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 ILA 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