Formation and Evidence of Customary International Law

(Michael Wood)

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Mr. Chairman,

1. I begin by thanking the Members of the Commission for having appointed me Special Rapporteur for the topic 'Formation and evidence of customary international law'. I shall try to live up to the responsibilities that follow from this appointment.

2. Uncertainty about the process of formation of rules of customary international law is sometimes seen as a weakness in international law generally. It is an easy target for those who seek to play down the importance and effectiveness of international law - some even deny its nature as law, a position taken by John Austin nearly 200 years ago, but not unknown in some quarters even today. So perhaps our study of this topic will contribute towards the acceptance of the rule of law in international affairs.

3. A more prosaic reason for engaging in this topic is to offer guidance - guidance not prescription - to those who, while not necessarily specialists in international law, are called upon to apply it. I think in particular of judges in domestic courts, not only in the highest courts but in lower courts too. And some arbitrators, for example in investment cases, may also have little instinctive understanding of how to identify rules of customary international law. Explaining to a judge, especially a domestic judge, why something is, or is not, a rule of customary international law can be quite challenging when there is no firm reference point, no North Star, apart from some rather brief pronouncements of the International Court. Guidance may also be helpful for lawyers operating primarily within national systems, who may come across public international law occasionally in their day-to-day work. So I hope that what we do under this topic will come to have practical importance, and will assist judges and lawyers practicing across a wide range of fields.

4. I shall now turn to the Note dated 31 May 2012, which is in document A/CN.4/653. This Note needs to be read together with Annex A to the Commission's Annual Report to the general Assembly for 2011. Annex A, among other things, contains rather an extensive, but by no means comprehensive, list of materials and writings.

5. In the introduction to the Note, I recall that the proposal was discussed within the Working Group on the Long-term Programme of Work in 2010 and 2011. My thinking on the topic has thus already benefited from useful input from present and former Members of the Commission, for which I am very grateful. And I look

forward to more input, even if only preliminary, during the present debate. Like all topics on our agenda, this is a collective endeavour.

6. The aim of the Note is to stimulate an initial debate. Section II lists seven 'preliminary points' that might be covered in a report in 2013. These points are on various levels, and of varying degrees of importance, but in my view each should be covered. The first, point A, concerns the previous work of the Commission relevant to the new topic. This refers in particular to the ground-breaking work that our predecessors did in 1949/1950, as almost their first task, a task prescribed in article 24 of the Commission's Statute. That work was very practical, and is of continuing relevance today. It is still the basis for many of the UN's publications in the field of international law, including some of admirable publication efforts the Codification Division.

7. There may, in addition, be much to learn from the Commission's work on other topics, especially when it was engaged largely in codification. Over the years the Commission presumably had considerable experience in identifying rules of customary international law. Given its dual mandate of progressive development and codification, I am not sure how easy it will be to identify the Commission's practice in this regard but I think we should try.

8. At point B in section II of the Preliminary Note, I drew attention to the 'London Statement' of the International Law Association. That Statement may be of interest when we are considering the form of our output on this topic. It may also be useful in indicating the range of issues that need to be covered, or not covered. But we must bear in mind that that exercise dates from the 1990s, and no doubt reflected the particular views of the ILA rapporteurs and committee members. How far we will reach similar conclusions to those reached in 2000, some of which proved to be controversial, remains to be seen. We shall also need to look at such other efforts as there may have been to deal with the subject comprehensively.

9. I do not think I need add anything to what I have said under points C to F in section II. These concern Article 38 of the Statute of the International Court of Justice; questions of terminology; the continuing importance of customary international law (something that has been particularly evident in our debates this year); and the various theories of the formation of customary international law, such as the supposed distinction between 'traditional' and 'modern' approaches. On this last point, I might say that personally I hope that we shall not find ourselves spending too much time on theory, and that we focus mainly on practical aspects of the topic.

10. Which brings me to preliminary point G, methodology. Here, as you will see at paragraph 18, I give particular emphasis to the approach of the International Court of Justice and its predecessor, the Permanent Court of International Justice. In addition to what the Court says about methodology, we need to see what it has done in practice

in particular cases, what it takes into account and, at least as important, what it does not take into account, when considering whether a rule of international law exists. We shall also need to look at the approach of other international courts and tribunals, and of domestic courts.

11. The practice of States on the formation of customary international law, while no doubt extensive, may not be that easy to identify. States rarely articulate their views on the formation of customary international law, except when they are involved in litigation. (How far what they say in the course of litigation represents their practice is an interesting question.) We should nevertheless attempt to identify when it is that States see themselves as legally bound by international custom.

12. The experience of those who have tried to identify customary international law in particular fields could make a significant contribution to our topic. This includes, for example, the authors of the 2005 Study commissioned by the ICRC on Customary International Humanitarian Law, which is on-going.

13. The works of writers on the formation of customary international law may shed important light as well. All the basic textbooks address the matter. There are some important monographs. And there is a vast array of articles, many covering the identification of rules in particular fields. There are probably as many different theories about the relationship of practice to *opinio juris* as there are writers on the subject. For example, a major issue dividing the writers is whether to regard statements as State practice combined with *opinio juris*, or only as indicating *opinio juris*. Some come to the conclusion that State practice and *opinio juris* are not really two things that always have to be proved separately, as opposed to two separate requirements which may be combined. Such different approaches sometimes lead to the similar results, but this is not always the case.

14. Section III of the Note looks at the scope of the topic and possible outcomes. These are related but distinct issues. I do not myself think there are particular difficulties concerning the scope of the topic. But I should nevertheless be grateful for confirmation that what I have said at paragraphs 20 to 22 is generally shared.

15. At paragraph 23 I ask whether we should cover the formation and identification of *jus cogens*. *Jus cogens* is an important issue, and one prone to great misunderstanding, with often quite serious results. I have an open mind on whether we should seek to deal with it. It would certainly be interesting and challenging to do so. But, as you will see from paragraph 23, my initial thinking is that it does not really belong in the present topic.

16. My tentative view of how to proceed is set out in paragraphs 24 to 27 of the Note. On the possible form of the eventual outcome of our work, I suggest at paragraphs 24 and 25 that this could be a set of 'conclusions' with commentaries. But I am not in any

sense wedded to that description. 'Guidelines' might be an equally appropriate term. Whatever they are called, the conclusions or guidelines should not be unduly prescriptive. We need to find the right balance between specific and helpful guidance on the one hand, and the avoidance of unduly restrictive rule-making on the other. This seems to accord with views expressed in the Sixth Committee, as briefly described in paragraph 3 of the Preliminary Note). The Commission will not be drafting a 'Vienna Convention on Customary International Law'. A Convention would scarcely be appropriate in this field, and would not be consistent with the need to retain the necessary degree of flexibility.

17. Nor, I believe, would we wish to be as comprehensive as our predecessors were over the law of treaties. The Commission worked on the draft articles on that subject over an extended period, some 16 years. Sixteen reports were produced by four Special Rapporteurs. By contrast, I would like us to aim to complete the work on the present topic within the present quinquennium, if possible.

18. I am of course fully aware of the inherent difficulty of the topic, and the need to approach it with a degree of caution. But I would nevertheless like us to aim for an outcome that is relatively straightforward and clear. The outcome should be one that is understandable by all those who are called upon to address rules of customary international law in their day-to-day work, who may well not be experts in public international law.

19. Mr. Chairman, my aim is modest in scope, but ambitious in timing. The topic, like the law of treaties, forms part of the secondary rules of international law, to use the terminology of the Commission in describing its draft articles on State Responsibility. I am not sure that much flows from that; the primary/secondary distinction is not always that clear. But to say that we are here addressing secondary rules does emphasise that it is not part of our task, under this topic, to determine substantive rules of law.

20. In my view it would be appropriate to seek certain information from Governments. This will be useful in itself, and it will help to engage governments in our work at an early stage. Footnote 14 in the Preliminary Note sets out my initial thinking on this. As I said there, such information could include (a) any official statements concerning the formation of customary international law; these might, for example, be in proceedings before international courts and tribunals, at the United Nations or within other international organizations, or in national parliaments; (b) any significant cases in national, regional or sub-regional courts shedding light on the formation of customary international law; and (c) any writings or work being done within universities and other institutions (beyond that listed in Annex A to last year's Annual Report).

21. It may be that Members of the Commission also have information on these and other matters. I would welcome any help that colleagues can give in this regard. Indeed, consistent with the collegiate nature of our work, I would encourage colleagues to let me have their thoughts at any time, and not only during our debates in plenary, important though these debates are.

22. That brings me to the question of a possible Secretariat study. Such studies have been invaluable in connection with other topics. After consultations with the Secretariat, I believe that, at this stage, it could be interesting if they could be requested to prepare a memorandum on the previous work of the Commission that is relevant to this topic. By giving examples, such a memorandum might throw light on the way in which the Commission has understood the notion of customary law in considering the state of the law regarding the topics that is has already considered. I would like to propose that the Secretariat be given a mandate to prepare such a memorandum.

23. The tentative schedule in section IV of the Note (paragraph 27) is just that, tentative, and will be subject to review next year when we see where we then stand. I would welcome initial views on that schedule.

24. Mr. Chairman, I look forward to hearing views of members of the Commission. They will undoubtedly be very helpful when I come to draft my first report.