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What Is Public International Law? The Need for Clarity about Sources

Sir Michael WOOD*
20 Essex Street, United Kingdom
mwood@20essexst.com

Abstract
This article addresses the need for clarity as regards the sources of public international law, or at least as much clarity as possible. Questions relating to sources lie at the heart of international law. Of particular concern is the lack of rigour shown by some domestic judges when it comes to determining the rules of customary international law.

This article addresses the need for clarity as regards the sources of public international law, or at least as much clarity as possible. Questions relating to sources lie at the heart of international law. Of particular concern is the lack of rigour shown by some domestic judges when it comes to determining the rules of customary international law. The Singapore Court of Appeal's decision of 14 May 2010 in *Yong Vui Kong v. Public Prosecutor*[1] ("*Yong*") is, however, encouraging in this respect. The case concerned the mandatory death penalty (MDP) for drug offences, which is no doubt very controversial as a matter of policy. But in its treatment of public international law, the Court of Appeal's judgment was exemplary.

The Court dealt with two central issues. First, under what circumstances are rules of customary international law incorporated into the common law, in this case the common law of Singapore?[2] I do not deal with that issue here.

Second, the Court considered what needs to be shown in order to establish the existence and content of a rule of customary international law.[3] The Chief Justice

* Senior Fellow of the Lauterpacht Centre for International Law, University of Cambridge; Barrister, 20 Essex Street; Member, UN International Law Commission. This is a slightly revised version of a lecture that was given at the Supreme Court of Singapore on 11 November 2010, under the auspices of the Attorney-General's Chambers' International Law Speakers' Series. I wish to thank Davinia Aziz and Eran Sthoeger for their invaluable assistance.

1. *Yong Vui Kong v. Public Prosecutor* [2010] 3 S.L.R. 489 [*Yong*].
2. *Ibid.*, paras. 87–92.
3. *Ibid.*, paras. 93–9.

noted that a significant number of states imposed, both in law and in practice, the MDP for drug-related and other serious offences.[4] He went on to say that:

> [a]s a result, although the majority of States in the international community do not impose the MDP for drug trafficking, this does not make the prohibition against the MDP a rule of CIL [customary international law]. Observance of a particular rule by a majority of States is not equivalent to extensive and virtually uniform practice by all States ... The latter, together with *opinio juris*, is what is needed for the rule in question to become a rule of CIL.[5]

The Court of Appeal's approach is grounded in the case-law of the International Court of Justice (ICJ), with appropriate citations from *Libya v. Malta*[6] and the *North Sea Continental Shelf* cases.[7]

This clarity, this "typical rigour",[8] is all the more impressive since it is only relatively infrequently that questions of public international law have thus far come before the Singapore courts.[9] For example, in the 2008 case of *Republic of the Philippines v. Maler Foundation and Others*,[10] which dealt with a novel and important point on state immunity, the Chief Justice noted that "[s]overeign or state immunity cases are not new to the courts of Singapore, but they are rare".[11] Indeed, he pointed out that the last occasion on which a sovereign asserted immunity from proceedings in a Singapore court had been the Privy Council's 1952 decision in *Sultan of Johore v. Abubakar Tunku Aris Bendahara*.[12]

Notwithstanding this rarity so far, questions of customary international human rights law may be rather significant in a state, like Singapore, which is party to relatively few human rights treaties.[13] Thus, a proper understanding of customary international law is all the more important.

Judges elsewhere do not always show the same grasp of public international law as the Court of Appeal in *Yong*. Judges in some European countries have reached some remarkable judgments on questions of customary international law, especially

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4. *Ibid.*, para. 96.
5. *Ibid.*
6. *Case Concerning the Continental Shelf (Libya v. Malta)*, [1985] I.C.J. Rep. 13 at 29–30, cited in *Yong, supra* note 1 at para. 98.
7. *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, [1969] I.C.J. Rep. 3 at 43, cited in *Yong*, *supra* note 1 at para. 98.
8. Davinia AZIZ, "Republic of the Philippines v. Maler Foundation and Others: State Immunity and Intangible Property" (2007) 13 Asian Yearbook of International Law 295 at 301.
9. See generally C.L. LIM, "Public International Law before the Singapore and Malaysian Courts" (2004) 8 Singapore Yearbook of International Law 243.
10. *Republic of the Philippines v. Maler Foundation and Others* [2008] 2 S.L.R. 857.
11. *Ibid.*, para. 33.
12. *Sultan of Johore v. Abubakar Tunku Aris Bendahara* [1952] AC 318, see *ibid.*
13. Of the international human rights instruments listed on the website of the Office of the High Commissioner of Human Rights, online: <www2.ohchr.org/english/law>, Singapore is party to the *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, GA Res. 34/180, UN Doc. A/34/46 (entered into force 3 September 1981) [*CEDAW*]; the *Convention on the Rights of the Child*, 20 November 1989, GA Res. 44/25, UN Doc. A/44/49 (entered into force 2 September 1990) [*CRC*]; and the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 25 May 2000, GA Res. 54/263, UN Doc. A/54/49 (entered into force 12 February 2002) [*OP-CRC-AC*].

on matters such as state and diplomatic immunity, universal jurisdiction, and *jus cogens* (peremptory norms of international law), as well as customary international human rights law. Early examples were the House of Lords' decisions concerning the extradition of Augusto Pinochet,[14] where those in the majority expressed some rather unorthodox views on international law. Courts in Spain, Belgium, and Italy, among others, have reached equally unorthodox conclusions. Italian court decisions on state immunity have even led to the current case between Germany and Italy at the ICJ.[15]

I.

Why is clarity in public international law important? All law, to be worthy of its name, should be as clear as possible. Is clarity a particular issue for international law?

There are a number of reasons why it is important. First, international law is often seen among the public, including the well-informed public, and even among lawyers, as highly subjective, even political. They sometimes question whether it is law at all, or whether with the general absence of courts or enforcement, it needs to be obeyed.

In England, at any rate, the general public has become increasingly interested in international law. For over a year, the *Pinochet* proceedings were much discussed. Above all, in the lead-up to the invasion of Iraq in 2003, the issues were often discussed in terms of international law. This debate continues in the UK, some eight years later, thanks in part to the Iraq Inquiry (the Chilcot Inquiry).[16]

Those in the media who hold forth on international law, journalists and others, often seem to have little understanding of the subject. Frequently they are not international lawyers by training, sometimes not even lawyers; yet they feel competent to speak on the subject. For example, in advance of the Pope's state visit to Britain in September 2010, much was written about whether or not he was entitled to immunity from legal proceedings. Some of it was ill-informed. The main point was "lost in sensation".[17] In the event, nothing happened. Debates like that can lead to cynicism, and only serve to bring international law into disrepute.

A second reason why clarity is important is this. With the great expansion of the scope of public international law, more and more lawyers who are not specialists in the field are called upon to apply it. Nowadays, judges in the domestic courts, in England and elsewhere (including in Luxembourg[18]), are frequently faced with arguments based on public international law. There is a tendency to "use"—or abuse—international law,

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14. *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex p. Pinochet Ugarte (Amnesty International Intervening)* [2000] 1 AC 61; *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex p. Pinochet Ugarte (No. 3) (Amnesty International Intervening)* [2000] 1 AC 147.

15. *Jurisdictional Immunities of the State (Germany v. Italy)*, online: ICJ ⟨www.icj-cij.org⟩. In July 2010, the Court found Italy's counter-claim against Germany inadmissible: see *Jurisdictional Immunities of the State (Germany v. Italy)*, Order of 6 July 2010, online: ICJ ⟨www.icj-cij.org⟩. The ICJ proceedings arise, inter alia, out of the 2004 Italian Supreme Court decision in *Ferrini v. Federal Republic of Germany*, (2006) 128 I.L.R. 658 [*Ferrini*].

16. Iraq Inquiry, online: ⟨www.iraqinquiry.org.uk⟩.

17. Geoffrey ROBERTSON QC, *The Case of the Pope: Vatican Accountability for Human Rights Abuses* (London: Penguin Special, 2010), Preface.

18. The Court of Justice and General Court of the European Union should be regarded as domestic courts for these purposes.

or what is said to be international law, to bolster arguments, especially in judicial review cases. Sometimes the arguments based on international law are hardly respectable. It is thought right to present to the judge resolutions of international bodies, such as the UN General Assembly, or documents of human rights organs or non-governmental organizations, without any serious attempt to explain what weight, or lack of weight, they have for the formation or evidence of international law. The number, importance, and complexity of cases involving public international law have grown hugely in England, Europe, and elsewhere, over the last decade. Correspondingly, practitioners in many areas of domestic law cannot properly advise or represent their clients without knowing at least some international law; obvious fields are human rights, the environment, investment protection, state and diplomatic immunity, international criminal law, and the laws of war. Lawyers working for the government who do not specialize in public international law increasingly need to advise on questions of international law. Lawyers working for multinational corporations, such as the defence industries and "private military companies", have to understand UN, regional, and domestic sanctions regimes and much else besides. Lawyers working for non-governmental organizations must keep up with international law relevant to their fields of activity, such as refugee law or human rights. Academic lawyers in many fields that are essentially domestic need to understand the international law aspects of their subject. Not all such non-specialists can be expected to master general international law to the same level as a specialist. Yet they definitely need a sound, if not detailed, grasp of general international law, and particularly of its sources.

International law has not, on the whole, been well served by authors, especially in recent years. Some have made brave efforts to write about international law in reasonably clear and simple terms, with the non-specialist, or even the non-lawyer, partly in mind: for example, Philippe Sands's *Lawless World*,[19] Anthony Aust's *Handbook of International Law*,[20] and John Murphy's *The United States and the Rule of Law in International Affairs*.[21] Among general works, in addition to those cited in *Yong*,[22] there is Malcolm Shaw's *International Law*,[23] as well as the collective work *International Law* edited by Malcolm Evans, now in its third edition.[24] But for every good book or article, there are many more that confuse and complicate unnecessarily.

It might of course be said in reply that public international law is unclear, that it is complex and that the authors are merely reflecting this. One could point to the absence in many fields of case-law from international courts and tribunals. Yet public international law is not nearly as unclear as some make it out to be; and if they are to be useful and relevant, authors should so far as possible seek to clarify and systematize.

This is true, for example, in the important field of international law on the use of force (*jus ad bellum*). As was explained in an article written in 2007, "[t]he rules of

19. Philippe SANDS, *Lawless World* (London: Allen Lane, 2005).

20. Anthony AUST, *Handbook of International Law*, 2nd ed. (Cambridge: Cambridge University Press, 2010).

21. John Francis MURPHY, *The United States and the Rule of Law in International Affairs* (Cambridge: Cambridge University Press, 2004).

22. *Yong, supra* note 1 at paras. 89, 98.

23. Malcolm SHAW, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008).

24. Malcolm EVANS, ed., *International Law*, 3rd ed. (Oxford: Oxford University Press, 2010).

international law on the use of force are relatively easy to state, though they can be difficult to apply in practice".[25]

The same article, referring to a number of occasions on which the UK used force overseas which had to be justified in terms of international law, said:

> [t]he Kosovo intervention in 1999 involved a major issue of principle: was there a right of unilateral "humanitarian intervention"? The use of force against Al Qaida in Afghanistan in 2001 (following the attacks on the United States on 11 September 2001) also raised an important issue: the right of self-defence against attacks by non-State actors. In my view, the use of force against Iraq in March 2003, on the other hand, though politically and legally the most controversial, involved no great legal issue. As the UK Attorney General's now public advice of 7 March 2003 indicates, for the United Kingdom, the legality of the invasion turned solely on whether it had been authorised by the Security Council. It is clear that the Security Council may authorise the use of force. The only question was whether it had done so.[26]

That was said in 2007. It is now borne out by the legal advice given at the time, both within the Foreign and Commonwealth Office (FCO) and by the Attorney General, disclosed by the British government in connection with the Chilcot Inquiry.[27] The differences over the legality of the 2003 invasion of Iraq were not ones of principle, but of interpretation of Security Council resolutions, including the weight to be given to factors such as language proposed by one party or another in the course of the negotiation of the resolution.

The need for the courts to understand the sources of international law was particularly apparent in the English case of *Jones v. Ministry of Interior of Saudi Arabia (Secretary of State for Constitutional Affairs Intervening)*.[28] That concerned, among other things, the entitlement of individual state officials to immunity from civil action in tort for acts alleged to amount to torture. The contrast in that case between the English Court of Appeal's approach to the sources of customary international law and the more orthodox approach of the House of Lords could hardly be greater. In the House of Lords, the late Lord Bingham said:

> There is no evidence that states have recognised or given effect to an international law obligation to exercise universal jurisdiction over claims arising from breaches of peremptory norms of international law, nor is there any consensus of judicial or learned opinion that they should. This is significant, since these are the sources of international law.[29]

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25. Michael WOOD, "The Law on the Use of Force: Current Challenges" (2007) 11 Singapore Yearbook of International Law 1 at 2.

26. *Ibid.*, at 3.

27. Iraq Inquiry, "Declassified Documents", online: ⟨www.iraqinquiry.org.uk/transcripts/declassified-documents.aspx⟩.

28. *Jones v. Ministry of Interior of Saudi Arabia (Secretary of State for Constitutional Affairs Intervening)* [2006] UKHL 26; [2007] 1 AC 270 [*Jones*]. This was an appeal from the decision of the English Court of Appeal in *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia and another (Secretary of State for Constitutional Affairs and another Intervening)* [2004] EWCA Civ. 1394.

29. *Ibid.*, at para. 27. For the English courts' attitude to international law, see "International Relations Law" in *Halsbury's Laws of England*, 5th ed., Vol. 61 (London: LexisNexis UK, 2010) at 10–25, paras. 12–25.

In the same case, Lord Hoffmann referred to academic comment suggesting that the Italian Supreme Court in *Ferrini* had "given priority to the values embodied in the prohibition of torture over the values and policies of the rules of State immunity".[30] He continued:

> [I]f the case had been concerned with domestic law, [this] might have been regarded by some as "activist" but would have been well within the judicial function ... But the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for the national court to "develop" international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other States.[31]

II.

The sources of international law are usually taken to be those set forth in Article 38 of the Statute of the International Court of Justice ("the ICJ Statute").[32] These are treaties, customary international law, general principles of law, and, as subsidiary means, judicial decisions and the writings of the most highly qualified publicists. All those called upon to apply international law need to have a clear understanding of what is covered by these sources, and what is not; what is law, and what is not; what is, as opposed to what is desired.

Some question whether Article 38 of the ICJ Statute remains a comprehensive statement of the sources of international law for the twenty-first century. Article 38 was, after all, drawn up some ninety years ago,[33] in a very different world. Now there are new actors on the international stage, not least international organizations, and the range and nature of international law has been transformed. It is no longer simply a law between states. There may, so it is said, be other and more varied sources of the law. Yet while no one would deny the great changes, it is by no means clear that these require any fundamental rethinking of the sources of international law. Decisions of the Security Council under Chapter VII of the UN Charter are an important source of obligation, but this is mandated by treaty—by the UN Charter.[34] And insofar as the decisions and actions of international organizations may contribute to the formation of customary international law, they can be seen as a form of state practice.

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30. *Jones*, *supra* note 28, para. 63. See also Pasquale DE SENA and Francesca DE VITTOR, "State Immunity and Human Rights: The Italian Supreme Court Decision on the *Ferrini* Case" (2005) 16 European Journal of International Law 89.

31. *Jones*, *supra* note 28, para. 63. For a critique of this view, see Anthea ROBERTS, "Comparative International Law? The Role of National Courts in International Law", (2011) 60 International and Comparative Law Quarterly 57.

32. *Statute of the International Court of Justice*, 26 June 1945, 59 Stat. 1031 [*ICJ Statute*]. See generally Alain PELLET, "Article 38" in Andreas ZIMMERMANN, Christian TOMUSCHAT, Karin OELLERS-FRAHM, Christian TAMS, and Tobias THIENEL, eds., *The Statute of the International Court of Justice: A Commentary* (Oxford: Oxford University Press, 2006), 677.

33. The 1920 text was repeated in 1945 in Article 38 of the ICJ Statute. On the provenance of Article 38, see Pellet, *ibid.*, at 680–9.

34. *Charter of the United Nations*, 24 October 1945, 1 U.N.T.S. XVI [*UN Charter*], Arts. 25, 48, and 103.

The sources of international law, and in particular of customary international law, are very different from the sources of law in national systems. They are unlikely to be instinctively understood by domestic lawyers. The best guide is to be found in the case-law of the ICJ.

Treaties are the first source listed in Article 38 of the ICJ Statute. The rules set forth in treaties are often thought to be relatively certain compared to the rules of customary international law. Leaving aside questions of interpretation, which can obviously be difficult,[35] an initial problem is that in some countries there may be no central treaty office in which all treaties binding on the state are processed and registered. In addition, there may well be other uncertainties.

First, there may be uncertainty as to whether a particular instrument is, or is not, a treaty. States frequently have recourse to memoranda of understanding (MOUs) in order to avoid entering into legally binding instruments, sometimes because they want to keep the matter confidential (something that in principle cannot be done with a treaty, given the Charter requirement for publication[36]), or sometimes to avoid constitutional or other practical difficulties. The negotiating states may have different views on the status of an instrument. This is something that can, and should, be overcome by clear drafting, provided political reasons do not stand in the way.[37]

Second, it can be surprisingly difficult to know whether a treaty is in force for a particular state. This can be so, for example, with older treaties, which may have lapsed or been superseded;[38] or where there has been one or more successions of states;[39] or in the case of armed conflict (a matter currently under study by the International Law Commission (ILC)).[40] Additionally, the territorial scope of a treaty is not always clear, particularly as regards a state's overseas territories.[41]

Third, the date of entry into force can also lead to confusion. Lawyers not trained in international law sometimes misunderstand elementary distinctions such as those between signature, ratification, and entry into force. The House of Lords in *Pinochet* seems not to have appreciated the distinction between expressing consent to be bound by the Torture Convention (through ratification)[42] and its entry into force in accordance with its terms, thirty days later.

Fourth, the principle in Article 18 of the Vienna Convention on the Law of Treaties,[43] that is the obligation not to defeat the object and purpose of the treaty between signature and entry into force, and the concept of provisional application of

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35. See generally Richard GARDINER, *Treaty Interpretation* (Oxford: Oxford University Press, 2008).
36. *UN Charter, supra* note 34, art. 102.
37. Anthony AUST, *Modern Treaty Law and Practice*, 2nd ed. (Cambridge: Cambridge University Press, 2007) at 48, 51–2.
38. *Ibid.*, at 306–7.
39. *Ibid.*, at 367–92.
40. *Ibid.*, at 308. On the work of the International Law Commission, see "Effects of Armed Conflicts on Treaties", online: ILC 〈http://untreaty.un.org/ilc/guide/1_10.htm〉.
41. *Ibid.*, at 200–14.
42. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85 (entered into force 26 June 1987) [*CAT*].
43. *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980) [*Vienna Convention*].

treaties in Article 25 of the Vienna Convention, can give rise to uncertainties. The effect of the provisional application article in the Energy Charter Treaty was at the core of the Interim Awards on Jurisdiction and Admissibility of 30 November 2009 in three related cases brought against the Russian Federation by shareholders in Yukos Oil Corporation OJSC.[44] Provisional application is a topic which the ILC could usefully take up.

Fifth, there is the need to identify the text of the treaty, usually a title, preamble, and articles, occasionally with annexes. Sometimes there are two or more documents, whose status can be uncertain. And, of course, the text may exist in any number of languages. The Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) are currently drawn up in twenty-three languages. Each is equally authentic.

Sixth, in addition to the text of the treaty, one has to take account of any reservations that states may have made. The effect of reservations is a notoriously difficult subject. In 2010 the ILC adopted provisionally, after some sixteen years of effort, a "Guide to Practice on Reservations to Treaties".[45] The final text, hopefully to be adopted in 2011, is likely to be in the region of a thousand pages long.

Notwithstanding the great increase in the number and scope of treaties, *customary international law* remains a very important source of international law. The ideal of a fully codified law, rendering customary international law superfluous, even if it were desirable, is far from a reality. There now appears to be a revival of interest in the formation of customary international law, in part stimulated by the attempts, sometimes quite controversial, of domestic courts to grapple with the subject. The earlier rejection of customary international law by the young Soviet Union is long a thing of the past, and it is hard to take seriously a few "rejectionist" theoretical writers in the United States.

International courts have done something to clarify the issues, as have domestic courts, and there is a vast amount of writing on the subject. But previous collective efforts to describe, systematically, the process of formation of customary international law, while containing useful material, have not been met with general approval. The most recent attempt was the study by a committee of the International Law Association, culminating in 2000 with the adoption of a set of "principles" with commentaries.[46] Among the most controversial aspects is the role of power in the formation of rules;[47] and occasional demands for "exceptionalism" for the very powerful. There remain

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44. *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226 (30 November 2009), online: Energy Charter Secretariat ⟨www.encharter.org/fileadmin/user_upload/document/Hulley_interim_award.pdf⟩; *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227 (30 November 2009), online: Energy Charter Secretariat ⟨www.encharter.org/fileadmin/user_upload/document/Yukos_interim_award.pdf⟩; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 228 (30 November 2009), online: Energy Charter Secretariat ⟨www.encharter.org/fileadmin/user_upload/document/Veteran_interim_award.pdf⟩.

45. International Law Commission, "Reservations to Treaties, (Draft) Guide to Practice", [2010] Yearbook of the International Law Commission at para. 105.

46. The London *Statement of Principles Applicable to the Formation of General Customary International Law*, with commentary: Resolution 16/2000 (Formation of General Customary International Law) (29 July 2000), online: ILA ⟨www.ila-hq.org⟩.

47. Michael BYERS, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999).

considerable differences of approach amongst writers, so recourse to textbooks does not help greatly.

Securing a common understanding of the process could be of considerable practical importance. It has recently been proposed that the ILC might take up a topic entitled "Formation and Evidence of Customary International Law".[48] The focus would be on formation (the process by which rules of customary international law develop) and evidence (the identification of such rules). The ILC, with its worldwide composition and collegiate working methods, and its close relationship through the General Assembly with states, may be able to make a useful contribution by producing something concise and authoritative. The Commission's work in relation to the sources of international law has been among its most important and successful, but has so far been largely confined to the law of treaties.[49]

The aim would not be to seek to codify "rules" for the formation of customary international law. It would be to produce authoritative guidance for those called upon to identify customary international law, including national and international judges. It is important not to seek to be overly prescriptive. Flexibility remains an essential feature of the formation of customary international law. The Commission's final output could be a series of propositions, with commentaries.

A study would need to cover some central questions raised by the traditional approach to the identification of rules of customary international law, in particular state practice and *opinio juris*. There is a need to identify state practice. What counts as "state practice"? State practice can include acts and omissions, as well as verbal and physical acts. How may states change their position on a rule of international law? How relevant are the decisions of domestic courts and tribunals (and the executive's response thereto)? Beyond the state, whose acts count? Certain international organizations, like the European Union?

State practice takes many forms. What counts as state practice may to some degree vary depending on the area of international law concerned. The identification of practice may be particularly difficult in the case of international human rights law and international humanitarian law, where what matters is a state's treatment of individuals. The determination of the rules of customary international law now has to be seen in the context of a world of nearly two hundred states, and numerous and varied international organizations, both regional and universal. Access to the practice of many states (apart from their practice within international organizations) remains difficult. While some states systematically publish a good deal of material relating to their practice in the field of international law, many do not.

The nature, function, and identification of *opinio juris* will have to be addressed, including the relationship between state practice and *opinio juris*. The many other issues include: how new rules of customary international law emerge; how unilateral measures

48. On the International Law Commission's methods for the selection of topics, and the Long-term Programme of Work, see "Introduction", online: ILC 〈www.un.org/law/ilc/index.htm〉; Arnold PRONTO and Michael WOOD, *The International Law Commission 1999–2009* (Oxford: Oxford University Press, 2010), 6–7.

49. See International Law Commission, "Analytical Guide to the Work of the ILC", online: ILC 〈http://untreaty.un.org/ilc/guide/gfra.htm〉.

by states may lead to the development of new rules; the potential role of silence or acquiescence; the role of "specially affected states"; the time element, and the density of practice; "instant" customary international law. Other aspects include the "persistent objector" theory; treaties as possible evidence of customary international law; and the role of resolutions of organs of international organizations, including the UN General Assembly and international conferences, in the formation of customary international law.

One issue, which may or may not be covered in any study, is the formation of regional (or even bilateral) customary international law. Regional custom is of course a recognized concept,[50] but it needs to be seen as part of general international law. The Asian Society of International law was launched in 2007, and from 2011, the *Asian Journal of International Law* has succeeded the *Singapore Year Book of International Law*.[51] This parallels developments in Europe and Africa, such as the European Society of International Law,[52] and the newly formed African Union International Law Commission.[53] Such regional initiatives are to be greatly welcomed, provided that it is borne in mind, as I am sure it is, that "there is, and can only be, one system of international law in today's world".[54]

With such a wide range of issues, there will be much to be done, not only by the ILC itself, but also a valuable contribution could be made from outside the Commission, including at universities and centres for international law such as the one here in Singapore.

The remaining sources of international law listed in Article 38 of the ICJ Statute will be referred to only briefly. *General principles of law* play an important but limited role (and must be distinguished from "general principles of international law" or "principles of international law", whatever those terms may mean).[55]

Judicial decisions and the writings of learned authors[56] are expressly stated to be "subsidiary means for the determination of rules of law".[57] The ninth edition of *Oppenheim's International Law* sums it up: "it is as evidence of the law and not as a law-creating factor that the usefulness of the teachings of writers has been occasionally admitted in judicial pronouncements."[58] The Court of Appeal was spot

50. See, for example, *Asylum Case (Colombia v. Peru)* [1950] I.C.J. Rep. 266 at 276–7.
51. Asian Journal of International Law, online: AsianJIL ⟨www.asianjil.org⟩.
52. European Society of International Law, online: ESIL ⟨www.esil-sedi.eu⟩.
53. African Union, "Statute of the African Union Commission on International Law", online: AU ⟨http://au.int/?q=node/2534⟩.
54. Michael WOOD, "A European Vision of International Law: For What Purpose?" in Hélène RUIZ FABRI, Emmanuelle JOUANNET, and Vincent TOMKIEWICZ, eds., *Select Proceedings of the European Society of International Law*, Vol. 1 (2006) (Oxford; Portland, OR: Hart Publishing, 2008), 152; Hélène RUIZ FABRI, "Reflections on the Necessity of Regional Approaches to International Law Through the Prism of the European Example: Neither Yes nor No, Neither Black nor White" (2011) 1 Asian Journal of International Law 83.
55. Giorgio GAJA, "General Principles of Law", online: Max Planck Encyclopedia of Public International Law Online ⟨www.mpepil.com/home⟩.
56. Michael WOOD, "Teachings of the Most Highly Qualified Publicists", online: MPEPIL ⟨www.mpepil.com/home⟩.
57. *ICJ Statute*, *supra* note 32, art. 38(1)(d).
58. Robert JENNINGS and Arthur WATTS, eds., *Oppenheim's International Law*, 9th ed., reprint. (Oxford: Oxford University Press, 2008) at 43.

on in the *Yong* case when it said that the Privy Council cases and two expert opinions of UN Special Rapporteurs, relied upon by the Appellant, were "relevant, but they are not in themselves sources of CIL. Instead, they are a subsidiary means for determining the existence or otherwise of rules of CIL."[59] The Court continued, "[i]n the final analysis ... the substance of CIL 'is to be looked for primarily in the actual practice and *opinio juris* of States'",[60] and then recalled that to establish a rule of customary international law the state practice accompanying the *opinio juris* must be "both extensive and virtually uniform".[61]

Finally, it should be noted that Security Council resolutions are now commonly coming before domestic courts (including the European Union judicature in Luxembourg).[62] A main issue here is how to interpret them, both to discern whether they are legally binding, and more widely to ascertain their true meaning. They are not treaties to which the Vienna Convention rules can be applied, but then what rules do apply to their interpretation? The ICJ has recently offered some useful guidance. In the *Kosovo* Advisory Opinion, it fell to the Court to interpret Security Council Resolution 1244 (1999), which had established the international civil and security presences in Kosovo following the NATO intervention in 1999. In addition to shedding light on the addressees of binding Security Council decisions,[63] the Court had some new things to say on the general question of the interpretation of Security Council resolutions. The Court noted that the Vienna rules on treaty interpretation may provide guidance, but other factors, including the drafting and voting process, the binding nature of Security Council resolutions for all UN Member States, explanations of votes by Security Council Member States' representatives, other Security Council resolutions on the same issue, as well as subsequent practice of relevant UN organs and affected states, should also be taken into account.[64]

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59. *Yong*, *supra* note 1 at para. 97.

60. *Ibid.*, at para. 98, citing *Libya v. Malta, supra* note 6.

61. *Ibid.*, citing the *North Sea Continental Shelf Cases, supra* note 7.

62. See, e.g., the judgment of the European Court of Justice in Joined Cases C-402/05 P & C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] E.C.R I-6351 (ECJ Grand Chamber), on appeal against the judgment of the General Court in Case T-315/01 *Kadi v. Council and Commission* [2005] ECR II-3649; and, on 30 September 2010, the judgment of the General Court of the European Union in Case T-85/09 *Yassin Abdullah Kadi v. European Commission*.

63. *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion (22 July 2010), online: ICJ 〈www.icj-cij.org/docket/files/141/15987.pdf〉, paras. 115–19 [*Kosovo Advisory Opinion*]. See also Michael C. WOOD, "The Interpretation of Security Council Resolutions" (1998) 2 Max Planck Yearbook of United Nations Law 73.

64. *Kosovo Advisory Opinion*, *ibid.*, para. 94:

> While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require[s] that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States ... irrespective of whether they played any part in their formulation. The interpretation of Security Council resolutions may require the Court to analyse statements by

III.

I end with three modest suggestions.

First, it is vitally important, for all those who want to understand international law, to study the sources. It is unclear to what extent public international law features as part of judicial study courses around the world. But at least judges should be aware, if they are not already, of the sources of international law. They, above all, need to be able to distinguish between rules of law and wishful thinking. In the United States, the American Society of International Law published some years ago a handbook for judges.[65] This was aimed at American judges, with much that we would regard as American constitutional or foreign relations law. But in principle, it could be good to have some such publication.[66]

Second, it is equally important that international law, at least its main elements and sources, be part of every practising lawyer's training. In England, notwithstanding the increasing importance of international law, it has to compete with other fields, not least European Union law and international human rights law.

Third, there is an important continuing role for the ILC in clarifying the law, in trying to reach an authoritative restatement of some central issues, such as those arising in the formation of customary international law, and in the provisional application of treaties. This is painstaking and slow work, but it is well worthwhile and needs the support and attention of governments and institutions such as the recently formed Asian Society for International Law and the Centre for International Law in Singapore.

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representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.

65. David J. BEDERMAN with Christopher J. BORGEN and David A. MARTIN, *International Law: A Handbook for Judges* (Washington, DC: American Society of International Law, 2003). A *Benchbook on International Law for Federal Trial Judges* is now being developed by the American Society of International Law.

66. Volume 61 of *Halsbury's Laws of England*, *supra* note 29, covers "International Relations Law".