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Agenda item 78 wi4 &ñ ± ™ S'^ìÍ ®eport on ILC's 6

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Mr. Chairman,

In this last intervention of the delegation of Romania on this year's ILC report I will address the last topics in the report of the Commission, as indicated in the programme of work.

Identification of customary international law

We welcome the second report of the Special Rapporteur on this topic and commend Sir Michael Wood for his outstanding work focused properly rather on the methodological aspects of the subject than the substance of the rules of the customary international law.

The identification of customary international law has an outstanding practical significance and therefore, the draft conclusions in their final form and the commentaries should be a solid guidance in assessing its existence and the content of its rules, preserving at the same time a certain flexibility which reflects in fact the flexibility of the customary international law itself.

The two-element approach ïthe general practice, the acceptance as law - adopted by the report is very important as it is consistent with the practice of States, the decisions of international courts, in particular the International Court of Justice and other specialized international courts and tribunals, as well as with the majority view of scholars. Although there may be differences in the application of the two-element approach, this should further underlie any developments resulting in the final outcome of the work on this topic.

With regard to item 3 of Draft conclusion 7 which reads as follows ñinaction may also serve as practiceò, we support 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.

Romania welcomes the reference to the international organizations in the draft conclusions adopted provisionally by the Drafting Committee. Recognizing that the practice of States is instrumental and it must be primarily taken into account, the role of the intergovernmental organizations must also be considered and highlighted in relation to the existence of the customary international law. This is of particular importance in the case of regional integration organizations to which the States have transferred competence or in such areas as immunities and privileges, the responsibility of international organizations and the depository function for treaties in which the practice of international organizations is essential. Having in view that Romania is a member of the European Union, we would like to underline that the practice of the European Union must be also taken into account in particular in those areas where it has exclusive competence.

Therefore, the use of ñthe general practiceò instead of ñpractice of Statesò is most appropriate encompassing both the practice of States and the practice of the intergovernmental organizations. Considering this, we support the view that the third report should deepen this aspect and further

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terminated as a consequence of the intention not to ratify.

On the same point concerning the termination of provisional application, Romania would find it very helpful if the examination within the International Law Commission gave more guidance as to the possible different effects of such termination under various hypothesis: termination of provisional application with the intention not to ratify; termination of provisional application with the intention to continue the domestic process necessary for the entry into force; termination of provisional application after ratification but before the entry into force, especially in the case of the activation during provisional application of institutional mechanisms (EU practice could prove very useful in this respect).

Considering the multitude of hypotheses mentioned above (going beyond the limited case provided for in paragraph 2 of article 25 of the Vienna Convention), as well as other possible variations, a more thorough analysis of the customary character (or not) of paragraph 2 of article 25 of the Vienna Convention could prove very useful, especially for States, such as Romania, who are not parties to the Convention but apply it as customary international law.

Romania would also appreciate more in-depth argumentation on the non-arbitrary character of the termination of provisional application. Romania does believe that, indeed, for reasons of legal