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**Report of the International Law Commission
on the work of its sixty-sixth session**

Part III

Agenda item 78

S T A T E M E N T

BY

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Identification of customary international law

Mr. Chairman,

Poland welcomes the activities of the International Law Commission (ILC) in the field of sources of international law. The topic of Identification of Customary International Law is particularly important, as the issues of customary law are at the same time underestimated and abused. We generally support a method adopted by the Special Rapporteur Mr. Michael Wood and the Drafting Committee, although at the present stage it is still difficult to evaluate possible outcomes. We accept especially a proposal that the Conclusions of the ILC should be read together with future commentaries. The approach of the Commission towards the problem is traditional, combining both practice and subjective element; we expect that recent developments in the domain of customary law, both method and substance, will be presented in a final instrument elaborated by the Commission.

We cannot however agree with a narrow approach adopted by the ILC as to the scope of practice and *opinio iuris* considered in the work of the ILC. It is beyond any doubt that States are still basic subjects of international law and their practice is the most significant. We cannot agree however with a limitation of practice of other secondary (derivative) subjects of international law to international organizations. An approach reducing an influence of non-state actors upon the creation and application of customary law to its acceptance by States can hardly be accepted. It would be desirable to investigate to what extent non-state actors are bound by general customary law. We are aware of unavoidable problems connected with the approach proposed above, also from the point of view of the theory of international legal personality. The ILC should not, however, escape from these problems by simply reducing the scope of its research.

Polish delegation notices certain difficulties experienced by the Commission in drawing a distinction between the practice as element of building of customary law, and expression of *opinio iuris*. Elements to be taken into account are largely the same. We are convinced that all the elements mentioned in draft conclusions 7(2) and 11(2) should be treated as a practice at a stage of formation of particular customary rule, and as an expression of *opinio iuris* at the stage of an application of a well-established rule.

As to varied practice by different state agencies, we suggest that not all elements of practice should be put at the same level. Declarations and activities of organs constitutionally empowered to represent the State in international relations are more important

than the same acts of other agencies. Similarly, the jurisprudence of constitutional courts and supreme judicial organs seems to be more important than the decisions of lower courts, taking into account the fact that judges of lower level are less familiar with an application of international law in general, and customary law in particular. Finally, our delegation is convinced that from a perspective of evaluation of different acts of state organs as customary law-making, it is not important whether a particular organ acted within its competence or ultra vires. All acts of the State must be considered together as a practice of this State, and the State herself cannot act ultra vires. Possible violations of domestic law do not matter from the perspective of international law, and this position is confirmed by the practice of the ICJ (in particular in *LaGrand and Avena* case).

We would welcome any guidelines as to the situation of conflicts between official statements and real actions taken by the States, and a possible influence of those conflicts for identification of customary rules.

As we have already remarked, we would particularly appreciate a clarification of relationship between custom and other sources of international law. In our opinion, customary law can possibly overlap with a subsequent practice, not in a sense of interpretation, but rather of a modification of a treaty. The ILC should also consider whether the criteria of relationship between treaties and custom, proposed by the ICJ in the North Sea Continental Shelf case, correspond with the new developments of international law. In our opinion, the relations between customary norms and general principles of international law are also interesting. Finally, the Commission should discuss the issue of a parallel binding force of two sources of the same normative content, but contained in two different categories of sources. The identification of custom, established on the basis of a treaty, requires particular attention, in order to avoid an excessive application of Article 38 of the 1969 Vienna Convention on the Law of Treaties. The judgment of the ICJ in the Nicaragua case could be a starting point.

Poland declares its readiness to cooperate with the ILC, and we shall formulate our detailed answers to questions posed by the Special Rapporteur, opinions and comments separately.

Protection of the environment in relation to armed conflicts

Mr. Chairman,

Poland welcomes preliminary report of the Special Rapporteur Ms. Marie G. Jacobsson on the topic "Protection of environment in relation to armed conflict".

Our delegation fully supports Commission's work on the issue. In this context we would like to inform that our policy on environmental protection in relation to armed conflicts is applied by the Ministry of National Defense. The development and the operation of this policy is based on the following premises:

- protection of the environment and its resources is the task of every soldier,
- the organization of environmental protection is the task of commanders at all levels of the Polish Armed Forces,
- the principle of minimizing damage to the environment is applied to military training and fulfilment of other tasks,
- rational use must be made of the natural resources,
- environmental education is an integral part of every form of training and education in the Polish Armed Forces.

A number of legal acts has been adopted with this in mind, i.a. the Ordinance of the Minister of National Defense Identifying Bodies with Oversight Responsibilities for Environmental Protection. Furthermore, annual reports are drawn up on fulfilment by organizational units of the Polish Armed Forces of the of environment protection requirements.

Provisional application of treaties

Mr. Chairman,

Provisional application of treaties is becoming increasingly important in the development of international law. It is an instrument that grants states some flexibility in shaping their legal relations and accelerates the acceptance of international obligations. It could be particularly useful in cases when time-consuming ratification procedures may adjourn or even completely eliminate potential benefits arising from the conclusion of a treaty.

Our delegation fully concurs with the Commission's conclusion that the provisional application of the treaty shall have the same effect as its entry into force, unless otherwise agreed. This view is clearly supported by Polish treaty practice. Poland does not have a specific domestic law on the provisional application of treaties. The Polish practice in this regard is based on Article 25 of the 1969 Vienna Convention on the Law of Treaties and the general rules of domestic law regarding conclusion of the treaties. Under our constitutional order, we consider as optimal to apply a treaty temporarily only when we complete our domestic procedures necessary for its entry into force.

The Special Rapporteur rightly points out, in paragraph 229 and others, that the analysis of the legal effects of provisional application of treaties should be considered in the light of the state practice based on domestic law. Therefore, taking into account the divergent views expressed in the work of the Commission (paragraphs 238 and 247), we support the view that the Special Rapporteur should include a comparative analysis of national provisions concerning the provisional application of treaties in the course of his further research. Attention should be also paid to the practice of states that are members of regional integration organizations that themselves (acting independently from its members) may conclude treaties which are binding – within that organization’s competence – for the members states. It is important that the Commission takes into account situations where the treaty is applied provisionally by such an organization as well as (some) of its members states, whereby the scope of provisional application is different for those entities.

Furthermore, we believe that the practice of issuing unilateral declarations which define the scope of the provisional application of a treaty deserves further examination. Such declarations may serve a significant role in ensuring a faster application of a treaty. Given a case when a treaty provides that it can be applied provisionally from the date of its signing, several situations could occur. First, a signatory may apply the treaty temporarily without further reservations. Second, a signatory – based on his domestic law - may declare that his provisional application of the treaty can be restricted as to the time or scope. For example: he may decline provisional application until his own constitutional procedures on the treaty conclusion are completed. Third, a signatory may indicate that it will apply provisionally only some of the provisions of the treaty. We believe that, in general, declarations are admissible, and may entail a number of consequences for mutual rights and obligations of the contracting parties. Therefore, the Polish delegation is of the view that it is highly desirable that further studies cover also the role of unilateral declarations in provisional application of treaties.

Thank you Mr. Chairman