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Introductory Remarks

Sir Michael Wood
Special Rapporteur of the International Law Commission

Madame Belliard, Chair of the Ad Hoc Committee of Legal Advisers in Public International Law (CAHDI),
Mr. Lezertua, Director of Legal Advice and Public International Law,
Distinguished guests and CAHDI participants,

It is a great pleasure to take part in this Conference on 'The Judge and International Custom', jointly organized here in Paris by the Ministry of Foreign Affairs of France and the Council of Europe. I look forward to greeting the Minister Delegate for European Affairs, M. Bernard Cazeneuve, who will be addressing us later this morning. It is much appreciated that he has found the time to attend our Conference despite his busy schedule.

The subject of this Conference interests me greatly. In May 2012 I was appointed Special Rapporteur of the International Law Commission for the topic *Formation and evidence of customary international law*.[1] The Commission's work on the topic is still at a very early stage. In late July, just before the end of this year's session, we had a brief but interesting debate[2] on the basis of a short preliminary Note.[3] My statement in the Commission summarizing the debate is annexed to these Introductory Remarks.[4]

The role of judges, national and international, in the identification of customary international law is a crucial and topical matter. I anticipate that a good deal of the Commission's work on the topic of 'Formation and evidence of customary international law' will be devoted to examining

1) *Report of the International Law Commission 2012*, paras. 156–202.

2) A/CN.4/SR.3148, 3050, 3051, 3052 (17, 24, 26 and 30 July 2012).

3) *Formation and evidence of customary international law, Note by Michael Wood, Special Rapporteur* (A/CN.4/653).

4) The summary record of this statement is in UN document A/CN.4/SR.3152 (30 July 2012), pp. 3–5.

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what it is that judges do when they are called upon to identify and apply rules of customary international law. This year alone we have had two decisions of the International Court of Justice that shed some light on this process. In *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*, the International Court of Justice restated, with some emphasis, its approach to the identification of customary international law, and referred in this connection to the role of national courts:

> It follows that the Court must determine, in accordance with Article 38 (1) *(b)* of its Statute, the existence of 'international custom, as evidence of a general practice accepted as law' conferring immunity on States and, if so, what is the scope and extent of that immunity. To do so, it must apply the criteria which it has repeatedly laid down for identifying a rule of customary international law. In particular, as the Court made clear in the *North Sea Continental Shelf* cases, the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris* (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 44, para. 77). Moreover, as the Court has also observed,
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> 'It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.' (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, pp. 29–30, para. 27.)
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> In the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention.[5]

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[5] Judgment, 3 February 2012, para. 55.

In *Questions Relating to the Obligation to Extradite or Prosecute (Belgium v. Senegal)*, the Court itself avoided getting into the issue raised by Belgium of the customary international law status of the *aut dedere aut judicare* principle, but individual judges, in particular Judge Abraham, had interesting things to say on the subject.[6] We see from recent cases that domestic courts often follow the International Court's lead.[7]

One of the main reasons for taking up the topic in the Commission was a feeling that it might be helpful to offer "authoritative guidance for those called upon to identify customary international law",[8] in particular for lawyers, including judges, who are not themselves primarily public international lawyers. I think, for example, of domestic judges, judges of the European Union judicature, those who sit on human rights instances, as well as those on more specialized international courts and tribunals, such as investment tribunals and international criminal courts and tribunals. Decisions of such courts and tribunals are not infrequently criticized as regards to their understanding and use of customary international law.[9]

I shall conclude my Introductory Remarks with three questions. No doubt many more will be raised in the course of this morning.

First, the place of customary international law differs within the various legal systems. It used often to be said, for example, that international law was part of the law of England, but that is a misleading statement of the position.[10] How does the place of customary international law within

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[6] Judgment, 20 July 2012, Separate Opinion of Judge Abraham, paras. 21–40.

[7] *Yong Vui Kong v. Public Prosecutor* [2010] 3 Singapore Law Reports 489; *Khurts Bat v. The Investigating Judge of the German Federal Court* [2011] EWHC 2029 (Admin); [2011] All ER (D) 293 (Jul); 147 *International Law Reports* 633 (judgment, 29 July 2011); *Mutua et al. v. Foreign and Commonwealth Office* [2011] EWHC 1913 (QB) (judgment, 21 July 2011); *Mutua et al. v. Foreign and Commonwealth Office* [2012] EWHC 2678 (QB) (judgment, 5 October 2012).

[8] *Report of the International Law Commission 2011*, Annex A, para. 4.

[9] See, for example, Rosalyn Higgins' questioning of the US Supreme Court in *Sabbatino* ('The Identity of International Law' in *International Law: Teaching and Practice* (ed., Bin Cheng, 1982), reproduced in *Themes and Theories. Selected Essays, Speeches, and Writings in International Law* (2009), p. 91, at p. 94); and the criticism of the Interlocutory Decision of 16 February 2011 of the Appeals Chamber of the Special Tribunal for Lebanon concerning the crime of 'terrorism' under customary international law (B. Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism', 24 *Leiden J. Int'l L.* 677–700 (2011)). See also Massimo Iovane, 'Domestic Courts Should Embrace Sound Interpretive Strategies in the Development of Human Rights-Oriented International Law', in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012) pp. 607–625.

[10] R. O'Keefe, 'The Doctrine of Incorporation Revisited', 79 *British Year Book of International Law* 7–85 (2009).

the particular system influence the judge or arbitrator's approach towards identifying and applying its rules?

Second, how do the judges and arbitrators of the various courts and tribunals set about determining the rules of customary international law? Is it, for example, a matter for argument, or for expert evidence? Where do the judges look for guidance on the process of formation of customary international law? To the decisions of the International Court of Justice? What light do judicial decisions in the various legal systems shed on the process?

Third, what role *should* domestic judges play in the development of customary international law? Here I would recall what Lord Hoffmann said in the *Jones and Mitchell* case in the House of Lords, a case now before the European Court of Human Rights.[11] Lord Hoffman referred to academic comment suggesting that the Italian Supreme Court in *Ferrini* had "given priority to the values embodied in the prohibition of torture over the values and policies of the rules of State immunity", and continued:

> if the case had been concerned with domestic law, [this] might have been regarded by some as 'activist' but would have been well within the judicial function.... But the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.[12]

Others have suggested that domestic judges have an important role in the development of customary international law.[13] Which is the right approach? Does the answer depend, at least to some extent, on which field of international law is in play?

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[11] *Jones v. United Kingdom* and *Mitchell & Others v. United Kingdom* (Application nos. 34356/06 and 40528/06).

[12] *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya; Mitchell and others v. Al-Dali and others and Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* [2006] UKHL 26, at para. 63.

[13] A. Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law', 60 *International and Comparative Law Quarterly* 57–92 (2011).

We have five distinguished keynote speakers from international and national courts. In order of speaking they are Peter Tomka, Judge and President of the International Court of Justice; Jiří Malenovský, Judge of the Court of Justice of the European Union; Ineta Ziemele, Judge of the European Court of Human Rights; Andreas Paulus, Judge of the German Federal Constitutional Court (*Bundesverfassungsgericht*); and Bernard Stirn, President of Section at the *Conseil d'Etat*, France. The intention is to publish the various contributions to this Conference, as was done with the Conference on '*International Courts and Tribunals – The Challenges Ahead*' held in October 2008, the end of the British chairmanship of CAHDI.[14]

[14] 'Selected Papers from the Conference *International Courts and Tribunals – The Challenges Ahead*, Lancaster House, London, 6–7 October 2008', Special Issue, 7 *The Law and Practice of International Courts and Tribunals* 257–362 (2008).