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# Concluding Observations

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The literature devoted to customary international law is vast and growing, a testimony to the continuing importance of custom as a source of international law.[1] The present volume is a timely addition, published after (though largely written before) the adoption by the International Law Commission (ILC) in 2016, on first reading, of a set of sixteen conclusions on 'Identification of customary international law'.[2] Together with their commentaries, the conclusions seek to offer concise and practical guidance to all those called upon to identify the existence and content of rules of customary international law, recognizing that such a task is increasingly of concern to those who are not necessarily specialists in public international law.

The five articles in this volume deal with several of the questions that the ILC, too, has debated. Even if not all of the articles take fully into account the adoption of the first reading conclusions and commentaries, it is notable that, even when critical, they are not inconsistent with the general approach and substance of the ILC's work. They also largely track the ILC's terminology for the topic, which promotes (as is the case with other work of the Commission) a common language of international legal discourse.

*Noora Arajärvi*'s contribution provides an overview of the four reports submitted by the ILC's Special Rapporteur to date, as well as their reception by States, and generally supports both the need for the ILC's conclusions and

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1 See the bibliography in UN Doc. A/CN.4/695/Add.1 (2016).

2 See UN Doc. A/71/10: *Report of the International Law Commission, Sixty-Eighth Session (2 May–10 June and 4 July–12 August 2016)*, pp. 75–115 (hereafter: 'ILC draft conclusions').

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their approach. Bearing in mind that it is not so much the Special Rapporteur's views but rather those of the Commission as a collective body that are of significance, it is gratifying to note that she finds that the approach adopted by the ILC to the identification of customary international law is "conceptually the most accurate and appropriate approach to the sources of international law", and that States have indeed generally welcomed and supported it. One might quibble with the statement that the work of the Commission and the reactions by States "*mark a return* to the basic concept of CIL by reinforcing, in the main, the traditional test of (general) practice and *opinio juris*" (emphasis added), since, in fact, that test was never really abandoned. Pleas for a "modern" custom in which either a general practice or its acceptance as law would not be necessary – much like the arguments that this source of international law was declining or even obsolete – were for the most part never more than an academic conceit among a few scholars. Such pleas gained no traction with States and no significant following among practitioners.[3] This is not to say that the formation of customary international law, and the means for identifying it, may not adapt to the changing circumstances of international relations and the evolving ways in which States act and interact. As Arajärvi writes, and the ILC conclusions suggest, they have, and will no doubt continue to do so. But this inherent flexibility of customary international law cannot go so far as to reject its essential nature as a general practice accepted as law. In each case, a structured and careful process of legal analysis and evaluation is required in order to ensure that only a rule of customary international law properly so called is identified.

Two articles, those by Nicolás Carrillo-Santarelli and by Sufyan Droubi, focus on the formation of customary international law, an issue which not infrequently coalesces with its identification. *Carrillo-Santarelli* addresses the role of non-State actors, suggesting, as the ILC has done,[4] that the practice of such entities (other than intergovernmental organizations) does not directly contribute to the formation of customary international law, but may do so indirectly. He then proceeds to suggest that, as a matter of policy, the direct participation of non-State actors in the formation of customary international law should at times be authorized by States (just as, he suggests, they have

3 Omri Sender and Michael Wood, "Custom's Bright Future: The Continuing Importance of Customary International Law", in C.A. Bradley (ed.), *Custom's Future: International Law in a Changing World* (2016) pp. 360–369; Omri Sender and Michael Wood, "The emergence of customary international law: Between theory and practice", in C. Brölmann and Y. Radi (eds.), *Research Handbook on the Theory and Practice of International Lawmaking* (2016) pp. 133–159.

4 ILC draft conclusion 4(3) and commentary, *supra* note 2 at pp. 86, 88–89.

authorized international organizations), as "the more voices we hear the better", and to do so would enhance the legitimacy and appeal of customary international law. He stresses, however, that such participation should be permitted on a case-by-case basis, depending on the particular qualities of the actors and only when there is "no real serious risk" that this would "[lead] to poorer essential guarantees and standards" of the law. Such subjective criteria and the need to take into account the practice of numerous entities of an infinite variety, would in fact make the identification of rules of customary international law very difficult. This is something that a legal system might not be able to admit, in particular one in which States remain the primary subjects.

*Droubi*'s article addresses the role of the United Nations, as an international organization, in the promotion of new rules of customary international law. Without attempting to respond to all of the assertions advanced by him, it seems that although he suggests that his approach differs from that of the ILC, it is not in fact incompatible with it. Like the ILC,[5] Droubi accepts that UN resolutions may have a significant role in the development of customary international law; that States and international organizations may and do interact in such processes; that resolutions, including the particular language employed in them, must be carefully assessed to determine whether they are evidence of customary international law; and that any relevant practice ought to always be accompanied by acceptance as law (even if, in seeking to identify the existence and content of customary international law, the two elements are to be assessed separately).

*Khagani Guliyev*'s contribution raises the interesting question of the extent to which what he terms "local custom" may be viewed as a tacit agreement, using the law of State succession as his testing laboratory. As he notes in a footnote, the ILC has preferred the term 'particular customary international law' to describe those customary rules applying only among a limited number of States; in part, this is because a measure of geographical affinity may not always be necessary for the existence of such rules. In any case, like the ILC (and the International Court of Justice),[6] Guliyev accepts that the basic approach requiring both a general practice and its acceptance as law for the identification of rules of general customary international law, applies also for rules of particular customary international law (in such cases, however, the practice must be general in the sense that it is a consistent practice among the States concerned, each of which must have accepted that practice as law among

5 ILC draft conclusion 12 and commentary; draft conclusion 3(2) and commentary, *ibid.* at pp. 104–107, 83, 85–86.

6 ILC draft conclusion 16(2) and commentary, *ibid.* at pp. 113–115.

them). It is important to recall, however, that neither the ICJ nor the ILC, nor States, have considered a long (or particular) duration of the practice as a condition for the existence of a customary rule;[7] rather, such duration may be of significant evidentiary value in determining whether a rule exists, by allowing for extensive practice and in proving its acceptance as law. Guliyev further argues that States have rarely raised claims of particular customary international law in legal disputes, and that international courts have been reluctant to apply such law, attributing this to a greater difficulty in identifying particular customary international law as compared with more general rules. An alternative explanation might be that relations among only a limited number of States on matters of particular relevance to them are generally characterized by greater legal certainty, which is anyhow often established by treaty. And while the application of the two-element approach is indeed stricter in the case of rules of particular customary international law (in the sense of having to assess the practice and *opinio juris* of each of the States concerned), the limited number of relevant States might arguably make such rules easier to identify.

*Panos Merkouris*, too, assumes that the existence of rules of customary international law is to be determined through an examination of the two constituent elements. The interesting argument advanced by him is that while the identification of rules of customary international law ought to be a process of strict induction, the interpretation of established rules is to be carried out by deduction. It is worthwhile noting in this connection that the ILC's commentaries suggest that the two-element approach does not preclude some measure of deduction, in particular when considering possible rules of customary international law that operate against the backdrop of rules framed in more general terms that themselves derive from and reflect a general practice accepted as law, or when concluding that possible rules form part of an "indivisible regime" (to borrow a term used by the ICJ).[8] Yet the interpretation of an established rule, which is often linked to a text which seeks to reflect it, is also likely to require an examination of the practice underlying the rule. In any event, before undertaking an exercise of interpreting allegedly existing customary rules it should also be remembered that a pronouncement on the state of customary international law does not freeze its development: a rule previously identified may have evolved since the date of a particular decision. In this sense, too, consideration of the practice underlying a rule may be integral to the task of interpretation.

7 See also ILC draft conclusion 8(2) and commentary, *ibid.* at pp. 92, 95.

8 Commentary to ILC draft conclusion 2, paragraph (5), *ibid.* at p. 83.

All these articles contribute, in their varying ways, to the ongoing debate about customary international law. One way in which they do so is by reference to the ILC's current work on the topic 'Identification of customary international law', thus contributing to its further consideration prior to the second reading, anticipated in 2018. It is hoped that the conclusions and commentaries adopted on first reading will stimulate further academic comment, to which reference may be made during that stage.