Editorial

International Organizations and Customary International Law

Is the International Law Commission Taking International Organizations Seriously?

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1 Introduction

Customary international law is relevant for international organizations, at times even essential. International organizations may derive both rights and obligations from this source of international law. Early this year, a Dutch court recognized that North Atlantic Treaty Organization (‘NATO’) entities enjoy immunity from jurisdiction on the basis of custom international law, in a case involving a private claim of hundreds of millions of US dollars. Even though this is the view of Dutch courts, it should be mentioned that it is far from generally accepted that international organizations may enjoy immunity not only on the basis of treaties, but also on the basis of custom international law.
also increasingly accepted that international organizations are bound by obligations under customary international law. Such obligations concern, for example, international human rights law and international humanitarian law. The practical relevance of this is clear if we ask whether United Nations (‘UN’) peacekeeping forces are fully bound by customary human rights and humanitarian law, knowing that it is unlikely that many international organizations will become parties to human rights and humanitarian law conventions in the near future. Therefore: customary international law is relevant for international organizations, at times even essential.

In 2012, the International Law Commission (‘ILC’) decided to include the topic ‘Formation and evidence of customary international law’ in its programme of work and appointed its member Michael Wood as Special Rapporteur for the topic. In 2013, it changed the title of the topic to ‘Identification of customary international law’. The Special Rapporteur has prepared four reports during the last few years, and has actively promoted discussions on the topic. In 2016, the ILC adopted, at first reading, a set of 16 ‘draft conclusions on customary international law’. It will resume its work on this topic in 2018, with the intention of concluding it that year. So this is the time to react to the draft conclusions, and this is the time to address the question of whether the ILC has taken international organizations seriously in the provisional outcome of its work on this topic.

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