MUNQSMUN '14

9-11 October 2014

International Law Commission
Background Guide

Letter from the Executive Board

Respected Delegates,

As your Executive Board we would like to bring your attention towards the importance of debate and deliberation that happens under the mandate of International Law Commission through this background guide and remind you that one of the most important traits a delegate in such a big and fast tracked committee must possess is patience and above all a fast hand and good handwriting. Our request to you would be to be extremely well researched, accommodating and humble. I hope this background guide acts as an effective starting point for your research and please feel free to contact us for any further clarifications.

*** Please note that nothing mentioned in this background may be used as established fact in committee without the presentation of a credible news source and substance mentioned henceforth may act only as a source for your basic understanding of the agenda.**

*** The links of the documents where the background guide has been derived have been mentioned at the end of sub paragraphs; please feel free to go through them.**

***Only mention complex legal terminology if you have proper understanding of it and don't expect the council to be self aware of what you mention, in a committee such as this one feel free to debate on the basics, any and all theories and analysis will be welcome.**

***Let WIKIPEDIA be your best friend if you need a simple one-place definition to a term with regards to the agenda since they council will be largely speculative and analytical in nature.**

Regards,

Shubhankar Gupta
Chairperson
shubhankargupta97@gmail.com

Vansh Sethi
Vice Chairperson
vanshsethi001@gmail.com

Madhav Aggarwal
Chairman of Drafting Committee
madhavaggarwal16@gmail.com

Vrinda Sood
General Rapporteur
vrinda.sood07@gmail.com

The International Law Commission: Introduction

The ILC was created by the General Assembly (UNGA) to better fulfill the mandate of the Charter's Article 13, and to further develop and codify international law. Its members are international legal practitioners and scholars from member states elected for a term of four years, though they do not officially represent these. It is designed to be a non-political, expert body. The ILC has previously codified international norms into "draft articles," which are often adopted to become international conventions. The topics have ranged from shared natural resources to nationality and from the law of treaties to international criminal law. Its suggestions, if not adopted and made into a treaty, are a non-binding, but nonetheless authoritative, statement of what, to the members, international law is or should be. The commission tackles topics suggested by the UNGA, UN agencies or Member states, and submits its reports and recommendations to the UNGA, where they are usually first considered in its sixth committee.

Agenda: Applicability of instant customs

Customary international law

Customary international law "... consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way." The elements of customary international law include:

- The widespread repetition by States of similar international acts over time (State practice);
- The requirement that the acts must occur out of a sense of obligation (opinio juris); and
- That the acts are taken by a significant number of States and not rejected by a significant number of States.[1]

Article 38 (1) (B) is generally accepted to be the principal authority on the sources of international law. It defines customary international law as "general practice accepted as law".

State practice is the phenomenon of many (if not most) states abiding by a certain norm, or principle. It can be evidenced by verifiable state actions

Opinio juris is the belief of a state that a certain practice is legally binding across the international community. This can be evidenced by speeches made internationally or domestically by state officials or internal memoranda, among other forms of proof.

The Concept of Instant Custom

An essential characterstic of development of customary international law is consistency of a state practice.
In north sea continental shelf case, ICJ noted:

[1] http://law.duke.edu/ilrt/cust_law_2.htm
http://www.oximun.org/downloads/studyguides/LegalStudyGuide.pdf

“Although the passage of only a short period of time is not necessarily . . . a bar to the formation of a new rule of cus[*PG150]tomary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.”
Which gave rise to certain to the theory that “the *usage* prong of customary international law has little or no significance. not only is it unnecessary that the *usage* be prolonged, but there also need be no *usage* at all in the sense of repeated practice, provided that the *opinio juris* of the states concerned can be established clearly.”
In simple words, it implies that emergence of customary law was possible if a consensus among states on the existence of a certain rule could be identified.
As per the theory, development of the principle of non-sovereignty over the space route is an example of instant customs as it developed just after the launch of the first satellites.

Development and formation of Instant Customs (as per the original Cheng theory)

International law association states that there is no required time frame for development of international law, but “practice of sufficient density”.
Although the passage of only a short period of time is not necessarily a bar to the formation of a new rule of customary international law, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

At the same time, a state's practice is not limited to its own acts; practice can consist of acquiescence through failure to protest the acts of other states.
In the same theory in which the very concept of instant custom was proposed by professor Cheng that no state practice at all, provided that the relevant states clearly establish their *opinio juris* by, for example, their votes on U.N. General Assembly resolutions.
However, Two main problems with the "instant custom" theory emerge when the theory rests solely on General Assembly resolutions.

a. The first problem is that states often vote for General Assembly resolutions to embellish their image, without the expectation that the international community will deem their votes acceptance of a new rule of law.

b. General Assembly resolutions are regarded as recommendations to Member states of the United Nations. To the extent, which is exceptional, that such resolutions are meant to be declaratory of international law, are adopted with the support of all members, and are observed by the practice of states, such resolutions are evidence of customary international law **on a particular subject matter, and hence the reflection of legal opinion might be strictly pertaining to the issue at hand.**

Not contesting, that under certain circumstances, General Assembly resolutions can "declare existing customs [or] crystallize emerging customs."

The Question at hand: Considering ILC' s responsibility to codify of customary international law, it is up to the committee to determine in it's documentation, the applicability of instant customs and sort the relevant complexities (non-exhaustive in nature) such as legitimate method of formation of an instant custom, the scope of its application, validation of an instant custom etc. It is must to take into the past cases, which provide conclusive evidences of their characteristics.

Kindly note, that the executive board regards going through the case studies given below, of paramount importance to understand the agenda, and essentially the elements of development and applicability of instant customs in different scenarios, to form an opinion on the applicability of instant customs. Also, the information given in the background guide shall not be competent to validate a fact.

CASE STUDY 1

When the United States and Soviet Union first developed the abilities to launch rockets into outer space and to place satellites in earth's orbit. In response to this new technological development, the U.N. General Assembly adopted the *Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space*, which provides that: the provisions of the U.N. Charter, including limitations on the use of force, apply to outer space; outer space and celestial bodies are not subject to national appropriation by claim of sovereignty; states bear responsibility for parts of space vehicles that land on the territory of other states; the state of registry of a spacecraft has exclusive jurisdiction over it and any personnel it carries; and states shall regard astronauts as envoys and shall accord them assistance and promptly return them to the state of registry. Though state practice was scant in the early years of space exploration, ICJ Judge Manfred Lachs concluded that "it is difficult to regard the 1963 Declaration as a mere recommendation: it was an instrument which has been accepted as law."

This case study clearly highlights how an instant custom was affirmed by a general assembly resolution, which was formed on the common recognition of an obligation (opinion juris).

CASE STUDY 2

The 1999 NATO intervention in Serbia in an effort to prevent a potential genocide of ethnic Kosovar Albanians. Significantly, the situation unfolded just five years after the U.N. failed to take action to halt genocide in Rwanda. When Russia and China prevented the Security Council from authorizing the use of force against Serbia, NATO proceeded to commence a seventy-eight day bombing campaign without U.N. approval. The near universal consensus, however, was that the circumstances justified the intervention. The international reaction to the 1999 NATO intervention prompted the General Assembly and Security Council to endorse a new doctrine known as "Responsibility to Protect," which would authorize humanitarian intervention in certain limited circumstances in the future.
(This study highlights how consensus of legitimacy gave birth in the manner of an instant custom to "responsibility to protect".)

CASE STUDY 3

The systematic terrorist attacks against the World Trade Center and Pentagon on September 11, 2001 and the international community's reactions to those attacks have had a profound impact on the global order68 and transformative "consequences for international law." Whereas the ICJ previously opined in the 1986 *Nicaragua Case* that states could not resort to force in response to attacks by non-state actors operating in other states a few days after the September 11th attacks, the U.N. Security Council adopted Resolution 1368, which was widely viewed as confirming the right to use force in self-defense against al Qaeda.

Furthermore, there is abundant evidence that states both acted and committed themselves to act in accordance with the resolutions. Indeed, by the end of September 2001, less than three

weeks after the passage of the U.N. General Assembly and Security Council resolutions, the U.S. already had obtained forty-six multilateral declarations of support from a long list of states, including: Great Britain, India, Pakistan, Russia, China, Japan, Australia, and South Korea. According to U.S. Secretary of State Colin Powell, states came forward immediately, offering finances, intelligence, law enforcement, military support, and humanitarian aid.

For example, Great Britain acted in conformity with the articulation of the Bush Doctrine by taking on a leading role in military operations against the Taliban.

(This case is a classic example of what is called the “groatian moment” a term that denotes a paradigm-shifting development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance.)

Articulation, a method to endorse instant custom?

There have been quite a few instances where treaties and treaty negotiations have crystallized instant customs, so as to make sure that their credibility isn’t disputed and to prove them as a legitimate obligation, in order to ensure their applicability.

For example- The International Court of Justice concluded in the Gabcikova-Nagymaros case that the requirements for invoking a state of necessity set out in the Draft Articles on State Responsibility adopted on first reading by the International Law Commission "reflect customary international law."

CASE STUDY 4

International Law Commission (ILC) has recognized that the Nuremberg Charter, Control Council Law Number 10, and the post-World War II war crimes trials gave birth to the entire international paradigm of individual criminal responsibility.85

Prior to Nuremberg, states were the only subjects of international law, and a state's treatment of its own citizens within its own borders was its own business. Nuremberg fundamentally altered that conception. "International law now protects individual citizens against abuses of power by their governments [and] imposes individual liability on government officials who commit grave war crimes, genocide, and crimes against humanity." The ILC has described the principle of individual responsibility and punishment for crimes under international law recognized at Nuremberg as the "cornerstone of international criminal law" and the "enduring legacy of the Charter and Judgment of the Nuremberg Tribunal."

(This case study highlights the existence of an opportunity for international law commission to also discuss the cases involving application of instant customs, and validate the existence of viable applications of instant customs by articulation.)

Agenda: Definition of conflicts with regard to applicability of laws

With regards to the definition of the term 'conflict' in itself we'd like to make it clear that as of now there exist numerous definitions of the term with very specific degrees and sub categories hence this shall be one of the most debatable and important topics of the committee.

ICRC Documentation as Basis for Definition:

https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf

In the past the terms 'Armed Conflict' and 'War' have been used synonymously but with the evolution in the global political scenario since the establishment of the Geneva Conventions we have seen numerous instances of conflict in the past which have seen a lack of concrete action and policy making due to the lack of objective definitions for the situations.

Some of the terms, which have come up relatively, recently include:

1. Non-International Armed Conflict:

   https://www.icrc.org/applic/ihl/ihl.nsf/INTRO/475?OpenDocument

   The second additional protocol of the Geneva Convention does cover the term but the question remains, **"At what point does an internal conflict become a non international armed conflict?"**, **"Does intervention constitute an international or a non-international armed conflict?"** and **"Does the breakaway of a state or declaration of regional independence by force come under the complete provisions of the Geneva Convention or the Additional Protocol?"**

2. Undeclared War:

   http://en.wikipedia.org/wiki/Undeclared_war

   The link contains comprehensive definition for the same, the questions in play are largely the same as mentioned above in the case of a "Non-International Armed Conflict" with one addition, **"Does an armed conflict simply side step the Geneva Convention in the absence of a formal declaration of war?"**

Internationalization of Armed Conflict:

We first need to agree on what the 'internationalization' of an internal armed conflict actually means. To my mind, that concept is only legally useful if it denotes the transformation of a prima facie non-international armed conflict into an international one, thereby rendering applicable to the said conflict the more comprehensive IAC legal regime. As is well known, there has been a long-standing trend – promoted, for example, by the case law of the ICTY and the ICRC customary law study – of arguing that most of IAC rules now apply to NIACs as well.

Crucially, however, at least one distinction between the two legal regimes remains. In IACs, the parties to the conflict are (at least) two equal sovereigns. Lawful participants in the hostilities who in effect represent those sovereigns thereby have combatant status, and enjoy the privilege of belligerency. They cannot be prosecuted by the other party for their mere participation in the hostilities, but solely for violations of IHL. In NIACs, however, the parties are fundamentally different – most commonly a government and a rebellious non-state actor. Because governments have every right to suppress rebellions against them, no combatant status or privilege exists in NIACs. A rebel can be prosecuted for the mere fact that he is a rebel, even if he has been completely observant of

the rules of IHL. Thus, for example, the government of Afghanistan has every right to imprison a Taliban soldier, even if that soldier committed no war crime.

Note that this distinction is based on party structure to the conflict and is therefore here to stay. Note also that because the distinction between IACs and NIACs is based on party structure, one cannot logically first ask the question (as Federico does in the comments) whether there is an armed conflict simpliciter, and then ask further whether that conflict is international or non-international. Rather, IACs and NIACs are separate legal categories, neither of which is residual in nature, as it is impossible to establish either without making an inquiry into party structure. In other words, an 'armed conflict' exists when there is an IAC or a NIAC, not the other way around.

Per Common Article 2 of the Geneva Conventions, IACs are defined as conflicts between states. There are thus two basic ways of 'internationalizing' a NIAC: (1) for treaties and/or custom to exceptionally expand the definition of an IAC to include as parties some sufficiently state-like entities, or (2) for the non-state actor which is a party to a NIAC with a state to be considered as acting on behalf of a third state.

As for option (1), I know of only two such possible exceptions: Art. 1(4) AP I, which renders international a conflict between a state and an oppressed people, which would otherwise be considered a NIAC; and the recognition of belligerency, which has now fallen into disuse, but perhaps not desuetude. As for the former, the idea behind Art. 1(4) AP I is that a people entitled to self-determination, whose right thereto is being denied by a state, exhibits a form of proto-statehood or sovereignty, an innate *legitimacy* that requires the application of the IAC regime, the privilege of belligerency and all. However, Art. 1(4) is not widely accepted as reflecting customary law, and it has to my knowledge never actually been applied. As for the recognition of belligerency, it allows the state fighting an insurgent and/or third states to recognize the fact that the magnitude of the insurgency is such that it would be appropriate to treat it as a belligerent. It has been used in the

19th century, when the operational concept of the law of war was, well, *war*, most notably during the American Civil War. It has not been used since, but it could conceivably still be used to 'upgrade,' as it were, a NIAC into an IAC, in case of particularly protracted civil war involving large-scale hostilities and stable insurgent control over large areas of territory (i.e. a conflict on an AP II scale).

Conceivably, one could demonstrate sufficient state practice and *opinio juris* to expand option (1) and the definition of an IAC even further, to include other situations. However, I don't believe that such a case can convincingly be made for any currently relevant situation. It is thus option (2) which is of practical relevance – a NIAC will become internationalized if it is shown that a non-state actor fighting a state is actually doing so on behalf of a third state. In other words, if the definition of an IAC that we are operating under is solely the CA2 one, i.e. if option (1) is excluded, a conflict will become international only if there are two states parties to it.

http://www.ejiltalk.org/what-exactly-internationalizes-an-internal-armed-conflict/

* Kindly look into the references given in the above link

CASE STUDY: Israel-Palestine

*** Any information given in the following section is only to be read for the purposes of learning how to form a structure for presentation of opinion.**
IT MAY NOT BE USES AS ESTABLISHED FACT AGAINST EITHER OF THE TWO PARTIES IN COUNCIL

It is clear that Hamas' firing of rockets, which are incapable of distinguishing between military and civilian targets, is a violation of international humanitarian law. However, the question whether

Israel's actions in Gaza, which have reportedly resulted in the death of over 2000 people, comply with international law generates much more heated debate. As Professor Geir Ulfstein has pointed out, in a recent post on *Just Security*, in discussions about whether Israel has violated international law, "the focus is only on violations of international humanitarian law (jus in bello), not on breaches of restrictions following from the right of self-defense (jus ad bellum)." An example is this post by Mark Ellis, Executive Director of the International Bar Association on Huffington Post. One of the key questions that arise in connection with Israel's actions in Gaza is whether its actions are proportionate. In a later post I will focus on proportionality and what it might mean in this conflict. Suffice it to say for now that as Geir Ulfstein notes (and as pointed out by Marko in this post) the "requirements of proportionality are different in international humanitarian law (IHL) and as a restriction on the right of self-defense". One may also note that even if every individual acts of targeting by a party to a conflict is proportionate under IHL, the overall campaign might still be disproportionate under the law relating to self-defense in the *jus ad bellum*.

http://www.ejiltalk.org/is-israels-use-of-force-in-gaza-covered-by-the-jus-ad-bellum/#more-11947

*** The link also contains a case study entailing the idea of 'Self Defense' with regards to the UN charter.**

We hope this guide has acted as an effective point to kick-start your research, we apologize for the short length of it but as has been mentioned repeatedly in the guide the council's debate structure will depend on your analysis and theorizing of the legal questions that the two agendas present.

Please feel free to contact us for any clarifications.