

## Formation and Evidence of Customary International Law

(Michael Wood)

30 July 2012

Mr. Chairman,

1. I should like to thank all the Members of the Commission who took part, last week, in our first debate on the new topic 'Formation and evidence of customary international law'. I found the debate very helpful, and have taken careful note of all that was said. The various suggestions will be reflected in due course in my reports.
2. Mr. Chairman, overall the Members of the Commission who spoke welcomed the topic; it was referred to as 'important and topical'. The preliminary views expressed by Members by and large confirm the main thrust of my preliminary Note. They drew attention, among other things, to the importance of customary international law within the constitutional order and the domestic law of many States. As Mr. Tladi said, domestic judges 'at all levels, whether schooled in international law or not, have to apply it.' That word - 'schooled' - reminds us of how important it is that public international law should form part of the core curriculum at law schools, something that is not always the case. And it reminds us of the need for public international law to be part of continuing legal education, for lawyers and judges alike. At the same time, I also take Mr. McRae's point that the reaction of the broader international law community is important for the standing of our work. Not that we can hope to satisfy everyone, especially not all those at universities who, no doubt quite rightly, live on disputation.
3. The first speaker in the debate, Professor Murase, had 'some serious doubts about [the] topic' and suggested that it was 'impractical, if not impossible, to consider ... the whole of customary international law even on a very abstract level.' He was, and I quote, 'quite critical of this issue as a result of [his] participation on the ILC Committee on the "Formation of Customary International Law"' between 1985 and 2000'. In his view, we are, and again I quote, 'doomed to fail, because, at the end of the day, we will end up either stating the obvious or stating the ambiguous.'
4. One preliminary answer to the thought that we might be stating the obvious was given on Friday by Mr. Gevorgian: what is obvious for us is not necessarily obvious for everyone. A clear and straightforward set of conclusions relating to this topic by the Commission might well be an important reference for the vast range of lawyers, many of them not experienced in international law, who find themselves confronted by issues of customary international law.

5. As for ambiguity, Mr. Murase's point seemed to be that we would not find it possible to reach conclusions that could apply across the whole field of customary international law, including the 95 per cent which, in his view, had not been covered by the International Court of Justice: at least, we could not do so without a lot of saving clauses. That seems to challenge the unity of the law. In any event, saving clauses are not necessarily a bad thing. Indeed, they can sometimes be very useful, not least in the Commission's work. I think I counted 17 saving clauses in the Articles on State Responsibility, which is one of the most cited of the Commission's texts.
6. As I said last Tuesday, I am fully aware of the inherent difficulty of the topic, and the need to approach it with a degree of caution. It has been referred to in our debate as 'challenging', 'daunting', 'so interesting and so difficult', 'a Herculean task'. I can assure colleagues that I too hope that the Commission will not be 'over-ambitious'. I will work towards an outcome that is useful, practical, and hopefully well-received. There appears to be a widespread view that such outcome is needed and, provided it is well done, will be welcomed.
7. It was not, of course, the aim under this topic to 'consider the whole of customary international law', or indeed any of it, in the sense of considering the substance of the law. We are chiefly concerned with what last Tuesday I termed secondary rules, though perhaps a better term might be systemic rules, concerning the identification of customary international law.
8. Professor Murase also suggested that we needed to look at possible 'intended [or 'target'] audiences'. I must confess that I do not entirely understand the relevance for our work of his differentiation between subjective, 'inter-subjective' and objective 'perspectives'. That seems to me to come close to a denial of law. If law is to have any meaning, the accepted method for identifying it must be the same for all. A shared, general understanding is precisely what we might hope to achieve. In his description of the approach of the International Court of Justice in one case, Mr. Murase suggested that 'the Court was primarily concerned with the customary status of the relevant rule as asserted by the parties'. This is a view of the judicial function that I must confess I do not recognise; courts do not feel bound to determine the existence of a rule of customary international law based solely on the arguments advanced by one or even both of the parties who appear before it. Rather, courts have a theory as to what customary international law is and how it is formed, which is brought to the bench regardless of what the parties say. Interestingly, Judge Abraham, at paragraph 22 of his Separate Opinion in the recent *Belgium v. Senegal* case, also seems to have rejected the 'inter-subjective' perspective. Judge Abraham said, and this is my rough translation:

‘Since it is a matter of rules which, if they exist, have a universal scope, it is obvious that it is not sufficient that the two parties present before the Court are in agreement on their existence and, if so, their scope, for the Court to register this agreement and apply the supposed rules in question. It is always for the Court to say what the law is and to do so, as necessary, *ex officio*....’

[‘*S’agissant de règles qui, si elles existaient, auraient une portée universelle, il tombe sous le sens qu’il ne suffit pas que les deux parties présentes devant la Cour soient d’accord sur leur existence et, le cas échéant, sur leur portée, pour que la Cour enregistre cet accord et fasse application des prétendues règles en cause. C’est toujours à la Cour de dire ce qu’est le droit et de le faire, au besoin, d’office ....*’]

9. Mr. Chairman, I shall now try to indicate the main points I take from the debate for the future direction of our work. First, there seems to be broad agreement that the ultimate outcome of the Commission’s work on this topic should be practical. The aim is to provide guidance for anyone, and particularly those not expert in the field of public international law, faced with the task of determining whether or not a rule of customary international law exists. It seems to be widely accepted that it is not our 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. As Mr. Hmoud said, practice is the cornerstone of the topic, not theory. At the same time, I take the point made by Mr. McRae and others that our eventual practical outcome must be grounded in detailed and thorough study, including of the theoretical underpinnings of the subject, if it is to be accepted as to some degree authoritative. My point was simply that we should not be diverted down theoretical byways. That is why I believe that at least initially the main focus should be to ascertain what courts and tribunals, as well as States, actually do in practice. In this connection, I fully agree with Mr. Petrič, Mr. Kamto and others who rightly stressed the need to have regard to practice of States from all of the principal legal systems of the world and from all regions.
10. Next, it seems to be agreed that the outcome of the Commission’s work on this topic should be a set of propositions, conclusions or guidelines – the actual term to be used is perhaps not so important and can be decided later. For now, I shall refer to ‘conclusions’, which I think is quite neutral. As I said in my introduction last Tuesday, the Commission will not be drafting a ‘Vienna Convention on Customary International Law’. It would not be appropriate to seek to be unduly prescriptive. As many speakers emphasised, it is a central characteristic of customary international law, one of its strengths, that its formation is a flexible process. I do not, however, agree with the position expressed by one member that “[a]mbiguity is part of the essence, and probably the *raison d’être*, of customary international law.” That seems to be a statement about the substance of the law, as much as about the process of identification. I cannot agree that ambiguity in the rules of international law is an inherently good quality. That is not the way to assure the rule of law in

international affairs. Flexibility in the process of formation of customary law should not lead to ambiguity in the substance of the law.

11. It was pointed out in the debate that approaches to customary international law may change over time, with changes in international society, and therefore we should be careful not to freeze the process. That may be true, but at the same time, as was also said in the debate, our objective is to explain the current process; in Mr. Murphy's words, it is 'to help to clarify the current rules on formation and evidence of international law, not to advance new rules'.
12. On the scope of the topic, there seems to be general agreement with what is said at paragraphs 20 to 22 of the preliminary Note, subject to a proper understanding of what is meant by the terms 'formation' and 'evidence' a matter to which I shall return in a moment.
13. There was a general welcome for an effort to develop a uniform terminology, with a lexicon or glossary of terms in the various UN languages.
14. There were divided views on whether we should open what Mr. Park referred to as the Pandora's box of *jus cogens*. Most speakers seemed to think that we should not address *jus cogens* head on, explaining why not, though we might need to refer to it in relation to particular aspects of the project. But some were of a different view. This is something we can always come back to as the topic progresses.
15. Mr. Chairman, in the course of the debate we heard a large number of suggestions for what might be covered under the topic. I shall not seek to list them comprehensively, but they include:
  - The need to study the origins of article 38.1 (b) of the Statute of the International Court of Justice (or rather the corresponding provision of the Statute of the Permanent Court of International Justice), and how it has been understood by the courts;
  - the relationship between custom and treaty, including the impact of widely ratified though not universal treaties; in this connection article 38 of the Vienna Convention on the Law of Treaties is particularly relevant.
  - the relationship between custom and general principles of law;
  - the distinction between customary international law and general international law;
  - the question of regional custom;
  - 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;

- the extent to which approaches may differ in different areas of the law. Mr. Hmoud pointed to the inconsistency between what I say in this regard in paragraph 22 and footnote 16 of the Note, though he was too polite to call it that. Let us just say that for now I have an open mind with regard to this.
  - the importance, or not, to be accorded to inconsistent practice;
  - the relevance of acquiescence, silence and acts of omission;
  - the concepts of ‘specially affected States’ and ‘persistent objector’.
16. A number of colleagues commented on the title of the topic, ‘Formation and evidence of customary international law’, and in particular the use of the two words ‘formation’ and ‘evidence’, including the translation of ‘evidence’ into other languages. Whatever the words used, it seems to me that the topic should cover both the method for identifying the existence of a rule of customary international law (for example, State practice plus *opinio juris sive necessitatis*) as well as the types of information that can be used as the raw material in conducting an analysis of customary international law and where it is that such information may be found. Getting the title right so that it reflects as clearly as we can what we have in mind under this topic is important. We shall need to bear in mind the issues raised as we proceed. As I understand it, it was suggested by Professor Forteau and others that the main issue to be addressed under the topic was the method to be followed for the identification of existing rules of customary international law. That is indeed my view, and it may be that ‘identification’ would have been a better word to use in the title of the topic also in English. In any event, I am happy that this word will be used in at least the French and Russian versions of the title. We can adjust the English version at a later stage, if it seems helpful to do so. For the time being, I agree with those who think that the inclusion of ‘formation’ is useful. Determining whether or not an alleged emerging rule exists may well involve a consideration of the modalities of the formation of customary rules in international law. As some speakers said, the two aspects cannot be entirely separated; in Mr Wisnamurti’s words they are ‘closely related’.
17. Mr. Hassouna suggested that we might wish to reappraise the Commission’s 1950 report on ways and means of making the evidence of customary international law more readily available. That report was prepared at the very outset of the Commission’s work, in implementation of the mandate in article 24 of our Statute. That report has stood the test of time, and is still the basis for important on-going activities.
18. Ms. Escobar Hernández asked two specific questions. The first concerned paragraph 16 of the preliminary Note, where I say that it could be useful to discuss briefly customary international law ‘as law’. I apologize for the elliptical nature of this remark. What I had in mind was the need to respond, albeit briefly, to those whom Mr. McRae referred to as ‘naysayers’, that is those who seem to deny the binding force of customary international law. Mr. Nolte also alluded to this in his

remarks. The second question related to paragraph 18 of the Note, with its reference to ‘codification efforts by non-governmental organizations’. Again, I apologize for the obscurity of the language. What I had in mind here was, first, the International Law Association, and then any other collective efforts of a non-governmental nature, including the ICRC and the *Institut de droit international*. There are clearly lessons that we could learn from private bodies, always however bearing in mind that our particular position, as a UN organ, gives us a special authority and role.

19. Many colleagues emphasised the importance of drawing on writings from as wide a range of authors as possible, and in the various languages. I fully share this view, and will do my very best. I look forward to assistance from Members of the Commission, such as the offer made by Professor Nolte, and perhaps also from those organizations with whom we have a close relationship, such as the Asian-African Legal Consultative Organization, the African Union’s Commission on International Law, the Council of Europe’s Committee of Legal Advisers in Public International Law, and the Inter-American Juridical Committee.
20. There was broad agreement on the proposed plan of work for the quinquennium, though it was acknowledged to be ambitious and will need to be approached flexibly. As Mr. Kamto said, it is purely indicative and subject to adjustment. I certainly take the point that the projected reports for 2014 and 2015 may in the event prove over ambitious, though I do think it is important that we approach State practice and *opinio juris* at the same time, given the interconnections between them. And we should certainly bear in mind what Ms Escobar Hernández said about the importance of ensuring that States have an opportunity to comment on the complete set of conclusions or guidelines before we finally adopt them.
21. Mr. Chairman, and notwithstanding Mr. McRae’s doubts on Friday, I do think it would be useful for the Commission now to ask States for certain information about their practice that we could not otherwise readily obtain. A number of speakers made the entirely valid point that we should not rely exclusively on the pronouncements of international courts and tribunals, but that we should pay particular attention to State practice including the practice of all organs of the State. I have taken due note of the comments of Ms. Jacobsson and Mr. Gervorgian on the language in footnote 14 of my preliminary Note. As a result I suggest that the request to States be simplified along the lines of:

“The Commission requests States for information on their State practice relating to the formation of customary international law and the types of evidence suitable for establishing such law in a given situation. Such practice might include (a) official statements before legislatures, courts and international organizations; and (b) decisions of national, regional and sub-regional courts.”

We can consider the precise formulation, and indeed the timing, of any such request later this week when we come to consider Chapter III of our annual report to the General Assembly. My own preference would be to ask for this information now; the sooner we receive it the better.

22. Finally, Mr. Chairman, I hope that the Commission will be ready to mandate the Secretariat to prepare, if possible in time for our next session, a memorandum identifying elements in the previous work of the Commission that could be particularly relevant to this topic. I have discussed this with the Secretariat, and I understand that they would be able and willing to do this.

23. Mr. Chairman, in conclusion, let me once again thank the Members of the Commission for their interest in this topic and for their very useful contributions to this debate. As I said at the outset, I shall study all that has been said very carefully as I come to prepare my first report.

24. I thank you, Mr. Chairman.