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**STATEMENT OF THE CHAIRMAN OF THE INTERNATIONAL  
LAW COMMISSION, MR. KIRILL GEVORGIAN**

*Part Three*

*Chapters X-XIII: Identification of customary international law; Protection of the environment in relation to armed conflicts; Provisional application of treaties; and The Most-favoured-Nation clause*

*Chapter X: Identification of customary international law*

Mr. Chairman,

I shall begin this third and final cluster with the introduction of **Chapter X** of the report, which concerns the topic “**Identification of customary international law**”. This year, the Commission had before it the second report of the Special Rapporteur, Mr. Michael Wood.

The second report addressed the “two-element” approach to the identification of rules of customary international law, and proposed eleven draft conclusions relating to the scope of the work and the role, nature and evidence of the two elements. All eleven draft conclusions were referred to the Drafting Committee and the Drafting Committee provisionally adopted eight draft conclusions. The Chairman of the Drafting Committee, delivered a statement to the plenary of the Commission on the work of the Drafting Committee on this topic, including a review of the eight draft conclusions provisionally adopted. That statement, dated 7 August 2014, is available on the website of the Commission. I would like to emphasize that those conclusions have not yet been considered or adopted by the Commission. It will consider them, along with accompanying commentaries next year.

For now, I will provide a brief overview of the second report and the plenary debate on the topic at this year's session. Paragraphs 137 to 148 of the report summarize the introduction of the second report by the Special Rapporteur. After addressing the scope and planned outcome of the topic, the second report focused on the basic approach to the identification of customary international law, as well as the nature and evidence of its two constituent elements, namely "a general practice" and "accepted as law".

A more detailed summary of the debate on the second report is contained in paragraphs 149 to 171. The debate addressed issues relating to the overall direction and scope of the work, the use of terms, the basic approach to the identification of rules of customary international law, and specific comments on the two elements and associated draft conclusions.

There was broad support for the **overall direction and approach** of the Special Rapporteur, and the two-element approach was welcomed. It was widely agreed that the outcome of the work should be a practical tool, of particular value to practitioners who may not be specialists in international law. There was also general agreement that the draft conclusions should not be unduly prescriptive and should reflect the inherent flexibility that customary international law represents.

Regarding the **scope of the topic**, some members of the Commission called for more direct reference to the process of formation of rules of customary international law, in addition to consideration of the evidence of customary international law. A number of members also raised concerns about omitting a detailed examination of the relationship between customary international law and other sources of international law, in particular general principles of law. The efforts of the Special Rapporteur to draw upon practice from different parts of the world were praised, though several members highlighted the difficulty of ascertaining the practice of States in this field.

With respect to the **use of terms**, some members doubted whether it would be advisable to include definitions of "customary international law" and "international

organizations” in the draft conclusions, while others considered the definitions to be useful. There were also differing opinions on how to best refer to the element of “accepted as law”, in particular whether the element should be defined by reference to the language of Article 38, paragraph 1 (b), of the Statute of the International Court of Justice, or whether to use the expression “*opinio juris*”.

On the **basic approach** to the identification of rules of customary international law, the view that the two-element approach does not vary across to fields of international law was supported by most members of the Commission. Some members indicated, however, that there appeared to be different approaches to identification in different fields, but acknowledged that the variation may be a difference in the application of the two-element approach, rather than a distinct approach.

Turning now to the first element, “**a general practice**”, there were a range of views on the proposed language in draft conclusion 5, which provided that it is “primarily the practice of States that contributes to the creation, or expression, of rules of customary international law.” In particular, there were divergent views on whether it was exclusively the practice of States that contributes to “a general practice”, or whether the practice of international organizations was also relevant. There was broad support for the proposal of the Special Rapporteur to further address the role of international organizations in his next report.

There was widespread support for the proposed forms of State conduct that may constitute “a general practice”. In particular, several members welcomed that verbal acts were included along with physical acts, though some members called for clarification as to which verbal acts were relevant. As to the inclusion of “inaction” as a form of practice, there was a general view that the issue needed to be further explored and clarified, with a particular suggestion that inaction or silence may only be relevant when the circumstances call for some reaction. With regard to weighing evidence of practice, questions were raised as to the precise meaning of the phrase in draft conclusion 8 “[t]here is no predetermined hierarchy among the various forms of practice”. Several

members indicated that the practice of certain organs of a State was more important than others, with some members noting that different organs were more or less empowered to reflect the international position of the State.

The concept of “specially affected States”, as reflected in draft conclusion 9, paragraph 4, was also the subject of considerable debate. Several members were of the view that the concept was irreconcilable with the sovereign equality of States and should not be included in the draft conclusions, while other members not opposed to including the concept stressed that it was not a means to accord greater weight to powerful states, or to determine whether practice was sufficiently widespread.

Turning now to the second element, “**accepted as law**” (or “*opinio juris*”), there was general agreement regarding the role of the element in determining the existence of a rule of customary international law, though some members expressed concern that the phrase “a sense of legal obligation” did not sufficiently clarify the operation of the element. With respect to evidence of acceptance of law, the notion that an act (including inaction) may establish both practice and acceptance as law was discussed. Certain members were of the view that, as a general matter, acceptance of a practice as compelled by law could not be proven by mere reference to the evidence of the practice itself. On the other hand, several members saw no problem with identifying evidence of the two elements on the basis of the same conduct. A number of additional issues relating to evidence of acceptance as law were also discussed, including whether such acceptance needed to be universal.

As the Special Rapporteur noted in his concluding remarks, which are summarized in paragraphs 172 to 185, the future programme of work proposed by the Special Rapporteur was generally supported. The Special Rapporteur indicated that the third report would address, among other things, the interplay between the two elements, the various aspects pertaining to international organizations, the relationship between customary international law and treaties, as well as questions of the “persistent objector”, and regional, local and bilateral custom. The importance of submissions by States on

their practice in relation to customary international law, as well as information on national digests and related publications, was also emphasized. Accordingly, in Chapter III of the report, the Commission has reiterated its request to States to provide information on their practice relating to the formation of customary international law and the types of evidence for establishing such law in a given situation, as set out in: (a) official statements before legislatures, courts and international organizations; and (b) decisions of national, regional and sub-regional courts. In addition, the Commission would welcome information about digests and surveys on State practice in the field of international law. Such information should be submitted preferably by 31 January 2015.

Mr. Chairman,

This concludes my presentation on Chapter X of the report.

***Chapter XI: Protection of the environment in relation to armed conflicts***

Mr. Chairman,

I will now turn to **Chapter XI** of the report, which concerns the topic “**Protection of the environment in relation to armed conflicts**”, a topic included in the current programme of work of the Commission last year. This year, the Commission had before it the preliminary report by the Special Rapporteur, Ms. Marie Jacobsson. It will be recalled that already last year, the Special Rapporteur had proposed to deal with the topic in temporal phases rather than considering each legal regime individually as a distinct category. The temporal phases would address the legal measures taken to protect the environment before, during and after an armed conflict: Phase I, phase II and phase III, respectively. Accordingly, the preliminary report this year provided an **introductory overview of phase I**, namely the environmental rules and principles applicable to a potential armed conflict, so-called “peacetime obligations”. It did not address measures to

be taken during an armed conflict or post-conflict, which will be the subject of future reports.

The preliminary report, whose summary introduction is contained in paragraphs 188 to 191, sets out in general terms the **Special Rapporteur's proposed approach** to the topic and provided, *inter alia*, **an overview of the scope and methodology**, as well as of the previous work of the Commission relevant to the topic. It also sought to identify certain existing obligations and principles arising under international environmental law that could guide peacetime measures taken to reduce negative environmental effects in armed conflict. The Special Rapporteur nevertheless indicated that it was premature, at this stage, to evaluate the extent to which any such obligations continued to apply during armed conflict. The preliminary report further addressed the use of certain terms which had been proposed to facilitate discussion, such as “armed conflict” and “environment”, as well as the relevance of international human rights law to the topic.

The summary of the debate in the Commission is contained in paragraphs 192 to 213 of the report. The debate addressed in particular questions of scope and methodology, use of terms, the range of materials to be consulted, environmental principles and obligations, human rights and the environment, as well as the future programme of work.

There was general support in the Commission for the **temporal approach** adopted by the Special Rapporteur. A substantial debate was, however, held on the weight that should be accorded to phase II, as well as on what issues should be excluded from the scope of the topic, in particular with regard to the issues of weapons, internally displaced persons and refugees, cultural heritage, environmental pressure as a cause of armed conflict, and non-international armed conflicts.

While there was broad support for the proposal to **develop working definitions** to guide the discussions on the topic, the question whether any definition would be included in the outcome of the work was left open. One of the main issues discussed in this context related to the proposed definition of “armed conflict” and concerned the proposal to

include conflicts between “organized armed groups or between such groups within a State”.

Turning to the **environmental principles and obligations** discussed in the preliminary report, the general position within the Commission was that further analysis of the relationship of such principles with armed conflict was required and that the topic should focus on their applicability in relation to armed conflict rather than to determine whether they were general principles or rules of international law. There was also a more general discussion on the specific principles presented by the preliminary report and their particular relevance to the topic.

Different views were expressed on the consideration of **human rights** as part of the topic, as well as on the advisability of according indigenous rights separate treatment.

With regard to the **future programme of work**, there was broad support for the proposal by the Special Rapporteur that her second report would further examine aspects of phase I, as well as address phase II, including analysing the extent to which particular environmental principles are applicable in relation to armed conflict.

As the Special Rapporteur noted in her concluding remarks, which are summarized in paragraphs 214 to 222 of the report, the importance of receiving information from States concerning legislation and regulation in force aimed at protecting the environment in relation to armed conflict was stressed. Therefore, in chapter III of its report, the Commission reiterated its request to States to provide information on whether, in their practice, international or domestic environmental law has been interpreted as applicable in relation to international or non-international armed conflict. Furthermore, the Commission would like to receive information as to whether States have any instruments aimed at protecting the environment in relation to armed conflict, such as national legislation and regulations, military manuals, standard operating procedures, Rules of Engagement or Status of Forces Agreements applicable during international operations, and environmental management policies related to defence-related activities. Such information should be submitted preferably by 31 January 2015.

Mr. Chairman,

This concludes my introduction of Chapter XI of the report.

**Chapter XII: Provisional application of treaties**

Mr. Chairman,

I will now turn to **Chapter XII** on the topic “**Provisional application of treaties**”. At this year’s session, the Commission had before it the second report of the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, which sought to provide an analysis of the legal effects of the provisional application of treaties. In his report, the Special Rapporteur identified at least four ways in which article 25, paragraph 1, of the Vienna Convention on the Law of Treaties might be manifested: (a) when a treaty established that it would apply provisionally from the moment of its adoption; (b) when the treaty established that it would be applied provisionally by the signatory States; (c) when the treaty left open the possibility for each State to decide if it wished to provisionally apply the treaty or not from the moment of the adoption of the treaty; and (d) when the treaty was silent on its provisional application and States applied article 25, paragraph 1. In his view, since the obligations under the provisional application of treaties could also take the form of one or more unilateral acts, a legal analysis of the effect of unilateral acts was also of relevance. He also suggested that the rights established by the provisional application of treaties as actionable rights would depend on how the provisional application had been enshrined in the treaty or agreed to. Hence, the scope of the rights would be clearer in those cases where the treaty explicitly established that it would be provisionally applied from the moment of adoption or that of signature. The analysis of the scope of obligations became more complex when a State decided unilaterally to apply a treaty provisionally. The Special Rapporteur was also of the view that the regime that applied to the termination of treaties applied *mutatis mutandis* to the provisional application of treaties. He pointed to the practice of States performing the obligations

agreed upon, during a transitional period over which the provisional application of a treaty was being phased out, in the same manner as the case of the termination of the treaty itself, as evidence that those States assigned the same legal effects to the termination of the provisional application of treaties as those for the termination of the treaty itself. As for the **legal consequences of breach of a treaty** being applied provisionally, the Special Rapporteur limited himself to reiterating the applicability of the existing regime of the responsibility of States, as provided for in the 2001 articles on the Responsibility of States for internationally wrongful acts. The Special Rapporteur's summary is reflected in paragraphs 228 to 235 of the report.

In considering the Special Rapporteur's report, whose debate is summarized in paragraphs 236 to 243, the Commission was cognizant of the fact that the comments received from States, both in the Sixth Committee and in writing, had generally supported the view that the **provisional application of treaties did give rise to legal effects**. Broad agreement was also expressed in the Commission that the provisional application of a treaty, although juridically distinct from entry into force of the treaty, did nonetheless produce legal effects and was capable of giving rise to legal obligations, and that those were the same as if the treaty were itself in force for that State; a conclusion that was supported both in the case-law and by State practice.

Reference was also made, during the debate, to **several specific legal constraints** on provisional application. Hence, it was noted that the provisional application of a treaty could not result in the modification of the content of the treaty, nor could States (or international organizations) which had not participated in the negotiation of the treaty resort to its provisional application, and the provisional application of a treaty could not give rise to a distinct legal regime separate from the treaty. Nor could provisional application give rise to rights for the State beyond those that were accepted by States and provided for in the treaty.

Different views were expressed during the debate regarding the characterization of the decision to provisionally apply a treaty **as a unilateral act**. It was noted that such a

position could not be reconciled with article 25 of the Vienna Convention, which specifically envisaged provisional application being undertaken on the basis of agreement between States and as an exercise of the free will of States. At the same time, it was also noted that recent practice had revealed the possibility that a State could unilaterally declare its intention to provisionally apply a treaty.

While support was expressed for the position that the **regime that applied to the termination of treaties** applied *mutatis mutandis* to the provisional application of treaties during the debate, other members were of the view that while there was some overlap in the legal position of the termination of treaties and that of provisional application, this did not mean that the same rules applied necessarily, even *mutatis mutandis*. A difference of opinion also existed as to the applicability of the rules on the unilateral acts of States to the termination of provisional application, as well as to the assertion that such termination could not be undertaken arbitrarily.

As for the **legal consequences of breach of a treaty** being applied provisionally, the view of the Special Rapporteur on the applicability of the existing regime of the responsibility of States, was supported in the Commission, and it was pointed out that article 12 of the 2001 articles referred to an obligation “regardless of its origin or character”, which could cover obligations emanating from treaties being provisionally applied. However, some other members called for further reflection on this issue.

There was support in the Commission for the Special Rapporteur’s decision not to embark on a **comparative study of domestic provisions** relating to the provisional application of treaties. Other members were, however, of the view that such an analysis, as part of a broader study on State practice, was both feasible and necessary for a proper consideration of the topic since the possibility of the resort to the provisional application of a treaty depended also on the internal legal position of the State in question.

As for **future action**, the Special Rapporteur indicated his intention to complete, in his next report, the analysis of the contributions made by States on their practice. Here, I

wish to draw the attention of the Sixth Committee to Chapter III of the Commission's report, in which the Commission reiterated its request to States that they provide to it information on their practice concerning the provisional application of treaties, including domestic legislation pertaining thereto, with examples, in particular in relation to: the decision to provisionally apply a treaty; the termination of such provisional application; and the legal effects of provisional application. Such information should be submitted preferably by 31 January 2015. The Special Rapporteur also indicated his intention to turn next to the legal regime applicable to treaties between States and international organizations, and those between international organizations, and indicated that he would propose draft guidelines or conclusions for the consideration of the Commission at its next session.

On the question of the **eventual outcome** of the work on the topic, support was expressed for the Special Rapporteur's intention to propose draft guidelines or conclusions. There was, however, the view that the Commission should not rule out the possibility of developing draft articles, as it had done in its work on the effects of armed conflicts on treaties.

This concludes my introduction of Chapter XII.

### **Chapter XIII: The Most-Favoured-Nation clause**

Chapter XIII is the last substantive chapter in this year's report, and it is devoted to "**The Most-Favoured-nation clause**". From the beginning of its work on this topic in 2009, following the inclusion on its programme of work the previous year, the Commission has transacted its business in the framework of a Study Group. Like last year, at this year's session, Mr. Mathias Forteau presided over meetings of the Study Group in the absence of its Chairman and dear colleague, Mr. Donald McRae. As I will report momentarily, it is envisaged that the Study Group could complete its work next

year. It is therefore the sincere hope of the Commission that Mr. McRae would be in Geneva to complete the task that he has so ably steered from the beginning.

This year, the Study Group had before it a **draft final report on its overall work**. It was prepared by Mr. McRae, putting together the various strands of issues concerning the topic into one comprehensive draft report, based on the various working papers and informal documents considered by the Study Group since 2009. The draft final report systematically analyses the various issues, within the broader framework of general international law, and in the light of developments since the adoption of the 1978 Draft articles. In its overall structure, the draft report consists of three parts, which: (a) provide the background and address the contemporary relevance of MFN clauses, and issues surrounding them; (b) survey the different approaches in the case law to the interpretation of MFN provisions in investment agreements; and (c) analyze in greater detail the various considerations concerning their interpretation.

The Study Group undertook a **substantive and technical review** of the draft final report with a view to providing input to the preparation of a new draft for next year to be agreed on by the Study Group. The Study Group acknowledged the need to make attempts to shorten the draft report and to update certain of its elements in the light of more recent awards.

The Study Group once more underlined the importance and relevance of the **Vienna Convention of the Law of Treaties, as a point of departure**, in the interpretation of investment treaties. Accordingly, there was emphasis placed on analyzing and contextualizing the case law and drawing attention to the issues that had arisen and trends in the practice. It also stressed the significance of taking into account the prior work of the Commission on Fragmentation of international law: difficulties arising from the diversification and expansion of international law, and its current work on Subsequent agreements and subsequent practice in relation to interpretation of treaties. It also highlighted the need to prepare an outcome that would be of practical utility to those involved in the investment field and to policy makers.

The Study Group considers as **feasible the timeline of seeking to present a revised draft final report** for consideration at the sixty-seventh session of the Commission next year, taking into account comments made and amendments proposed by individual members of the Study Group during the present session.

Mr. Chairman

This completes the introduction of Chapter XIII and of the entire report of the Commission at its sixty-sixth session.

I am most appreciative of your attention. And I thank you all.

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