



# AUSTRALIA



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**UN GENERAL ASSEMBLY  
SIXTH COMMITTEE**  
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## **Agenda item 83: Report of the International Law Commission, Cluster II**

**Statement by Mr Bill Campbell  
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(Check against delivery)

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Mr Chair

Australia will address two topics in this Cluster: the identification of customary international law, as well as the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties.

Moving first to the identification of customary international law. Australia welcomes the progress made in the Commission's consideration of this topic, which is of great importance and practical value. Australia expresses its gratitude to the Special Rapporteur Sir Michael Wood for his detailed and thoughtful consideration of the topic as well as its gratitude to the Drafting Committee.

Australia emphasises the need to take a consistent and principled approach to the identification of customary international law. Such an approach requires that, in discerning the existence of a customary rule, separate consideration be given to each of the two elements of customary international law: State practice and *opinio juris*.

The mere fact that a State engages in particular conduct does not, without more, mean that the State perceives itself to be acting pursuant to a legal obligation. Australia supports the Special Rapporteur's conclusion that, in general, each element should be supported by separate evidence, in order to avoid conflating the two elements.

Mr Chair

Australia also emphasises that caution should be exercised before assuming that the absence of a reaction from a State to a given practice constitutes evidence of *opinio juris*. Inaction can serve as evidence of *opinio juris* only when a State, in the circumstances, and by its silence, really does signal its acceptance of a particular practice as being required as a matter of law.

Australia sees as constructive, in this regard, the Commission's efforts to carefully delineate those circumstances. Australia supports the Drafting Committee's Draft Conclusion 10, paragraph 3 which observes that, for inaction to evidence *opinio juris*, the relevant State must have been in a position to react and the circumstances must have called for some reaction.

Australia also finds helpful the Special Rapporteur's observation that, first, the State must have had knowledge of the practice to which it did not object. And second, the inaction must have been maintained over a sufficient period of time.

Australia stresses that there is no positive obligation on a State to protest against every practice that does not conform to its understanding of international law – although such protest may, in the case of a persistent objector, prevent an emerging customary norm from applying to that State.

Mr Chair

It is first and foremost the practice and *opinio juris* of States that results in the formation of customary international law. For this reason, a cautious approach needs to be taken in drawing conclusions from the practice of other actors.

As noted in Paragraph 71 of the Special Rapporteur's report, particular care should be taken to ensure that the practice of States within an international organisation is properly attributed to the relevant States.

Australia agrees also that the practice of international organisations, particularly those that have independent legal personality, should not be assimilated to that of the States themselves.

Australia is open to the possibility, as suggested in the Draft Conclusions, that the practice of international organisations might contribute to the formation of custom 'in certain cases'. At the same time, setting aside those exceptional cases where States have expressly and exclusively assigned certain of their competencies to an international organisation – We suggest that the role of international organisations in directly forming customary international law must be approached with caution.

We appreciate the efforts of the Special Rapporteur to draw some parameters around the 'certain cases' in which organisational practice might be relevant to the formation or expression of custom. We hope to see further consideration of this issue in the commentary prepared to accompany the Draft Conclusions.

Mr Chair

Australia is of the view that the conduct of other non-State actors does not contribute directly to the formation or expression of customary international law, although their valuable work may operate as a catalyst for State action or comment.

In this regard, Australia supports the Special Rapporteur's formulation of paragraph 3 of Draft Conclusion 4, which states clearly that conduct by other non-State actors is not 'practice' in the relevant sense. Australia prefers this formulation to that provisionally adopted by the Drafting Committee, which states that the practice of non-State actors 'may be relevant' in assessing the practice of States and international organisations.

Mr Chair

Moving to the matter of subsequent agreement and practice. Australia welcomes the Commission's focus on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties. Australia thanks the Special Rapporteur, Professor Georg Nolte, for his extensive work on this topic. We will focus our remarks on Draft Conclusion 11, dealing with the constituent instruments of international organisations, which was provisionally adopted by the Drafting Committee in its most recent session.

The International Court of Justice has recognised, in its 1996 advisory opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict, that the constituent instruments of international organisations are treaties of a particular type. They create new subjects of international law, endowed with a degree of autonomy and entrusted by the States Parties with the task of realising particular common goals.

Australia acknowledges that, because these treaties are in the nature of constitutional documents, they may give rise to special kinds of interpretative questions – for example, relating to the jurisdiction of the organisations that they establish.

At the same time, the International Court of Justice also recognised in the Nuclear Weapons Advisory Opinion that the constituent instruments of international organisations are first and foremost multilateral treaties. As such, they are subject to the well-established principles of treaty interpretation. Indeed, as noted in the Commission's report, article 5 of the Vienna Convention on the Law of Treaties makes clear that the constituent instruments of international organisations are treaties to which the provisions

of the Vienna Convention apply. The value of these general interpretative principles is that they are widely understood and can be applied consistently across different contexts.

In this context, Australia notes that article 31(3) of the Vienna Convention on the Law of Treaties – dealing with subsequent agreement and subsequent practice – is directed at the practice of the parties to a treaty. Paragraph 2 of Draft Conclusion 11 reflects this position. As the Chairman of the Drafting Committee has stated, paragraph 2 is directed not to the practice of international organisations as such. Rather it is directed at how State practice may ‘arise from, or be expressed in’, the practice of those organisations. For example, the practice of the organisation may prompt some reaction from States, or the organisation may be a forum through which States’ positions are expressed.

Mr Chair

Draft paragraph 3 of Draft Conclusion 11 concerns the circumstances in which the practice of an international organisation itself may contribute to the interpretation of its constituent instrument.

Australia recognises that, in some certain instances, such practice may inform the application of articles 31(1) and 32 of the Vienna Convention on the Law of Treaties. Moreover, Australia observes that, in many instances, the practice of an international organisation may be relevant for the very reason that its member States concur in that practice.

Mr Chair

Australia appreciates the efforts of the Special Rapporteur and the Drafting Committee to distil simplicity from what is a complex topic. In further addressing this complexity, in common with the suggestion of Romania made earlier today, it might be helpful if the language of Draft Conclusion 11 could be made more straightforward. For example, it might be worth clarifying, in express terms, that paragraph 2 of the Draft Conclusion is directed at the practice of States, whereas paragraph 3 applies to the practice of international organisations as such.

We look forward to engaging with the Commission's future work on this important topic.

Thank you, Mr Chair, for the opportunity to express Australia's views on these topics being considered by the ILC.