

**Draft Conclusions on the Identification of Customary International Law**  
**adopted by the International Law Commission (A/71/10 at Chapter V)**

**Comments by the Government of New Zealand**

**21 December 2017**

**Introduction**

1. New Zealand thanks and congratulates the Special Rapporteur, Sir Michael Wood, and the Commission for the work that has gone into the Draft Conclusions and their Commentaries. The Draft Conclusions can be expected to be a helpful reference point for practitioners and others called upon to identify and apply norms of customary international law.
2. New Zealand welcomes the opportunity to comment on the Draft Conclusions and their Commentaries in their entirety. By its nature, it is important that the work on this topic reflects and takes account of the views expressed by States, both in their written comments and in the Sixth Committee debates. New Zealand appreciates the efforts of the Special Rapporteur to respond to comments from States as the work on this topic has evolved and expects that the Commission will continue to do so as the topic nears its completion.
3. In these comments New Zealand offers some general observations on the Draft Conclusions as a whole, as well as specific comments on Draft Conclusions 4, 6, 10, 11, 12, 13, 15, and 16. These specific comments are consciously directed to those areas that have attracted particular attention within the Commission and from States and other commentators, or which New Zealand considers require further consideration within the Commission.

**General Observations**

4. New Zealand supports the description of the Commission's work as "conclusions". New Zealand considers that the Draft Conclusions are best understood as representing the outcome of the Commission's own analysis and consideration. As such they will be a useful practical guide but do not themselves have a normative character. In New Zealand's view some aspects of the Draft Conclusions can be considered to be progressive development,

rather than codification, and this should be reflected more clearly in the accompanying Commentaries. For example, New Zealand considers Draft Conclusion 4.2 to go beyond the codification of settled law, and notes in this respect the absence of judicial authority in the Commentary to this provision.

5. New Zealand appreciates the Commission's efforts to make the Draft Conclusions concise and accessible. That is no easy task. At times, however, the desire to keep the Draft Conclusions brief and not overly prescriptive has resulted in general statements that do not always provide clear guidance. New Zealand understands that the Draft Conclusions are expected to be read together with their Commentaries. But the text of the Draft Conclusions should still be capable of standing alone. There are a number of occasions in which the Commentaries contain significant qualifications to the general language of the Draft Conclusions. In New Zealand's view these elements should also be included in the text of the Draft Conclusions themselves.

### **Specific Comments**

#### Draft Conclusions 4.1 and 4.2: the practice of international organisations

6. New Zealand has some hesitations about Draft Conclusions 4.1 and 4.2 and their relationship to Draft Conclusion 12.
7. Draft Conclusion 4.1 provides that it is "primarily" the practice of States that contributes to the formation, or expression, of rules of customary international law. As noted in the accompanying Commentary, the word "primarily" indicates that it is not exclusively State practice that is relevant and directs the reader to Draft Conclusion 4.2. Draft Conclusion 4.2 in turn provides that "in certain circumstances" the practice of international organisations also contributes to the formation, or expression, or rules of customary international law.
8. New Zealand considers that there is no difficulty with the proposition that the practice of States within an international organisation can contribute to the formation of customary international law. It also is comfortable with the proposition in Draft Conclusion 12 that resolutions or decisions taken by international organisations may be referred to as evidence to identify the existence or content of a customary international law rule.

9. New Zealand is cautious, however, about the proposition in Draft Conclusion 4.2 that the practice of an international organisation itself may contribute to the formation of customary international law. New Zealand considers that the conceptual basis for that proposition has not been clearly articulated in the Draft Conclusion or its Commentary. The Special Rapporteur's reports identify a number of differing justifications from academic commentators without providing a clear indication as to which is preferred. While New Zealand recognises the particular situation of the European Union, it is cautious about attempts to identify general conclusions from that limited example.
10. In the absence of a clear conceptual underpinning it is very difficult to identify the "certain circumstances" in which Draft Conclusion 4.2 would apply. Those identified in the Commentary appear to include both:
- a. circumstances where the practice of an international organisation is carried out on behalf of its member States, including through the transfer of exclusive competence;<sup>1</sup> and, at the other end of the spectrum,
  - b. circumstances where an international organisation acts independently in the exercise of its operational functions.<sup>2</sup>
11. Further, the factors articulated in paragraph 8 of the Commentary are difficult to align with the treatment of resolutions adopted by international organisations in Draft Conclusion 12. Is a decision of the Security Council expressed in a resolution: the aggregated practice of its member States within the Council contributing to the formation of a rule of customary international law under Draft Conclusion 4.1; the practice of the United Nations contributing to the formation of a rule of customary international law under Draft Conclusion 4.2; or simply evidence of the existence of such a rule under Draft Conclusion 12?
12. New Zealand considers that further consideration should be given to this aspect of the Draft Conclusions. In New Zealand's view, Draft Conclusion 4.2 should be retained only if the "certain circumstances" in which the practice of an international organisation may contribute to the formation of customary international law are articulated more clearly in the text of Draft Conclusion itself. In this regard, New Zealand notes, in particular, its view that the practice of an international organisation cannot contribute to the formation of a rule of customary international law unless: it is authorised by that organisation's legal

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<sup>1</sup> Commentary at [5] and [8].

<sup>2</sup> Commentary at [6], [7] and [8].

functions and powers; has been generally accepted over time by the organisation's member States; and the rule of customary international law is one to which the international organisation itself would be bound.

Draft Conclusion 4.3: the practice of non-State actors

13. New Zealand agrees with the conclusion regarding the practice of non-State actors expressed in Draft Conclusion 4.3, as discussed in paragraphs 9 and 10 of the Commentary.

Draft Conclusion 6.1: inaction as "practice"

14. New Zealand shares the hesitations that have been expressed by a number of States about the extent to which "inaction" can constitute practice for the purposes of either the formation or identification of rules of customary international law.
15. New Zealand notes the comments in paragraph 3 of the Commentary to Draft Conclusion 6 that the words "in certain circumstances" in Draft Conclusion 6.1 confirm that "only deliberate abstention from acting may serve such a role; the State in question needs to be conscious about refraining from acting in a given situation." (emphasis added).
16. In New Zealand's view this is an important qualification that would be better reflected in the text of the Draft Conclusion itself. This would be consistent with the approach taken to failure to react in the context of *opinio juris* in Draft Conclusion 10.3.

Draft Conclusion 6.2: decisions of national courts as "practice"

17. New Zealand notes the comments in paragraph 6 of the Commentary to Draft Conclusion 6 that: it is "likely" that greater weight will be given to decisions of higher courts; and decisions that have been overruled are "unlikely" to be considered relevant when assessing State practice.
18. New Zealand agrees that careful consideration must be given to a court's place in the national judicial hierarchy when assessing whether a decision of that court can be considered to be State practice. In general, New Zealand would expect that only decisions of higher courts would be sufficient to be considered to be State practice for the purposes of

the formation or identification of rules of customary international law. New Zealand cautions against placing reliance on decisions of lower courts or isolated decisions without supporting authority. In New Zealand's view it is very difficult to imagine a situation in which a decision that has been overruled by a higher court could still be relied upon as State practice in this context.

Draft Conclusion 10.3: failure to react as evidence of *opinio juris*

19. New Zealand shares the caution expressed by a number of other States regarding the extent to which a State's failure to react to the practice of another State may be used to infer *opinio juris*. A failure to react may, in some circumstances, imply acceptance of law. But this cannot be presumed. There are many legitimate reasons why a State may not publicly react to, or protest against, the actions of another State. States must balance a range of interests when considering whether and how to respond to the actions of another State, including the maintenance of friendly relations and the effective functioning of international affairs. This is particularly the case where a State has not been directly affected by the actions taken or has no other particular interest in them. In other cases, a State may judge it more appropriate to react on a confidential basis.
20. New Zealand accordingly supports the proviso in Draft Conclusion 10.3 that a failure to react will only serve as evidence of *opinio juris* where: the State concerned was in a position to react; and the circumstances called for some official public reaction. New Zealand further agrees with the elaboration of this proviso in paragraph 7 of the Commentary. New Zealand considers that the additional elements identified in that paragraph would be more appropriate in the Draft Conclusion text. In particular, New Zealand considers that the State must have: been directly affected by the practice in question; known of that practice; and had sufficient time and the ability to respond.

Draft Conclusion 11: treaties

21. New Zealand supports the general approach of Draft Conclusion 11 regarding the role of treaties in the formation of rules of customary international law. In New Zealand's view, the formulation of this Draft Conclusion accords with the principle expressed in Article 38 of the Vienna Convention on the Law of Treaties.

22. New Zealand considers that the three categories identified in Draft Conclusion 11.1 (a) to (c) are helpful and accurately capture the role that treaties can play in this context. It notes the importance of the expression “if it is established” in the chapeau to Draft Conclusion 11.1 and welcomes the clarification in paragraph 4 of the Commentary that the existence of the rule must be confirmed by evidence of both practice and *opinio juris*.
23. New Zealand also supports the inclusion of Draft Conclusion 11.2 and the particular caution regarding the reliance on bilateral treaties expressed in paragraph 8 of the Commentary.

Draft Conclusion 12: resolutions of international organisations

24. New Zealand generally agrees with the conclusions in Draft Conclusion 12 and the additional clarifications in its accompanying Commentary. In New Zealand’s view there is ample judicial authority to support the conclusion that resolutions adopted by an international organisation may, in certain circumstances, be referred to as evidence of the existence or content of a rule of customary international law. Similarly, New Zealand agrees that such resolutions may contribute to the development of such rules. In this regard, New Zealand is conscious of the contribution of such resolutions as the Universal Declaration of Human Rights to the development of customary international law. The language of such declarative resolutions, when clearly expressed and widely supported, can be compelling evidence of *opinio juris*. New Zealand also agrees with the conclusion in Draft Conclusions 12.1 and 12.3 that, absent corresponding State practice, such resolutions do not in themselves create customary international law. As one delegation put it in a previous Sixth Committee debate, resolutions may “distil but not declare” a customary international law rule.
25. As noted in paragraph 11 above, New Zealand considers that further thought should be given to the relationship between Draft Conclusion 12 and Draft Conclusion 4.2. As paragraph 3 of the Commentary to Draft Conclusion 12 acknowledges, the adoption of a resolution is a legal act of the organ of the international organisation concerned. It would be helpful therefore to have a clearer analysis of why such acts are not considered to be the “practice” of that organisation as provided for in Draft Conclusion 4.2.

Draft Conclusion 13: decisions of national courts

26. New Zealand agrees with the comment in paragraph 7 of the Commentary to Draft Conclusion 13 that caution should be applied to the findings of national courts regarding the existence or content of customary international law rules. The judges of national courts are not always experts in international law and, as noted, may not always receive arguments from States. New Zealand agrees that the judgments of international courts and tribunals should be accorded greater weight in this regard, and suggests that this could be reflected more directly in the language of Draft Conclusion 13 itself.

Draft Conclusion 15: persistent objectors

27. New Zealand generally supports the articulation of the persistent objector rule in Draft Conclusion 15. It supports the clarification in Draft Conclusion 15.1 that the existence of a persistent objector does not in itself prevent the formation of a rule of customary international law. At the same time, New Zealand acknowledges that, where objections have been expressed by a number of States, it is unlikely that practice will be sufficiently widespread to satisfy the first constituent element for the formation of a rule of customary international law. This point is helpfully explained in paragraph 8 of the Commentary to Draft Conclusion 15.
28. New Zealand agrees with a number of other States that have previously noted that it is not possible for a State to maintain a persistent objection against a *jus cogens* norm. New Zealand does not consider that paragraph 10 of the Commentary to Draft Conclusion 15 is adequate in this regard. It does not consider that the relationship between the persistent objector rule and *jus cogens* necessarily falls outside the scope of the current topic and is concerned that the failure to address this principle leaves the Draft Conclusions incomplete. In New Zealand's view, the principle should be reflected more fully in the Commentary and the text of the Draft Conclusion itself.

Draft Conclusion 16: rules of particular customary international law

29. New Zealand supports the inclusion of Draft Conclusion 16 regarding rules of particular customary international law. Such rules may be developed to implement general rules of

international law in a particular common geographic or other context; or where no such general rule of international law exists. In New Zealand's view, however, they cannot replace or derogate from fundamental principles of international law, including *jus cogens* norms, or obligations *ergo omnes*. This should be reflected in the accompanying Commentary.

30. It is important that it is very clear which States have participated in the formation of such rules and therefore can be considered to be bound by them. In this regard, New Zealand supports the qualification in paragraph 7 of the Commentary that practice must be consistent amongst all of the States to which the rule of particular customary international law is considered to apply. That is a significant qualification, which New Zealand considers should be reflected in the text of Draft Conclusion 15.2 itself.

#### **Concluding Remarks**

31. New Zealand trusts that these comments will be of assistance to the Commission in its continuing work and looks forward to the Commission's further revision of the Draft Conclusions and their Commentaries in due course.