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STATEMENT OF THE CHAIRMAN OF THE INTERNATIONAL LAW COMMISSION, MR. NARINDER SINGH

Part Two

Chapters VI-VIII: ***Identification of customary international law; Crimes against humanity and Subsequent agreements and subsequent practice in relation to the interpretation of treaties***

Thank you Mr. Chairman,

In this second cluster of issues, I

Commission. It is anticipated that the Commission will consider them, along with accompanying commentaries next year.

The relevant chapter of the report only reflects the plenary debate on the third report at this year's session. The introduction by the Special Rapporteur of his third report is summarized in **paragraphs 62 to 73** of the Report. Firstly, the third report sought to cover issues that were raised last year, and in particular the relationship between general practice and *opinio juris,* the question of inaction, as well as the relevance of the practice of international organizations and of non-State actors. Secondly, the third report considered several new issues, beginning with certain particular forms of practice and of evidence of *opinio juris*, namely treaties and resolutions of international organizations and conferences. It further dealt with the role of judicial decisions and writings. Finally, the third report addressed questions relating to the category of "particular custom" and to the persistent objector rule.

The summary of the debate in Plenary is contained in **paragraphs 74 to 96** of the report. Allow me now to highlight some of the issues discussed. Members of the Commission reiterated their support for the two-element approach to the identification of customary rules, which requires to ascertain the existence of a general practice and acceptance as law (*opinio juris*). There was general agreement that the outcome of the topic should be a set of practical and simple conclusions, with commentary, aimed at assisting practitioners in the identification of rules of customary international law.

On the **relationship between the two constituent elements**, some members of the Commission supported the conclusion that, although the two elements always needed to be present, there could be a difference in application of the two-element approach in different fields or with respect to different types of rules. Support was expressed for the conclusion that each element was to be separately ascertained and that this generally required an assessment of specific evidence for each element. It was stressed that the separate assessment of the two requirements did not mean that the same material could not be evidence of both elements.

While the analysis provided for in the third report on the relevance of **inaction** for the identification of rules of customary international law was generally welcomed, a number of members pointed to the practical difficulty of qualifying inaction for that purpose. It was indicated that the situation should warrant reaction by the States concerned, that States must have actual knowledge of the practice in question and that inaction had to be maintained for a sufficient period of time.

There were different views within the Commission as to the relevance of the **practice of international organizations**. In particular, a number of members pointed out that such practice could contribute to the formation or expression of rules of customary international law, and that the importance of the practice of international organizations in some areas had to be emphasized. Some other members stressed that this could be the case only if the practice of an international organization reflected the practice or conviction of its member States or if it would catalyze State practice, but that the practice of international organizations as such was not relevant for the assessment of a general practice.

The draft conclusion proposed by the Special Rapporteur that the **conduct of other non-State actors** was not practice for the purposes of the formation or identification was supported by several members of the Commission. Some members considered the proposal to be too strict, in particular in the light of the importance of the practice of certain non-State actors, such as the International Committee of the Red Cross, as well as in view of the importance of activities involving both States and non-State actors.

On the role of particular form of practice and evidence, namely **treaties and resolutions of international organizations and adopted at international conferences,** the conclusion reached in the third report on the role of treaties as evidence of customary international law was generally supported. Some members stressed that all treaty provisions were not equally relevant as evidence of rules of customary international law and that only treaty provisions of a “fundamentally norm-creating character” could

generate such rules. A range of views was expressed on the evidentiary value of resolutions adopted by international organizations or at international conferences. According to one viewpoint, such resolutions, and in particular resolutions of the General Assembly of the United Nations, could under certain circumstances be regarded as sources of customary international law. It was suggested that the evidentiary value of these resolutions were in any case to be assessed with great caution. Members generally agreed that resolutions of international organizations and conferences could not, in and of themselves, constitute sufficient evidence of the existence of a customary rule. It was noted that the evidentiary value of such resolutions depended on other corroborating evidence of general practice and *opinio juris*. It was pointed out that a separate assessment of whether a rule contained in a resolution was supported by a general practice that is accepted as law was required in order to rely on a resolution.

As regards **judicial decisions and writings**, members welcomed the conclusion according to which such materials were relevant for the identification of rules of

practitioners with guidelines on the matter, and especially to clarify the requirements for a State to become a persistent objector.

Based on the Special Rapporteur's indications, it is a realistic aim to complete a first reading of the draft conclusions and commentaries on this topic next year. In this connection, the Commission would appreciate any additional information by 31 January 2016 on its request made previously 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 subregional courts. In addition, the Commission would welcome information about digests and surveys on State practice in the field of international law.

Mr. Chairman,

This concludes my presentation on Chapter VI of the report.

***Chapter VII*: Crimes against humanity**

I shall now turn to **Chapter VII** of the report, which concerns the topic **"Crimes against humanity."** This year, the Commission had before it the first report of the Special Rapporteur, Mr. Sean Murphy, which proposed two draft articles. The report was discussed in the plenary and the two draft articles proposed therein were referred to the Drafting Committee. The Drafting Committee decided to reformulate them into three draft articles and to adopt an additional draft article on "scope". These four draft articles were then provisionally adopted by the Commission. The text of the provisionally adopted draft articles, together with commentaries, can be found at **paragraphs 116 and 117** of the report. I will deal with these draft articles in turn.

Draft article 1 establishes the **scope of the present draft articles** by indicating that they apply both to the prevention and to the punishment of crimes against humanity. Prevention of crimes against humanity seeks to preclude the commission of such offences, while punishment of crimes against humanity is focused on criminal proceedings against persons after such crimes have occurred or when they are in the process of being committed.

Draft article 3 provides a **definition of "crimes against humanity"** for the purpose of the draft articles. The first three paragraphs of draft article 3 establish a definition of "crime against humanity." The text of these three paragraphs is verbatim the text of article 7 of the Rome Statute, except for three non-substantive changes, which are necessary given the different context in which the definition is being used. Various definitions of "crimes against humanity" have been used since 1945, both in international

speak to the conduct of either State or non-State actors. At the same time, the paragraph addresses this issue only in the context of the obligation of prevention and not, for example, in relation to possible defences by an individual in a criminal proceeding or

Paragraph 1 recognizes the applicability of articles 31 and 32 of the Vienna Convention to treaties which are constituent instruments of international organizations.

Paragraph 2 highlights a particular way in which subsequent agreements and subsequent practice under articles 31 (3) and 32 may arise or be expressed. Subsequent agreements and subsequent practice of States parties may "arise from" their reactions to the practice of an international organization in the application of a constituent instrument. Alternatively, subsequent agreements and subsequent practice of States parties to a constituent agreement may be "expressed in" the practice of an international organization in the application of a constituent instrument. "Arise from" is intended to encompass the generation and development of subsequent agreements and subsequent practice, while "expressed in" is used in the sense of reflecting and articulating such agreements and practice. Either variant of the practice in an international organization may reflect subsequent agreements or subsequent practice by the States parties to the constituent instrument of the organization.

Paragraph 3 refers to another form of practice which may be relevant for the interpretation of a constituent instrument of an international organization: the practice of the organization *as such*, meaning its "own practice", as distinguished from the practice of the Member States. The possible relevance of an international organization's "own practice" can be derived from articles 31 (1) and 32 of the Vienna Convention. Those rules permit, in particular, taking into account practice of an organization itself, including by one or more of its organs, as being relevant for the determination of the object and purpose of the treaty, including the function of the international organization concerned, under article 31 (1).

Paragraph 4 reflects article 5 of the Vienna Convention and its formulation borrows from that article. The paragraph applies to the situations covered under paragraphs 1 to 3 and ensures that the rules referred to therein are applicable, interpreted and applied "without prejudice to any relevant rules of the organization". It implies, *inter alia*, that more specific "relevant rules" of interpretation which may be contained in a

constituent instrument of an international organization may take precedence over the general rules of interpretation under the Vienna Convention.

As noted in Chapter III, it would assist the further work of the Commission if States and international organizations could provide it with: (a) any examples of decisions of national courts in which a subsequent agreement or subsequent practice has contributed to the interpretation of a treaty; and (b) any examples where pronouncements or other action by a treaty body consisting of independent experts have been considered as giving rise to subsequent agreements or subsequent practice relevant for the interpretation of a treaty.

This completes the introduction of Chapter VIII and of the Part II of my statement Thank you very much for your kind attention.