6th Ctee
26th meeting
Item 78

STATEMENT BY
Marcel van den Bogaard

Legal adviser, Netherlands Permanent Mission

United Nations General Assembly
69th Session

Sixth Committee
Agenda item 78
Report of the International Law Commission
Part 3
Chapters X, XI, XII and XIII

Chapter X

(Identification of customary international law)

Mr. Chairman,

1. Let me first address the identification of customary international law. First of all, I wish to congratulate the Special Rapporteur, sir Michael Wood on the excellent work and the second report. The footnotes are a true treasure trove for those who wish to study the subject in greater detail. I wish to comment on some of the draft conclusion in the order in which they appear in the report.

2. With respect to the attribution of practice to States, and the formulation of draft conclusion 6, we would question whether – as the Special Rapporteur seems to do – one can simply 'borrow' the attribution rules from the Articles on State Responsibility. We do not disagree that the actions of all branches of the State may contribute to what is State practice, but would note that the attribution rules in the ARSIWA (2001) clearly serve a different purpose. Determining attribution for the purpose of responsibility is an evaluation of a fundamentally different nature than the evaluation of facts that may be understood as practice of States for the purpose of determining the existence of a rule of law.

3. On draft conclusion 7(2) (paragraphs 41 and 47), we feel that the matter of the confidentiality of government correspondence, such as confidential letters or equally confidential *Notes Verbale*, would require some further clarification. While agreeing that such statements may attest to the *opinio iuris* of States and are thus highly relevant for the identification of customary law, the report does not really clarify how confidential documents can be relevant unless they are somehow published, and what this implies for legal opinion that is not published.
4. Frequently there is no need to publish such documents, and they serve their primary purpose of transmitting a view through a diplomatic channel in a satisfactory manner because they are confidential. Governments do not generally release confidential correspondence, and may only do so when problems arise, when this is necessary in litigation, or in reaction to the work of the International Law Commission. There is much more *opinio iuris* around than is somehow published.
5. Also on draft conclusion 7 (2) we would caution against the list contained here. When addressing forms of practice the emphasis ought to be on actions of States that one can notice in everyday life. Practice is the objective element in the development of customary international law. We doubt whether official

documents in which governments express their legal opinions ought to be counted as practice as the Special Rapporteur suggests. Referring to such instruments – like statements on codification efforts or acts in connections to resolutions – to us would seem to fall in the category of *opinio iuris*, rather than practice. Draft conclusion 7 (2) enters in the complex territory of whether the one element (opinion) may also be counted as the other element (practice), which we think is unhelpful.

6. Still further on draft conclusion 7 (2), and similarly draft conclusion 11 (2), and their reference to judgements of national courts, we wonder if this ought not be more qualified. Particularly in States where the judiciary is traditionally barred from relying on customary international law, such as in our legal system, it is difficult to see how such case law could contribute to practice. Also the reference would seem to presuppose that a domestic judiciary which may not be

international organisations in the development of international law cannot be ignored in this day and age.

8.

We wonder whether the ‘specially affected States’ are the same as the ‘interested States’ discussed with respect to *opinio iuris* (para.64)?

10.

matter of this study, is defined by international humanitarian law and should not be redefined by the Commission. Such definitions need not

regimes establishing an institutional framework or a secretariat that would require entry into force of the treaty to become fully effective.

7. We are not convinced of the relevance of, and therefore the need to include in this study the law relating to unilateral declarations of States, as the Special Rapporteur has done. As an instrument available under the law of treaties we believe that article 25 of the Vienna Convention should be the primary reference point for conducting this study.

8. In that respect, we are also not convinced whether there is any authority supporting the conclusion arrived at by the Special Rapporteur in paragraph 81 of his report that ‘a State that had decided to terminate the provisional application of a treaty would be required, as a matter of law,

Vienna Convention would be required and we would therefore like to reiterate our r