

# United Nations Nations Unies

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6 October 2016

Dear Sir/Madam,

At its sixty-eighth session, on 24 May 2016, the United Nations International Law Commission requested the Secretariat to prepare a memorandum of ways and means for making the evidence of customary international law more readily available (A/71/10, para. 56). This request was made in connection with the topic “Identification of customary international law”, for which the Commission has provisionally adopted, on first reading, a complete set of sixteen draft conclusions. A copy of the draft conclusions is enclosed.

The memorandum will survey the present state of the evidence of customary international law and make suggestions for its improvement. In connection with the preparation of the memorandum, the Office of Legal Affairs is collecting information from various organizations and entities by means of a questionnaire concerning available sources of such information. A copy of the questionnaire is enclosed.

The questionnaire aims to collect information from your organization or entity with regard to three aspects:

1. How your organization or entity makes publicly available the decisions and resolutions adopted under its auspices.
2. How your organization or entity makes publicly available any information concerning the conduct of States in relation to the mandate and activity of your organization or entity or its decisions and resolutions.
3. How your organization or entity makes publicly available any information concerning its own practice.

Intergovernmental organizations and entities

In order for the relevant information to be reflected in the memorandum, we would appreciate receiving the completed questionnaire by 1 May 2017. Please submit your contribution via e-mail to Mr. David Nanopoulos at [nanopoulosd@un.org](mailto:nanopoulosd@un.org) and Ms. Judith Maclang-Violago at [maclang@un.org](mailto:maclang@un.org). Hard copies may be addressed to the United Nations Headquarters OLA/COD: attn. Secretariat of the International Law Commission, 405 East 42nd Street, Room DC2-0566, New York, NY 10017, USA.

We greatly appreciate your assistance in the preparation of the memorandum.

Yours sincerely,



Miguel de Serpa Soares  
Under-Secretary-General for Legal Affairs  
and United Nations Legal Counsel

## **C. Text of the draft conclusions on identification of customary international law adopted by the Commission**

### **1. Text of the draft conclusions**

62. The text of the draft conclusions adopted by the Commission on first reading is reproduced below.

#### **Identification of customary international law**

##### **Part One**

##### **Introduction**

##### **Conclusion 1**

##### **Scope**

The present draft conclusions concern the way in which the existence and content of rules of customary international law are to be determined.

##### **Part Two**

##### **Basic approach**

##### **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*).

##### **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.

##### **Part Three**

##### **A general 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.

##### **Conclusion 5**

##### **Conduct of the State as State practice**

State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.

**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.

**Conclusion 7****Assessing a State’s practice**

1. Account is to be taken of all available practice of a particular State, which is to be assessed as a whole.
2. Where the practice of a particular State varies, the weight to be given to that practice may be reduced.

**Conclusion 8****The practice must be general**

1. The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.
2. Provided that the practice is general, no particular duration is required.

**Part Four****Accepted as law (*opinio juris*)****Conclusion 9****Requirement of acceptance as law (*opinio juris*)**

1. The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation.
2. A general practice that is accepted as law (*opinio juris*) is to be distinguished from mere usage or habit.

**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.

**Part Five**  
**Significance of certain materials for the identification of customary international law**

**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.

**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.

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*).

**Conclusion 13**  
**Decisions of courts and tribunals**

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.

2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules.

**Conclusion 14**  
**Teachings**

Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law.

**Part Six**  
**Persistent objector**

**Conclusion 15**  
**Persistent objector**

1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.
2. The objection must be clearly expressed, made known to other States, and maintained persistently.

**Part Seven**  
**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 particular 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*).



# Ways and means for making the evidence of customary international law more readily available

Questionnaire addressed to entities in the United Nations system and to entities and organizations having received a standing invitation to participate as observers in the sessions and the work of the General Assembly

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## I. Introduction

At its 3303<sup>rd</sup> meeting, on 24 May 2016, the International Law Commission requested the United Nations Secretariat to prepare a memorandum on ways and means for making the evidence of customary international law more readily available, which will survey the present state of the evidence of customary international law and make suggestions for its improvement. This is in connection with the Commission's topic 'Identification of customary international law'; in August 2016 the Commission has provisionally adopted, on first reading, a complete set of sixteen draft conclusions, which may be found in Chapter V of the Commission's 2016 report to the General Assembly (A/71/10). A copy of the sixteen draft conclusions is attached. For this purpose, the present questionnaire aims to collect information from your organization or entity with regard to three aspects:

1. How your organization or entity makes publicly available the decisions and resolutions adopted under its auspices.
2. How your organization or entity makes publicly available any information concerning the conduct of States in relation to the mandate and activity of your organization or its decisions and resolutions.
3. How your organization or entity makes publicly available any information concerning its own practice.

The aim of the questionnaire is to identify those publicly available sources of such information, as well as to collect any data concerning information which is not currently publicly available, but which could be made available if resources were dedicated to such an effort. Whenever the questionnaire refers to the "publication" by your organization of any information, the question is intended to encompass all forms of publication, including print materials, websites and online databases. In this regard, you are kindly requested to provide the full bibliographic details, the methods of dissemination, as well as the languages in which they are produced. It would also be useful to hear of any publications that are being planned.

The completed questionnaire should be submitted electronically to Mr. David Nanopoulos at [nanopoulosd@un.org](mailto:nanopoulosd@un.org) and Ms. Judith Maclang-Violago at [maclang@un.org](mailto:maclang@un.org) before **1 May 2017**. Hard copies may be addressed to the United Nations Headquarters OLA/COD: attn. Secretariat of the International Law Commission, 405 East 42nd Street, Room DC2-0566, New York, NY 10017, USA.

An electronic version of this questionnaire can be found at <http://legal.un.org/ilc/>.



## II. General information

Focal point

Phone number

Office address

Email address

Name and email address of Director

## III. Questionnaire

### 1. Reporting

Which areas of international law are particularly relevant to the mandate and activity of your organization?

Does your organization publish the decisions, resolutions and official statements adopted by the organization or its organs?

Yes  No  Not applicable

If yes, where could these be accessed (please include ISBN, ISSN and/or URL)?

Does your organization separately publish the decisions, resolutions and official statements adopted by the organization or its organs, which concern legal issues?

Yes  No  Not applicable





**If yes, how are these accessible (please include title(s), ISBN, ISSN and/or URL)?**

**Does your organization publish the treaties, other agreements, or other binding legal acts and instruments adopted under its auspices?**

Yes  No  Not applicable

**If yes, how are these accessible (please include title(s), ISBN, ISSN and/or URL)?**

**Does your organization publish any official annual or periodical report on its activities in general?**

Yes  No  Not applicable

**If yes, how are such reports accessible (please include title(s), ISBN, ISSN and/or URL)?**

**Does your organization separately publish any official annual or periodical report on its activities specifically dealing with legal issues?**

Yes  No  Not applicable

**If yes, how are such reports accessible (please include title(s), ISBN, ISSN and/or URL)?**

**Does your organization publish annual or periodical reports on the legal opinions rendered by counsel of the organization, if any?**

Yes  No  Not applicable

**If yes, how are such reports accessible (please include title(s), ISBN, ISSN and/or URL)?**

**Does your organization contribute to collections of legal opinions published by third parties, such as the *United Nations Juridical Yearbook*?**

Yes  No  Not applicable



If yes, which are these (please include title(s), ISBN, ISSN and/or URL)?

Does your organization regularly collaborate with any academic publication?

Yes  No  Not applicable

If yes, which one(s) (please include title(s), ISBN, ISSN and/or URL)?

## ***2. Evidence of State practice and acceptance as law (opinio juris)***

Does your organization publish the verbatim or summary records of meetings in which representatives of States participate?

Yes  No  Not applicable

If yes, how can they be accessed (please include title(s), ISBN, ISSN and/or URL)?

Does your organization publish the video or audio recording of such meetings?

Yes  No  Not applicable

If yes, how can they be accessed (please include title(s), ISBN, ISSN and/or URL)?

Does your organization publish diplomatic correspondence addressed to it from States or the correspondence it circulates on behalf of States?

Yes  No  Not applicable

If yes, how can it be accessed (please include title(s), ISBN, ISSN and/or URL)?



**Does your organization collect information concerning diplomatic acts and correspondence of States relating to its mandate and activity?**

Yes  No  Not applicable

**If yes, does it publish such information?**

Yes  No  Not applicable

**If yes, how can it be accessed (please include title(s), ISBN, ISSN and/or URL)?**

**Does your organization collect information concerning the conduct of States (including legislative and administrative) in relation to a particular treaty, or in relation to particular decisions or resolutions adopted under the provisions of a treaty, including the constitutive instrument of the organization?**

Yes  No  Not applicable

**If yes, does it publish such information?**

Yes  No  Not applicable

**If yes, how can it be accessed (please include title(s), ISBN, ISSN and/or URL)?**

**Does your organization collect information concerning decisions of national courts in relation to its mandate and activity?**

Yes  No  Not applicable

**If yes, does it publish such information?**

Yes  No  Not applicable

**If yes, how can it be accessed (please include title(s), ISBN, ISSN and/or URL)?**

**Does your organization collect information concerning decisions of international courts and tribunals which are relevant to its mandate and activity?**

Yes  No  Not applicable



**If yes, does it publish such information?**

Yes  No  Not applicable

**If yes, how can it be accessed (please include title(s), ISBN, ISSN and/or URL)?**

**Does your organization collect information concerning public statements made by States in relation to the mandate and activity of the organization?**

Yes  No  Not applicable

**If yes, does it publish such information?**

Yes  No  Not applicable

**If yes, how can it be accessed (please include title(s), ISBN, ISSN and/or URL)?**

**Does your organization collect information concerning official publications of States in relation to the mandate and activity of the organization?**

Yes  No  Not applicable

**If yes, does it further disseminate such information?**

Yes  No  Not applicable

**If yes, how can it be accessed (please include title(s), ISBN, ISSN and/or URL)?**

**Does your organization collect information concerning government legal opinions in relation to its mandate and activity?**

Yes  No  Not applicable

**If yes, does it publish such information?**

Yes  No  Not applicable



If yes, how can it be accessed (please include title(s), ISBN, ISSN and/or URL)?

### ***3. Practice of your organization***

**Does your organization publish the official correspondence it sends to States?**

Yes  No  Not applicable

**If yes, how can such correspondence be accessed (please include title(s), ISBN, ISSN and/or URL)?**

**Does your organization publish its official correspondence with other international organizations?**

Yes  No  Not applicable

**If yes, how can such correspondence be accessed (please include title(s), ISBN, ISSN and/or URL)?**

**Does your organization publish the minutes of internal meetings of its Secretariat?**

Yes  No  Not applicable

**If yes, how can these be accessed (please include title(s), ISBN, ISSN and/or URL)?**

**Does your organization publish all the decisions and internal instructions adopted by its administrative bodies?**

Yes  No  Not applicable

**If yes, how can these be accessed (please include title(s), ISBN, ISSN and/or URL)?**



**Do mechanisms exist for the legal review of decisions and internal instructions adopted by its administrative bodies (for instance, internal administrative tribunals dealing with employment-related disputes)?**

Yes  No  Not applicable

**If yes, are their decisions published?**

Yes  No  Not applicable

**If yes, how are they accessible (please include title(s), ISBN, ISSN and/or URL)?**

**How can press releases of the organization be accessed (please include title(s), ISBN, ISSN and/or URL)?**

**Are the organization's archives open to the public?**

Yes  No  Not applicable

**Is there an access to information policy or procedure in place?**

Yes  No  Not applicable

**If yes, how can such policy be viewed?**