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Chapter VII
Formation and evidence of customary international law

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Chapter VII
Formation and evidence of customary international law

A. Introduction

1. The Commission, at its sixty-fourth session (2012), decided to include the topic "Formation and evidence of customary international law" in its programme of work and appointed Mr. Michael Wood as Special Rapporteur.[1] At the same session, the Commission had before it a Note by the Special Rapporteur (A/CN.4/653).[2] Also at the same session, the Commission requested the Secretariat to prepare a memorandum identifying elements in the previous work of the Commission that could be particularly relevant to this topic.[3]

B. Consideration of the topic at the present session

2. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/663), as well as a memorandum of the Secretariat on the topic (A/CN.4/659). The Commission considered the report at its 3181st to … meetings, from 17 … to … 2013.

1. Introduction by the Special Rapporteur of the first report

3. The first report, which is introductory in nature, aims to provide a basis for future work and discussions on the topic, and sets out in general terms the Special Rapporteur's proposed approach to it. The report presents, *inter alia*, a brief overview of the previous work of the Commission relevant to the topic, and highlights some views expressed by delegates made in the context of the Sixth Committee during the sixty-seventh session of the General Assembly. It also discusses the scope and possible outcomes of the topic, and considers some issues concerning customary international law as a source of law. It proceeds to describe the range of materials to be consulted going forward, as well as a proposed programme for the Commission's future work on the topic.

4. In introducing his report, the Special Rapporteur noted the importance of taking into account the practice of States from all legal systems and regions of the world while considering this topic, as well as the usefulness of exchanges of views between the Commission and other bodies and with the wider academic community. The Special Rapporteur also considered that the Memorandum prepared by the Secretariat, which describes elements in the previous work of the Commission that could be particularly relevant to the topic, would be of substantial assistance going forward. In particular, the Memorandum's observations and explanatory notes would constitute important points of reference for the Commission's future work.

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[1] At its 3132nd meeting, on 22 May 2012 (*Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), para.157). The General Assembly, in paragraph 7 of its resolution 67/92 of 14 December 2012, noted with appreciation the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its sixty-third session (2011), on the basis of the proposal contained in annex A to the report of the Commission (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), pp. 305–314).

[2] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 157–202.

[3] *Ibid*., para. 159.

5. The Special Rapporteur was fully aware of the complexities involved in this topic and the need to approach it with caution so as to ensure, in particular, that the flexibility of the customary process was preserved. He recalled that the intention was neither to consider the substance of customary international law nor to resolve purely theoretical disputes about the basis of customary law. Instead, the Special Rapporteur proposed that the Commission focus on the elaboration of conclusions, with accompanying commentaries, on the identification of rules of customary international law. It was envisaged that such an outcome would be of practical assistance to judges and lawyers, particularly those who may not be well versed in public international law.

6. In light of the proposed focus on the systemic method of identifying customary rules, and since the current title of the topic's reference to "formation" had given rise to some confusion regarding the scope of the topic, the Special Rapporteur suggested changing the title to "The identification of customary international law". Even if the title were changed, the proposed work of the Commission would nevertheless include an examination of the requirements for the formation of rules of customary international law, as well as the material evidence of such rules, both being necessary to the determination of whether a rule of customary international law exists. The Special Rapporteur further reiterated his preference to not deal with *jus cogens* as part of the scope of the present topic.

7. Concerning customary international law as a source of international law, the Special Rapporteur first turned to Article 38, paragraph 1, of the Statute of the International Court of Justice, on the basis that it was an authoritative statement of the sources of international law. The Special Rapporteur then addressed the relationship between customary international law and other sources of international law. While observing that its relationship with treaties was a matter of great practical importance, he also noted that it was a relatively well-understood question. Less obvious, in his view, was the relationship between customary international law and general principles of law, which required a careful examination by the Commission. In drawing attention to the importance of consistent terminology he further proposed to include a conclusion on use of terms.

8. The report also provided an illustrative list of materials relevant for the consideration of the topic. Although not intended to be exhaustive, the materials identified were thought to reflect the general approach to the formation and evidence of customary international law. Upon an initial examination of certain materials on State practice, as well as the case law of the International Court of Justice and other courts and tribunals, the Special Rapporteur preliminarily noted that, although there were some inconsistencies, virtually all of the materials reviewed stressed that both State practice and *opinio juris* were required for the formation of a rule of customary international law. He further observed that the work of other bodies on this topic, such as the International Law Association, the *Institut de droit international* and the International Committee of the Red Cross, as well as ensuing debates and writings, would be of interest.

9. While the Special Rapporteur observed that the inclusion of two draft conclusions in the report confirmed his intention concerning the form of the outcome of the Commission's work, he considered it premature to refer them to the Drafting Committee. Instead, his intention was to conduct informal consultations in order to reach agreement on the title of the topic and whether or not to deal with *jus cogens*.

2. Summary of the debate

(a) General comments

10. There was general agreement that the work of the Commission could usefully shed light on the process of identifying rules of customary international law. Broad support was expressed for the development of a set of conclusions with commentaries, a practical

outcome which would serve as a guide to lawyers and judges who are not expert in public international law. It was underscored that customary international law remained highly relevant despite the proliferation of treaties and the codification of several areas of international law. At the same time, it was the general view that the work on this topic should not be unduly prescriptive, as the flexibility of the customary process remained fundamental. In this regard, it was also emphasized that the process of formation of customary international law is a continuing one, which does not stop when a rule has emerged.

11. Some members commented on the need to identify the added value the Commission could offer on this topic, and to distinguish the work on this topic from the prior work of the Commission and other entities. In this regard, it was suggested that it was it was important to distinguish the work of the Commission from similar work undertaken by the International Law Association, and to clarify which gaps in treatment the Commission would address.

12. A number of members noted the complexity and difficulty inherent in the topic. The view was expressed that the ambiguities surrounding the identification of customary international law has given rise to legal uncertainty and instability, as well as opportunistic or bad faith arguments regarding the existence of a rule of customary international law. The proposed effort to clarify the process by which a rule of customary international law is identified was thus generally welcomed.

(b) Scope of the topic

13. A preliminary matter which raised issues relating to scope was the title of the topic. Several members agreed with the proposal of the Special Rapporteur to change the title from “Formation and evidence of customary international law” to “The identification of customary international law”, though several members also expressed support for maintaining the current title. Other members suggested alternative titles, including “The evidence of customary international law” and “The determination of customary international law”. The view was also expressed that it would not be appropriate for the Commission to address the theoretical aspects relating to “formation”, and it should thus be removed from the title. Ultimately, there was a general view that, even if the title were changed, it remained important to include both the formation and evidence of customary international law into the scope of the topic.

14. There was general agreement that the main focus of the Commission’s work should be to clarify the common approach to identifying the formative and evidentiary elements of customary international law. The relative weight to be accorded to the consideration of “formation” and “evidence” was, however, the subject of debate. Some members were sceptical that the largely academic or theoretical questions relating to the formative elements of customary international law were necessary or relevant to the Commission’s work on the topic. A view was expressed that formation and evidence are diametrically opposed concepts, as the former refers to dynamic processes that occur over time, while the latter refers the state of the law at a particular moment. Several other members were of the view that it was impossible to distinguish the process of formation from the evidence required to identify the existence of a rule.

15. Several members agreed with the proposal to not undertake a detailed study of *jus cogens* within the scope of the topic. A number of members observed that *jus cogens* presented its own peculiarities in terms of formation and evidence. The identification of identification of the existence of a rule of customary international law was a materially different question than whether such a rule also possessed the additional characteristic of not being subject to derogation by way of treaty. It was also indicated that a separate topic on *jus cogens* was under consideration in the Working Group on the Long-Term

Programme of Work. Other members suggested that *jus cogens* should be dealt with as part of this topic, as the interrelation between the two concepts is substantial and should be studied. Some members indicated that it would be useful for the Commission to address the issue of the hierarchy of sources of international law, including treaty law and *jus cogens*.

16. Several members agreed with the proposal of the Special Rapporteur to study the relationship between customary international law and general principles of international law and general principles of law. It was suggested that the Commission should endeavour to clarify the complex and unclear relationship between the concepts. In this regard, some members noted that distinguishing between general principles of international law and customary international law is not always possible. A similar point was made as to general principles of law and customary international law. At the same time, some members were of the view that broad questions relating to general principles and general principles of international law that are unrelated to customary international law should be excluded, as any study of such matters would unduly broaden this topic.

17. General support was expressed for an examination of the relationship between customary international law and treaty law. It was recalled in this context that it is generally recognized that treaties may codify, crystallize, generate or disprove the existence of customary international law. The point was also made that a rule of customary international law may operate in parallel to an identical treaty provision. Support was also expressed for the study of the effects on customary international law of multilateral treaties with very few States parties. It was suggested that any examination of the relationship with treaty law should be reserved for a later stage of the work on this topic, as a thorough analysis of the constitutive elements of customary international law was first required.

18. Consideration of the relationship between customary international law and other sources of international law, including unilateral declarations, was also recommended. Some members suggested an analysis of the interplay between non-binding instruments or norms and the formation and evidence of customary international law.

19. Some members expressed support for the study of regional customary international law, with particular emphasis on the relationship between regional and general customary international law. As part of its consideration of this relationship, it was suggested that the Commission look at regional practice, including relevant judicial decisions, agreements and regulations. It was noted in this context that it can be difficult to distinguish between the practice of regional organizations and individual States.

(c) Methodology

20. Broad support was expressed for the proposal of the Special Rapporteur to consider both the formative elements of customary international law, namely the elements that give rise to the existence of a rule of customary international law, as well as the requisite criteria for proving the existence of such elements. In this regard, general support was expressed for the proposed focus on the practical process of identifying rules of customary international law, rather than the content of such rules. It was suggested, however, that it would be impossible to fully distinguish the substance of primary rules from the analysis of applicable secondary rules. According to another view, the emphasis on the approach to the identification of rules would need to be supported by illustrative examples of primary rules.

21. Broad support was also expressed for the Special Rapporteur's proposal carefully to examine State practice and *opinio juris sive necessitates*, the two widely accepted constituent elements of customary international law. Several members noted that the identification of rules of customary law must be based on an assessment of State practice, and due regard should be given to the generality, continuity and representativeness of such practice. It was agreed that not all international acts bear legal significance in this regard,

particularly acts of comity or courtesy. Some members similarly suggested that certain State positions may not reflect *opinio juris*, particularly where a State indicates as much. Several members commented that identifying the existence of the requisite State practice and/or *opinio juris* was a difficult process. It was also noted that *opinio juris* may be revealed in both acts and omissions.

22. Attention was drawn to the need to carefully study the temporal aspects of the "two-elements" approach, in particular whether *opinio juris* may precede state practice, and whether a rule of customary international law may emerge in a short period of time. The utility of determining the relative weight accorded to State practice and *opinio juris* was also mentioned. In this regard, it was suggested that the Commission's work on the topic could be critical to bridging the gap between the "traditional" and "modern" approaches to customary international law. According to the view of other members, while it was important to analyse varying approaches to customary international law, classifying such approaches with terms such as "traditional" and "modern" was unnecessary or misleading.

23. Several members agreed that the Commission should aspire towards the elaboration of a common, unified approach to the identification of rules of customary international law, as such rules arise in a single, interconnected international legal system. According to the view of several other members, a system-wide or unitary approach should not be assumed as the approach to the identification of rules may vary according to the substantive area of international law. The view was expressed that the relative weight to be accorded to the evidence of State practice or *opinio juris* may vary depending on the field. In this regard, it was suggested that differing weight was accorded to certain materials in different fields of international law. In particular, it was suggested that soft law may play a greater role in the formation of customary international law in certain areas.

24. A view was expressed that the proposed approach of the Special Rapporteur did not take sufficient account of the distinction between formal and material sources of customary international law. It was also suggested that the proposal of the Special Rapporteur to incorporate the definition of international custom contained in the Statute of the International Court of Justice may be misguided. Some members indicated that a definition of customary international law should consider Article 38.1(b) of the ICJ Statute, particularly as the constituent elements identified therein are widely cited and accepted, but any definition produced by the Commission should focus primarily on the core elements which give customary international law its binding nature.

25. Some members also stressed the importance of addressing the process by which a rule of customary international law becomes obsolete.

26. A number of members recommended that the Commission examine the role of other actors in the formation of customary international law. In particular, it was suggested that the potential juridical value of determinations of *sui generis* subjects of international law, such as the International Committee for the Red Cross, should be examined. A view was expressed that such actors and interest groups play a significant role in the development, and the pace of development, of customary international law in certain fields. According to another view, determinations of certain non-governmental organizations should be accorded lesser weight than the practice or pronouncements of States.

(d) Range of materials to be consulted

27. There was general support for the range of materials the Special Rapporteur proposed to consult. It was suggested, however, that a distinction should be made between the relative weight accorded to different materials.

28. There was broad support for a careful examination of the practice of States. A view was expressed that materials on State practice should be examined from all areas of the

world, though it was also noted that, regrettably, not all States publish a survey of State practice in this area. It was suggested that State practice in some areas may be limited as not all States have participated in the formation of certain rules of customary international law. Several members suggested that the Commission research the decisions of national courts, statements and declarations of national officials, as well as State conduct. The view was expressed that the Commission should carefully consider the actual behaviour of States, particularly where it conflicted with national statements. Attention was also drawn to States' arguments before international courts and tribunals, as they may usefully indicate positions on the formation and evidence of customary international law. In addition, where available, it was suggested that the Commission consider the analysis of legal advisers to Governments, as well as the relevance of confidential exchanges of views between States.

29. With regard to the jurisprudence of national courts, several members agreed that such cases should be approached cautiously, and should be carefully scrutinized for consistency. It was suggested that the manner in which national courts apply customary international law is a function of internal law, and domestic judges may not be well versed in public international law.

30. There was general support for the proposal to examine the jurisprudence of international, regional and subregional courts. Several members expressed particular support for an analysis of the jurisprudence of the ICJ. Some members expressed the view that the jurisprudence of the ICJ may be considered the primary source of material on the formation and evidence of rules of customary international law, as it constituted the principal judicial organ of the United Nations whose authoritative status on such matters was widely recognized. The view was expressed that advisory opinions, while not binding, may also deserve consideration. Several members also stressed the importance of analysing the jurisprudence of other international courts and tribunals, particularly as it appeared that certain courts and tribunals adopted varying approaches to the assessment of customary international law.

31. The view was expressed that the Commission should be careful not to place too much emphasis on jurisprudence, as courts and tribunals are charged with the resolution of specific disputes, and not with the development of uniform international legal criteria or procedures. Some members also indicated that the apparent difference in approaches among courts and tribunals may, in actuality, simply constitute variance in drafting.

32. The general view was that the role of the practice of international and regional organizations merited consideration. Attention was drawn to the value of resolutions, declarations, recommendations and decisions of such organizations as potential evidence of both State practice and *opinio juris*. It was suggested, however, that greater weight should be accorded to the practice of the intergovernmental organs of international organizations.

33. Some members were of the view that the Commission should not have an overly restrictive conception of the "law" relevant to its work on this topic. In particular, it was noted that "soft law" norms have played an integral role in the emergence of rules of customary international law.

34. The point was also made that writings of publicists would usefully shed light on the topic. Attention was drawn to the widespread support among writers for the "two-elements" approach to customary international law, as well as to the existence of critics advocating other approaches.

(e) Future work on the topic

35. Broad support was expressed for the elaboration of a set of conclusions with commentaries. The general view was that the Commission should produce a practical outcome that would be useful to practitioners and judges. It was recalled, however, that any

outcome of the Commission should not prejudice the flexibility of the customary process or future developments concerning the formation and evidence of customary international law.

36. General support was also expressed for the plan of work for the quinquennium proposed by the Special Rapporteur. Several members were, however, of the view that the plan of work was overly ambitious and may not be feasible given the difficulties inherent in the topic, though it was also noted that the proposed focus on practical issues could make the work plan feasible. In addition, the suggestion that the Commission ask States to respond to a request for information on their practice relating to the topic by no later than 31 January 2014 was generally welcomed. A view was expressed that the lack of practice provided so far by States was regrettable.

37. Several members expressed support for the proposed effort to build common understanding and usage of terminology by developing a glossary of terms in all languages. The potential practical utility of such an endeavour was emphasized. According to the view of some other members, a rigid lexicon of terms may not be advisable as a default phrase such as “rules of international law” may not adequately reflect the spectrum of customary international law, which includes principles and norms as well as rules. According to another view, a lexicon or glossary of terms may not result in the desired clarity as it would be difficult to suggest that certain terms have been consistently used while others have not. Attention was also drawn to the varying use of terms and standards by the Commission itself in its identification of rules of customary international law.