

Chapter VII

FORMATION AND EVIDENCE OF CUSTOMARY INTERNATIONAL LAW

A. Introduction

63. 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 Sir Michael Wood as Special Rapporteur.³⁸⁰ At the same session, the Commission had before it a note by the Special Rapporteur.³⁸¹ 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.³⁸²

B. Consideration of the topic at the present session

64. 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 on the topic by the Secretariat (A/CN.4/659). The Commission considered the report at its 3181st to 3186th meetings, from 17 to 25 July 2013.

65. At its 3186th meeting, on 25 July 2013, the Commission decided to change the title of the topic to “Identification of customary international law”.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF THE FIRST REPORT

66. The first report, which was introductory in nature, aimed to provide a basis for future work and discussions on the topic, and set out in general terms the Special Rapporteur’s proposed approach to it. The report presented, *inter alia*, a brief overview of the previous work of the Commission relevant to the topic and highlighted some views expressed by delegates in the context of the Sixth Committee during the sixty-seventh session of the General Assembly. It also discussed the scope and possible outcomes of the topic and considered some issues concerning customary international law as a source of law. It proceeded to describe the range of materials to be consulted and to outline a proposed programme for the Commission’s future work on the topic.

³⁸⁰ At its 3132nd meeting, on 22 May 2012 (see *Yearbook ... 2012*, vol. II (Part Two), 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 I to the report of the Commission on its work at that session (*Yearbook ... 2011*, vol. II (Part Two), paras. 365–367, and annex I).

³⁸¹ *Yearbook ... 2012*, vol. II (Part One), document A/CN.4/653. See also *ibid.*, vol. II (Part Two), paras. 157–202.

³⁸² *Ibid.*, vol. II (Part Two), para. 159.

67. 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 described elements in the previous work of the Commission that could be particularly relevant to the topic, would be of substantial assistance. In particular, the memorandum’s observations and explanatory notes would constitute important points of reference for the Commission’s future work.

68. The Special Rapporteur was fully aware of the complexities involved in the 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 should 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.

69. In the light of the proposed focus on the method of identifying customary rules, and since the 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 existed. The Special Rapporteur further reiterated his preference not to deal with *jus cogens* as part of the scope of the present topic.

70. 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 sources of international law. The Special Rapporteur then addressed the relationship between customary international law and other sources of international law. While observing that the relationship of customary international law 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.

71. 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 of 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 Institute of International Law and the ICRC, along with ensuing debates and writings, would be of interest.

72. 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 to deal with *jus cogens*.

2. SUMMARY OF THE DEBATE

(a) General comments

73. 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 were not experts 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 of the Commission that work on this topic should not be unduly prescriptive, as the flexibility of the customary process remained fundamental. 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.

74. Some members commented on the need to identify the added value that the Commission could offer on this topic and to distinguish work on this topic from the prior work of the Commission and of other entities. In this regard, it was suggested that 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.

75. 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 had 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 therefore generally welcomed.

(b) Scope of the topic

76. A preliminary matter that raised issues relating to scope was the title of the topic. Several members agreed with the Special Rapporteur's proposal to change the title from "Formation and evidence of customary international law" to "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 therefore 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 within the scope of the topic.

77. There was general agreement that the main focus of the Commission's work should be to clarify the common approach to identifying the formation and evidence 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 formation 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 to 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.

78. Several members agreed with the proposal not to undertake a 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 the existence of a rule of customary international law was a different question from whether such a rule also possessed the additional characteristic of not being subject to derogation by way of treaty. It was also noted that a proposal had been made for a possible new topic on *jus cogens*. 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 to address the issue of the hierarchy of sources of international law, including treaty law and *jus cogens*.

79. Several members agreed with the Special Rapporteur's proposal 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 to 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.

80. 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 or generate rules 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 work on the topic, as a thorough analysis of the constitutive elements of customary international law was first required.

81. 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.

82. 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 that of individual States.

(c) Methodology

83. Broad support was expressed for the Special Rapporteur's proposal to consider both the formative elements of customary international law, i.e. the elements that give rise to the existence of a rule of customary international law, and the requisite criteria for proving the existence of such elements. General support was also expressed for the proposed focus on the practical process of identifying rules of customary international law, rather than on 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.

84. Broad support was also expressed for the Special Rapporteur's proposal carefully to examine State practice and *opinio juris sive necessitatis*, 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.

85. Attention was drawn to the need to study carefully 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.

86. 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.

87. A view was expressed that the approach proposed by 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 Special Rapporteur's proposal 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, paragraph 1 (b), of the Statute of the International Court of Justice, 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 that give customary international law its binding nature.

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

89. A number of members recommended that the Commission should 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 ICRC, 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*

90. 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 in the relative weight accorded to different materials.

91. 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. 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 should research the decisions of national courts, statements of national officials and 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 should consider the analysis of legal advisers to governments, and also the relevance of confidential exchanges of views between States.

92. With regard to the jurisprudence of national courts, several members agreed that such cases should be approached cautiously and 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.

93. 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 International Court of Justice. Some members expressed the view that the jurisprudence of the Court may be considered the primary source of material on the formation and evidence of rules of customary international law, as it constitutes the principal judicial organ of the United Nations and its authoritative status on such matters is 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.

94. 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.

95. 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.

96. 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 a role in the emergence of rules of customary international law.

97. 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*

98. 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.

99. 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 might 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 workplan 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.

100. 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 was not advisable since a general phrase such as "rules of international law" might 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 might 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.

3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

101. The Special Rapporteur observed that there was general agreement that the outcome of work on this topic should be of an essentially practical nature. In that regard, there was broad support for the elaboration of a set of “conclusions” with commentaries. He 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 might sometimes be “closely entangled”, and that the relative weight to be given to each might vary depending on the context.

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

103. 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 law. There was also widespread interest in considering 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.

104. With regard 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 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.

105. The Special Rapporteur was aware that his proposal to conclude work on the topic by 2016 might not be feasible; there had to 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.

106. 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 “*Détermination du droit international coutumier*” in French. The Special Rapporteur recommended that the title be changed accordingly.

107. 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.