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70TH UNITED NATIONS GENERAL ASSEMBLY

AGENDA ITEM 83
REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS 67TH SESSION

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Identification of customary international law

Mr. Chairman,

Poland attaches great importance to the work of the International Law Commission on the topic of identification of customary international law. This issue is in our view particularly significant as it covers one of the most fundamental sources of international law. Unfortunately, customary law is sometimes on the one hand ignored and sometimes, on the other, abused. The first situation is the consequence of the volume of treaties in force and the assertion that, at least some of them, can be self-contained. The second, relates to a situation when customary norms are often and easily invoked without appropriate assertion that there exists a general practice that is accepted as law, nor without a thorough evaluation of opinio iuris.

The Polish delegation supports two-constituent-elements approach. We are of the opinion that both elements are interrelated, but they cannot be mixed; an existence of both of them must be proven in the process of ascertaining and applying customary law. Let us stress e.g. that according to the ILC decisions of national courts can be regarded as evidence of both practice and opinio iuris.

In this context, in our view, the issue of necessity as an important factor of *opinio iuris sive necessitatis* should be given due regard. We welcome the adoption by the ILC conclusions on treaties, decisions of courts and tribunals, *persistent objector* and particular customary international law. This question should be also considered in the future work of the Commission in the context of a fragmentation of international law, in the context of possible special or self-contained customary regimes.

However, one should also keep in mind the importance of the question of evolution of rules of customary international law or – to put it in the ILC's terms – the question of "custom over time". This issue is not only of theoretical but also of practical importance as exemplified in the jurisprudence of international investment tribunals.

The Commission should analyse under what circumstances it is possible to withdraw from a binding rule of customary international law (in analogy to a withdrawal/denunciation from a treaty), and how to evaluate whether such situation constitutes a violation of a rule or a beginning of a new practice leading to a creation of a new custom.

Let me now turn to specific draft conclusions.

- The Polish delegation is of the opinion that draft conclusion 12 is too far-reaching in restraining the role of international organisation in creating customary rules. Moreover, this provision does not differentiate between custom binding only within the international organisation, on the one hand, and general customary rules, on the other.
- Draft conclusion 11 regulating relations between treaty and customary law rules should, in the end of paragraph 1 letter (a), contain a conjunction "or". We understand that the solution presented in the conclusion does not relate to a possible formation of a customary norm on the basis of the treaty, which requires special attention as to the evaluation of state practice and opinio iuris.
- Draft conclusion 15 regarding persistent objector should in our view indicate, *expressis verbis,* in paragraph 2 that objection should be manifested not only in verbal but also in physical acts.

Crimes against humanity

Mr. Chairman,

Poland welcomes the work of ILC on the topic of crimes against humanity. We support the use by the Commission of the definition of crimes against humanity as it is defined in article 7 of the Rome Statute. As we have stated last year, one has to consider introducing to the draft also a victim-oriented approach, with particular regard to the most vulnerable category of victims, notably children. Thus, this approach ought to be reflected in draft article 1 by adding that they apply also to "a remedy and reparation for victims" and draft article 2. As regards draft article 4 paragraph 2 we are of the view that ending formulae should read „as justification of failure to prevent crimes against humanity". This would be in line with the commentary stating that this "paragraph is addressing this issue only in the context of the obligation of prevention".

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

Mr. Chairman,

As Chapter VIII of the Report of the ILC on "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" is concerned, we fully endorse the draft conclusion 11 referring to the constituent instruments of international organizations. The conclusion perfectly reflects Article 5 of the Vienna Convention on the Law of Treaties recognizing not only the applicability of the rules on treaty interpretation to the founding treaties of international organizations but also their specific character. It properly differentiates between obligatory and supplementary means of interpretation.

We also support careful drafting of paragraphs 2 and 3 ("may arise from", "be expressed in" "may contribute to").

Finally, we want to congratulate the Special Rapporteur and the Commission on detailed, very well documented, and convincing commentary to the draft provision.

Thank you Mr. Chairman,