Chapter VIII

FORMATION AND EVIDENCE OF CUSTOMARY INTERNATIONAL LAW

A. Introduction

156. The Commission, at its sixty-third session (2011), decided to include the topic "Formation and evidence of customary international law" in its long-term programme of work,[323] on the basis of the proposal reproduced in annex I to the report of the Commission on the work of that session.[324] The General Assembly, in paragraph 7 of its resolution 66/98 of 9 December 2012, took note of, *inter alia*, the inclusion of this topic in the Commission's long-term programme of work.

B. Consideration of the topic at the present session

157. At its 3132nd meeting, on 22 May 2012, the Commission decided to include the topic "Formation and evidence of customary international law" in its programme of work and appointed Sir Michael Wood as Special Rapporteur for the topic.

158. During the second part of the session, the Commission had before it a note by the Special Rapporteur (A/CN.4/653). The Commission considered the note at its 3148th, 3150th, 3151st and 3152nd meetings, on 24, 26, 27 and 30 July 2012.

159. At its 3152nd meeting, on 30 July 2012, 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.

1. Introduction by the Special Rapporteur of his note

160. The Special Rapporteur observed that uncertainty about the process of formation of rules of customary international law was sometimes seen as a weakness in international law generally. Thus, the Commission's study of this topic might contribute to encouraging the acceptance of the rule of law in international affairs. The Special Rapporteur also hoped that it would provide practical guidance to judges and lawyers practising across a wide range of fields, including those who, while not necessarily specialists in international law, were nevertheless called upon to apply that law.

161. The note needed to be read in conjunction with annex I to the Commission's 2011 annual report.[325] Its aim was to stimulate an initial debate. Paragraphs 11 to 19 listed seven "preliminary points" that might be covered by the Special Rapporteur in a report to be submitted at the sixty-fifth session (2013). The question of methodology was addressed in the note. In that regard, the Special Rapporteur envisaged giving special emphasis to the approach followed by the International Court of Justice and its predecessor, the Permanent Court of International Justice, with respect to customary international law. In addition to considering the Court's pronouncements about methodology, it was necessary to examine what the Court had done, in practice, in particular cases. That having been said, the approach of other international courts and tribunals, and of domestic courts, could be instructive as well.

162. The practice of States on the formation and identification of customary international law, while no doubt extensive, might not be easy to identify. An attempt should be made, however, to ascertain when it was that States saw themselves as legally bound by international custom, and to shed light on how their practice was to be interpreted.

163. The experience of those who had tried to identify customary international law in particular fields, such as the authors of the study commissioned by the International Committee of the Red Cross (ICRC) on *Customary International Humanitarian Law*,[326] could make a significant contribution to the topic. The works of writers on the formation of customary international law—including textbooks, relevant monographs and specialized articles—might also shed important light. While different theoretical approaches might sometimes lead to similar results, that was not always the case.

164. Paragraphs 20 to 25 of the note were devoted to the scope of the topic and possible outcomes—two related but distinct matters.

165. As for the scope, it did not seem to raise particularly difficult issues. The Special Rapporteur was open as to whether the Commission should deal with *jus cogens* under this topic, although his initial thinking was that *jus cogens* did not really belong in it.

166. On the possible form of the eventual outcome of the Commission's work, the Special Rapporteur suggested that it could be a set of "conclusions" or "guidelines", with commentaries; a convention would be scarcely appropriate in that field and would not be consistent with the need to preserve the degree of flexibility inherent in the

[323] *Yearbook … 2011*, vol. II (Part Two), paras. 365–367.

[324] *Ibid.*, p. 183.

[325] *Ibid.*

[326] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (ICRC/Cambridge University Press, vol. I: Rules, 2009, and vol. II: Practice, 2005).

customary process. At the same time, such conclusions should be relatively straightforward and clear in order to be of practical usefulness even for those who might not be experts in international law.

167. The Special Rapporteur was of the view that it would be appropriate to seek certain information from Governments. He also welcomed any information and thoughts that members of the Commission would provide to him in relation to the topic.

168. Finally, the Special Rapporteur sought the initial views of the members of the Commission on the tentative schedule for the development of the topic that appeared in paragraphs 26 and 27 of the note.

2. Summary of the debate

(a) *General comments*

169. The importance of the topic as well as its practical and theoretical interest were underlined by various members, taking into account the significant role that customary international law continued to play in the international legal system, as well as within the constitutional order and the domestic law of many States. Some members were of the view that the Commission's work on that topic was useful in order to provide guidance, not only to international lawyers but also to domestic lawyers—including judges, government lawyers and practitioners—who were often called upon to apply rules of customary international law. At the same time, several members emphasized the inherent difficulty of the topic, the consideration of which posed real challenges to the Commission.

170. According to a different view, it was doubtful that the Commission's work on the topic, insofar as it purported to follow a holistic approach to customary international law, could lead to any fruitful result; also, addressing at the same time the dynamic concept of "formation", which referred to a process, and the static concept of "evidence", which presupposed an existing body of rules, brought about some confusion.

171. It was the general view that the Commission should not be overly prescriptive, in order not to tamper with the flexibility of the customary process. It was also observed that, given the complexity and sensitivity of the topic, and also considering the "spontaneous" nature of the customary process, the Commission's approach to the topic should be a modest one; thus, at no point should the Commission embark on a codification exercise in a proper sense. The view was also expressed that the Commission's objective should be to help clarify the current rules on formation and evidence of customary international law, not to advance new rules.

172. Wide support was expressed for the tentative plan of work for the quinquennium as proposed in the note, although some members were of the view that it was quite ambitious and needed to be approached with the necessary flexibility. Attention was drawn to the importance of ensuring that States had an opportunity to comment on the complete outcome of the work on this topic before its final adoption by the Commission.

(b) *Scope of the topic and use of terms*

173. Support was expressed for the Special Rapporteur's approach concerning the scope of the topic, as described in the note. In particular, several members agreed that the work on the topic should cover the formation and evidence of customary law in the various fields of international law.

174. Some members suggested, however, that the main focus of the Commission's work should be the means for the identification of rules of customary international law, rather than the formation of those rules. A view was expressed that the Commission should not attempt to describe how customary law was formed, but should focus on the more operational question of its identification, i.e. how the evidence of a customary rule was to be established. However, some members underlined that the formation and identification of customary international law were closely linked. The observation was also made that some clarification of the process of formation of customary law was of both theoretical and practical importance because of the character of customary law as the result of a process.

175. While recognizing the need, in considering the topic, to address the distinction between customary international law and general principles of law, it was suggested that definitive pronouncements on the latter should be avoided, as general principles possessed their own complexities and uncertainties.

176. Several members expressed support for not including a general study of *jus cogens* within the scope of the topic. The point was made that the notion of *jus cogens* presented its own difficulties in terms of formation, evidence and classification. It was also observed that determining the existence of a customary rule was a different question to determining if such a rule also possessed the additional characteristic of not being subject to derogation by way of treaty. Some members suggested that, should the Commission decide not to include *jus cogens* within the scope of the topic, it should explain the reasons. According to another opinion, the Special Rapporteur should reconsider his intention not to deal with *jus cogens* norms, as those norms were essentially customary in character. A view was also expressed that it would be premature to exclude, at that stage, an analysis of *jus cogens*.

177. The need to clarify certain terms relating to the topic was underlined. Some members supported the proposal of the Special Rapporteur concerning the elaboration of a short lexicon or glossary of relevant terms in the six official languages of the United Nations. Specific mention was made of the need to explain such terms as "general international law" and "law of nations", and their relation to the notion of custom.

(c) *Methodology*

178. Several members expressed support for the Special Rapporteur's proposal to focus on the practical aspects of the topic rather than on the theory; it was stated, in particular, that the Commission should not attempt to evaluate the correctness of various theoretical approaches

to customary international law. However, some members indicated that an analysis of the main theories would be useful to understand the nature of customary law and the process of its formation. The point was made that, in order to be seen as authoritative and as a useful tool for the international community as a whole in identifying rules of customary international law, the practical outcome that the Commission intended to seek had to be based on a thorough study, which could not avoid dealing in an adequate manner with certain theoretical issues and controversies regarding the topic.

179. Attention was drawn to the question of the intended audience, namely for whom the Commission was undertaking that work. In that regard, it was suggested that the subjective perspective of States, the "inter-subjective" perspective of a third-party decision maker and the objective perspective of a detached observer be duly differentiated in order to avoid confusion.

180. Some members supported the view of the Special Rapporteur that particular emphasis should be given to analysing the case law of international tribunals, and more specifically the International Court of Justice and its predecessor. Attention was drawn, however, to the need to consider also the case law of other international courts and tribunals, including regional courts, some of which had made a significant contribution in identifying customary rules in specific fields of international law, such as international criminal law or human rights law. Some members were of the opinion that the relevant case law should be appraised critically, including by drawing attention to any methodological inconsistency that might be identified in judicial pronouncements. It was suggested that jurisprudential divergences with respect to the identification of a rule of customary international law be also studied.

181. According to another view, overreliance on the case law of international courts and tribunals as a method of work for the purposes of the topic would be problematic in view of the "inter-subjective" context of judicial proceedings and of the limited number of areas covered by judicial precedents. The point was also made that, in many instances, international courts and tribunals did not indicate the reasoning on the basis of which the existence of a rule of customary law was asserted.

182. Some members referred to the need to research and analyse relevant State practice—including the jurisprudence of domestic tribunals—as well as practice of other subjects of international law, such as international organizations. The importance for the Commission to base its work on contemporary practice was emphasized, as well as the need to take into account the practice of States from all of the principal legal systems of the world and from all regions.

183. It was suggested that, in addition to the work undertaken by the International Law Association[327] and by ICRC,[328] and to the previous work of the Commission itself[329] that could be relevant to the topic, special attention be given to other work done in that field by individual researchers, academic institutions or learned societies. More generally, the importance of utilizing relevant sources from the various regions of the world, also representing the diversity of legal cultures, and in various languages was underlined.

(d) *Points to be covered*

184. Some members suggested that the work on the topic should focus on an analysis of the elements of State practice and *opinio juris*, including their characterization, their relevant weight and their possible expressions or manifestations in relation to the formation and identification of customary international law. It was suggested that consideration be given, in particular, to the extent to which those two elements were relied upon by courts and tribunals, including the International Court of Justice and its predecessor, as well as by States when making their arguments regarding the existence or non-existence of a rule of customary international law, whether before courts or within diplomatic forums.

185. Support was also expressed by some members for reviewing the origins of Article 38, paragraph 1 (*b*), of the Statute of the International Court of Justice, by focusing on the *travaux* associated with the corresponding provision in the Statute of the Permanent Court of International Justice, and for studying the way in which that provision was understood by courts and tribunals, and within the international community more generally.

186. It was proposed that the Commission consider the extent to which the process of formation of rules of customary international law had changed as a result of the profound modifications—including the significant increase in the number of States—that had occurred in the international legal system during the second half of the twentieth century; it was further suggested that those changes might have complicated, to a certain extent, the study of the formation and evidence of customary international law.

187. The question whether there were different approaches to customary law in various fields of international law was alluded to during the discussions. In that regard, the view was expressed that this question should not be answered *a priori* but on the basis of a thorough study of relevant practice.

188. The question of the degree of participation by States in the formation of rules of customary international law was mentioned by several members. Referring, in particular, to situations in which the conduct of a particular State

[327] "London statement of principles applicable to the formation of general customary international law" (with commentary), adopted in resolution 16/2000 (Formation of general customary international law) on 29 July 2000 by the International Law Association; see *Report of the Sixty-ninth Conference, London, 25–29 July 2000*, p. 39. For the plenary debate, see pp. 922−926. The "London statement of principles" is at pp. 712−777, and the report of the working session of the Committee on Formation of Customary (General) International Law held in 2000 is at pp. 778−790.

[328] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (see footnote 326 above).

[329] See, in particular, report of the International Law Commission on the work of its second session, *Yearbook ... 1950*, vol. II, document A/1316, paras. 24–94 (Ways and means for making the evidence of customary international law more readily available).

or group of States might require special attention in the customary process, the point was made that the concept of "specially affected States" as well as the concept of "persistent objector" were important, as they attempted to mediate between values of community and those of sovereignty in international law; thus, the Commission should avoid upsetting the equilibrium between those values that the current system seemed to provide. According to another view, those two concepts required thorough study by the Commission.

189. While indicating that the Commission should not become tied up in theoretical distinctions that ultimately had no practical value, it was observed that the age-old debate about "words" versus "actions" operated on a very practical level with respect to instances where certain rules of customary international law were asserted, not on the basis of the establishment of actual, operational practice of all or of a majority of States, but by relying on surrogates. Those instances occurred in two specific situations, namely when the assertion of a rule was based on the adoption by States of a resolution or on the existence of a widely ratified treaty. The hope was expressed that the outcome of the Commission's work on that topic could provide guidance and clarification with respect to those two arenas.

190. A number of other points were mentioned as deserving attention in the consideration of that topic. They included, *inter alia*, the relationship between custom and treaty, including the impact of widely ratified though not universal treaties, questions raised by article 38 of the 1969 Vienna Convention, and possibly also the role of customary international law in the interpretation of treaties; the effect of codification treaties on the identification of customary rules; the relationship between custom and general international law, general principles of law and general principles of international law; the effect of resolutions of international organizations; more generally, the role of the practice of subjects of international law other than States, in particular international organizations such as the European Union; the relationship between "soft law" and custom, and between *lex lata* and *lex ferenda*; the importance to be accorded, or not, to inconsistent practice in the formation and identification of rules of customary international law; the relevance of the notion of opposability and the possible role of acquiescence, silence and abstentions in the process of formation of rules of customary international law; the role played, in that process, by unilateral acts such as protest and recognition; the respective conditions for the formation and for the modification of a rule of customary international law; the possible effects of reservations to treaties on rules of customary international law; the role of regional practice and its relation to international law as a system; as well as the relationship between regional and general customary international law.

(e) *Final outcome of the Commission's work on the topic*

191. Broad support was expressed for the Special Rapporteur's proposal concerning the elaboration of a set of conclusions with commentaries. The point was made that any such conclusions should not prejudice future developments concerning the formation of customary international law. It was also suggested that the Commission begin its work by drafting propositions with commentaries, which might become conclusions at a later stage.

3. Concluding remarks of the Special Rapporteur

192. The Special Rapporteur observed that, overall, the members of the Commission who had taken the floor welcomed the topic, and that the preliminary views expressed by them confirmed the main thrust of the note of the Special Rapporteur. Attention had been drawn, *inter alia*, to the importance of customary international law within the constitutional order and the internal law of many States and to the usefulness of the Commission's work for domestic lawyers. At the same time, it had been rightly noted that the reaction of the broader international community was important for the standing of the Commission's work on this topic.

193. A view had been expressed casting serious doubts about the topic, suggesting in particular that it was impractical, if not impossible, to consider the whole of customary international law even on a very abstract level, and that the contemplated outcome would either state the obvious or state the ambiguous. The Special Rapporteur indicated that it had never been the aim, under this topic, to "consider the whole of customary international law", or indeed any of it, in the sense of examining the substance of the law; the Commission was only concerned with "secondary", or "systemic", rules on the identification of customary international law. He also recalled a point made during the discussions, namely that what might be obvious for some lawyers was not necessarily obvious for everyone, and not even for the vast range of lawyers, many of them not experienced in international law, who found themselves confronted by issues of customary international law. Moreover, the alleged ambiguity problem could be avoided by elaborating a clear and straightforward set of conclusions relating to the topic, accompanied, whenever necessary, by appropriate saving clauses—a technique to which the Commission had often resorted.

194. The Special Rapporteur was aware of the inherent difficulty of the topic and of the need to approach it with caution. He also hoped that the Commission would not be "overambitious", and he intended to work towards an outcome that was useful, practical and hopefully well received. There appeared to be a widespread view that such an outcome was needed.

195. The Special Rapporteur did not entirely understand the proposed differentiation between subjective, "intersubjective" and objective perspectives. If law was to have any meaning, the accepted method for identifying it must be the same for all. A shared, general understanding was precisely what the Commission might hope to achieve.

196. On the scope of the topic, there seemed to be general agreement with the approach suggested in the note of the Special Rapporteur, subject to a proper understanding of what was meant by the terms "formation" and "evidence". Whatever the words used, the Special Rapporteur

was of the view that the topic should cover both the method for identifying the existence of a rule of customary international law and the types of information that could be used for that purpose, as well as the possible sources of such information.

197. As the topic progressed, the Commission could revert to the question of whether and to what extent *jus cogens* should be considered under this topic—a question on which divergent views had been expressed.

198. The Special Rapporteur noted that wide support had been expressed for developing a uniform terminology, with a lexicon or glossary of terms in the various United Nations languages.

199. He also observed that there seemed to be broad agreement that the ultimate outcome of the Commission's work on that topic should be practical. The aim was to provide guidance for anyone, and particularly those not expert in the field of public international law, faced with the task of determining whether a rule of customary international law existed. It seemed to be widely agreed that the final outcome of the Commission's work should be a set of propositions or conclusions, with commentaries. It would not be appropriate for the Commission to be unduly prescriptive, since, as various members had emphasized, it was a central characteristic of customary international law, one of its strengths, that it is formed through a flexible process. It also seemed to be widely accepted that it was not the Commission's task to seek to resolve theoretical disputes about the basis of customary law and the various theoretical approaches to be found in the literature to its formation and identification. At the same time, the Special Rapporteur accepted the point made by some members that the eventual practical outcome of the Commission's work on the topic, in order to be regarded as to some degree authoritative, must be grounded in detailed and thorough study, including of the theoretical underpinnings of the subject. The Special Rapporteur nevertheless believed that, at least initially, the main focus should be to ascertain what courts and tribunals, as well as States, actually did in practice. In that connection, he fully agreed with those members who had stressed the need to have regard to the practice of States from all of the principal legal systems of the world and from all regions. He likewise shared the view of those members who had emphasized the importance of drawing on writings from as wide a range of authors as possible and in the various languages.

200. Concerning the tentative schedule for the consideration of the topic during the present quinquennium, the Special Rapporteur recognized that the projected reports for 2014 and 2015 might prove overambitious, although he did think that it was important to approach State practice and *opinio juris* at the same time, given their interconnection.

201. The Special Rapporteur expressed the hope that the Commission would be ready to mandate the Secretariat to prepare, if possible in time for the sixty-fifth session (2013), a memorandum identifying elements in the previous work of the Commission that could be particularly relevant to the topic.

202. In conclusion, the Special Rapporteur had taken careful note of the various suggestions for what might be covered under the topic. Those would be reflected in his future reports.