

University of Groningen

Advies inzake De identificatie van internationaal gewoonterecht

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ADVISORY COMMITTEE ON ISSUES OF PUBLIC INTERNATIONAL LAW

ADVISORY REPORT ON

**The identification of customary
international law**

ADVISORY REPORT NO. 29

THE HAGUE

NOVEMBER 2017

List of abbreviations

UNGA	United Nations General Assembly
CAVV	Advisory Committee on Issues of Public International Law
ILC	International Law Commission
NGOs	Non-governmental organisations
UN	United Nations

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1. Introduction

In his letter of 27 March 2017 the Minister of Foreign Affairs requested the Advisory Committee on Issues of Public International Law (the Committee) to prepare an advisory report on the draft conclusions of the International Law Commission (ILC)¹ of the United Nations on the identification of customary international law, as adopted on first reading. The Committee has the honour to submit the following advice to the Minister and hopes that its findings will aid the contribution to be made by the Netherlands to the follow-up debate on the draft conclusions.²

2. General remarks

The Committee takes a generally positive view of the draft conclusions and would therefore like to express its appreciation for the ILC's work to date.

2.1 Status of positions taken by the International Law Commission

In Part Five of its report, entitled 'Significance of certain materials for the identification of customary international law', the ILC briefly discusses the role and significance of its own work (pp. 101-102), noting that it has 'decided not to include at this stage a separate conclusion on the output of the International Law Commission'.³ This raises the question of what weight should be given to the draft conclusions and the commentaries on them in determining the rules on the identification of customary international law.

Many different factors play a role in determining what significance may be attached to the work of the ILC:

- As a subsidiary organ of the General Assembly, the ILC helps to implement the General Assembly's task under article 13, paragraph 1(a) of the Charter of the United Nations of

¹The ILC was established by the United Nations in 1948 and is formally a subsidiary organ of the United Nations General Assembly (UNGA). The ILC has its permanent seat in Geneva and currently has 34 members. It assists the General Assembly in implementing article 13 of the UN Charter, on the basis of which the General Assembly makes recommendations for the development of international law and its codification.

² Annexe II to this advisory report contains the ILC's draft conclusions as adopted on first reading. Unless stated otherwise, all references to pages and sections in this report relate to UN document A/71/10, in which the text of the draft conclusions and the commentary are contained on pages 76-117.

³ Footnote 319 to the report states that 'Once the General Assembly has taken action in relation to a final draft of the Commission, such as by commending and annexing it to a resolution, the output of the Commission may also fall to be considered under draft conclusion 12', which concerns the significance of resolutions of international organisations and intergovernmental conferences. Draft conclusion 12 mentions various possibilities, which are also endorsed by the Committee (p. 106). It is indeed correct that such a resolution 'cannot, of itself, create a rule of customary international law'. However, such a resolution 'may provide evidence for establishing [such a rule], or contribute to its development' and may also 'reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*)'.

encouraging the progressive development of international law and its codification.

- The composition of the ILC, the position of its members (who function as independent experts), the position of the special rapporteur and the reaction of the ILC's members to the work of the rapporteur.
- The stage which the work of the ILC has reached. Needless to say, greater weight must be given to the final conclusions of the ILC as a whole than to the individual reports of the special rapporteurs.
- The comments of States on the work of the ILC in its various stages and the manner in which the ILC has taken account of these comments.
- The extent to which the ILC considers there is codification or progressive development of international law. After all, the ILC's task is not confined to codification of existing international law; a text may also contain elements *de lege ferenda*.

It would therefore seem reasonable to conclude that – given the stage of the study and the incorporated reactions of States about determining the existence of a rule of customary international law – significance can be given to the work of the ILC as a special form of ‘subsidiary means for the determination of rules of law’ within the meaning of article 38(1)(d) of the Statute of the International Court of Justice. It follows that, in general, greater weight should be attached to the work of the ILC than to that of the *Institut de Droit International* (IDI), the International Law Association (ILA) or the work of individual writers.

2.2 Distinction between the existence and content of a rule

The draft conclusions and the commentaries on them regularly refer to the identification or determination of ‘the existence and content of rules of customary international law’ (draft conclusions 1, 2, 12, 13 and 16; report p. 79 § 1 and footnote 246, pp. 81-82 § 3, 4 and 5 and footnote 253, p. 84 § 6, p. 98 footnote 309, p. 100 § 6, p. 102 § 2, p. 111 § 2). The ILC indicates that in some cases it is accepted that a rule of customary international law exists although its precise scope is disputed or there is disagreement as to whether there are exceptions to the rule (p. 81 § 3). It remains unclear whether the process by which the existence of a rule is determined is the same as the process by which the content of the rule is determined.

However, the question of whether rules of customary international law can be the subject of interpretation is raised in the literature (most recently by Dr P. Merkouris, *Interpreting the Customary Rules of Interpretation*, 19 ICLR 2017, pp. 126-155). It may be wondered, for example, whether the unity and coherence of the system of international law to which the ILC refers (p. 84 § 6) does not require that rules of customary international law be interpreted in their mutual context. Reference could be made, for example, to the considerations of the International Court of Justice (ICJ) in the *Asylum Case*, in which it held that the possibility of granting diplomatic asylum would derogate from the sovereignty and territorial jurisdiction of a State (I.C.J. Reports 1950, 274-275), and in the *Jurisdictional Immunities of the State Case*, in which it construed the immunity rules in conjunction with the underlying rule of territorial jurisdiction (I.C.J. Reports, 123-124, § 57; see also the ILC's report p. 98 footnote 309). In short, the Committee believes it

would be desirable to make this distinction explicit or in any event to bear it in mind. There are various processes which are or could be applicable to determining the existence of a rule of customary international law on the one hand and its content on the other.

2.3 Role of international organisations

International organisations figure in the draft conclusions in two ways: in their role of platform for the juridical and other acts of States and in their role of independent international legal actors. Draft conclusion 4 (Requirement of practice) refers in paragraph 2 to the practice of international organisations themselves as potentially contributing to ‘the formation, or expression, of rules of customary international law’. Draft conclusions 6 (Forms of practice, paragraph 2), 10 (Forms of evidence of acceptance as law (*opinio juris*), paragraph 2) and 12 (Resolutions of international organizations and intergovernmental conferences) discuss the practice and *opinio juris* of States in the context of international organisations.⁴

Although the draft conclusions therefore examine the role of international organisations at some length as a context within which States act, they deal only briefly with the independent role of international organisations in the formation and determination of rules of customary international law. As already noted, the practice of international organisations is mentioned in paragraph 2 of draft conclusion 4. No reference is made in draft conclusion 10 to the *opinio juris* of international organisations. The commentary confirms that draft conclusion 10 focuses on the acts of States (p. 107 § 3).

International organisations understandably receive only limited attention as independent legal actors since this codification project, being practically oriented, is primarily concerned with determining *existing* international law. Nonetheless, the draft conclusions do indicate that international organisations may, in principle, be considered to possess both relevant practice and *opinio juris* (see the commentary on draft conclusion 4 (pp. 88-89 § 4): ‘Their practice in international relations (..), when accompanied by acceptance as law (*opinio juris*), gives rise or attests to rules of customary international law (...).’) This principle is particularly striking since paragraph 3 of draft conclusion 4 expressly states that other non-State actors do not have this capacity.

Questions about how the independent role of international organisations will be defined in relation to the formation of customary international law will therefore continue to arise, particularly since these organisations are playing an ever more important role on the international stage. One question is how to determine whether a given practice is that of an international organisation as such (as referred to in paragraph 2 of draft conclusion 4) and not that of member States acting within such an international organisation. Another is how the *opinio juris* of an international organisation as such can be determined.

The Committee broadly supports the draft conclusions in so far as they relate to international organisations, but considers that the commentary could give more attention to the issues raised above.

⁴ See also briefly under the draft conclusions concerned.

3. Remarks on selected draft conclusions

3.1 Draft conclusion 2 on the two constituent elements

Conclusion 2

Two constituent elements

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

The ILC emphasises that a rule of customary international law may be assumed to exist only if it can be shown that there is '[a] general practice and acceptance of that practice as law (*opinio juris*)' (p. 82) (the so-called 'two-element approach'). The Committee too considers that this inductive form of identification of customary international law should take clear precedence. According to the ILC, 'the two-element approach does not in fact preclude a 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 (accompanied by *opinio juris*), or when concluding that possible rules of international law form part of an "indivisible regime"' (p. 84).

In that case, the absence of a specific practice and a specific acceptance of that practice as law is compensated, as it were, by a broader and more general rule supported by other or more general practice than the specific practice and by a broader and more general *opinio juris* than would support the existence of a more specific rule of customary international law. The Committee believes that the use of deduction in identifying customary international law should only be supplementary to the strict two-element approach. The limit of the deductive approach should be taken to have been reached where the result of identifying customary international law by this means would differ from that which can reasonably be achieved by inductive means through strict application of the two-element approach.

3.2 Draft conclusion 3 on the assessment of evidence

Conclusion 3

Assessment of evidence for the two constituent elements

1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.

2. Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element.

In the commentary on draft conclusion 3 (p. 86, § 4), the ILC states that ‘where prohibitive rules are concerned (such as the prohibition of torture) it may sometimes be difficult to find positive State practice (as opposed to inaction)’. The Committee believes that talking of ‘positive State practice’ in the context of prohibitive rules is unfortunate. As prohibitive rules, by their very nature, require abstention from action, practice must initially be assessed in terms of inaction. Naturally, the ‘positive State practice’ to which the ILC refers could be relevant, but mainly in relation to the possible formation of a prohibitive rule and not so much in determining the content of an existing rule. In the latter case, two hypotheses are possible, as revealed in the *Nicaragua Case* (I.C.J. Reports 1986, 98, § 186). First, State practice may constitute a breach of the rule. Second, a State may invoke a new or existing exception or justification. In the latter case, the State’s conduct could possibly be said to constitute ‘positive State practice’, but then only in relation to the exception or justification and not in relation to the prohibitive rule itself. The Committee therefore considers that where prohibitive rules exist it is better to speak of ‘affirmative State practice’.⁵

3.3 Draft conclusion 4 on the requirement of practice

Conclusion 4

Requirement of practice

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

The Committee agrees with the statement in paragraph 3 of draft conclusion 4 that the conduct of non-State actors other than international organisations, for example NGOs, non-State armed groups, transnational corporations and private individuals, does not constitute relevant practice for the formation of customary international law or contribute to the formation of acceptance of the practice as law. Nonetheless, it is quite conceivable that non-State actors such as the International Committee of the Red Cross (ICRC) influence the practice of States and their acceptance of the practice as law (and in certain

⁵ See also footnote 34 in *The first report on formation and evidence of customary international law* by Michael Wood, Special Rapporteur (A/CN.4/663).

cases that of international organisations as referred to in paragraph 2 – (see also above at 2 ‘General remarks’, 2.3 ‘Role of international organisations’) and thus contribute indirectly to the formation of customary international law. The Committee therefore welcomes the considerations and nuances mentioned in the commentary (pp. 89-90, § 9 and 10).

3.4 Draft conclusion 6 on forms of practice

Conclusion 6

Forms of practice

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

Draft conclusion 6 on forms of practice states in paragraph 1 that ‘Practice may take a wide range of forms. It includes both physical *and verbal* acts. It may, under certain circumstances, include inaction (italics added by the Committee).

§ 2 (p. 91) of the relevant commentary also states that: ‘[I]t is now generally accepted that verbal conduct (whether written or oral) may count as practice; action may at times consist solely in statements, for example a protest by one State addressed to another’.

Treating ‘verbal conduct (whether written or oral)’ as equivalent to the actual practice of States is not without its problems. Statements by States do not necessarily coincide with their actual practice. In fact, laws of States can sometimes be nothing more than dead letters. And decisions of courts are not always executed in practice. There is therefore a danger in treating verbal statements of States as evidence of both their actual practice and their *opinio juris*. Reference should once again be made here to footnote 25 of the Third Report of the Special Rapporteur (UN doc. A/CN.4/695):

25 ... See also M.H. Mendelson, *The Formation of Customary International Law*, 272 Recueil des cours (1998), pp. 155 and 206-207 (‘What must, however, be avoided is counting the same act as an instance of both the subjective and the objective element. If one adheres to the “mainstream” view that it is necessary for both elements to be present, and in particular for the subjective element to be accompanied by “real” practice, this must necessarily preclude treating a statement as both an act and a manifestation of belief (or will)’); ... At the same time, ‘[q]uite often, both elements coincide; even in the cases where it has proclaimed the validity of the theoretical distinction between practice and *opinio juris*, the [International] Court mixes them up’ (Pellet, *supra* note 20) [A. Pellet, ‘Article 38’, in A. Zimmerman et al. (eds), *The Statute of the International Court of Justice: A Commentary*, 2nd edition (Oxford University Press, 2012), at p. 827).

The Committee believes that weight can be attached to verbal statements as practice only if the actual practice of the State concerned corresponds more generally to the verbally formulated position.

The Committee also considers that clarification of paragraph 3 of draft conclusion 6 would be desirable since it is not entirely clear what hierarchy is being referred to here. According to the commentary (p. 92 § 7), this is about the absence of a predetermined hierarchy in the probative value of different forms of practice. However, this would seem to allow a pick-and-choose approach that might not be conducive to legal certainty, whereas it should be noted that greater weight would, for example, generally be attached in international relations to an official government statement than to a decision of a parliament or an inferior national court. The commentary points to nuances in the contextual approach that follows from draft conclusion 3 (with the emphasis it puts on the general picture that emerges from the practice) and draft conclusion 7 (with the emphasis it puts on hierarchy within a particular form of practice, such as decisions of superior and inferior courts), but even this approach does not necessarily preclude general, context-independent principles in respect of a hierarchy in forms of practice. For example, greater probative value could, in principle, be given to more specific – narrowed down – forms of practice as well as to more recent practice (compared with older practice) and to the practice of State bodies which adheres to the internal (intra-state) hierarchy (e.g. where a government blocks the enforceability of a decision of a national court on account of the obligations of the State under international law).

3.5 Draft conclusion 10 on forms of evidence of acceptance as law (opinio juris)

Conclusion 10

Forms of evidence of acceptance as law (*opinio juris*)

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

According to the draft conclusions, decisions of national courts constitute – or may constitute – evidence of State practice and of *opinio juris* and, if applicable, a subsidiary means of determining customary international law (draft conclusions 6, 10 and 13, paragraph 2, respectively). In theory, it therefore seems that a given rule of customary international law may consist of or be inferred from (purely) national case law. It seems to the Committee that it would be better to avoid putting too much emphasis on the decisions of national courts as being a source of – or evidence of – customary international law;

customary international law will (or should) mainly be found in the practice of States in their international relations. Placing too much emphasis on national case law also raises questions that may blur still further the already difficult process of identifying the existence and content of rules of customary international law. For example, when can national case law be said to be general and consistent, is more weight attached to the national case law of certain States (for example democratic States) than to that of other States, can national case law also be evidence that the State is a persistent objector, and so forth.

The ILC has nonetheless justly assumed that the evidence of State acceptance as law can take many forms. The Committee can therefore generally endorse the various forms mentioned in paragraph 2, as well as the wording to the effect that the list is not exhaustive. However, it does have some misgivings about the inclusion of court decisions as an expression of *opinio juris*. Admittedly, the commentary contains the rather ambiguous statement (p. 100 § 5) that '[d]ecisions of national courts may also contain such statements when pronouncing upon questions of international law'. The preceding sentence in the commentary also indicates that national legislation, while it is most often the product of political choices, may be valuable as evidence of acceptance as law where it has been specified that it gives effect to customary international law. Nonetheless, it remains unclear to what extent decisions of courts can serve independently as evidence of acceptance by States as law. Although it is naturally undeniable that courts are State organs and can therefore contribute to breaches of international law (articles 2 and 4 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts), they do not as such have any independent function in determining the legal positions taken by States in international relations. As it is generally a matter for the government of a State to determine the legal positions taken by the State in international relations, it is hardly surprising that the forms of evidence of acceptance as law mentioned in draft conclusion 10 derive mainly from the governments *or* representatives of the State acting under the authority of governments.

Moreover, neither national nor international courts (with the possible exception of courts in common law jurisdictions) have any law-making role. They are therefore bound to interpret and apply the law as they find it, not to contribute to the formation of new rules. For example, in § 18 of its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the International Court of Justice observed, in response to the contention that by rendering an advisory opinion it would be going beyond its judicial role and taking upon itself a law-making capacity, that '[i]t is clear that the Court cannot legislate, [...] it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend'. All in all, the Committee feels that these considerations deserve special attention in the commentary on draft conclusion 10.

Paragraph 3 of draft conclusion 10 states that failure to react over time to a given practice may serve as evidence of acceptance as law (*opinio juris*), provided that the State was in a position to react and the circumstances called for some reaction. It is noted in this connection in the commentary (pp. 100-101 § 7) that 'Toleration of a certain practice may indeed serve as evidence of acceptance as law (*opinio juris*) when it represents concurrence in that practice. For such a lack of open objection or protest to have this probative value, however, two requirements must be satisfied in order to ensure that it does not derive from causes unrelated to the legality of the practice in question. First, it is essential that a

reaction to the practice in question would have been called for: this may be the case, for example, where the practice is one that (directly or indirectly) affects – usually unfavourably – the interests or rights of the State failing or refusing to act.’ The commentary on draft conclusion 3 (p. 86 § 5) refers in this connection to the significance of a State’s failure to protest in circumstances where it is aware of certain concrete action which has an ‘immediate negative impact on its interests’.

The Committee agrees with this position in general and endorses the specified conditions and supporting arguments. Nonetheless, it considers it necessary to note that the absence of a reaction by a State may be due to many different factors. After all, a State’s silence may possibly be explained by the political, economic or even military pressure exerted by another State involved, the existence of a political alliance or the importance attached to maintaining amicable relations. Whether the two conditions mentioned above are sufficient to exclude the possibility that the silence derives from ‘causes unrelated to the legality of the practice in question’ (p. 100) may therefore be doubted.

In fact, the positions taken by States in international relations are not primarily motivated by legal considerations. Take, for example, the *Nicaragua Case*, to which reference has already been made. Here the International Court of Justice noted (108-109, § 207) that the grounds sometimes advanced by the United States for intervening in the affairs of other States should be regarded as ‘statements of international policy, and not an assertion of rules of existing international law’. And the ICJ extended this reasoning (109, § 208) by stating that the United States had not claimed legal justification for certain of its acts against Nicaragua, but noted that they were ‘justified in this way on the political level’.

The Committee therefore considers it desirable for the statements made retrospectively by States themselves (on request) explaining certain positions and their possible silence to be examined more closely. The starting point should not be that these statements or the State’s silence should by definition be assigned a particular legal weight, but that the weight to be given to them should instead depend on a range of factors, with the specific legal nature of the statements and the underlying political or other reasons for the silence being taken into account. As far as the specific legal nature of the statements is concerned, the report (p. 99 § 4) refers in only very general terms to statements that a given practice is permitted, prohibited or mandated under customary international law. As regards possible statements explaining the silence of States in certain situations, the report does not contain any indications other than those referred to above (pp. 100-101, § 7, p. 86 § 5).

Draft conclusion 10 makes no mention of the *opinio juris* of international organisations (see also above at 2 ‘General remarks’, 2.3 ‘Role of international organisations’). The Committee considers that the commentary could at least say that *opinio juris* of international organisations is a possibility (as implied in § 4 of the commentary on draft conclusion 4) which is not excluded by legal theory or legal doctrine. In this respect, the emphatic positions taken by the UN (rather than by its member States) on ‘Responsibility to Protect’ and ‘The Rule of Law’ in judicial practice over the past 15 years can be regarded as relevant.

3.6 Draft conclusion 11 on the role of treaties

Conclusion 11

Treaties

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

This draft conclusion gives an adequate description of the possible significance of treaties for existing, evolving or future customary international law. However, the relationship between treaties and customary international law remains extremely complicated. Although a treaty can confirm customary international law or encourage its formation, it may also make it much more difficult to adduce evidence that a treaty incorporates a corresponding rule of customary international law. A treaty may, after all, be concluded by the parties precisely in order to depart from an existing or disputed rule of customary international law. It may also always be argued that the parties to a treaty observe a given rule solely because they are obliged to do so by a treaty obligation. Unless there are other clear indications about the incorporation of a rule of customary international law into a treaty, the litmus test for this must be whether it is possible to demonstrate the requisite practice and its acceptance as law by States that are not party to the treaty or in the practice followed between States that are party to the treaty and States that are not party to it.⁶ The Committee therefore considers it desirable for the commentary to give more attention to these matters.

3.7 Draft conclusion 12 on the role of resolutions of international organisations and intergovernmental conferences

Conclusion 12

Resolutions of international organizations and intergovernmental conferences

1. A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.

⁶ In this connection, see ICJ, *North Sea Continental Shelf*, Judgment, ICJ Reports 1969, pp. 3 and 43 § 76.

2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for establishing the existence and content of a rule of customary international law, or contribute to its development.
3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).

The Committee can endorse draft conclusion 12, but considers that the commentary unnecessarily restricts its scope (§ 3: ‘(..) in the context of the present draft conclusion what matters is that they may reflect the collective expression of the views of States members (..)’). As it has been noted (see above) that international organisations too can, in principle, independently ‘have’ relevant practice and *opinio juris*, the conclusion about – specifically – resolutions of international organisations as a source of customary international law need not be limited to States.

3.8 Draft conclusion 16 on particular customary international law

Conclusion 16

Particular customary international law

1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.
2. To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*).

The Committee wonders whether the use of the term ‘particular’ in this context is also intended to serve as a legal definition. If so, it would be a new name with little distinguishing capacity for customary international law that is not generally applicable either geographically or thematically. An alternative title such as ‘customary international law that binds a limited number of States’ would admittedly be more cumbersome, but would also be more consistent. This would indicate more clearly than is now the case that as a basic rule customary international law is of general and universal application and that a general practice (see draft conclusion 8) is also required for customary international law that is not generally binding, which would, as is evident from draft conclusion 16, mean the general practice within the (limited) circle of States concerned. The last point to be made is that in draft conclusion 16 the ILC refers to a rule of customary international law ‘that applies only among a limited number of States’. Any confusion that could arise from the use of the term ‘apply’ could perhaps be avoided by speaking of a rule of customary international law ‘that binds only a limited number of States’.

ANNEXES

Request for advice of 27 March 2017 on the draft conclusions adopted by the International Law Commission on the identification of customary international law

Draft conclusions adopted by the International Law Commission on the identification of customary international law, as adopted on first reading (chapter V of the ILC report of 2016, doc. no. A/71/10)

Members of the Advisory Committee on Issues of Public International Law

Annexe I

Request for advice of 27 March 2017 on the draft conclusions adopted by the International Law Commission on the identification of customary international law

Professor R.A. Wessel
Chair
Advisory Committee on Issues of Public International Law

Date: 27 March 2017
Re: Request for advice on the ILC's conclusions

Dear Professor Wessel,

I would kindly request the Advisory Committee on Issues of Public International Law to produce two separate reports on the draft conclusions on the identification of customary international law, adopted by the International Law Commission during its sixty-eighth session (chapter V of the ILC report of 2016, doc. no. A/71/10) and its draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, adopted during the same session (chapter VI of the ILC report of 2016, doc. no. A/71/10). Please find the draft conclusions enclosed with this letter.

I expect that these two reports by your Committee will add considerable value to the Dutch commentary on the draft conclusions.

It would be desirable for your report on the identification of customary international law to include the role of the Dutch courts.

I should be grateful to receive the two reports from your Committee by 1 November 2017 at the latest.

Yours sincerely,

Bert Koenders
Minister van Buitenlandse Zaken

Annexe II

Draft conclusions adopted by the International Law Commission on the identification of customary international law, as adopted on first reading (chapter V of the ILC report of 2016, doc. no. A/71/10)

Annexe III

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The Advisory Committee on Issues of Public International Law is an independent body that advises the government and parliament on international law issues.