



Permanent Mission  
of the Federal Republic of Germany  
to the United Nations  
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**Statement by**

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**6<sup>th</sup> Committee**

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<b>Identification of customary international law</b> <b>Special Rapporteur: Michael Wood</b>
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Madam Chairwoman/Mr Chairman,

Once again Sir Michael Wood has delivered an impressive and thought provoking report on “*Identification of customary international law*”. We welcome and support his third report and also the set of draft conclusions provisionally adopted.

**Some remarks on the draft conclusions:**

First, we support the clarification in draft conclusion 3 paragraph 2 that in the course of an assessment of evidence, the existence of each of the two constituent elements of customary law, “general practice” and “*opinio juris*”, must be ascertained separately. This is so even in cases where it may be the same fact or action which provides evidence of both State practice and *opinio juris*. This provides very useful guidance in particular to those legal practitioners who may not be deeply familiar with public international law.

Secondly, Germany also appreciates the approach of draft conclusion 4. While paragraph 1 unequivocally confirms that States are and remain the primary subjects of international law, paragraphs 2 and 3 provide helpful insight into the possible significance of the practice of international organisations and of the conduct of certain non-state actors, e.g. the International Committee of the Red Cross. The contribution of international organisations to the development of customary international law is particularly important when it comes to supranational institutions. Since their member states have transferred specific competences to the supranational institution, this institution exercises these competences instead of the member states, in certain cases even exclusively. Such practice and *opinio iuris* should be taken into account in the same way as if the member states would have continued to exercise this competence at the national level.

However, the absence of commentaries is in particular regrettable in the case of paragraph 3, as commentaries could provide necessary guidance on cases in which the conduct of non-state actors may be qualified as being relevant when assessing the practice of States and international organisations, *inter alia* by pointing out examples.

Thirdly, draft conclusion 7 paragraph 2: We would like to reiterate our perception that although we certainly agree that practice should be unequivocal and consistent, the wording used here may raise some questions. Notably, it might result in less weight being given to the practice of countries with an open and pluralistic society, where the independence of the judiciary and the juxtaposition of government and parliament may lead to different views, or at least different nuances being expressed. This should not automatically diminish the influence of the practice and *opinio juris* of such States. Although we are aware that consistency of practice is an important aspect, this point merits attention and should be clarified in a future commentary.

Fourthly, draft conclusion 10 paragraph 3: The Commission has rightfully clarified that States cannot be expected to react to each instance of practice by other States. The absence of a specific reaction should only be relevant if circumstances in the given case would have called for some reaction.

Overall – and in the expectation of commentaries to provide additional insight and allow for a more substantiated assessment – the well-balanced approach of the Special Rapporteur and the Commission on this highly pertinent topic is already visible even at this rather provisional stage. Germany fully supports this approach.

We will continue to follow this project closely.

Thank you.

**Subsequent agreements and subsequent practice in relation to the  
interpretation of treaties**  
Until 2012: Treaties over Time

**Special Rapporteur: Georg Nolte**

Madam Chairwoman/Mr Chairman,

Germany welcomes the impressive third report by Special Rapporteur Georg Nolte on “*Subsequent agreements and subsequent practice in relation to the interpretation of treaties*”, which is based on broad and in-depth research.

We also welcome and support Draft Conclusion 11 and the commentary thereto. We appreciate in particular that the Commission has been able to adopt a commentary which allows States a much more substantive assessment of the Commission’s work.

Just two comments:

First, Draft Conclusion 11 paragraph 3 rightly reflects the case law of the ICJ, recognising that the international organisation’s practice itself may deserve special attention in the process of treaty interpretation. We fully agree that this practice may be particularly relevant for determining the object and purpose of its constituent treaty.

Second, we would deem it beneficial if the commentaries to Draft Conclusion 11 paragraph 4 provided some examples of cases in which the rules of an international organisation contain *lex specialis* provisions on the role of subsequent agreements and practice for the interpretation of its constituent treaty. The rules of the European Union, which seem to exclude taking into account subsequent agreements between the parties regarding the interpretation of its constituent instruments in areas in which the Court of Justice of the European Union exercises jurisdiction, could serve as an illustrative example. Any other example of such *lex specialis* provisions would, of course, also be welcome.

In our view, the Draft Conclusions and commentaries adopted so far already offer excellent orientation for interpretation without unduly restraining State practice. Germany continues to follow this project with great interest.

Thank you!

**Crimes against Humanity**  
**Special Rapporteur: Sean D. Murphy (USA)**

Madam Chairwoman/Mr Chairman,

Germany welcomes the work of the ILC on this highly relevant topic. We thank Special Rapporteur Sean Murphy for his highly impressive and informative first report, which is based on broad and in-depth research.

As a staunch supporter of international criminal law, Germany attaches great importance to the topic at hand. In our view, a possible Convention on Crimes against Humanity would not only complement treaty law on the core crimes, but might also foster inter-state cooperation on the investigation, prosecution and punishment of such criminal acts. Thus, a future convention might provide further impetus to our mutual aspirations to end impunity for atrocity crimes.

Two remarks on the draft articles by the German side:

First, as one of the original Signatories of the Rome Statute and an ardent supporter of the International Criminal Court, Germany welcomes the clear focus of draft article 3 to the corresponding Article 7 of the Rome Statute of the International Criminal Court. In our view, it is crucial for the success of the work of the ILC on this project that compatibility with existing rules and institutions of international criminal law, in particular the International Criminal Court and its statute is guaranteed by all means.

Second, speaking of compatibility, in our view it is highly pertinent to ensure that future developments in the case law of international courts and tribunals play an important role in interpreting a possible future Convention. This seems to be the most promising way to avoid or, at any rate, minimise the danger of diverging implementation. Hence, we welcome the clarification in the commentary to draft article 3 that the jurisprudence of the International Criminal Court and other international or hybrid courts and tribunals will continue to provide guidance on the meaning of the definition of crimes against humanity. This premise might even be formulated a little more strongly, *e.g.* by including an obligation to duly take into account the said case law when interpreting this provision. This would still leave national authorities and courts the necessary discretion, while making clear the objective of a uniform criminalisation of certain actions.

We will continue to follow the work of the ILC on this issue with great interest. Germany has already supported it by providing relevant information and we would like to encourage other States to do likewise.

Thank you!