

Only states have the power to shape the development of customary international law

Introduction

While it has not offered an explanation, the ILC has lately confirmed that, under some circumstances, international bodies can contribute to the formation of customary international law. According to the commission's findings, the procedure and *opinio juris* of international organizations can have an impact on the formation of rules I dealing with a subject within the organizations' mandate and/or (ii) aimed at the organizations themselves. 16 In addition to the explanation, several examples are provided. The European Union is an example of "States having ceded exclusive powers to [an] international organisation, "States have acted inconsistently" (EU). Furthermore, the ILC states that international organizations can make contributions where States have "conferred competencies upon [an] international organization."

States were able to voice their opinions on the ILC's actions in two different venues: the ILC itself and The United Nations General Assembly's Sixth (Legal) Committee. There was only talk of foreign entities contributing directly to CISG in 20 countries¹. There was a great deal of disagreement between these states. Respondents were split on whether or not Customary international law is subject to the guidance of international authorities, although the clear majority were in favor of the ILC's approach. There were welcoming and cautious states. Both Iran and the United States are good examples since they reject the authority of global organizations. In its extensive response, the United States argued that the assumption that international organizations can make such a contribution is not supported " in the law as it is actually practiced in the various states" or "other binding authority.

Definition

The widely consistent practice of nations is generally acknowledged to be the foundation upon which customary international law rests. States are seen to have a feeling of legal responsibility, or *opinio juris*, if they consistently act in a specific way, and This idea has resulted in international custom being recognized as law.

Traditional View of CIL

¹ M. Wood (Special Rapporteur), Fifth Report on Identification of Customary International Law, UN Doc. A/CN.4/71, 14 March 2018, paras. 36–39, summarizes these exchanges..

"The common understanding holds that CIL is a universal force in international affairs. Governments make an effort to follow CIL and have adopted many of its standards into domestic laws². Whether it's used as a legal precedent, an affirmative defense, or a guideline for interpreting a statute, CIL is used by national courts. Several nations disagree on whether or not a certain action violates CIL. Several experts in the field of international law consider CIL to be its very foundation.

Typical Perspectives On CIL

The two pillars of international law are treaties and customary international law (CIL)³. Several academics are sceptical that treaties and CIL constitute actual legal duties since they lack a centralised judicial and enforcement mechanism and because infractions often go unpunished. Unlike treaties, CIL is plagued by additional issues concerning its legality. Treaties are legally binding agreements between two or more parties and are usually in the form of a written document. Dispute resolution clauses are sometimes included, such as international arbitration, but only bind those who have signed the document. Nevertheless, it is widely accepted that governments are bound by CIL responsibilities just as much as by treaties.

"To the extent that international law is followed, it gives us a basis for establishing stability and order and for anticipating the conduct of those with whom we have mutual legal duties."
Representative J. William Fulbright

State action in shaping customary international law

International law is ungoverned without a worldwide parliament. "Other sources" underpin international law, under Article 38 of the ICJ Statute (ICJ Statute). Article 38 establishes the validity of international law, including customary law, treaties, and fundamental legal principles⁴.

The phase will include an effort to reconcile the two competing theories of customary international law. Customary international law is often cited as having been established by sovereign nations acting in their own self-interest. Under a framework that incorporates the customary procedure and other important structural characteristics of international law, this theory posits, customary norms evolve largely via the exercise of state power. As such, this

² Third Edition of Parry and Grant's International Law Lexicon (Oxford University Press 2009).

³ Ohlin, John D. "Nash Equilibrium and International Law," 23 European Journal of International Law 915 (2012).

⁴ See to paragraphs 36–39 of Five-Year Report on the Attempt to Identify Customary International Law, M. Wood (Special Rapporteur), United Nations Document A/CN.4/717, March 14, 2018 for a summary of these discussions.

theory seeks to integrate the study of power into the study of international law without undermining the stability and predictability of the law⁵.

How Global Organizations Help Shape the Field of Customary

International Law

To better grasp what comprises customary international law, it may be useful to examine the actions of international organizations, which are increasingly acknowledged as having a legislative role. Understanding the components of customary international law will be facilitated by this. According to Article 38 of the ICJ Statute, organizational practice cannot serve as a basis for customary international law. This is true even if the development of international legal standards is aided by "organization practice." The basis of customary international law is the generally recognized behaviour of sovereign nations. The idea that nations have a feeling of legal responsibility, or *opinio juris*, if they consistently behave in a specific manner has led to international custom being recognized as a basis of international law⁶.

It shouldn't be contentious to suggest that non-State actors, like international organizations, might help effect the advancement of global customary law. International organizations and states may interact in ways that lead to the development of customary international law.

Customary international law is primarily influenced by the actions of sovereign states. In cases where non-state actors have functionally surpassed states, international organizations may serve as vehicles for the articulation of State practice and *opinio juris*, the Special Representative takes into consideration the activities of such bodies. Further evidence that the ILC prioritizes the State over other entities.

Articles on the Responsibility of International Organizations, drafted by the International Law Commission, and other attempts to codify international law share an emphasis on States (ARIO). The European Commission and other ARIO detractors have argued that the ILC ignored the impact of the EU's vast treaty practice on customary law⁷.

⁵ International Law Commission Draft Articles and Comments on State Liability for Internationally Wrongful Actions (Document A/56/10 of the United Nations), 53rd Session, Part I (2002).

⁶ Authors Joost Wouters and Pieter De Man, in their 2016 edition of "International Organizations as Law Makers" (Edward Elgar 2011). The references may be found in the Third Report, at footnote 169.

⁷ Article 9 ARIO (n. 6) Comments (Behavior established as the norm by an international body).

The European Commission asserted that the ARIIO should account for the fact that, inside the EU framework, a special norm of attribution had developed, enabling the group to take credit for the actions of EU Member States' agencies. Since the inception of the ILC's initiative, the European Commission has been quite vocal about the necessity for separate legislation to be developed regarding the EU as a different international entity by its Member States⁸.

When it comes to international affairs, the European Union is "not only a venue for its Member States to negotiate or manage their bilateral ties, but also a participant in its own right. The EC is a signatory to a wide variety of international treaties with other countries that pertain to its areas of expertise. Many of the EU's agreements with its Member States are structured similarly, with each side staying within its designated area of authority. European Union (EU) member states and the EU itself each assume international responsibility in their areas of expertise, making the EU a one-of-a-kind organization. In international courts, most notably the World Trade Organization (WTO), the European Union (EC) is actively involved in legal disputes (WTO)⁹.

Customary lawmaking authority may be inferred

Customary international law may include the implicit authority of international organisations. For a long time, people have considered the implied powers of international organizations to be at least as great as the powers explicitly assigned to them in their charters. The International Court of Justice has ruled that these individuals have "those powers which are imposed upon them by fundamental implication as being necessary to the accomplishment of their functions" (ICJ). Because the inferred powers of international organizations are not necessarily dependent on the subjective purpose of the nations that founded the international organization, the implied powers test provides an alternative means of establishing that international organizations may encourage the development of international law through example. This is because the test accounts for the fact that national governments first established most international organizations. Instead, scholars are investigating the origins and future goals of these global institutions¹⁰.

⁸ The European Union's Role in the Development and Enforcement of Customary International Law, by J. Vanhamme (29 New York Yearbook of International Law 131) (2008).

⁹As Brölmann points out, in almost every field of human cooperation, organizations emerge as international players in their own right, rather than as just venues for national institutions." Christian Brölmann, Author of Public International Law, International Organizations, and Treaty Law (Hart 2007) 1. ..

¹⁰ Murphy (n 25) 7

How United Nations shape the customary international law

Historically, the ICJ has been rather lenient while defending implied powers against challenges. Both the UN's ability to pursue claims for compensation from throughout the world against the company and the rights of individual victims were at the center of the ICJ's decision on reparations for injuries. The Court reached a majority decision that the United Nations can seek compensation for the first type of losses claimed.

The Court did look at the second set with regard to implied powers. The majority of the Court held that where United Nations agents are suffered because of a violation of international law, the United Nations should submit an international claim on their behalf. This is due to the fact that UN agent independence is crucial to UN sovereignty¹¹. I can see why Judge Hackworth would find such power appealing, but I do not believe it is necessary. He claimed that other players are allowed to seek reparation on behalf of victims of abuse and that there are other means to ensure the impartiality of international civil employees.

Since then, the Court has repeatedly affirmed the UN's implied powers, often notwithstanding the vehement resistance of individual member nations. Among these unstated authorities is the authority to establish a peacekeeping force and a tribunal to settle labor disputes¹². So far, just once has the Supreme Court gone against an implied powers argument, and that was when it found that the WHO didn't have jurisdiction to ask for an advisory opinion on whether or not states might legally deploy nuclear weapons. The central question for the Court was whether or not WHO actions were violating UN mandates.

Vienna Case

By way of illustration, if the Special Rapporteur needs clarification on a legal question that isn't directly addressed in the treaty, interested parties may check out the Convention on the Law of Treaties, signed in Vienna in 1986 (VCLT-IO) for guidance on such matters. Norms of customary international law develop via negotiation between nations and multilateral organizations or among themselves. Such interactions may give rise to custom in areas such as treaty law, organizations' international legal duties and the rules governing the transfer of power between different international bodies¹³.

¹¹ References: *Ibid.*, pp. 181-184

¹² The Influence of UN Administrative Tribunal Advisory Judgment on Compensation Awarded on July 13, 1954; Certain UN Costs, July 20, 1962; ICJ Reports (1962) 151.

¹³ In 1986 (25 ILM 543), the Vienna Convention on the Law of Treaties (VCLT-IO) was formed as a foundation for treaty law..

The principles guiding the application of public international law to entities other than states, such as third states and international organizations, may be illuminated by the acts of international organizations, particularly in regard to other objects of international law. This is due to the fact that the rules determining whether or not non-state actors are subject to public international law are drawn from the principles determining how states are to be treated. This is precisely what would occur if non-state actors were required to abide by public international law. The discussion has shifted significantly as it has expanded from including merely states to incorporating nations and international organizations in its establishment, Customary international law and the function of international organizations is brought into clearer focus. International institutions have been criticized by academics and government officials for allegedly being unable to have a role in shaping the evolution of international customary law by their own unilateral activities.

International Organizations as a Means of Fostering Inter-State Collaboration

Cooperation between governments through an international organization is one possible strategy. State-level activity is facilitated by the international organization, allowing them to establish norms or voice opinions on the law through its various institutions. This strategy reduces the role of international organizations to that of facilitators for State-led initiatives. " Customary law is developed via a variety of sovereign actions, such as those taken by or through international organizations," according to the United States Foreign Relations Law, One method in which nations can influence the evolution of international law is by the adoption of resolutions, declarations, and statements by the UNGA (see Third Restatement) (UNGA). What constitutes an appropriate response The amount of support for the resolution or declaration, and whether or not subsequent practice has followed the initial action, are two of the many elements that influence state practice. If the United Nations General Assembly adopts or takes notice of an International Law Commission decision, such decision is more likely to be recognized as reflecting CIL. It is commonly agreed that resolutions passed by the UN General Assembly can provide evidence for the assertion of *opinio juris*. Although certain delegates to the UN General Assembly may hold this view, it does not reflect the stance of the Assembly as a whole or as a player in international law.

A "catalyst" role for international organizations in shaping CIL

When the actions of a global organization 'catalyze' State policy, this method is employed. When international bodies have prepared papers to which States are invited to respond, this method has been adopted in some cases. Customary international law may emerge from the discussions sparked by the work of international organizations. Another instance is when international organizations recommend that their member nations do something concrete, like enact new legislation at the national level, that can have an impact on the way things are really done. This second method of donation is inextricably linked to the first. It recognizes the importance of carefully examining the actions of states that prompted international organizations to adopt a certain practice, such as a proclamation.

The European Union's Impact on International Customary Law

"Such action may be compared with the practice of States" because of the EU's hegemony in international affairs," to paraphrase the Special Rapporteur. If non-State practices were not equated with State practices, " To put it another way, the capacity of members to contribute to State practice would be reduced or eliminated," as the Special Rapporteur put it. According to the EU, this decision "makes practical and legal sense." It's possible that EU law prevents individual EU member states from speaking out in international forums on issues that fall under EU jurisdiction. Due to their duty of loyalty under EU statute, EU Member States may be barred from expressing dissenting thoughts once the EU has developed a position on a particular matter¹⁴. Being an international organization and not a State, the European Union cannot be barred from contributing to the formation of customary international law by its Member States.

Instead of relying exclusively on the abstract concept of international organization, the European Union thinks a closer examination of the institutions- or kinds of organizations - engaged.

The EU is obligated to "contribute... to the rigorous respect and development of international law," as stated in the Treaty on European Union¹⁵. The European Union's (EU) "observance" of international law has been extensively debated, but the EU's "contribution" to the development of international law has received far less attention. The European Union's (EU)

¹⁴ " According to "The Duty to Remain Silent: Maximum Loyalty in EU Foreign Relations," Member States are expected to remain silent in international interactions until prompted to do so by EU authorities (2011)

¹⁵ Paragraph 5 of the Declaration Made on Behalf of the European Union (no 34).

impact on international law may be examined in the context of international environmental law and the law of the sea. To ensure that international law reflects EU policies, values, and interests, the European Union (EU) is actively shaping global trends in a number of sectors. The European Union's (EU) ability to influence not only specific international laws or policies, but the whole international legal system, has gotten less attention than it deserves. Due to the EU's specific characteristics and its interactions with other nations, international law ideas that were developed in an inter-State setting need "adaptation" in reality. Relevant factors may include, but are not limited to, the CJEU's case law, the EU's involvement in (other) international organizations, the EU's history of mediating international conflicts, etc.

Conclusion

According to the findings of this analysis, nations are the primary participants in the evolution of principles of customary international law. Notwithstanding this, international organizations, which are autonomous and independent legal bodies and who operate in the international arena, are able to potentially make their own improvements to the growth of international customary law. The ongoing relationships that the European Union maintains with individual states and several other international organizations do not account for the whole of this practice. In addition to States, non-State institutions like international organizations are recognized as having the potential to influence the evolution of international law. The precise role that international organization acts have in shaping customary international law remains unclear. The International Law Commission may have overlooked some of these other types of potential contributions from international organizations. This is because the ILC places more emphasis on the role of states in making international law and less emphasis on the role of independent international entities. While states are unquestionably essential players in the evolution of customary international law, which will be the subject of this article, it is vital to recognize the independent influence that international organizations may have. [Citation needed.]

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