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Report on ILC's 66th Session**

Chapter X – Identification of customary international law
Chapter XI – Protection of the environment in relation to armed conflicts
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**Speech delivered on behalf of Mr. Ion Gâlea
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Mr. Chairman,

In this last intervention of the delegation of Romania on this year's ILC report I will address the last topics in the report of the Commission, as indicated in the programme of work.

Identification of customary international law

We welcome the second report of the Special Rapporteur on this topic and commend Sir Michael Wood for his outstanding work focused properly rather on the methodological aspects of the subject than the substance of the rules of the customary international law.

The identification of customary international law has an outstanding practical significance and therefore, the draft conclusions in their final form and the commentaries should be a solid guidance in assessing its existence and the content of its rules, preserving at the same time a certain flexibility which reflects in fact the flexibility of the customary international law itself.

The two-element approach –the general practice, the acceptance as law - adopted by the report is very important as it is consistent with the practice of States, the decisions of international courts, in particular the International Court of Justice and other specialized international courts and tribunals, as well as with the majority view of scholars. Although there may be differences in the application of the two-element approach, this should further underlie any developments resulting in the final outcome of the work on this topic.

With regard to item 3 of Draft conclusion 7 which reads as follows “inaction may also serve as practice”, we support the view that inaction may be deemed as practice as a constituent element of the customary international law but only where inaction results from the consciousness of a duty not to act, as fairly noted by the Permanent Court of Justice in the LOTUS case.

Romania welcomes the reference to the international organizations in the draft conclusions adopted provisionally by the Drafting Committee. Recognizing that the practice of States is instrumental and it must be primarily taken into account, the role of the intergovernmental organizations must also be considered and highlighted in relation to the existence of the customary international law. This is of particular importance in the case of regional integration organizations to which the States have transferred competence or in such areas as immunities and privileges, the responsibility of international organizations and the depository function for treaties in which the practice of international organizations is essential. Having in view that Romania is a member of the European Union, we would like to underline that the practice of the European Union must be also taken into account in particular in those areas where it has exclusive competence.

Therefore, the use of “the general practice” instead of “practice of States” is most appropriate encompassing both the practice of States and the practice of the intergovernmental organizations. Considering this, we support the view that the third report should deepen this aspect and further deal with international organizations, the relationship between customary international law and treaties and the resolutions of the international organizations.

As regards the practice of non-State actors, we share the view of Sir Michael Wood expressed in his second Report in paragraph 45.

As to the second element and the use of the expression “the acceptance as law”, we support the view of the Special Rapporteur expressed in his concluding remarks that it may be better to

supplement it by the term “*opinio juris*” used previously.

Also, we think that the wording of the drafting conclusions should be further reviewed so that the two elements are fully aligned.

Protection of the environment in relation to armed conflicts

The preliminary report of the Special Rapporteur provides a very clear introduction into the topic of protection of the environment in relation to armed conflict. Thus, the outcome of this topic’s consideration should be just as clear: the clarification of the rules and principles of international environmental law applicable in relation to armed conflict.

We agree that there is no urgent need to address questions relating to the use of terms, such as “environment”. Any in-depth discussion of these questions will necessarily stray away from the topic under consideration.

We encourage a closer look at State practice and the practice of international organizations. The practice of the Mechanism for administering compliance and implementation of the Basel Convention might be highly relevant in this respect.

We are also looking forward to the Special Rapporteur analysis of environmental impact assessments in the context of armed conflict, but we would like to stress that while the International Court of Justice had found that such assessments were required under general international law for industrial activities in a transboundary context, the content of these assessments is not established under general international law.

We maintain our position presented by Romania in the intervention of last year on the topic, that there is no need to separately address the effects of certain weapons on the environment, and in this respect, we fully support the Special Rapporteur position.

Considering the treatment of the cultural heritage in the context of the consideration of the protection of the environment in relation to armed conflicts, we are of the opinion that, should there be a need to address such issues within this topic, it must be dealt with great care and with due regard to the need not to unnecessarily expand the scope of the topic (given that we agree that there is no need to define the terms, but rather rely on definitions already in place in international law) or to revise norms of international law already in place dealing with the protection of cultural heritage. Thus, we look forward with great interest to the approach the Special Rapporteur will undertake on this matter in her second report.

Provisional application of treaties

The Delegation of Romania welcomes the work of the International Law Commission concerning the provisional application of treaties, and in particular the efforts of the Special Rapporteur, Mr. Gomez-Robledo, in drafting the second report on the topic and expresses its interest on the matter, as well as in other subjects on the ILC agenda concerning the law of the treaties.

With regard to the particular issue of provisional application of treaties, Romania has in its specific legislation on the law of treaties relevant provisions concerning specifically the provisional application.

It should be mentioned from the outset that in the Romanian legislation, provisional application is viewed as an exceptional treaty action, of limited applicability. Thus, according to the relevant provisions on the matter, only treaties for the entry into force of which ratification by Parliament is not required can be applied provisionally as of the date of signature, if the treaty expressly allows it. Treaties for which ratification by Parliament is compulsory cannot be applied provisionally.

4One exception from the above-mentioned rule exists, however: treaties (even requiring ratification by Parliament) between the European Union and its Member States (Romania being an EU Member State), on the one side, and third States (the so-called “mixed treaties”), on the other side, can be applied provisionally before their entry into force if the treaty expressly provides so.

After this brief introduction into the relevant provisions of Romanian legislation, which may be of interest for the current study for reasons to be presented further on, the Romanian Delegation makes the following remarks concerning the draft Second Report of the Special Rapporteur on the provisional application of treaties:

Romania welcomes the Second Report of the Special Rapporteur, Mr. Gomez-Robledo, which serves as a very useful basis for further exploration and debate on the topic.

As it results also from its domestic legislation, provisional application of treaties is viewed by Romania as an exceptional, and therefore limited, treaty action, for reasons attached primarily to legal certainty.

In this respect, Romania believes that the usefulness of a comparative study of various domestic provisions on provisional application of treaties lies in the fact that they can contribute to understanding the State practice in the field.

As we are on the ground of treaty law, Romania underscores the relevance of the will of the parties in the case of provisional application. Therefore, the Romanian Delegation joins the reservations expressed as to the relevance of the law of unilateral acts in the context of provisional application of treaties. Although it may occur that a treaty is, on some occasion, applied provisionally by only one of the Parties, this does not modify the consensual nature of the *source* of provisional application. The Report should therefore underline the distinction between provisional application as a result of the agreement of the parties (which is the object of the current topic) and provisional application as a unilateral act (the case of the provisional application by the Syrian Arab Republic of the Convention on the Prohibition of Chemical Weapons), which is not the object of the present research. In the same vein, Romania considers that the rules applicable to the obligations resulting from provisional application may rather be inferred from the principle of good faith and the need for legal security than from the law of unilateral acts.

The Romanian Delegation suggests that a distinction should be made between two categories of obligations related to provisional application: the obligation to apply the treaty provisionally (in the case of treaties providing for compulsory provisional application) and the rights and obligations resulting from the provisional application itself.

Romania believes that further examination should consider the issue of termination of provisional application, under various aspects, including that of the legal consequences of such termination (including under the aspect of the termination of obligations, touched upon in the Special Rapporteur’s second Report). On the particular point of the termination of obligations, Romania believes that deeper examination is needed of the question of the relevance of article 18 of the VCLT in the case of termination of provisional application, that is to what extent the obligation to defend the object and purpose of the treaty persists, especially if provisional application is

terminated as a consequence of the intention not to ratify.

On the same point concerning the termination of provisional application, Romania would find it very helpful if the examination within the International Law Commission gave more guidance as to the possible different effects of such termination under various hypothesis: termination of provisional application with the intention not to ratify; termination of provisional application with the intention to continue the domestic process necessary for the entry into force; termination of provisional application after ratification but before the entry into force, especially in the case of the activation during provisional application of institutional mechanisms (EU practice could prove very useful in this respect).

Considering the multitude of hypotheses mentioned above (going beyond the limited case provided for in paragraph 2 of article 25 of the Vienna Convention), as well as other possible variations, a more thorough analysis of the customary character (or not) of paragraph 2 of article 25 of the Vienna Convention could prove very useful, especially for States, such as Romania, who are not parties to the Convention but apply it as customary international law.

Romania would also appreciate more in-depth argumentation on the non-arbitrary character of the termination of provisional application. Romania does believe that, indeed, for reasons of legal security and predictability, the party terminating provisional application should at least state its intention (of ratification or not).

As far as the future work is concerned, Romania subscribes to the proposal to look into the question of the provisional application of treaties by international organizations. Under this header, the practice of the European Union is particularly reach and the effect it may have on the law and practice of its Member States could be also relevant.

Additionally, the examination of the effects of other treaty actions during provisional application - e.g. modification of the treaty or ratification without entry into force – represents a significant aspect to explore further.

To conclude, Romania underlines its interest in the topic and is looking forward to the further study of the International Law Commission in this field.

The Most- Favoured- Nation Clause

With respect to the *Most-Favored-Nation Clause*, we would like to thank the Study Group and its chairs, Mr. Donald McRae and Mr. Mathias Forteau who chaired the 2013 session, for the work carried out so far regarding a topic that has a practical relevance especially to policy-makers and those involved in the investment field. The work of the Study Group is expected to bring more clarity to issues related to investment law highly debated at present.

The discussions held within the Study Group during its meetings, the structure and the content of the draft final report make us confident that further progress will be made towards a good revised draft final report to be presented during the next session of the Commission. In our opinion, regard should be given in this endeavour to all the significant developments since the adoption of the 1978 Draft articles and the need to analyse and put them forward within the broader normative framework of the general international law thus limiting further fragmentation of the international law and difficulties arising from its diversification and expansion.

Thank you.