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LECTURE

International Organizations and Customary International Law

2014 Jonathan J. Charney
Distinguished Lecture in Public
International Law

Presented at Vanderbilt University
Law School on November 4, 2014

*Sir Michael Wood**

It is a privilege to be invited to deliver this lecture in honor of Jonathan Charney.

Professor Charney was, of course, one of this country's most respected public international lawyers, both at home and abroad. Described as "one of the leading international legal scholars of his

* Member of the UN International Law Commission. I wish to express my gratitude to Omri Sender for his assistance. The present text is a slightly modified and updated version of the lecture as delivered.

generation,”¹ he was also an inspiring teacher.² Particularly relevant to my subject today, Charney had a special interest in the sources of international law, including customary international law and the role of international organizations. He was famously a persistent objector to the “persistent objector rule.” He devised and coedited the invaluable *International Maritime Boundaries* series. This publication, now in its seventh volume and stretching over some 5,000 pages, is an essential resource for anyone dealing with maritime delimitation. He has written on Kosovo and on Antarctica. These are all matters that I have followed closely myself, and so I have a particular interest in his work.

My subject today is “International Organizations and Customary International Law”—that is, the role of international organizations in relation to the formation and determination of rules of customary international law.

Charney devoted a good part of his well-known article on “Universal International Law” to what he termed “contemporary international law-making.” By that, he meant chiefly law-making within “international forums”—that is, within organs of international organizations and at international conferences. He starts the discussion from the somewhat heretical position that

[w]hile customary law is still created in the traditional way, that process has increasingly given way in recent years to a more structured method, especially in the case of important normative developments.

Rather than state practice and *opinio juris*, multilateral forums often play a central role in the creation and shaping of contemporary international law.³

Charney’s conclusions, however, are perhaps not as radical as his premise. He acknowledged that “[s]ome may question the authority to legislate universally, even in the face of some dissent, because it appears to be inconsistent with the sovereignty and autonomy of states. Such apprehension is not unreasonable. The international legal system, however, will invoke this authority sparingly.”⁴

It cannot be said that Charney’s proposal for a dramatic change in the (secondary) rules of recognition has been widely accepted by states. It would indeed shift the process through which customary international law is formed from state practice to some kind of legislation by various unspecified fora, and who is to say that it would

1. W. Michael Reisman, In Memoriam, *Jonathan I. Charney: An Appreciation*, 36 VAND. J. TRANSNAT’L L. 23, 23 (2003).

2. See generally James R. McHenry, III, Tribute, *Professor Jonathan I. Charney: Commitment Underpinned by Conviction*, 36 VAND. J. TRANSNAT’L L. 11 (2003) (describing personal and shared experiences, and anecdotes from students of Professor Charney).

3. Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT’L L. 529, 543 (1995).

4. *Id.* at 551.

be “invoked sparingly.” Nevertheless, like all of Charney’s writings, this article offers much food for thought. He was ahead of his time. As we shall see, the multilateral activities he discussed could actually generate state practice and evidence *opinio juris*, the two elements widely accepted as the building blocks of customary international law, and, in that way, indeed play a significant role in creating (and expressing) rules of such law.

I shall first say a word about the background to the subject and why it is important (Part I). Then I shall look at what states do within the context of international organizations (Part II), and finally, before concluding, I shall consider whether international organizations as such may contribute to the formation and determination of customary international law and to what extent they are bound by it (Part III).

I. INTRODUCTION

As you know, public international lawyers devote an inordinate amount of time and effort to trying to explain the sources of the law that they claim to teach or practice. That is not the case in other fields of law, where the sources are more or less clear and not seriously questioned. It is widely accepted as a starting point—at least by practitioners—that the sources of public international law are those listed in Article 38 of the Statute of the International Court of Justice (ICJ). Of these, the two principal sources are treaties and customary international law.

It has sometimes been suggested that the importance of customary international law is now greatly reduced as so much is regulated by treaty. Of course, treaties, where they apply, do tend to overshadow customary law. But even in a field like the law of the sea, where we have the 1982 United Nations Convention on the Law of the Sea (UNCLOS)—hundreds of pages long, the so-called “constitution for the oceans,” with (as of now) 167 states parties—customary international law still applies in relations among nonparties (such as the United States) and between nonparties and parties. In its two most recent law of the sea cases, decided in 2012 and 2014, the International Court of Justice applied customary international law, since in each case one side (Colombia and Peru, respectively) was not a party to the Law of the Sea Convention. In a field like international human rights law, while there are a large number of detailed treaties, many of the most difficult issues that arise in practice, especially before the courts of states that are not party to many of the treaties, concern the existence and scope of customary international law. The same is true of the law of armed conflict, particularly noninternational armed conflict, but also for those states, like the United States, that are not parties to the 1977 Additional Protocols to the Geneva Conventions.

Rules of customary international law may also fill gaps in treaties and assist in their interpretation. For example, the customary international law on the use of force (the *jus ad bellum*) helps to inform the UN Charter. A court may, moreover, seek to apply customary international law where treaty law cannot be applied because of limits on its jurisdiction or applicable law. Finally, customary international law is “the principal construction material for general international law” (in the sense of its capability to generally bind all states),⁵ underlying the international legal structure as a whole.

The international law relating to treaties—how they become binding, how they terminate, how they are to be interpreted, etc.—is well-trodden ground. The 1969 Vienna Convention on the Law of Treaties largely covers the field. By contrast, customary international law is often seen as shrouded in mystery and paradox, the subject of endless theorizing among academics. A couple of days ago I attended a conference at Duke University (with Professor Wuerth⁶), entitled “Custom in Crisis.” I am not at all convinced that there is a crisis. As I recently wrote, together with a colleague,

[W]hile the theory of customary international law may well be “one of the big mysteries of international legal scholarship,” the reality of practice remains relatively straightforward The theoretical torment which accompanies such law in the books rarely impedes it in action, where a settled methodology for ascertaining the existence of a rule of customary international law is clearly evident.⁷

This settled methodology is often referred to as the “two-element approach.” Article 38 of the ICJ Statute refers to “international custom, as evidence of a *general practice accepted as law*”: so, what is needed to ascertain a rule of customary international law is, first, a general practice (often referred to as a “state practice”) and, second, evidence of the acceptance of that practice as law (often referred to by the Latin term “*opinio juris*”).

The International Law Commission of the United Nations (Commission) has recently begun working on a topic now entitled “Identification of Customary International Law.” In deciding to take up this topic, the Commission was well aware of the difficulties in attempting to “codify the relatively flexible process by which rules of customary international law are formed”.⁸ But it was also aware of the

5. V.I. KUZNETSOV & B.R. TUZMUKHAMEDOV, INTERNATIONAL LAW – A RUSSIAN INTRODUCTION 77 (W.E. Butler ed., 2009).

6. Professor of Law, Director of International Legal Studies, Vanderbilt University Law School.

7. Omri Sender & Michael Wood, *The Emergence of Customary International Law: Between Theory and Practice*, in HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAW MAKING (C. Brölmann & Y. Radi eds.) (forthcoming).

8. *Report of the Study Group on the Future Work of the International Law Commission*, in THE INTERNATIONAL LAW COMMISSION AND THE FUTURE OF INTERNATIONAL LAW 1, 42 (M. R. Anderson et al. eds., 1998).

need for some reasonably authoritative guidance on how to identify rules of customary international law in concrete cases, especially at a time when “questions of customary international law increasingly fall to be dealt with by those who may not be international law specialists, such as those working in the domestic courts of many countries, those in government ministries other than Ministries for Foreign Affairs, and those working for non-governmental organizations.”⁹ Of course, in this country you have a useful piece of guidance for the judiciary and others in the relevant section of the *Third Restatement of the Foreign Relations Law of the United States*; other states and actors, for the most part, do not. A further reason for the Commission to take up the topic was to seek to add to the legitimacy of this important source of international law, which has often been challenged due to its inherent flexibility, not least in academic circles. In doing so, the Commission seeks to dispel some of the mysteries and paradoxes associated with customary international law and increase its predictability.

The Commission took up the topic in 2012 and, as usual, appointed a Special Rapporteur. I have so far produced two reports, in 2013 and 2014.¹⁰ In the second report, I proposed 11 draft conclusions. These, in turn, were referred to the Commission’s Drafting Committee in 2014, which provisionally adopted eight conclusions.¹¹

One of the central conclusions adopted in 2014 sets out the basic two-element approach. It reads:

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

The two-element approach is often referred to in terms of *state practice plus the acceptance by states* of the practice as law. What role, then, do international organizations play in this process?

I shall first make three basic points about international organizations (by which I mean intergovernmental organizations, not nongovernmental organizations). First, international organizations, while subjects of international law, are not states. They are established by states, but, like companies, they have separate (international) legal

9. Rep. of the Int’l Law Comm’n, 63d Sess., Apr. 2–June 3, July 12–Aug. 12, 2011, Annex A, ¶ 3, U.N. Doc. A/66/10; GAOR, 66th Sess., Supp. No. 10 (2011) [hereinafter ILC Report 2011].

10. All Commission documents referred to in this lecture are available on the Commission’s website: INT’L LAW COMM’N, <http://www.un.org/law/ilc/> (last visited Feb. 19, 2015) [<http://perma.cc/H6VL-FLLV>] (archived Feb. 8, 2015).

11. For lack of time, the Drafting Committee did not deal in 2014 with the draft conclusions on “acceptance as law.” See Identification of Customary International Law, Statement of the Chairman of the Drafting Committee (Aug. 7, 2014) [hereinafter Drafting Committee Chairman Statement], [http://legal.un.org/ilc/sessions/66/DC_ChairmanStatement\(IdentificationofCustom\).pdf](http://legal.un.org/ilc/sessions/66/DC_ChairmanStatement(IdentificationofCustom).pdf) [<http://perma.cc/MH6X-J3BF>] (archived Feb. 8, 2015) (suggesting that these draft conclusions concerning “acceptance as law” will be addressed during the Commission’s next session).

personalities. Second, their nature is very different from that of states. Unlike states, they have limited powers and functions, set out expressly or by necessary implication in the treaty by which they are established (the constituent instrument). Third, they are all quite different from each other. They range from a universal organization with broad political purposes like the United Nations; to a regional organization like the Organization of American States; to a supranational organization like the European Union, which in many respects acts like a state; to specialized and technical institutions like the World Bank, the World Health Organization, and the International Telecommunication Union. So it is not easy to generalize about the role of international organizations. No two are alike. And as the International Court of Justice has said, "The subjects of law in any legal system are not necessary identical in their nature or in the extent of their rights . . ." ¹²

Much has been written about "law-making" through international organizations. Jonathan Charney's article on *Universal International Law* drew attention to the very great practical importance of international organizations in today's world. Through international organizations, states interact intensively and adopt positions, often jointly, on a continuing and collective basis that would have been unimaginable in the not too distant past. This inevitably has an important impact on the development of customary international law. ¹³

What I want to do is to explain the role of international organizations in the customary law process in terms of the accepted two-element methodology for the determination of rules of customary international law.

It is important at this stage to distinguish between two quite separate matters. First, in assessing whether there is a general practice, one has to take into account the acts (including verbal acts) of states in connection with the activities of international organizations and whether there is *opinio juris* of states that may be deduced from such acts. That is relatively uncontroversial and of much practical importance in today's world. But, second, there is the possible contribution that the practice and *opinio juris* of international organizations themselves, as subjects of international law, may make to the rules of customary international law. For the time being at least, that is more controversial.

This important distinction, between acts of member states and acts of the organization, needs constantly to be kept in mind. But the

12. Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 178 (Apr. 11).

13. See G. CAHIN, LA COUTUME INTERNATIONALE ET LES ORGANISATIONS INTERNATIONALES: L'INCIDENCE DE LA DIMENSION INSTITUTIONELLE SUR LE PROCESSUS COUTUMIER (2001).

distinction may not always be easy to maintain in practice. When the UN Security Council adopts a resolution with implications for customary international law, it is an act of the Security Council as an organ (and hence of the United Nations). But the fifteen members of the Council, by their votes and statements, may also have acted on their own views of customary international law. So the same procedure may involve both the practice of states and the practice of an international organization. An example from the Security Council concerns the question whether the right of self-defense is available in response to attacks by non-state actors, such as transnational terrorist groups. In the immediate aftermath of the terrorist attacks of 11 September 2001, the Security Council adopted resolutions 1368 (2001) and 1373 (2001) reaffirming “the inherent right of individual and collective self-defence as recognized by the Charter of the United Nations.” Those resolutions have been cited as evidence that the right of self-defense applies in relation to an attack by non-state actors. Indeed, the Security Council itself recognized (albeit implicitly) its potential role in shaping customary international law when it expressly underscored that its resolutions authorizing action against pirates in the territorial sea of Somalia “shall not be considered as establishing customary international law.”¹⁴

II. STATE PRACTICE AND *OPINIO JURIS* IN CONNECTION WITH THE ACTIVITIES OF INTERNATIONAL ORGANIZATIONS

I now turn to state practice consisting of, and *opinio juris* found in, the conduct of states in connection with the activities of international organizations (including but not limited to resolutions). It is reasonably easy to find state practice in the context of international organizations and often harder to find the *opinio juris* of states.

Draft conclusion 6, as provisionally adopted in 2014 by the International Law Commission’s Drafting Committee, includes among a nonexhaustive list of ‘forms of State practice’ ‘acts in connection with resolutions of international organizations or international conferences’. This includes voting, joining in a consensus, statements etc.

Evidence of *opinio juris* of states may also be found in connection with their acts, including verbal acts, within international organizations. Indeed, statements or votes within international organizations are frequently cited, especially by writers, also as evidence of *opinio juris*. This is a particularly difficult matter, and such

14. See S.C. Res. 2125, ¶ 13, U.N. Doc. S/RES 2125 (Nov. 18, 2013) (limiting the resolution to the situation in Somalia so as not to affect the rights and obligations of other member states to the relevant Convention).

statements and votes need to be approached with considerable caution. Political rather than legal considerations may play a dominant role. It should not be assumed that states have carefully considered all that they do, day after day, within international organizations. Moreover, it is necessary to look with particular care at the context of any statements or votes. The relevant considerations include such questions as which states voted for the resolution? Did the vote include all those states specially affected by the matter at hand? What did states say about the resolution? Even states that vote in favor frequently make it clear that they do not regard a particular resolution as reflecting the law as it is (*lex lata*). Such matters are unfortunately often overlooked.

III. THE PRACTICE OF INTERNATIONAL ORGANIZATIONS AND CUSTOMARY INTERNATIONAL LAW

I turn finally to the contribution of international organizations themselves to the formation and determination of rules of customary international law. Much has been written about international organizations as ‘law-makers’, but for the most part the writings address matters other than their role in connection with customary international law.

The issue was much discussed in the Commission’s Drafting Committee in 2014, and proved to be quite controversial. But it does not seem possible to dismiss the practice of at least certain international intergovernmental organizations in certain fields, such as the law of treaties, or privileges and immunities. More widely, the European Union (as a supranational organization to which states have transferred some exclusive competences) may be very special, but it exists, and it exercises some of the powers of states and so contributes to practice and *opinio juris*. These facts cannot be ignored.

Draft Conclusion 4, paragraph 1, says that the requirement of a general practice “means that it is *primarily* the practice of states that contributes to” customary international law. Draft Conclusion 4, paragraph 2 provides that:

In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.

And a footnote attached to this text currently reads:

The Drafting Committee provisionally adopted Draft Conclusion 4 with the understanding that this draft conclusion would be considered again at the next session in light of the analysis of the question of the practice

of international organizations that will be part of the third report of the Special Rapporteur.¹⁵

One matter that the drafting may perhaps not make entirely clear is whether the practice and *opinio juris* of subjects of international law other than states and international organizations may be relevant. Questions may arise in connection with *sui generis* bodies, such as the International Committee of the Red Cross. Nongovernmental organizations and other private entities, however, would seem to have no direct role. However influential they may sometimes be, it is only through the reactions of states (or possibly international organizations) that they may influence the law.

The debate continued at the Sixth Committee of the UN General Assembly in 2014. The US representative, for example, expressed concern

that the treatment of international organizations together with States in Draft Conclusion 4 may be taken to suggest that these actors play the same roles with respect to the formation of custom, obscuring, in particular, significant limitations on the role of international organizations in this regard . . .

While we are not persuaded as yet that the practice of international organizations is of general relevance to the identification of custom, we are open to the possibility that there may be circumstances in which some activities of international organizations may contribute to the formation of customary international law.¹⁶

If it is accepted, as I think it must be, that international organizations as such may contribute to the formation of customary international law, a number of quite difficult questions have to be addressed.

First, the practice and *opinio juris* of those international organizations to which member states have transferred exclusive competences would seem to fall into a special category. Their practice may be equated with that of their member states, since in particular fields such organizations act in place of the member states. This applies to the actions of such organizations whatever form they take, whether executive, legislative, or judicial. Indeed, if one were not to equate the practice of such international organizations with that of states, not only would the organization's practice not contribute to a general practice but its member states would be deprived or reduced of their ability to contribute to such practice in cases where they have conferred some public powers to the organization.

Second, the question arises, which organs of international organizations are relevant to the customary process? Such organs may

15. Drafting Committee Chairman Statement, *supra* note 11, at 18 n.2.

16. Stephen Townley, Counsellor for Legal Affairs, U.S. Mission to the United Nations, Remarks at the 69th General Assembly Sixth Committee on Agenda Item 78: Report of the International Law Commission on the Work of its 66th Session (Nov. 5, 2014), <http://usun.state.gov/briefing/statements/233960.htm> [<http://perma.cc/4G94-5JBV>] (archived Feb. 10, 2015).

be divided in many ways, but perhaps the most important distinctions for present purposes is a threefold one: organs composed of states, such as the United Nations General Assembly and Security Council; Secretariats, whose role varies greatly, but in the case of the UN Secretary-General undoubtedly has an important political element; and organs composed of individuals, such as a Special Rapporteur for human rights appointed to fulfil a mandate laid down by the Human Rights Council or the members of a UN field operation, such as KFOR in Kosovo, or indeed the International Law Commission.

My view is that it is primarily the practice and *opinio juris* of organs to which member states have delegated relevant powers that may contribute to a general practice. As a member of the Commission stated in 2013, the distinction is between the products of the secretariats of international organizations and products of the intergovernmental organs of international organizations. While both can provide materials that can be consulted, the “greater relative weight . . . [is to be] given to the products of the latter, whose authors were also the primary authors of State practice.”¹⁷ Nevertheless, the acts of secretariats may be important. An example would be the exercise of treaty depositary functions of the UN and other secretariats. By contrast, the practice of organs composed of individuals serving in their personal capacity cannot be said to represent states or the organization.

Third, in assessing the practice of international organizations, we need to distinguish between practice relating to the internal affairs of the organization, on the one hand, and the practice of the organization in its relations with states, international organizations, etc., on the other. It is the latter practice that is relevant for present purposes, though the dividing line may not always be clear.

Fourth, is it necessary that the organization be acting *intra vires*—that is, within its mandate and powers and functions—for its acts to count? Perhaps so, but it is not obvious why acts that are *ultra vires* should not also count. In any event, it is often difficult to say whether or not an organization is acting *ultra vires* in any given set of circumstances. There is usually no authoritative decision maker.

Fifth, may inaction by an international organization play a part in the determination of a rule of customary international law? Inaction (acquiescence) of states often serves an important role in the formation of rules of customary international law.

Finally, to the determination of which rules of international law may the practice and *opinio juris* of organs of international organizations contribute? It is generally assumed, and I think that this is right, that they may contribute primarily to those rules of international law by which they themselves are (or would be) bound.

17. Int'l L. Comm'n, Provisional Summary Record of the 3182d Meeting, U.N. Doc. A/CN.4/SR.3182 (Sept. 3, 2013).

That last point raises a separate yet important issue: to what extent are international organizations bound by rules of customary international law? That they may be so bound is clear.¹⁸ However, there seems to have been little serious discussion—at least not in the literature—of the actual scope of such international obligations of international organizations. It is matter that is usually addressed in the same breath as international personality (under some heading such as “consequences of legal personality”) or wrapped up with the capacity of the organizations (their powers and functions). It is sometimes simply asserted that since organizations have international legal personality, and may therefore be the holders of international rights and obligations, they are generally bound by international law in the same way as states.¹⁹ Yet that does not necessarily follow.

In his work on *International Organizations as Law-makers*, José Alvarez wrote

It . . . remains uncertain whether organizations . . . are liable for violations of customary law, especially since it is not clear whether the rules of custom, such as the rules arising under international humanitarian law, apply in exactly the same way to IOs.²⁰

And Dapo Akande is surely right when he says that “[p]ossessing international legal personality means that an organization possesses rights and duties in international law, but this does not usually tell us the particular rights and capacities possessed by a particular organization.”²¹ What then is the position? As the Commission pointed out in its General Commentary to its draft articles on the *Responsibility of international organizations*, “International organizations are quite different from States, and in addition present great diversity among themselves. There are very significant differences among international organizations with regard to . . . the primary rules including treaty obligations by which they are bound.”²²

This is indeed self-evident as regards treaties: most international organizations are parties to few treaties, and even an organization like the EU that has extensive treaty relations is not, and cannot be, a party to some of the main multilateral conventions. The position as regards customary international law is much more complex.²³

18. See ILC Report 2011, *supra* note 9, at 96–97.

19. See PHILIPPE SANDS & PIERRE KLEIN, *BOWETT'S LAW OF INTERNATIONAL ORGANIZATIONS* 14.034–14.035, 14.037 (6th ed. 2009).

20. JOSE E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 138 (2006).

21. Dapo Akande, *International Organizations*, in *INTERNATIONAL LAW* 282 (M. Evans ed., 4th ed. 2014).

22. ILC Report 2011, *supra* note 9, at 68.

23. See H.G. SCHERMERS & N.M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW* ¶ 1579 (5th rev. ed. 2011); see also FREDERICK NAERT, *INTERNATIONAL LAW ASPECTS OF THE EU'S SECURITY AND DEFENCE POLICY, WITH A PARTICULAR FOCUS ON THE LAW OF ARMED CONFLICT* 230–33 (2010) (discussing the uncertainty as to whether privileges and

To conclude, I have sought to explain that the proceedings of international organizations offer a rich field for state practice and manifestations of state *opinio juris*. But it is a field that has to be approached with some caution, given the often ambiguous or dual nature of proceedings in such organizations.

And likewise, while on one view international organizations may provide shortcuts to finding custom, at the same time, considerable caution is required in assessing *their* practice, and a number of important issues need to be considered. I hope that the International Law Commission will be able to shed some light in this regard as it continues its work on the topic of "identification of customary international law."

I have perhaps raised more questions than I have answered. What is certain, however, is that in approaching this subject I have benefitted greatly from reading what Jonathan Charney wrote. This is a difficult field, and we certainly miss his wisdom and insights. And while you may find much that I have said to be rather theoretical (to an extent that is perhaps inevitable when discussing the sources of public international law), I would like to conclude by quoting what Professor Reisman said in 2002 of Jonathan Charney's approach to customary international law:

While he was interested in theory and contributed to it and he had many suggestions to make about improving international law, he was at heart an empiricist.²⁴

immunities enjoyed by international organizations are rooted in customary international law); Albert Bleckmann, *Zur Verbindlichkeit des Allgemeinen Völkerrechts für International Organisationen*, 37 HEIDELBERG J. INT'L L. 107 (1977).

24. Reisman, *supra* note 1, at 24.