/CN.4/SR.3253.

<sup>68</sup> “The [Third] report also recognized that writings remained a useful source of information and analysis for the identification of rules of customary international law, although it was important to distinguish between those that were intended to reflect existing law (*lex lata*) and those that were put forward as emerging law (*lex ferenda*). Para. 70, *Report of the International Law Commission, Sixty-seventh session* (2015), A/70/10.

formation of customary international law”.<sup>69</sup> Mexico reiterated this, stating that “despite their clarity, the draft conclusions often did not fully reflect the ample analysis and debate that had preceded their drafting”. It called for a more balanced final wording, which would also include the depth and detail, as evident in the Special Rapporteur’s reports.

#### 4. The changing notion of customary international law: some (re)interpretations

Article 38 (1) of the Statute of the International Court of Justice lists the sources of international law applicable by the ICJ.<sup>70</sup> Beyond this function, Article 38 (1) has become the authoritative – but not necessarily exhaustive<sup>71</sup> – statement of the sources of international law in general.<sup>72</sup> CIL, unlike other sources listed in Article 38 (1), arises from “undirected” behaviour: treaties are drafted and negotiated with a specific objective and purpose in mind; general principles are drawn from national laws and practices; and the subsidiary sources of case-law and teachings of publicists are the result of specialist deliberations. CIL is “a non-negotiated, unwritten and universal form of cooperation”<sup>73</sup> and “a spontaneous, not a deliberate, means of creating international law, and it [is] important not to constrain it within over-strict limits that in reality pertain[...] to the law of treaties”<sup>74</sup>. These features also distinguish custom from soft-law instruments. The definition of CIL set out in Article 38 (1) (b) (“international custom, as evidence of a general practice accepted as law”) translates into two elements required for custom to emerge: practice and *opinio juris*, in other words, the practice (of States) accompanied by a sense of legal obligation.<sup>75</sup>

As the opening quote of this article by Robert Y. Jennings indicates, there are – and have been for decades – voices suggesting that the traditional notion and test for the identification of CIL is in crisis and does not live up to the demands of the contemporary (be it in the 1980s or 2010s) international community. The two-element requirement of CIL has not vanished, but it has been redefined to an extent and the relative importance of practice and *opinio juris* has been re-evaluated. While the notion of CIL and the methods of its formation and identification have been interpreted in a number of ways by courts and scholars, the work of the ILC Special Rapporteur on CIL, and its reception by States, mark a return to the basic concept of CIL by reinforcing, in the

<sup>69</sup> As articulated by Marcelo Vázquez-Bermúdez, ILC 67<sup>th</sup> session, provisional summary record of the 3253<sup>rd</sup> meeting, A/CN.4/SR.3253. This approach was also clearly noted in the Second Report, para. 3.3.

<sup>70</sup> The Article is identical to that codified in the Statute of the Permanent Court of International Justice in 1920, Statute of the Permanent Court of Justice, 16 December 1920, P.C.I.J. Series D, No 1 (2<sup>nd</sup> ed.) 7.

<sup>71</sup> See for instance Jean D’Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (2011), p. 149: “[...] article 38 has never purported to provide an exhaustive list of the sources of international law”.

<sup>72</sup> First Report, para. 29: “Article 38 (1) [...] is widely regarded as an authoritative statement of sources of international law [...]” Sir Michael Wood notes “It is widely accepted as a starting point—at least by practitioners—that the sources of public international law are those listed in Article 38 of the Statute of the International Court of Justice.” Sir Michael Wood, “International Organizations and Customary International Law”, 48 (3) *Vanderbilt Journal of Transnational Law* (2015) 609, p. 611. Article 38 (1) has also been dubbed as “a convenient catalog of international legal sources generally” and “the foundation stone for any credible discussion on sources of international law”, see respectively, David Kennedy, “The Sources of International Law”, 2 (1) *American University International Law Review* (1987) 1, p. 2; and Aldo Zammit Borda, “A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals”, 24 (2) *European Journal of International Law* (2013) 649, p. 651.

<sup>73</sup> Laurence R. Hefner and Ingrid B. Wuerth, “An Instrument Choice Perspective on Customary International Law”, 37 *Michigan Journal of International Law* (forthcoming 2016).

<sup>74</sup> Statement of Mathias Forteau, ILC 67<sup>th</sup> session, provisional summary record of the 3251<sup>st</sup> meeting, A/CN.4/SR.3251.

<sup>75</sup> See the Second Report, pp. 8-14.

main, the traditional test of (general) practice and *opinio juris*, as discussed above. In the same vein, the inclusion of the persistent objector rule underlines that consensualism<sup>76</sup> in international law has not been refuted.

Even then, practice and *opinio juris* are seen arising in new places and through processes that were not anticipated at the time of drafting of Article 38 (1). For instance, international organizations and non-state actors have become increasingly influential in the international community, and their impact on CIL – directly, or indirectly through their influence on States – cannot be disregarded. Therefore, in order to accurately reflect the changing international landscape, the elements of CIL may not be strictly confined to the practice and *opinio juris* of States only. The Special Rapporteur notes this issue and approaches it – especially the role of non-state actors – cautiously. The possible impact of international organizations on CIL, on the other hand, is given a more progressive consideration – a move criticised by some States in the Sixth Committee, and warmly welcomed by others, as discussed above.

Furthermore, not only physical acts of States contribute towards practice but “verbal acts” constitute a widely accepted form of practice. In addition, it is widely (but by no means universally) accepted that while *opinio juris* alone cannot constitute CIL, it may precede practice. *Opinio juris* has also been interpreted more broadly than “the sense of legal obligation”, to consist of a motivation “to follow the norm out of a sense of legal or *moral* obligation”.<sup>77</sup> So, the elements of the source of international law remain the same, but they cover a much wider range of conduct, opinions and considerations than previously.

#### **a) Two-element approach**

The doctrinal views on the formation of CIL show a broad spectrum of theoretical positions: the traditional model asserts that the actual physical practice of States is the bedrock of custom and *opinio juris* is an articulation of the legally binding nature of practice, which can be found from the official statements of the State. *Opinio juris* articulates a legal norm and its normativity but cannot constitute the material component of custom.<sup>78</sup> Some realist scholars argue that CIL, as traditionally understood, stems from an illusion of unitary sense of obligation or interest, and practice can be traced to the pursuit of self-interest of States.<sup>79</sup> While the traditional theory of CIL holds that the temporal order of these two elements is crucial – practice must precede *opinio juris* – many voices – including the ICJ – have suggested that the order in which the elements emerge

<sup>76</sup> For discussion, see Andrew Guzman, “The Consent Problem in International Law”, Berkeley Program in Law and Economics Working Paper Series (2011); and Andrew T. Guzman and Jerome Hsiang, “Some Ways that Theories of Customary International Law Fail: A Reply to László Blum”, 25 (2) *European Journal of International Law* (2014) 553.

<sup>77</sup> As articulated in Larry May, *Crimes Against Humanity: A Normative Account* (2005), p. 50. Emphasis added by the author.

<sup>78</sup> For example, Anthony D’Amato, *The Concept of Custom in International Law* (1971) and Maurice H. Mendelson, “The Formation of Customary International Law”, 272 *Recueil des cours*, (1998) 155.

<sup>79</sup> Jack L. Goldsmith and Eric A. Posner, “A Theory of Customary International Law”, 66 *University of Chicago Law Review* (1999) 1113; see also Jack L. Goldsmith and Eric A. Posner, “Understanding the Resemblance Between Modern and Traditional Customary International Law”, 40 *Virginia Journal of International Law* (1999) 639.

may be reversed.<sup>80</sup> This is the approach adopted also by the Special Rapporteur and commended by many States.

The main crux of the ILC Special Rapporteur's Reports on the identification of CIL centres on these two elements, their identification and evidence thereof, and their interplay. The issues include the fundamental question of "double-counting"; using same material to find evidence of both practice and *opinio juris*; whether CIL can exist when evidence of one of the elements is weak, or lacking altogether (what the author below refers to as "extreme" sliding scale theory); and the possibility of relaxed rules on CIL formation when there is a "need" or "moral necessity" to find such a rule. Karol Wolfke notes that *opinio juris* brings a "naturalistic tinge" to the identification of CIL, because practice may arise on the basis of some pre-existing, higher belief, duty or right.<sup>81</sup> The balance between this "naturalistic tinge" and the reliance on practice underlines much of the discussion of the CIL formation and its identification.

Frederick Kirgis' sliding scale theory addresses the relative significance, or weight, of state practice and *opinio juris* in the formation of a CIL.<sup>82</sup> This theory is based on the idea that "the more destabilizing or morally distasteful the activity [...] the more readily international decision makers will substitute one element for the other, provided that the asserted restrictive rule seems reasonable."<sup>83</sup> This would imply that *opinio juris* may wholly, or at least mostly, be the foundation for a rule of CIL.<sup>84</sup> In other words, a CIL rule may come into existence solely because of the existence of a very strong normative sense of obligation, without much or any state practice; or alternatively it can arise when the sense of legal obligation is weak or non-existent, as long as there is widespread state practice.

In the ILC debate on the Third Report, Kriangsak Kittichaisaree, a Member of the ILC, questioned the level of separation of practice and *opinio juris*, and whether "by going forward with a strict separation between evidence of practice and *opinio juris*, the Special Rapporteur was rejecting Kirgis's "sliding scale" approach, in other words, the notion that the weight accorded to each element could vary according to circumstances."<sup>85</sup> This is not the case. The Special Rapporteur does, in fact, implicitly reject Kirgis' sliding scale theory in its most extreme form, but for a very different reason than suggested by Mr. Kittichaisaree: the "extreme sliding scale" theory as described above, where strong evidence of one element may wholly replace the other, is not an acceptable method of identifying CIL, because for CIL to emerge, both practice and *opinio juris* must be present. As Sir Michael Wood noted in response to Mr. Kittichaisaree's comment: "Les deux éléments doivent être présents, chacun ayant un rôle propre à jouer; l'abondance de l'un ne peut

<sup>80</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States)*, 1986 I.C.J. Reports 14. For discussion and references on the temporal order of the elements, see paras. 16-17 of the Third Report.

<sup>81</sup> Karol Wolfke, *Custom in Present International Law* (2<sup>nd</sup> ed. 1993), 46. Wolfke also accurately points out that "Some authors use the term *opinio juris sive necessitatis* also in a more general meaning – namely, that practice should be accompanied by a conviction of acting according to a general sense of law, social needs, morality, etc." *Ibid.*

<sup>82</sup> Frederick L. Jr. Kirgis, "Custom on a Sliding Scale", 81 *American Journal of International Law* (1987) 146.

<sup>83</sup> *Ibid.*, p. 149.

<sup>84</sup> As Kirgis notes, "[...] a clearly demonstrated *opinio juris* establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule." *Ibid.*, p. 149.

<sup>85</sup> Summary of the statement by Kriangsak Kittichaisaree, ILC 67<sup>th</sup> session, provisional summary record of the 3251<sup>st</sup> meeting, A/CN.4/SR.3251.

pas compenser l'absence de l'autre, sans quoi il ne s'agirait tout simplement pas de droit international coutumier.”<sup>86</sup>

On the issue of “double-counting” and the use of the same material to ascertain both elements, it was noted in the Second Report that *opinio juris* can be “indicated or inferred” from the conduct of States, and “[s]ome practice may thus in itself be evidence of *opinio juris*, or, in other words, be relevant both in establishing the necessary practice and its ‘acceptance as law’.”<sup>87</sup> It continues, however, to point out that “[...] the same conduct should not serve in a particular case as evidence of both practice and acceptance of that practice as law.”<sup>88</sup> Later, the Drafting Committee of the ILC has adopted the general agreement that “the possibility of using the same material to ascertain practice and *opinio juris* should not be ruled out; what [is] important [is] that, even in such cases, the material would be examined for different purposes.”<sup>89</sup>

The Third Report does note that practice and *opinio juris* may be inseparable, whereas the same material should not *generally* serve as evidence of both elements.<sup>90</sup> In practice, however, the same material may provide evidence for both elements but separate assessment of them must be carried out, for determining practice on one hand, and *opinio juris*, on the other. Therefore, a case may arise where – in assessing practice – evidence X shows some but not a broad or uniform level of practice; and in assessing *opinio juris*, the same evidence X provides for a high sense of legal obligation attached to the (in actuality, weak) practice. This may lead into the conclusion that a rule of CIL has materialised – and the method illustrates an application of the sliding scale theory, while including both required elements.

In instances where CIL is found in verbal acts and statements, Professor Sienho Yee has suggested in his writings and in the AALCO Report that “[m]aking a distinction between verbal acts taken in connection with a particular commitment or matter and verbal acts expressed in a general and abstract way can also help to solve the problem of double-counting verbal acts as practice as well as evidence of *opinio juris*. The former can count as practice and as evidence of *opinio juris*, while the latter, probably on the side of *opinio juris* only, or perhaps should not be counted at all.”<sup>91</sup> Further, he notes that the context and situation in which the verbal act takes place is of high relevance. While the suggestion that more specific “verbal acts” may provide for both practice and *opinio juris* seems feasible, it remains unclear how precisely this alone may solve the issue of “double-counting”. On the other hand, it may be questioned if the problem of double-counting evidence has been overemphasised. As long as practice (be it physical or verbal) on one hand and *opinio juris* (be it evidenced in the same or different materials as the practice) on the other, are separately assessed, resulting in a finding that both elements are present, one may reach the conclusion that a rule of CIL has materialised. Moreover, it could be questioned whether it is conceptually accurate, or necessary, to describe the instances when States expressed themselves

<sup>86</sup> Summary of the statement by Sir Michael Wood, ILC 67<sup>th</sup> session, provisional summary record of the 3254<sup>th</sup> meeting, A/CN.4/SR.3254.

<sup>87</sup> Second Report, para. 70.

<sup>88</sup> *Ibid.* para. 74.

<sup>89</sup> Provisional summary record of the 3280<sup>th</sup> meeting of the ILC, A/CN.4/SR.3280.

<sup>90</sup> Third Report, para. 15.

<sup>91</sup> AALCO Report, para. 40, and Sienho Yee, *Towards an International Law of Co-progressiveness* (Brill, 2004), pp. 27, 35-36.

“in a general and abstract way” as “verbal acts”. Are such expressions not simply statements that may or may not count towards *opinio juris*?

One concern that the author shares with some other scholars on double-counting using verbal acts, is the possibility that “such acts might evidence custom that was ultimately not substantiated in the real activity of states”<sup>92</sup>. In order to remain faithful to the nature and concept of custom, it must be grounded in actual practice, as has been argued elsewhere.<sup>93</sup> In addition, over-emphasis on words over deeds, or on *opinio juris* over practice, could result in an accelerated pace of CIL formation where the actual practical developments may not be up to speed, and hence, resulting CIL may be reflective of *lex ferenda* rather than *lex lata*.<sup>94</sup>

*Opinio juris* is sometimes interpreted to reflect an ideal or wishful state of affairs – *lex ferenda* – as opposed to *lex lata*. The formation of what might be called “moral *opinio juris*,” as a reflection of *lex ferenda*, may provide for a progressive method of developing international law in areas where treaties are scarce and practice is not yet widespread, but strong ethical grounds – which may be reflected in the statements of States, and, perhaps, rational thought – all demand that such rules ought to exist. Brian Lepard explores the role of ethics in customary human rights law, and notes that “[u]sually ethics has found its way indirectly into the determination of customary law through the *opinio juris* requirement.” This approach has also been adopted in a number of decisions by international criminal courts and tribunals.<sup>95</sup> Nonetheless, CIL that is *lex lata* cannot crystallize in the absence of some evidence of practice regardless of any other persuasive factors. In the absence of practice, such norms may be a reflection of emerging customary international law, or fall within some other source of international law.<sup>96</sup>

## **b) CIL and international organizations: resolutions of the General Assembly**

As noted above, much discussion in the doctrine has focused on distinguishing between the elements of practice and *opinio juris*, on one hand, and, on the other, the impact of treaties and the so-called “soft law” instruments on either of these elements of CIL. Fundamentally, there is no ultimate test for separating practice and *opinio juris*. This is so because, in many instances,

<sup>92</sup> Duncan French and Jean D’Aspremont, “The ILC Project on the Identification of Customary International Law—Saving the Temple from Submergence”, Guest post, *Opinio Juris* blog on 17 November 2014, available at <http://opiniojuris.org/2014/11/17/guest-post-ilc-project-identification-customary-international-law-saving-temple-submergence/#8230>.

<sup>93</sup> Noora Arajärvi, “From the ‘Demands of Humanity’: The Formulation of *Opinio Juris* in Decisions of International Criminal Tribunals and the Need for a Renewed Emphasis on State Practice” in Brian Lepard (ed.), *Reexamining Customary International Law* (forthcoming). See also Karol Wolfke, *Custom in Present International Law* (2<sup>nd</sup> ed. 1993), p. 41: “Without practice (consuetudo) customary international law would obviously be a misnomer, since practice constitutes precisely the main *differentia specifica* of that kind of international law”.

<sup>94</sup> Or neither, as suggested by William Boothby, calling it “a law related notion” which may not be *lex lata* nor *lex ferenda*. Discussion at the conference “Legitimacy and Law-Making in International Humanitarian Law”, Freie Universität Berlin, 28 November 2015.

<sup>95</sup> Most strikingly, *Prosecutor v. Kupreškić*, 14 January 2000, IT-95-16-T, para 527. For further references, see Noora Arajärvi, “From the ‘Demands of Humanity’”, (forthcoming).

<sup>96</sup> For discussion, see Fabian O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (2008); Ottavio Quirico, “A Formal Prescriptive Approach to General Principles of (International) Law,” EUI LAW Working Papers, 2007/19; Hiram E. Chodosh, “Neither Treaty nor Custom: The Emergence of Declarative International Law,” 26 *Texas International Law Journal* 87 (1991); and Hazel Fox, “Time History, and Sources of Law Peremptory Norms: Is There a Need for New Sources of International Law?” in *Time, History and International Law*, edited by Matthew Craven, Malgosia Fitzmaurice, and Maria Vogiatzi (2007), 119.

evidence used to determine the existence of CIL may relate to both elements, depending on the subject matter, actors involved, and the expected outcomes of the existence or non-existence of a specific customary rule. The impact of ‘soft-law’ instruments in the identification of the two elements of CIL remains ambiguous, and has attracted many comments in relation to the Reports on CIL, as the review of the Sixth Committee debate illustrates.

In particular, resolutions of international organizations, with the focus on the UNGA, which has a near-universal membership, have been discussed in the Third Report, and subsequently by States. GA resolutions may be viewed as state practice; international practice; “paper – or verbal – practice”; *opinio juris*; reflections of existing or emerging CIL in general; or as carrying no relevance in the identification of CIL – as political statements without legal value. The determination of the effect of a resolution largely depends on the perceived normative value of the particular resolution and the circumstances surrounding its adoption.<sup>97</sup>

The traditional view maintains that GA resolutions are recommendations that do not contribute to practice; these reflect the political, and not legal, views of States. This view is based on the plain language of Article 13 of the Charter of the United Nations, which affirms that the GA shall “make recommendations for the purpose of [...] promoting international co-operation in the political field and encouraging the progressive development of international law and its codification.”<sup>98</sup>

Anthony D’Amato notes that a clear separation of deeds and words is vital in ascertaining CIL through acts and arguments of governments.<sup>99</sup> Somewhat similarly, Michael Scharf discusses possible problems arising from identifying CIL through GA resolutions: “The resolutions are not intended to have binding effect; they do not clearly differentiate between *lex lata* and *lex ferenda*; voting in favor of a resolution may be purely a political show-off; differentiating whether the resolutions provide for practice, *opinio juris*, or both, creates the problem of double counting; and finally, the self-contained nature of General Assembly resolutions, which is not related to real world situations, undermines the rule of law.”<sup>100</sup>

On the other hand, as expressed by Dame Rosalyn Higgins, GA resolutions can be a rich source of evidence about the development of CIL.<sup>101</sup> She does, however, refrain from defining how and in what form the resolutions could be used as evidence of the development of CIL or whether they may merely reiterate pre-existing customary rules. At the same time, she makes a nod towards accepting GA resolutions as evidence of practice.<sup>102</sup>

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<sup>97</sup> Third Report, paras. 45-54.

<sup>98</sup> U.N. Charter, art. 13, para. 1 (emphasis added).

<sup>99</sup> D’Amato states: “It is an extremely dubious proposition to rely upon the *arguments* of governments, expressed either through their attorneys or foreign offices, rather than their *acts*.” Anthony D’Amato, *The Concept of Custom in International Law* (1971), 134 (emphasis in original).

<sup>100</sup> Michael P. Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (2013), 51-53.

<sup>101</sup> Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (1963), 2 (“With the development of international organizations, the votes and views of states have come to have legal significance as evidence of customary law. Moreover, the practice of states comprises their collective acts as well as the total of their individual acts.”).

<sup>102</sup> See *ibid.* (affirming that “international custom is to be deduced from the practice of states, which includes their international dealings as manifested by their diplomatic actions and public pronouncements”).



An important factor in determining the effect of GA resolutions on CIL concerns their normative or non-normative nature.<sup>103</sup> Maurice Mendelson articulates this issue as follows: “as a matter of principle, there is no reason why Assembly resolutions should not in appropriate circumstances be treated as evidence of the *opinio juris* of states (or at least those voting in favor), bearing in mind there is no particular form prescribed by the law for the expression of such beliefs. But whether they do so depends very much on the terms of the resolution and the context.”<sup>104</sup> Accordingly, resolutions that use merely recommendatory language do not possess the normative power from which elements of CIL could be deduced. If the formulation of the resolution, however, is declaratory of pre-existing legal rules and reinforces them, it can be taken as evidence of *opinio juris*, and perhaps, of verbal practice.

ILC Special Rapporteur’s Second Report includes GA resolutions on the list of types of state practice as well as on the list of manifestations of “acceptance as law.”<sup>105</sup> The Report notes that practice and *opinio juris* arise, or may be deduced from, voting in favour of or against a resolution and statements made in connection with the resolution.<sup>106</sup> This approach finds support also in the ICJ case-law. In *Legality of Nuclear Weapons* Advisory Opinion, the Court stated that General Assembly resolutions “may sometimes have normative value,” and can contribute to the evidence of the existence of a rule or “the emergence of an *opinio juris*.”<sup>107</sup> In *Barcelona Traction* case, in his Separate Opinion, Judge Ammoun stated that “the positions taken up by the delegates of States [...] in the United Nations naturally form part of State practice.”<sup>108</sup>

The Second Report continues, however, to suggest that the final resolution itself may not be useful in identifying state practice, and States may have various motives – beyond the sense of legal obligation – when consenting to the text of a resolution.<sup>109</sup> This issue is also highlighted by Jean-Marie Henckaerts and Els Debuf who draw an example from humanitarian law: “[...] it may be difficult to determine whether a state votes in favor of a resolution condemning attacks on cultural property in armed conflict because it believes this prohibition to reflect an existing or emerging rule of (customary) law, or whether it does so following a policy decision. Moreover, the vote could be based on both considerations at the same time.”<sup>110</sup>

<sup>103</sup> These characteristics are also referred to as “mandatory” and “nonmandatory.” See Anthea Elizabeth Roberts, “Traditional and Modern Approaches to Customary International Law” (2001), 763. See also *North Sea Continental Shelf Cases*, para. 72: “The provision concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law.”

<sup>104</sup> Maurice Mendelson, “The International Court of Justice and the Sources of International Law,” in *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, edited by Vaughan Lowe and Malgosia Fitzmaurice (2008), p. 86.

<sup>105</sup> Second Report; as evidence of state practice, para. 41.1.9; *opinio juris*, para. 76.7.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Legality of the Threat or Use of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, 1996 I.C.J. Reports 226, paras. 70-73. See also *Prosecutor v. Blaškić*, IT-95-14-A, Appeals Chamber, 29 July 2004, para. 158: “evidence of the existence of *opinio juris* is demonstrated in the General Assembly Resolution 2444 (1968) [...] and in Resolution 2675 (1970)”.

<sup>108</sup> *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)*, Judgement of 5 February 1970, 1970 I.C.J. Rep 3, Separate Opinion of Judge Ammoun, para. 11.

<sup>109</sup> Second Report, para. 76.7.

<sup>110</sup> Jean-Marie Henckaerts and Els Debuf, “The ICRC and the Clarification of Customary International Humanitarian Law”, in *Reexamining Customary International Law*, Brian D. Lepard (ed.), Chapter 6 (forthcoming).

The political nature of GA resolutions has been further discussed in the ILC Special Rapporteur's Third Report: "[...] the General Assembly is a political organ in which it is often far from clear that their [Member States'] acts carry juridical significance."<sup>111</sup> Finally, the ILC Special Rapporteur's draft conclusion 12 states that resolutions of international organizations may provide evidence for establishing the existence and content of a rule of CIL, or may contribute to its development, and may be reflective of CIL if practice and *opinio juris* have been established, but cannot as such create it.<sup>112</sup>

## 5. Concluding Remarks

The Reports and the draft conclusions of the Special Rapporteur Sir Michael Wood provide an excellent assessment of the ways of identifying CIL, which is cross-cutting throughout the different fields of international law – whilst noting that the nature of the rule may be taken into account in assessing the two constitutive elements of CIL. The Reports represent a somewhat conservative – or debatably, a rigorous and systematic – approach, which the author observes as conceptually the most accurate and appropriate approach to the sources of international law. There is a strong need to preserve legal certainty, foreseeability, and unity of international law when assessing the very founding rules and principles of international law – in its formation and identification.

The Reports – and largely the reactions to these Reports<sup>113</sup> – emphasise the need for unity in the identification of CIL by defending the requirements of practice and *opinio juris*: "[...] both elements are required. Any other approach risks artificially dividing international law into separate fields, which would run counter to the systemic nature of international law."<sup>114</sup> Any explicit loosening of the two-element test, or finding CIL in the absence of one or both of those two elements, would deconstruct the concept of CIL: while the resulting norms may well be a reflection of *lex ferenda*, or even *lex lata*, they are not by definition CIL. Moreover, it is conceptually flawed to set aside the requirement of practice in the formation and identification of CIL, or to deduce *opinio juris* from moral beliefs or aspirations, or from a "need for a rule"<sup>115</sup>, or requests or wishes of States and other actors. This approach finds support by States generally, as seen in the analysis of the statements of

<sup>111</sup> The Third Report, para. 47. This approach raised some opposition in the 2015 ILC debate on the Third Report. For instance, Special Rapporteur on *jus cogens*, Dire Tladi, stated that it was clear that the acts of Member States carry juridical significance – the only question was the extent of that significance. ILC 67<sup>th</sup> session, provisional summary record of the 3251<sup>st</sup> meeting, A/CN.4/SR.3251. He continued on this topic at the 68<sup>th</sup> session of the ILC, noting that "there was an unfortunate trend to downplay the significance of resolutions, which constitute[d] one of the most easily identifiable and accessible forms of practice". ILC 68<sup>th</sup> session, provisional summary record of the 3301<sup>st</sup> meeting, A/CN.4/SR.3301.

<sup>112</sup> *Ibid.* para. 54.

<sup>113</sup> As conspicuously articulated by Huang Huikang: "uniform standards must be applied to the identification of customary international law regardless of the field of law or the intended end-user of the draft conclusions. The application of different standards would exacerbate the fragmentation of customary international law and even call its validity into question." ILC debate on the Third Report, ILC 67<sup>th</sup> session, provisional summary record of the 3253<sup>rd</sup> meeting, A/CN.4/SR.3253.

<sup>114</sup> Second Report, para. 28.

<sup>115</sup> See for instance the summary of the statement of Maurice Kamto: "M. Kamto ne peut donc pas se rallier à la position du Rapporteur spécial, et ne trouve pas convaincant le point de vue qui est cité à la note 28 du rapport, selon lequel, dans certains cas, « l'expression d'un "besoin de droit" [...] est à l'origine d'une pratique qui parachève la formation de la norme coutumière », car il peut y avoir un besoin de droit sans que cela soit nécessairement un besoin de droit coutumier : il s'agit bien souvent d'un besoin de droit conventionnel." ILC debate on the Third Report, ILC 67<sup>th</sup> session, provisional summary record of the 3252<sup>nd</sup> meeting, A/CN.4/SR.3252(Prov.). This was echoed by Ernest Petric, ILC debate on the Third Report, ILC 67<sup>th</sup> session, provisional summary record of the 3253<sup>rd</sup> meeting, A/CN.4/SR.3253.

delegations delivered in the Sixth Committee. At the same time, as noted in the ILC debate on the Third Report in 2015, while the two elements of custom serve different functions, they should not be artificially separated,<sup>116</sup> as they represent “two aspects of the same phenomenon”<sup>117</sup>.

The statements by delegations in the Sixth Committee in relation to the Reports and the draft conclusions provide factual and valuable information on how States perceive the concept of custom in international law, its two constitutive elements, the contribution by international organizations, and so on. The manner in which sources of law, CIL included, are identified, stems from formalised rules, that is, under Article 38 (1) of the ICJ Statute, but it has developed beyond the formalistic methodology. Different contributions, statements, and reports, mainly by States, could be viewed as contributing to the ‘custom of custom formation and/or identification’. Hence, what States do and say in relation to the ILC’s draft conclusions on the identification of CIL should be taken seriously.<sup>118</sup>

CIL, as noted in the first part, is fluid by its nature. Consequently, it has been characterised as being in crisis at multiple points in history, or as being undermined by the multiplication of other sources of international law. The Reports – and the extensive references they make to scholarly works and case-law – point to a contrary conclusion.<sup>119</sup> CIL, composed of practice and *opinio juris*, is as relevant as ever. It is true, however, that the forms and evidence of both of these elements have changed and broadened. This is the result of an increased number of actors performing their functions on an international level, the expanding scope of international law, and the intensified efforts to regulate these areas. While CIL has been identified and applied in a flexible manner by some – a prime example being international and hybrid criminal tribunals – the author sees this more of a slump than an indication of a crisis or decline of CIL. Although the specific parameters of CIL and selected issues – such as the role of international organizations and the persistent objector rule – still call for clarification, the general consensus among States leaves no question about the need for a rigorous and cautious approach in the identification of CIL, and their endorsement of these aspects as adopted in the Reports by the Special Rapporteur Sir Michael Wood.

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<sup>116</sup> Summary of the statement of the Special Rapporteur on *jus cogens*, Dire Tladi, ILC 67<sup>th</sup> session, provisional summary record of the 3251<sup>st</sup> meeting, A/CN.4/SR.3251.

<sup>117</sup> Summary of the statement of the Special Rapporteur on subsequent agreements and subsequent practice in relation to interpretation of treaties, Georg Nolte, ILC debate on the Third Report, ILC 67<sup>th</sup> session, provisional summary record of the 3253<sup>rd</sup> meeting, A/CN.4/SR.3253.

<sup>118</sup> First Report makes a passing reference to this issue in para. 38: “It is perhaps unnecessary, at least at this stage, to enter upon the question of the nature of the rules governing the formation and identification of rules of customary international law, for example, whether such rules are themselves part of customary international law. But as in any legal system, there must in public international law be rules for identifying the sources of the law. These can be found for present purposes by examining in particular how States and courts set about the task of identifying the law.”

<sup>119</sup> For instance, the Second Report explicitly states that Article 38 (1) (b) “has lost none of its relevance”, para. 17. See also the addendum to the Fourth Report, “Annex II. Identification of customary international law: bibliography”, U.N. Doc. A/CN.4/695/Add.1 (May 2016).

## The Author



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The Kolleg-Forschergruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformation of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

The Research Group brings together international lawyers and political scientists from five institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Hertie School of Governance, Humboldt-Universität zu Berlin, Universität Potsdam and Social Science Research Center Berlin (Wissenschaftszentrum Berlin). An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.