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STATEMENT OF THE CHAIRMAN OF THE INTERNATIONAL LAW COMMISSION, MR. KIRILL GEVORGIAN

Part Three

Chapters X-XIII: ***Identification of customary international law; Protection of the environment in relation to armed conflicts; Provisional application of treaties; and The Most-favoured-Nation clause***

Chapter X: ***Identification of customary international law***

Mr. Chairman,

I shall begin this third and final cluster with the introduction of **Chapter X** of the report, which concerns the topic "**Identification of customary international law".** This year, the Commission had before it the second report of the Special Rapporteur, Mr. Michael Wood.

The second report addressed the "two-element" approach to the identification of rules of customary international law, and proposed eleven draft conclusions relating to the scope of the work and the role, nature and evidence of the two elements. All eleven draft conclusions were referred to the Drafting Committee and the Drafting Committee provisionally adopted eight draft conclusions. The Chairman of the Drafting Committee, delivered a statement to the plenary of the Commission on the work of the Drafting Committee on this topic, including a review of the eight draft conclusions provisionally adopted. That statement, dated 7 August 2014, is available on the website of the Commission. I would like to emphasize that those conclusions have not yet been considered or adopted by the Commission. It will consider them, along with accompanying commentaries next year.

For now, I will

organizations” in the draft conclusions, while others considered the definitions to be useful. There were also differing opinions on how to best refer to the element of “accepted as law”, in particular whether the element should be defined by reference to the language of Article 38, paragraph 1 (b), of the Statute of the International Court of Justice, or whether to use the expression “*opinio juris*”.

On the **basic approach**

members indicated that the practice of certain organs of a State was more important than others, with some members noting that different organs were more or less empowered to reflect the international position of the State.

The concept of "specially affected States", as reflected in draft conclusion 9, paragraph 4, was also the subject of considerable debate. Several members were of the view that the concept was irreconcilable with the sovereign equality of States and should not be included in the draft conclusions, while other members not opposed to including the concept stressed that it was not a means to accord greater weight to powerful states, or to determine whether practice was sufficiently widespread.

Turning now to the second element, **"accepted as law" (or "*opinio juris*"),** there was general agreement regarding the role of the element in det

their practice in relation to customary international law, as well as information on national digests and related publications, was also emphasized. Accordingly, in Chapter III of the report, the Commission has reiterated its request to States to provide information on their practice relating to the formation of customary international law and the types of evidence for establishing such law in a given situation, as set out in: (a) official statements before legislatures, courts and international organizations; and (b) decisions of national, regional and sub-regional courts. In addition, the Commission would welcome information about digests and surveys on State practice in the field of international law.

be taken during an armed conflict or post-conflict, which will be the subject of future reports.

The preliminary report, whose summary introduction is contained in paragraphs 188 to 191, sets out in general terms the **Special Rapporteur's proposed approach** to the topic and provided, *inter alia*, **an overview of the scope and methodology**, as well as of the previous work of the Commission relevant to the topic. It also sought to identify certain existing obligations and principles arising under international environmental law that could guide peacetime measures taken to reduce negative environmental effects in armed conflict. The Special Rapporteur nevertheless indicated that it was premature, at this stage, to evaluate the extent to which any such obligations continued to apply during armed conflict. The preliminary report further addressed the use of certain terms which

Mr. Chairman,

position could not be reconciled with article 25 of the Vienna Convention, which specifically envisaged provisional application being undertaken on the basis of agreement between States and as an exercise of the free will of States. At the same time, it was also noted that recent practice had revealed the possibility that a State could unilaterally declare its intention to provisionally apply a treaty.

While support was expressed for the position that the **regime that applied to the termination of treaties** applied *mutatis mutandis* to the provisional application of treaties during the debate, other members were of the view that while there was some overlap in the legal position of the termination of treaties and that of provisional application, this did not mean that the same rules applied necessarily, even *mutatis mutandis*. A difference of opinion also existed as to the applicability of the rules on the unilateral acts of States to the termination of provisional application, as well as to the assertion that such termination could not be undertaken arbitrarily.

As for the **legal consequences of breach of a treaty** being applied provisionally, the view of the Special Rapporteur on the applicability of the existing regime of the responsibility of States, was supported in the Commission, and it was pointed out that article 12 of the 2001 articles re

wish to draw the attention of the Sixth Committee to Chapter III of the Commission's report, in which t

year. It is therefore the sincere hope of the Commission that Mr. McRae would be in Geneva to complete the task that he has so ably steered from the beginning.

This year, the

The Study Group considers as