Check against delivery

STATEMENT BY
Dr. Liesbeth Lijnzaad

Legal Adviser, Netherlands Ministry of Foreign Affairs

United Nations General Assembly
70th Session

Sixth Committee
Agenda item 83
Report of the International Law Commission
Part 2
Chapters VI, VII, and VIII

NEW YORK, 4 November 2015

KINGDOM OF THE NETHERLANDS
UNITED NATIONS SECURITY COUNCIL
CANDIDATE 2017 - 2018

Mr. Chairman,

Chapter VI

(Identification of customary international law)

1. We are happy to see the development of the work on the identification of customary international law, and wish to congratulate Special Rapporteur Michael Wood on his excellent third report and the progress made. If indeed the work will be concluded next year, that would be an impressive achievement for a thorough study on a key aspect of the sources of international law.

2. First of all, I wish to address the question of inaction and silence in the formation of international customary law. The difficulty with inaction is that is hard to explain the meaning of silence. Understanding the silence or inaction of States raises an almost philosophical problem as to motives, and the presumption that all States' action (or indeed inaction) is based on rational decision-making.

3. We appreciate the generally careful approach of the Special Rapporteur against drawing too many conclusions from the silence or inaction of States, and for underlining that what is essential is that consequences may only be attached to

the absence of a reaction where such a reaction would be expected. This implies that the rule is not that silence equals acquiescence, but rather that in a particular situation when it was clear that a reaction was called for, no such reaction came.

4. We do agree with the Commission that actual knowledge of the practice in question is a necessary requirement, which raises further questions as to how public or well-reported the *opinio iuris* or practice should be? Is there a general requirement for information to be provided on the acceptance of a nascent customary rule in order to be able to draw consequences from silence? After all, while there appears to be silence, there may in fact be confidential governmental action such as for instance diplomatic correspondence that is not shared with the public at large, but is quite relevant nevertheless.

Mr. President,

5. The discussion in the Commission on the "writings" as subsidiary means for the identification of customary international law is interesting. We wonder if further clarification could be provided as to how this discussion is related to

article 38 (1)(d) of the ICJ Statute where these writings are called "teachings" and are referred to as subsidiary means for the determination of rules of law.

Mr. President,

6. Let me first of all support the inclusion of the persistent objector in the project undertaken by the Commission. We consider that this matter necessarily needs to be included in the conclusions that are being formulated.

7. However, we do have hesitations with respect to the rule that has been formulated so far. Draft conclusion 15 [16] suggests that, although the State that has objected during the formative period of a rule will achieve its goal of not being bound, there is somehow an obligation to continue expressing its objection to the rule thus formed which is binding on all other States except the persistent objector (".. for so long as it maintains its objection.").

We would question where this requirement comes from, as it does not seem to be theoretically or logically correct. At the heart of the position of the persistent objector is the notion that international law is a consensual system (para.90 A/CN.4/682). While the need for *explicit* consent is visible in the establishment of treaties, this is much less the case in customary international law. In the

formation of customary international law, no explicit consent is needed for States to become bound. On the contrary: only explicit, consistent and clearly expressed objections will prevent a State becoming bound. On one crucial condition: these objections must take place during the formation of the rule, objections afterwards will not have the desired effect of not being bound.

8. If this is the case, then it stands to reason that – once the position of persistent objector has been obtained through the required steps, and the customary rule has been established – this position does not require any further maintenance in the form of continuing objections. Why should it, the State concerned has expressed its lack of consent to the newly developed rule, and that expression remains legally relevant once the rule has become a rule of law not binding for the persistent objector. Or are we to understand that a legal rule to which that State has not consented during its formation, would itself trump the requirement of consent? There cannot be an obligation to repeat the desire not to be bound, if the State has made its wish not to be bound sufficiently clear during the formative period.

9. We would suggest that the rule is in fact the opposite: *only* when there is subsequent practice, or expressions of legal opinions by the persistent objector in support of the "new" rule, and in deviation from its original position as persistent objector, will it lose that position. This view is correctly reflected in para.93 of the report of the Special Rapporteur.

Chapter VII
(Crimes against humanity)

10. My Government would like to present its compliments to the Special Rapporteur, Sean Murphy, on his first report on crimes against humanity and the first four draft Articles in that regard.

11. The Netherlands agrees with the Commission that the prevention and punishment of crimes against humanity is important and we share the Commission's concerns regarding the continuing occurrence of these crimes. However, we would like to suggest that the problem is perhaps not so much one of definition. In view of the established case law of the various international criminal tribunals and the existing legal instruments defining crimes against humanity, such as the Rome Statute, the notion of what constitutes crimes against humanity is familiar.

12. The issue, rather, is the operationalization of the mechanisms to address the prevention and punishment of crimes against humanity, particularly in domestic jurisdiction. It is in this context that a treaty would provide a welcome instrument. The focus of this instrument, and hence the effort of the Commission, should be directed at the question of how to enforce the prohibition of crimes against humanity, rather than providing yet another definition.

13. Having said that, a pertinent question in our view is the relation between this draft convention and the Rome Statute. The Netherlands, obviously, supports the Rome Statute. It is important to recall that the States Parties to the Rome Statute are required to implement the Statute, including its provisions on crimes against humanity, in their respective national legal orders. Any subsequent legal instrument on the same topic could, and should, build on this existing practice. Yet it is equally necessary to underline that the obligation to prevent and prosecute crimes against humanity is equally binding on States not party to the ICC Statute.

14. It is of key importance, especially in cases with many international aspects, to ensure the connection between the relevant national judicial systems, so as to

promote inter-State cooperation with respect to prosecution. Strengthening mutual legal assistance is needed in this respect, and indeed the creation of a legal instrument, not only for crimes against humanity, but for all atrocity crimes.

15. We would like to recall that, together with the governments of Argentina, Belgium and Slovenia, the Netherlands is working towards a new Multilateral treaty on Mutual Legal Assistance and Extradition for domestic prosecution of the most serious international crimes. As of today, 48 countries have expresses support for the opening of negotiations on such a Multilateral Treaty, representing all continents (both ICC and non-ICC countries). Support for such an instrument is growing steadily. We would welcome close cooperation between the ILC and the promotors of the initiative to improve legal cooperation in the area of combatting the most serious international crimes.

Chapter VIII

(Subsequent agreements and subsequent practice in relation to the interpretation of treaties)

16. Turning now to the topic of subsequent agreements and subsequent practice, let me express our appreciation to the Special Rapporteur, Georg Nolte, for his

comprehensive third report on the topic. We note that this report introduces one further conclusion to those presented in previous reports. Allow me to concentrate on this draft conclusion and its commentary only today.

17. As we did in our written reaction, we would like to emphasise the importance of constituent instruments of international organizations as a particular type of treaty to which the different elements and criteria of "subsequent agreement" and "subsequent practice" may apply.

18. As host state of many international organisations, we would like to draw the attention to the distinction between treaty interpretation and treaty amendment or modification through the operation of subsequent agreement or subsequent practice, especially in the case of the practice of an international organization in the application of its constituent instrument. It is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by implication, contain.

19. Thus, the conduct of an organ of an international organisation may influence the practice of the organization in the application of a constituent instrument, especially when this practice has never been challenged by the parties to that

instrument. This may ultimately result in an implicit modification of the constituent instrument of the organisation.

20. However, in this regard we would also draw the attention to the relationship between the organs of an international organisation and its member states, and the ensuing difficulty to determine whether a decision interpreting or modifying a constituent instrument was taken by an organ of the organisation or by the member states as parties to the constituent instrument. This was also mentioned in the statement of the EU. In situations like these, it might be difficult to establish subsequent practice in the application of the constituent instrument within the meaning of Article 31(3)(b) of the Vienna Convention.

Thank you, Mr. Chairman