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Check against delivery

Identification of customary international law

Statement of the Chair of the Drafting Committee

Mr. Charles Chernor Jalloh

25 May 2018

Mr. Chair,

This morning, it is my pleasure to introduce the third report of the Drafting Committee for the seventieth session of the International Law Commission, which concerns the topic “Identification of customary international law”. The report, which is to be found in document A/CN.4/L.908 issued on 17 May 2018, contains the texts and titles of the draft conclusions on identification of customary international law provisionally adopted by the Drafting Committee, and which the Drafting Committee recommends for adoption by the Commission on second reading.

Before commencing, allow me to pay tribute to the Special Rapporteur, Sir Michael Wood, whose mastery of the subject, guidance and cooperation once again greatly facilitated the work of the Drafting Committee. I also thank the other members of the Committee for their active participation and significant contributions. Furthermore, I wish to thank the Secretariat for its invaluable assistance. As always, and on behalf of the Drafting Committee, I am pleased to extend my appreciation to the interpreters.

Mr. Chair,

Part Two

Let me now turn to Part Two - “Basic approach” - which sets out the basic approach to the identification of customary international law. It comprises two draft conclusions.

Draft conclusion 2

Mr. Chair,

The title of draft conclusion 2 is “Two constituent elements”. The Drafting Committee adopted the draft conclusion with no changes to the text adopted on first reading.

Draft conclusion 2 sets out the basic approach, according to which the identification of rules of customary international law requires an inquiry into two distinct, yet related, questions: whether there is a general practice and whether such general practice is accepted as law (that is, accompanied by *opinio juris*). The Drafting Committee acknowledged the strong support expressed by States for this two-element approach over the years of the Commission’s consideration of the topic. The proposal by some States to add the words “of States”, after the word “practice” was considered. In view of the unqualified formulation “a general practice” employed in the Statutes of both the Permanent Court of International Justice and the International Court of Justice, and given the possible relevance of practice of international organizations, it was deemed preferable to maintain the text adopted on first reading. The Drafting Committee also considered that Part Three of the draft conclusions was devoted to the question of explaining the meaning of “general practice”, so that a qualifier in draft conclusion 2 was anyhow unnecessary.

The Drafting Committee also considered whether an additional paragraph should be added to draft conclusion 2 in order to clarify that a rigorous and systematic approach ought to be employed in the identification of customary international law. It was considered, however, that the draft conclusions as a whole require just that, and that the commentary will highlight that. The commentary would also clarify that a measure of deduction, as an occasional aid in the application of the two-element approach, may only be resorted to with great caution, and not as an alternative to the standard, inductive approach.