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International Law Commission
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Chapter VI – Identification of customary international law
Chapter VII – Crimes against humanity
Chapter VIII – Subsequent agreements and subsequent practice in relation to the interpretation of treaties

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Thank you Mr Chairman.

Chapter VI Identification of customary international law

We congratulate Sir Michael Wood for the third report, a thorough and well documented work, and for the draft conclusions which also deal with issues rose at the previous session. The report brings clarification as to the relationship between general practice and *opinion juris.* The role of inaction is treated in more depth, which is an important development.

The third report concludes that in order to ascertain the existence of a rule of customary international law, the two constituent elements are necessary to be present irrespectively of their temporal order. It also identified differences in application of the two-element approach in different fields of international law or in respect to different types of rule. We think that this issue should be further examined as to assess the weight of the two elements in different fields and different types of rules.

Mr Chairman, allow me to refer briefly to inaction. In 2014, Romania expressed 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. We maintain this position. Inaction must not be a simple omission, but must be based on that States conviction that it must not act.

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Indeed, inaction may lead to other legal consequences than formation of a custom, such as leading to an *estoppel.* Inaction must also be studied in relation to the relevant rule at state or to a particular right invoked (for example, in the *Malaysia/Singapore dispute,* inaction may have referred to a claim of sovereignty). In this sense, we see that the formula "provided that the circumstances call for some reaction" needs further clarification. We welcome the suggestion made during the debates of the Commission to specify criteria or circumstances under which inaction is relevant.

A supplementary question might be asked in relation to inaction: if a State invokes a general custom against another State, is the participation in the practice (or action) of the latter State necessary? The answer would be no. Thus, the inaction of the latter State may be sufficient for its "acceptance" of the custom which is proven by practice and opinion juris of other States, but it would be hard to argue that such inaction represents *evidence* of a custom.

As far as the international treaties are concerned, we share the view of the Special Rapporteur that the multilateral ones have the main significance, while the impact of the bilateral treaties, although not excluded from the draft conclusions, should be approached with caution.

We also see value in the view mentioned in paragraph 81 of the ILC report, according to which there would be little difference between crystallization of a customary rule and generation of a new rule through the adoption of a treaty. Indeed, positions and votes expressed during an international conference may have their own value towards establishing practice and *opinio juris.*

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The judicial decisions and writings are now included in the draft conclusion 14. However, we share the view that they should be treated separately because they have a different weight and significance.

As to the future programme of work on this topic, we hope to have a full set of first reading draft conclusions and commentaries by end of 2016 sessions as envisaged by the Special Rapporteur.

We welcome the considerations related to “particular custom”. We agree that they fall within the scope of this topic. Indeed, we welcome emphasis on the practice and acceptance of *each* of the State concerned (as opposed to the “general” custom).

We consider that the inclusion of the persistent objector rule is correct and reflects a largely accepted view. However, difficulties may arise as to the thin difference between the case when a custom exists, but is not binding for one or more States that objected in a persistent manner, and the situation when a number of “persistent objectors” lead in fact to non-uniform practice. It can be recalled that in both *Asylum* and *Fisheries* cases, the persistent objector argument was subsequent to the non-existence of the custom.

Chapter VII – Crimes against humanity

The Romanian delegation would like to commend the International Law Commission for its work on the topic of "*Crimes against humanity*" and would like

to particularly thank Special Rapporteur Sean D. Murphy for a very comprehensive and well-structured report.

We have read with great interest the solid arguments put forward in paragraphs 10-15 of the Report of the Special Rapporteur, which advocate for the adoption of a treaty for preventing and punishing the crimes against humanity. These arguments will be taken into account by the Romanian side. However, we will communicate our position on this issue at a later stage, as we intend to consider further the implications of such a decision. We are particularly cautious of not undermining, even indirectly, the efforts towards the universality of the Rome Statute of the International Criminal Court. Anyway, the provisions of such a document should not overlap with or undermine the Rome Statute of the International Criminal Court. Romania reiterates its strong and constant supporter of the International Criminal Court.

The Romanian delegation welcomes the inclusion of an article dealing with the scope of the draft articles.

As regards article 2, we agree with the position expressed by the International Law Commission, according to which the qualification of a crime as "*crime against humanity*" should not be conditional upon the existence of an armed conflict, since the conduct constituting that type of crime could occur in times of peace as well.

With respect to draft article 3, the Romanian delegation fully supports the approach of the International Law Commission of not departing from the

provisions of article 7 of the Rome Statute of the International Criminal Court, which enjoy broad consensus.

The Romanian side shares the view taken by the Commission and illustrated in the formulation of Article 4 paragraph 1 letter (a), which covers situations in which a state exercises *de jure* as well as *de facto* jurisdiction.

We are also favorable to the inclusion of the non-derogation provision, inspired by similar provisions of other multilateral treaties.

Chapter VIII

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

Romania congratulates the Special Rapporteur, Mr. Georg Nolte, for the third report, offering a comprehensive analysis of the role of subsequent agreements and subsequent practice in relation to treaties that are constituent instruments of international organizations. We welcome the draft conclusion 11 and the commentaries attached thereto.

Romania would like to emphasize the very thin line between paragraphs 2 and 3 of draft conclusion 11. The difference, that paragraph 2 deals with practice *of States parties*, while paragraph 3 deals with the "own practice" of the organizations "as such", is clarified only after a thorough reading of the commentaries. Therefore, for better clarity, we may ask whether it would be appropriate to place the words "subsequent agreements or subsequent practice

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of the Parties" in paragraph 2, and "practice of the international organization *as such*" in paragraph 3.

On the substance, the difference between the two paragraphs is also very thin. Romania agrees with the idea expressed in paragraph 15 of the commentaries that subsequent practice of States may arise from their reactions to the practice of an international organization. Similarly, we agree to the conclusion in paragraph 34 of the commentaries, that the "own practice" of the organizations is "relevant for the determination of the object and purpose of the treaty, under article 31 (1)". However, the reactions of States to such "own practice" matter. In this sense, Romania suggests that the relation between paragraph 2 and 3, on one side, and draft conclusion 9 paragraph 2, referring to silence that may constitute acceptance, on the other side, should be further explored.

I thank you for your attention.