



STATEMENT OF THE REPUBLIC OF CYPRUS

Report of the International Law Commission

Sixth Committee

(Agenda Item 83, Cluster II)

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Mr. Chairman,

At the outset my delegation would like to acknowledge the importance of the work ILC and welcome the Commission's latest Report. Given the complementary mandates of the Commission and the Sixth Committee in the progressive development and codification of international law, my delegation supports initiatives to further enhance the relationship between the two bodies. We also note with satisfaction the efforts to make ILC more easily accessible through the Commission's website.

Mr. Chairman,

We wish to deliver particular comments on the Chapter "**Identification of Customary International Law**". In this respect we would like to thank Special Rapporteur Sir Michael Wood for his work on this very important Chapter and the quality of his third report. My delegation will focus its comments on the subjects of "persistent objector" and "particular custom".

On the subject of "persistent objector", Cyprus shares the doubts already expressed by some members of the Drafting Committee, as to its relevance to the scope of this Chapter, given that the Chapter concerns the identification rather than the application of Customary International Law.

Moreover, the use of "persistent objection", as a means to avoid Customary International law obligations, is highly contentious and could lead to the fragmentation of international law. As Dunberry notes, "No tribunal has ever ruled that the status of persistent objector prevented the application of a norm of customary law to the objecting State. The concept is also not supported by State practice. It is rarely used by States and whenever it is invoked, it ultimately fails". To the extent that there is any credence to this subject, it is beyond debate that it is inapplicable to *jus cogens*. The ICJ, for instance, relied on the prohibition of the use of force as being "a conspicuous example of a rule of international law having the character of *jus cogens*." (Nicaragua Case). Any right of a State to dissent from a rule of Customary International Law should not be construed only in the narrowest

possible degree, in order to protect the basic scope of *jus cogens* as a fundamental principle of a law-abiding international community. Rather, it should be construed to the fullest extent, to safeguard the stability, predictability and security that Customary International Law affords to international relations. What would be the outcome in international relations, if a State would be allowed, on the “persistent objector” basis to question the validity of generally binding rules of international law.

Further, regarding the applicability of the concept, a State can only be a “persistent objector” – and have the benefits of being a persistent objector – up to the point of the formation of the rule and only prior to the point that it solidifies into custom. This is also consistent with the fact that existing Customary Law binds new States and that they cannot withdraw from custom.

Accordingly, such a controversial theory, without sufficient support by State practice and international jurisprudence, should not be included in the draft conclusions, as it dynamites the essence of Customary International Law, as a concept based on well-established and thoroughly tried rules.

Mr. Chairman,

As regards the concept of particular or local or regional custom, addressed in draft Conclusion 15, the ICJ has acknowledged that it could be resorted to in some instances (*Asylum Case (Colombia/Peru)* (Judgment) [1950] ICJ Rep. 266, p. 276; *Right of Passage Over Indian Territory (Portugal v India)* (Judgment) [1960] ICJ Rep 6, pp. 39-43; *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213, paras 134-144). Nevertheless, as Cassese notes, in order for a regional customary rule to be formed “it has to be tacitly accepted by all the parties concerned” and, most importantly, “its existence must be proved by the State that invokes it” (Antonio Cassese, *International Law* (2nd edn OUP 2005) 164). Therefore, the draft conclusion should include an additional clause, which may serve as a safeguard for the interests of the dissenting States; namely, the State invoking an alleged regional custom should bear the burden of proof for the existence of such a rule.

I thank you for your attention.