Statement by Chile

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Report of the International Law Commission (first part)

Sixth Committee, New York, 25 October 2016

Mr. Chair,

At the outset, allow me to congratulate you on your well-deserved election as chair of our committee. This election shows recognition not only of your personal achievements as a jurist and diplomat, but also of the contribution of your country in the field of international law. I also extend a warm welcome to the other members of the bureau.

Special congratulations must also be extended to the Chair of the International Law Commission, Mr. Pedro Comissário Afonso, for his excellent presentation on the work done by the Commission this year.

Our consideration of this report brings to a conclusion five years of fruitful work accomplished by the Commission. My delegation would like to commend all members of the Commission on their work and, in particular, the Special Rapporteurs on the issues that have been under consideration over these years.

I would like to highlight here one element of this report that is of particular importance to my delegation. The International Law Commission is made up of high-ranking and distinguished jurists, experts in international law, who benefit from the assistance of the Secretariat, whose members include qualified legal specialists. The Commission also benefits from the observations regularly submitted by Governments.

There are some technical, scientific and other specialized areas, however, in which – owing to the complexity of the issues involved – the cooperation of technicians, scientists and specialists is essential for the Commission to perform its mandate. On previous occasions, for example, the Commission has held meetings with specialists on a variety of issues, including shared natural resources, such as aquifers, or most-favoured-nation clauses.

We were pleased to learn from the report that, on 4 May this year, the Commission held an informal dialogue with scientists, organized by the Special Rapporteur, on the topic of protection of the atmosphere. We welcome the recourse to this method and we would encourage the Commission and the other special rapporteurs to follow this valuable approach in tackling complex technical, scientific or specialized issues.

This year the Commission approved on second reading the draft articles on the protection of persons in the event of disasters; and on first reading a set of 16 draft conclusions on the topic of identification of customary international law. My delegation wishes on this occasion to refer to these two drafts.

With regard to the protection of persons in the event of disasters, the Commission has adopted, on second reading, a draft preamble and 18 draft articles. I would like to begin my remarks by commending the Special Rapporteur on his laudable effort.

Since assuming his appointment as Special Rapporteur in 2008, Eduardo Valencia Ospina has performed his duties admirably, demonstrating not only his great competence as an international jurist, but also his leadership qualities in successfully accomplishing his assigned tasks.

My country, Chile, has suffered serious disasters throughout its history. We have been the victim of earthquakes – some followed by tidal waves – which are among the most severe and devastating anywhere in the world; but we have always made efforts to alleviate the resulting suffering in an effective and timely manner and to rebuild the country. In this we have also enjoyed the generous assistance of many States and different organizations, entities and even individuals, who have given us their help and selfless cooperation. Similarly, when disasters have occurred in other parts of the world, and in particular in our own region, Chile has responded promptly and to the extent of its abilities, in helping the victims of these disasters.

Accordingly, from the outset, we have always supported the International Law Commission and its Special Rapporteur in their efforts to achieve binding rules of law that would protect people in the event of disasters.

In preparing the draft articles, the Special Rapporteur has cooperated with governmental and non-governmental organizations with experience in the field of protection of persons in the event of disasters, such as, among others, the Office for the Coordination of Humanitarian Affairs of the United Nations Secretary-General and the International Federation of Red Cross and Red Crescent Societies. In addition, many Governments, including my own, regularly submitted comments and observations which were taken into account by the Special Rapporteur. All this means that we now have before us a set of sound and well-substantiated articles.

In our view, the resulting draft, approved on its second reading, represents a very important step towards the regulation of this matter in international law.

In its 18 articles, the draft which we have before us takes up the most important issues subsumed by the question of the protection of persons in the case of disasters, such as, among others, defining what constitutes a disaster; respect for the human dignity and human rights of persons affected by disasters; the relevant humanitarian principles; the duty of cooperation and means of its provision; the prevention of disasters; the role of the affected State and its consent to external assistance; conditions for the provision of external assistance; the termination of

such assistance; and the relationship of the proposed rules to other rules of international law, including those relating to international humanitarian law. By and large, these are *lex lata* rules that effectively reflect existing practice.

The International Law Commission is recommending that, on the basis of article 23 of its Statute, we draw up a convention on the protection of persons in the event of disasters.
My delegation stands ready to approve this recommendation, in view of the importance of the issue and because the rules set out in Commission's draft articles on the subject are satisfactory.

I shall now turn to the topic of the identification of customary international law, taken up in chapter V of the report.

At this session, the Special Rapporteur, Sir Michael Wood, presented to the Commission his fourth report on the subject, which includes a bibliography. The report examines the suggestions put forward by States and other stakeholders on the provisionally approved draft conclusions, and proposes amendments to several of the conclusions, in the light of comments received. It also considers the means of making the evidence under customary international law more readily accessible, recalling the history of the previous work of the Commission as the basis for the continued consideration of this topic.

I shall begin my analysis of this report with my congratulations to the Special Rapporteur, Sir Michael Wood, for the excellent work done, which represents a genuine contribution to international law.

I will now comment briefly on each of the 16 proposed conclusions.

We support the wording of conclusion 1, which forms part of the section of the draft conclusions entitled "Part One, Introduction". We find that conclusion 2, which relates to the two essential elements that constitute the custom, and conclusion 3, which relates to the assessment of evidence for the two constituent elements, are for the most part correctly worded.

In conclusion 2, the Commission has not departed from the classic definition, found in article 38, paragraph 1 (b), of the Statute of the International Court of Justice, pointing out in the comments that the question that should guide us in this matter must always be: "Is there a general practice that is accepted as law?" Conclusion 3 indicates the evidence and the assessment that must be followed in identifying these two constituent elements and adds that "regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found".

The third part of the draft, entitled "A general practice", contains conclusions 4, 5, 6, 7 and 8 relating to international practice, as a constituent element of custom.

Conclusion 4, on the requirement of practice, states in its paragraph 1 that: " it is primarily the practice of States that contributes to the formation, or expression, of rules of customary international law". As explained in the commentary, this reflects the primacy that States still have as subjects of international law, playing a pre-eminent role in the formation and identification of international custom.

For its part, paragraph 3 of conclusion 4 seems correct to us when it states that the conduct of other actors is not relevant to the formation or constitution of international practice, but it may be relevant to the assessment of the practice referred to in paragraphs 1 and 2.

We support the wording of conclusion 5 on "conduct of the State as State practice" and emphasize one of the comments on this conclusion, which indicates that, to qualify as State practice, the practice in question must always be publicly available or at least known to other States.

Conclusion 6, "Forms of practice", states in its paragraph 1 that "[p]ractice can take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction". As we know, the draft conclusions of the International Law Commission are to be read in conjunction with the relevant commentaries. This is vital for this paragraph, since the delicate issue of inaction is something that cannot be properly understood without being carefully analysed and clearly defined. For the inaction of a State to constitute a practice, that is, an element of custom, it must be a deliberate act of the State, conducted in full awareness and voluntarily for that sole purpose. We believe that it would be useful for the Commission to give closer attention to the importance which should attach to inaction in this matter.

The wording of paragraphs 2 and 3 of conclusion 6 seem correct to us, as do the associated comments.

We fully support the wording of conclusions 7 and 8, on assessing a State's practice and specifying that the practice must be general.

Part Four of the draft, "Accepted as law", which contains conclusions 9 and 10 concerning the "*opinio juris*", namely, acceptance of the practice as law, specifies that, to be able to identify an element in international custom, we must have before us a genuine legal conviction and not just formal consent to the element.

Conclusion 9, "Requirement of acceptance as law (*opinio juris*)", states in its paragraph 1 that "[t]he requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation". In other words, for us to accept that we are dealing with international custom, a general practice must be accompanied by a conviction that it is permitted, required or prohibited by customary international law. This, as clearly noted in the commentary on the conclusion, must be clearly distinguished from other motives,

such as those of comity or political expediency. In addition, as clearly indicated in paragraph 2 of the conclusion, it must be distinguished from mere usage.

We consider appropriate conclusion 10, "Forms of evidence of acceptance as law (*opinio juris*)", but we would like to emphasize the distinction made in the commentary on paragraph 3, which reads: "Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction."

Conclusions 11, 12, 13 and 14, which are set out in Part Five of the report, on the significance of certain materials for the identification of customary international law, refer to treaties, resolutions of international organizations and intergovernmental conferences, decisions of courts and tribunals, and teachings, respectively. We support the wording of these conclusions and their commentaries, but we note the absence of a special section on the work accomplished by the International Law Commission.

This could perhaps be reflected in the text under conclusion 12 relating to the resolutions of international organizations and intergovernmental conferences as a means of identification of customary international law, since, as a rule, once the Commission has completed its work on a draft, the General Assembly takes steps to adopt it as an annex to a resolution. It seems appropriate to us, however, that there should be a specific reference to the International Law Commission in a conclusion.

It would also be useful to our delegation if, when presenting his final report for adoption on second reading, the Special Rapporteur could indicate the reason for the absence of any reference in conclusion 12 to the generating and crystallizing effects referred to in conclusion 11, on treaties.

Part Six and Part Seven of the report, containing conclusions 15 and 16, refer to two exceptional cases: the persistent objector, and the particular customary international law, in other words, one that applies to a limited number of States.

Conclusion 15 on the persistent objector states that:

1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.
2. The objection must be clearly expressed, made known to other States, and maintained persistently.

We support both the wording of the conclusion and the corresponding commentary. In order for an exception to the rule to be justified, it must meet the specified requirements exhaustively and unequivocally. By their very nature, the rules of customary international law must apply generally and equally to all members of the international community, so it is the responsibility of the State that has sought to challenge the application of the custom to do so at the very beginning of the process of its formation, and not once the custom has already emerged.

As pointed out in conclusion 15, this objection must be clearly expressed, and maintained persistently. It will also be the objector who has that responsibility, to ensure that its objection is not considered to be abandoned.

In any event, it is important to note that, where the rules of *jus cogens* are concerned, the persistent objector institution does not apply. Accordingly, it would be advisable to highlight the above mentioned by incorporating it in the text, as paragraph 3 of conclusion 15.

Lastly, we welcome the recognition in conclusion 16 of the existence of "particular customary international law". In a diverse world, it is only natural that the different geographical regions and peoples, even those sharing similar interests, should have customary rules which are not general in nature. This is not only recognized by the Commission but has already been accepted by the International Court of Justice, in cases regarding the right to asylum and the right of passage.

In short, Mr. Chair, this is an excellent report that will undoubtedly expedite the identification of customary international law. My delegation endorses the action by the Commission, in accordance with articles 16–21 of its Statute, to circulate the aforementioned draft conclusions, through the Secretary-General, to Governments for them to submit their comments and observations thereon by 1 January 2018.

In conclusion, let me reiterate my congratulations to the Commission for the work accomplished this year, and particularly to the Special Rapporteurs, Eduardo Valencia Ospina and Sir Michael Wood, for their reports, adopted by the Commission on its second and first readings, respectively.

Thank you, Mr. Chair.