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STATEMENT BY
Marcel van den Bogaard

Legal adviser, Netherlands Permanent Mission

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Chapters X, XI, XII and XIII

Chapter X

(Identification of customary international law)

Mr. Chairman,

1. Let me first address the identification of customary international law. First of all, I wish to congratulate the Special Rapporteur, sir Michael Wood on the excellent work and the second report. The footnotes are a true treasure trove for those who wish to study the subject in greater detail. I wish to comment on some of the draft conclusion in the order in which they appear in the report.

2. With respect to the attribution of practice to States, and the formulation of draft conclusion 6, we would question whether – as the Special Rapporteur seems to do – one can simply 'borrow' the attribution rules from the Articles on State Responsibility. We do not disagree that the actions of all branches of the State may contribute to what is State practice, but would note that the attribution rules in the ARSIWA (2001) clearly serve a different purpose. Determining attribution for the purpose of responsibility is an evaluation of a fundamentally different nature than the evaluation of facts that may be understood as practice of States for the purpose of determining the existence of a rule of law.

3. On draft conclusion 7(2) (paragraphs 41 and 47), we feel that the matter of the confidentiality of government correspondence, such as confidential letters or equally confidential *Notes Verbale*, would require some further clarification. While agreeing that such statements may attest to the *opinio iuris* of States and are thus highly relevant for the identification of customary law, the report does not really clarify how confidential documents can be relevant unless they are somehow published, and what this implies for legal opinion that is not published.
4. Frequently there is no need to publish such documents, and they serve their primary purpose of transmitting a view through a diplomatic channel in a satisfactory manner because they are confidential. Governments do not generally release confidential correspondence, and may only do so when problems arise, when this is necessary in litigation, or in reaction to the work of the International Law Commission. There is much more *opinio iuris* around than is somehow published.
5. Also on draft conclusion 7 (2) we would caution against the list contained here. When addressing forms of practice the emphasis ought to be on actions of States that one can notice in everyday life. Practice is the objective element in the development of customary international law. We doubt whether official

documents in which governments express their legal opinions ought to be counted as practice as the Special Rapporteur suggests. Referring to such instruments – like statements on codification efforts or acts in connections to resolutions – to us would seem to fall in the category of *opinio iuris*, rather than practice. Draft conclusion 7 (2) enters in the complex territory of whether the one element (opinion) may also be counted as the other element (practice), which we think is unhelpful.

6. Still further on draft conclusion 7 (2), and similarly draft conclusion 11 (2), and their reference to judgements of national courts, we wonder if this ought not be more qualified. Particularly in States where the judiciary is traditionally barred from relying on customary international law, such as in our legal system, it is difficult to see how such case law could contribute to practice. Also the reference would seem to presuppose that a domestic judiciary which may not be well versed in international law could nevertheless – and independent of government – contribute to *opinio iuris*. We wonder if this choice is perhaps a consequence of the reliance on the attribution rules for State responsibility, which have as mentioned before a very different function.

7. On the role of international organisations in the development of customary law and draft conclusion 7 (4), we agree with the Special Rapporteur that the role of

international organisations in the development of international law cannot be ignored in this day and age.

8. However, there are a number of systematic issues that we believe should be addressed. While the practice of international organisations will be visible for all to see, there is the obvious question of how to establish the *opinio iuris* of the international organisation. Of equal relevance is the question as to the remit of the mandate of the international organisation, and whether or how this has an impact on its possibility to have an *opinio iuris* relevant to the creation of customary international law. With respect to treaty law, the scope of treaty-making powers of international organisations tends to be prescribed in its foundational document – but how does this work with respect to the *opinio iuris*?

9. On the notion that the practice of "specially affected States" is of specific importance when evaluating practice (draft regulation 9 (4)), we would generally agree with this view, but do consider the report to be too succinct in this respect. Reference to the importance of the practice of "specially affected States" is logical, but how to identify States falling into this category? The report tells us that this ".. will depend upon the rule under consideration, and indeed "not all areas.. allow a clear identification of 'specially affected' states".

We wonder whether the 'specially affected States' are the same as the 'interested States' discussed with respect to *opinio iuris* (para.64)?

10. We would invite the Special Rapporteur to give more depth to this part of his report – perhaps this identification could include aspects such as whether these are the States tjat will face increased burdens as a consequence of a new rule. And there may be a need to reflect on how changes in the law as a consequence of technological changes will have an impact on the developing rules and how they apply to different States.

11. Technological developments raise specific questions concerning the identity of the 'specially affected States'. When for instance law develops as a consequence of the development of weapons technology, who are the "specially affected" States? The States possessing modern weapons technology, and perhaps also States not possessing such technology who may face the risk of an armed conflict in which the opponent uses such new technology? Both would appear to have a specific interest in how the law in this field develops. This example indicates that a further sketch of how to determine the notion of "specifically affected" would be very welcome.

12. Let me end my comments on this report by reiterating our support and appreciation for the work undertaken by Special Rapporteur, sir Michael Wood.

Chapter XI

(Protection of the environment in relation to armed conflicts)

Mr. Chairman,

1. Concerning the topic of the Protection of the environment in relation to armed conflicts. We express our appreciation to the Special Rapporteur, Ms Marie Jacobsson, for her first preliminary report.
2. We note that the work on this topic is still in its early stages and therefore believe it is important to delineate the topic of study so as not to cover matters that would only complicate the Commission's work. We welcome therefore the cautious approach taken by the Special Rapporteur, including the possibility of the use of a 'without prejudice clause'.
3. Similarly, we note that the overall purpose of the study would be to clarify rules and principles of international environmental law to armed conflicts and agree with the Special Rapporteur that it should not modify the existing law of armed conflict. This includes working definitions proposed by the Special Rapporteur, such as the definition of the term armed conflict, which although necessary in terms of framing the subject-

matter of this study, is defined by international humanitarian law and should not be redefined by the Commission. Such definitions need not therefore to be included in the final text of the study.

Chapter XII

(Provisional application of treaties)

4. Turning to the topic of Provisional application of treaties, we thank the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, for his second report and his efforts to identify and clarify issues relevant to this topic.

5. We agree with the approach taken by the Special Rapporteur, to concentrate his analysis of the legal effects of provisional application of treaties on the effects produced at the international level. Indeed, there can be no doubt that the provisional application of a treaty has legal effects under international law.

6. We note the view expressed by the Special Rapporteur concerning the distinction to be made between the legal régime with respect to the entry into force of a treaty and the régime governing provisional application of a treaty and would ask him to further clarify that distinction, notably in the light of different situations, including the one relating to treaty

regimes establishing an institutional framework or a secretariat that would require entry into force of the treaty to become fully effective.

7. We are not convinced of the relevance of, and therefore the need to include in this study the law relating to unilateral declarations of States, as the Special Rapporteur has done. As an instrument available under the law of treaties we believe that article 25 of the Vienna Convention should be the primary reference point for conducting this study.

8. In that respect, we are also not convinced whether there is any authority supporting the conclusion arrived at by the Special Rapporteur in paragraph 81 of his report that 'a State that had decided to terminate the provisional application of a treaty would be required, as a matter of law, to explain to other States to which the treaty applies provisionally or, to other negotiating or signatory States whether that decision was taken for other reasons'. Neither do we believe there is any authority for the conclusion drawn in paragraph 82 that 'provisional application could not be revoked arbitrarily'.

9. We believe that, in order to draw more definitive conclusions on the topic of provisional application of treaties, including in order to determine the status of the concept under customary international law, a thorough analysis of state practice in light of the language of article 25 of the

Vienna Convention would be required and we would therefore like to reiterate our request made in last year's statement.

10. Finally, as regards other issues the Special Rapporteur may want to address in his study, we support his proposal to pay attention to the provisional application of treaties by international organizations, particularly treaties concluded between the European Union and its Member States and third States.