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Rapporteur: Mr. Mathias Forteau

Chapter VII

Formation and evidence of customary international law

Addendum

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B. Consideration of the topic at the present session (*continued*)

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3. Concluding remarks of the Special Rapporteur

1. There was general agreement that the outcome of the work of this topic should be of an essentially practical nature. In this regard, there was broad support for the elaboration of a set of “conclusions” with commentaries. The Special Rapporteur also noted the general support among members for the “two-elements” approach, that is to say, that the identification of customary international law requires an assessment of both State practice and *opinio juris*, while recognizing that the two elements may sometimes be “closely entangled”, and that the relative weight to be given to each may vary depending on the context.

2. There also seemed to be support among members for a unified or common approach to the identification of customary international law.

3. With regard to the scope of the topic, there seemed to be broad support for examining the relationship between customary international law and other sources of international law, including treaty law and general principles of international law. There was also widespread interest in the consideration of regional customary international law. As to *jus cogens*, the Special Rapporteur observed that there was general agreement that it should not be dealt with in detail as part of the present topic.

4. As to the concerns expressed about his emphasis on terminological clarity, the Special Rapporteur indicated that his underlying intention was to promote a degree of clarity in reasoning. He added in this regard that the Commission had over the years been able to bring a degree of terminological clarity and uniformity to many areas of international law. At the same time, there was a balance to be struck between clarity and flexibility.

5. The Special Rapporteur was aware that his proposal to conclude work on the topic by 2016 may not be feasible; there must be adequate time for research, study and reflection within the Commission, the Sixth Committee and the international community more generally. He explained that the proposed date should be understood simply as a target date, and not as suggesting an intention to rush ahead with undue speed.

6. With respect to the proposal to change the title of the topic, the Special Rapporteur noted that the issue had also been discussed in informal consultations. Consensus had been reached on the title in all official languages, including “Identification of customary international law” in English and “La détermination du droit international coutumier” in French. The Special Rapporteur recommended that the title be changed accordingly.

7. The Special Rapporteur welcomed the important discussion on the matter of the publication of State practice, and indicated that a good first step would be to draw up a comprehensive list of existing digests and publications. There was also general support for a renewed call to States for information on their approach to the identification of customary international law.
