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STATEMENT
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IN THE
SIXTH COMMITTEE OF THE GENERAL ASSEMBLY
UNDER THE AGENDA ITEMS
"IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW", "PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICT", AND "PROVISIONAL APPLICATION OF TREATIES"

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Mr Chairman

The South African delegation welcomes the progress made in the topic "Identification of customary international law" and we wish to applaud the Special Rapporteur, Sir Michael Wood, for a very comprehensive and analytical report which we believe cover a lot of important issues. We are pleased that the Drafting Committee at the sixty-sixth session provisionally adopted the eight draft conclusions in this regard.

Mr Chairman

In order for customary international law to "work" it needs both *opinio juris* and state practice. We are in support of the two-element approach and agree that the first element, "a general practice", is often a term that is preferably used to "State practice". We agree with the Special Rapporteur that the language of Article 38, paragraph 1(b), of the Statute of the International Court of Justice could be relevant to the practice of international organisations, since the practice of states takes many forms and includes what states do in or through international organisations. However, we would like to also caution that even though the practice of certain international organisations may be of great importance, it should rather be assessed in greater detail. We support the proposal by the Special Rapporteur to address the role of international organisations in the third report in relation to the identification of rules of customary international law.

Mr Chairman

We have taken note of the Special Rapporteur's assessment of the second element, "accepted as law," and agree that this element has indeed been theoretical rather than practical and wish to see more of a practical element developing over time. We support the Special Rapporteur's suggestion to rather use the term "*opinio juris*" instead of the expression "accepted as law". Since the term "*opinio juris*" is most commonly used in the jurisprudence and writings, we would prefer to use this expression. We agree with the members who are of the view that the two elements should not follow in a specific temporal order and do not support the approach articulated in draft conclusion 3which implies that "a general practice" must precede "acceptance as law". We are of the view that the existence of both elements are important rather than any temporal order in which they may be manifested.

Mr Chairman

It is important that the that the work n this topic should result in a practical guide to assist practitioners in the task of identifying customary

international law and that decisions of international courts and tribunals are among the primary materials for seeking guidance on this topic. We are of the view that there is a need to further engage governments from the outset and to examine the jurisprudence of international, regional and sub-regional courts. The Republic of South Africa's Constitution is very clear that customary international law is automatically part of the domestic legal system. This is reflected in section 232 of the Constitution: "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

Mr Chairman

Finally, we fully support the decision of the Commission to exclude the study of *jus cogens* from the scope of the topic since this is an important topic that requires specific attention. South Africa will continue to support this topic, since customary international law is an extremely underutilised yet significantly important source of substantive law in our domestic legal order.

Mr Chairman

Let me now turn to the topic "Protection of the Environment in relation to Armed Conflicts". South Africa welcomes the inclusion of the topic "Protection of the environment in relation to armed conflicts" in the ILC programme of work and is appreciative of the preliminary work done by the Special Rapporteur, Ms Jacobson.

The environment is the silent victim of armed conflicts with effects being felt long after the conflicts are over. This topic brings to the fore an issue that is important and has for too long gone unnoticed.

We have studied with interest the preliminary work of the Special Rapporteur and we have noted the suggestion of the Special Rapporteur to have three phases of the project: Phase I – on the environmental rules and principles applicable to a potential armed conflict; Phase II - addressing measures taken during an armed conflict and Phase III – on the measures taken post-conflict.

While we see merit in this approach, we look forward to hearing from the Special Rapporteur as to whether the different themes or legal regimes applicable would in fact be easier to study in this fragmented way or whether a broader approach focussing on all the applicable laws may be more beneficial. No matter the approach, we share the view that ultimately the focus of this work should ensure that the environment is protected both prior to, during and post-conflict.

Mr Chairman

On Phase I of the topic, which is concerned with the environmental rules and principles applicable to potential armed conflict, we consider that rules beyond the environmental sphere may also have some applicability. We submit that the study of the next phase, during conflict, go beyond environmental principles, and also include human rights law, international criminal law and international humanitarian law.

It is also worth noting that in relation to this topic, protection of the environment could also be relevant with respect to potential sources or causes of conflict and factors which could contribute to the prolongation of a conflict. We cannot ignore that in many conflicts, the root causes of conflict is access to and benefit from natural resources. We would therefore consider that some exploration of this aspect of the topic, particularly during Phase I, could be useful.

Concerning the outcome of the work, South Africa considers it too premature to comment at this stage on what the result of the work should be and whether a soft law instrument or normative approach should be taken.

We look forward to watching how this work will progress in the future and wish the Special Rapporteur success in her work.

Mr Chairman

Let me now turn to the last topic "Provisional Application of Treaties". We have noted that considerable progress has been made with respect to the Commission's work on the topic of the provisional application of treaties since its inclusion in its programme of work in 2012. Two reports have since been produced by the Special Rapporteur, Mr Juan Manual Gomez-Robledo, the result of unfailing hard work for which we want to commend him.

The technique of provisional application of treaties is an important interim mechanism that can contribute to ensuring that the implementation of useful international norms is not delayed pending the definitive entry into force of a treaty.

However, whether a particular state is able to exercise this international law right is not a question of international law, but of the municipal law of the state concerned. Therefore, the effectiveness of a treaty regime during the provisional phase may depend on the attitude adopted by the national legal systems of its parties. It thus becomes important to

consider whether it is necessary and possible for a provisionally applied treaty to become part of domestic law and if so whether the courts can actually apply it? We therefore recommend that the following questions may be of benefit to this study:

- Can a treaty that is being applied provisionally have any legal effect under domestic law?
- When could such a treaty be relied on as a basis for a right of interest before a domestic court?
- If a provisionally applied treaty supersedes a pre-existing treaty that is part of the law of the land, which one will prevail?
- If the domestic courts do not apply a provisionally applicable treaty, what consequences will this have for the country's international obligations?

Mr Chairman

In South Africa, new procedures for the conclusion of treaties were introduced in democratic South Africa, first by the 1993 Interim Constitution and finally by the 1996 Constitution of the Republic of South Africa. In view of the enhanced status the 1996 Constitution accords to international law, it may be of particular relevance to the Special Rapporteur to consider South African law with respect to the formation and domestic effect of provisional applicable treaties.

The customary right of the state to enter into provisionally applicable treaties is recognised in Section 232 of the 1996 Constitution.

Unless the agreement on provisional application itself requires ratification, the power of the executive to agree to the provisional application of a treaty without prior Parliamentary approval is established by the following sub-Sections of the Constitution: Sub-Section 231(1) authorises the executive to negotiate and sign international agreements, which includes the power to negotiate and sign agreements on provisional application; and it can be inferred from sub-Section 231(3) that the provisional application may commence without Parliamentary consent in three circumstances:

(a) Where the treaty that is provisionally applied is of a technical, administrative or executive nature;
(b) Where the agreement on provisional application of a treaty is itself an agreement of a technical, administrative or executive nature; and
(c) Where the agreement on provisional application of a treaty is one that requires neither ratification nor accession.

Arguably these approaches encompass almost, if not all, of the methods by which a State may agree to apply a treaty provisionally.This m ay be done by the inclusion of a provision to this effect in the treaty itself, an agreement in simplified form, a resolution of a conference, or a notification or declaration of provisional application. In the South African context, whatever form it takes, an agreement on provisional application must be tabled in the National Assembly and the National Council of Provinces, the two Houses of Parliament, within a reasonable time – failure to do so may constitute a breach of the Constitution.

Mr Chairman

The executive in South Africa may decline to ratify a treaty approved by Parliament should the other party/parties delay or refuse to ratify, the entire treaty has become obsolescent, or there is a need to renegotiate some terms. If the South African Government decides not to ratify a provisionally applied treaty, the executive could choose to terminate the provisional application (provided the agreement on provisional application does not prohibit this).

Section 233 of the 1996 Constitution commands that, when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law – it is believed that 'international law' in this context would include treaties that have entered into force for the Republic of South Africa and also those that it applies provisionally.

The Office of the Chief State Law Adviser (International Law) and the South African Treaty Section, the depositary of all South African treaties, are currently compiling the formal input requested in Para 33 of the Report of the International Law Commission's 66th Session.

I thank you for your attention.