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**STATEMENT OF THE CHAIRMAN OF THE INTERNATIONAL  
LAW COMMISSION, MR. NARINDER SINGH**

*Part Two*

*Chapters VI-VIII: Identification of customary international law; Crimes against humanity and Subsequent agreements and subsequent practice in relation to the interpretation of treaties*

Thank you Mr. Chairman,

In this second cluster of issues, I address three topics, beginning with Chapter VI.

*Chapter VI: Identification of customary international law*

**Chapter VI** of the report concerns the topic “**Identification of customary international law.**” This year, the Commission had before it the third report of the Special Rapporteur, Sir Michael Wood.

The third report covered issues that were raised in 2014, as well as new issues. It proposed additional paragraphs to three draft conclusions proposed in the second report, as well as five new draft conclusions, which were referred to the Drafting Committee. The Drafting Committee provisionally adopted eight draft conclusions, as well as additional paragraphs for two of the draft conclusions provisionally adopted last year. The statement of the Chairman of the Drafting Committee, dated 29 July 2015, on the work of the Drafting Committee on this topic is available on the website of the Commission. The 16 draft conclusions provisionally adopted so far by the Drafting Committee, which are reproduced in document A/CN.4/L.869, are annexed to that statement. The Commission took note of 16 draft conclusions at the present session on which it would welcome any preliminary comments delegations may have. I would like to emphasize, however, that those conclusions have not yet been adopted by the

Commission. It is anticipated that the Commission will consider them, along with accompanying commentaries next year.

The relevant chapter of the report only reflects the plenary debate on the third report at this year's session. The introduction by the Special Rapporteur of his third report is summarized in **paragraphs 62 to 73** of the Report. Firstly, the third report sought to cover issues that were raised last year, and in particular the relationship between general practice and *opinio juris*, the question of inaction, as well as the relevance of the practice of international organizations and of non-State actors. Secondly, the third report considered several new issues, beginning with certain particular forms of practice and of evidence of *opinio juris*, namely treaties and resolutions of international organizations and conferences. It further dealt with the role of judicial decisions and writings. Finally, the third report addressed questions relating to the category of "particular custom" and to the persistent objector rule.

The summary of the debate in Plenary is contained in **paragraphs 74 to 96** of the report. Allow me now to highlight some of the issues discussed. Members of the Commission reiterated their support for the two-element approach to the identification of customary rules, which requires to ascertain the existence of a general practice and acceptance as law (*opinio juris*). There was general agreement that the outcome of the topic should be a set of practical and simple conclusions, with commentary, aimed at assisting practitioners in the identification of rules of customary international law.

On the **relationship between the two constituent elements**, some members of the Commission supported the conclusion that, although the two elements always needed to be present, there could be a difference in application of the two-element approach in different fields or with respect to different types of rules. Support was expressed for the conclusion that each element was to be separately ascertained and that this generally required an assessment of specific evidence for each element. It was stressed that the separate assessment of the two requirements did not mean that the same material could not be evidence of both elements.

While the analysis provided for in the third report on the relevance of **inaction** for the identification of rules of customary international law was generally welcomed, a number of members pointed to the practical difficulty of qualifying inaction for that purpose. It was indicated that the situation should warrant reaction by the States concerned, that States must have actual knowledge of the practice in question and that inaction had to be maintained for a sufficient period of time.

There were different views within the Commission as to the relevance of the **practice of international organizations**. In particular, a number of members pointed out that such practice could contribute to the formation or expression of rules of customary international law, and that the importance of the practice of international organizations in some areas had to be emphasized. Some other members stressed that this could be the case only if the practice of an international organization reflected the practice or conviction of its member States or if it would catalyze State practice, but that the practice of international organizations as such was not relevant for the assessment of a general practice.

The draft conclusion proposed by the Special Rapporteur that the **conduct of other non-State actors** was not practice for the purposes of the formation or identification was supported by several members of the Commission. Some members considered the proposal to be too strict, in particular in the light of the importance of the practice of certain non-State actors, such as the International Committee of the Red Cross, as well as in view of the importance of activities involving both States and non-State actors.

On the role of particular form of practice and evidence, namely **treaties and resolutions of international organizations and adopted at international conferences**, the conclusion reached in the third report on the role of treaties as evidence of customary international law was generally supported. Some members stressed that all treaty provisions were not equally relevant as evidence of rules of customary international law and that only treaty provisions of a “fundamentally norm-creating character” could

generate such rules. A range of views was expressed on the evidentiary value of resolutions adopted by international organizations or at international conferences. According to one viewpoint, such resolutions, and in particular resolutions of the General Assembly of the United Nations, could under certain circumstances be regarded as sources of customary international law. It was suggested that the evidentiary value of these resolutions were in any case to be assessed with great caution. Members generally agreed that resolutions of international organizations and conferences could not, in and of themselves, constitute sufficient evidence of the existence of a customary rule. It was noted that the evidentiary value of such resolutions depended on other corroborating evidence of general practice and *opinio juris*. It was pointed out that a separate assessment of whether a rule contained in a resolution was supported by a general practice that is accepted as law was required in order to rely on a resolution.

As regards **judicial decisions and writings**, members welcomed the conclusion according to which such materials were relevant for the identification of rules of customary international law. The special importance of **judicial decisions** of international courts and tribunals was emphasized. The relevance of decisions of national courts on the other generated different views. According to some members, those decisions had to be included within the category of “judicial decisions” for the purpose of the identification of rules of customary international law. Some other members of the Commission, however, considered that such decisions had to be addressed separately and that their role should be assessed with caution.

Regarding **writings**, it was suggested that the term “writings” proposed by the Special Rapporteur was too broad and should be qualified. Several members of the Commission also stated that the selection of relevant writings could not amount to preference for writers from specific regions but had to be universal.

On **particular custom**, a debate ensued as to whether the question was within the scope of the topic. It was also stressed that special attention had to be paid to the importance of acquiescence for the identification of particular custom. According to some

members, it followed that a stricter standard existed for particular custom than for general or universal custom. Some other members, however, indicated that all rules of customary international law were subject to the same conditions.

Several members supported the inclusion of **the persistent objector rule** in the set of draft conclusions, while some other members considered that it was based on a controversial theory not supported by sufficient State practice and jurisprudence, and which could lead to the fragmentation of international law. The members also discussed extensively the conditions of application of the persistent objector rule, as well as its consequences.

As regards to the **future programme** of work on the topic, the suggestion by the Special Rapporteur to examine practical means of enhancing the availability of materials on the basis of which a general practice and acceptance as law may be determined was welcomed.

In his concluding remarks, summarized at **paragraphs 97 to 107** of the Report, the Special Rapporteur emphasized that the **aim of the topic** was to assist in the determination of the existence or not of a rule of customary international law and its content. This was the task that was faced by judges, arbitrators and lawyers advising on the law as it existed at a particular time, as opposed to those advising on how the law might develop or be developed. Regarding the **application of the two-element approach** in different fields, he stressed that regard had to be had to the context in which the evidence arose and that this required a careful evaluation of the factual foundations of each case and their significance. On the issue of the **separate assessment of the two elements**, the Special Rapporteur noted the general agreement within the Commission that each element had to be separately ascertained in order to identify rules of customary international law. He clarified that there could be occasions where the same evidence might be used in order to ascertain the two elements. The important aspect was that both elements needed to be present.

The Special Rapporteur considered that the conclusion that the **practice of international organizations** as such was relevant for the purpose of the identification of rules of customary international law was not controversial since it appeared that the practice of international organizations in their relations among themselves, at least, could give rise to customary rules binding in such relations. The Special Rapporteur stressed that the role of international organizations, despite their importance, was not comparable to that of States. Regarding the **role of non-state actors**, the Special Rapporteur indicated that such entities might have a role in the formation and identification of rules of customary international law – but through prompting or recording State practice and the practice of international organizations, and not by their own conduct as such.

With respect to the **role of treaties in the identification of rules of customary international law**, the Special Rapporteur, while acknowledging the importance of multilateral treaties, considered that bilateral treaties could not be excluded from the draft conclusions, even though their impact had to be approached with particular caution. The Special Rapporteur indicated that the proposed draft conclusion on **judicial decisions and writings** needed to be developed further and that the two sources should be dealt with in separately. The Special Rapporteur concurred with the view that in reality judicial decisions came into play as part of a single process of determining whether or not a certain customary rule existed. He indicated that by “writings”, he was referring to the “writings of jurists” and highlighted the benefit of considering the teachings of jurists representing different legal systems of the world.

On **particular custom**, the Special Rapporteur confirmed that all the other conclusions reached on the identification of customary rules in general were applicable to particular custom, including the draft conclusion on treaties, except in so far as the draft conclusion on the issue provided otherwise. The Special Rapporteur noted that the draft conclusion on the **persistent objector** received widespread support and acknowledged that it should be illustrated by reference to practical examples in the commentary. He pointed out that the persistent objector rule could be raised before judges asked to identify customary international law and that it was therefore important to provide

practitioners with guidelines on the matter, and especially to clarify the requirements for a State to become a persistent objector.

Based on the Special Rapporteur's indications, it is a realistic aim to complete a first reading of the draft conclusions and commentaries on this topic next year. In this connection, the Commission would appreciate any additional information by 31 January 2016 on its request made previously to States to provide information on their practice relating to the formation of customary international law and the types of evidence for establishing such law in a given situation, as set out in: (a) official statements before legislatures, courts and international organizations; and (b) decisions of national, regional and subregional courts. In addition, the Commission would welcome information about digests and surveys on State practice in the field of international law.

Mr. Chairman,

This concludes my presentation on Chapter VI of the report.

### ***Chapter VII: Crimes against humanity***

I shall now turn to **Chapter VII** of the report, which concerns the topic “**Crimes against humanity.**” This year, the Commission had before it the first report of the Special Rapporteur, Mr. Sean Murphy, which proposed two draft articles. The report was discussed in the plenary and the two draft articles proposed therein were referred to the Drafting Committee. The Drafting Committee decided to reformulate them into three draft articles and to adopt an additional draft article on “scope”. These four draft articles were then provisionally adopted by the Commission. The text of the provisionally adopted draft articles, together with commentaries, can be found at **paragraphs 116 and 117** of the report. I will deal with these draft articles in turn.

**Draft article 1** establishes the **scope of the present draft articles** by indicating that they apply both to the prevention and to the punishment of crimes against humanity. Prevention of crimes against humanity seeks to preclude the commission of such offences, while punishment of crimes against humanity is focused on criminal proceedings against persons after such crimes have occurred or when they are in the process of being committed. The draft articles focus solely on crimes against humanity, which are grave international crimes wherever they occur. They do not address other grave international crimes, such as genocide, war crimes or the crime of aggression. Further, the draft articles on crimes against humanity will avoid any conflicts with relevant existing treaties or with the obligations of States arising under the constituent instruments of international or “hybrid” criminal courts or tribunals, including the International Criminal Court.

**Draft article 2** sets forth a **general obligation of States** to prevent and punish crimes against humanity. The content of this general obligation will be addressed through the various more specific obligations set forth in the draft articles that follow, beginning with draft article 4. Those specific obligations will address steps that States are to take within their national legal systems, as well as their cooperation with other States, with relevant intergovernmental organizations, and, as appropriate, with other organizations.

In the course of stating this general obligation, draft article 2 recognizes crimes against humanity as “crimes under international law.” This characterization indicates that they exist as crimes whether or not the conduct has been criminalized under national law. Draft article 2 also identifies crimes against humanity as crimes under international law “whether or not committed in time of armed conflict”. The reference to “armed conflict” should be read as including both international and non-international armed conflict. As such, while early definitions of crimes against humanity required that the underlying acts be accomplished in connection with armed conflict, that connection has disappeared from the statutes of contemporary international criminal courts and tribunals, including the Rome Statute of the International Criminal Court.



**Draft article 3** provides a **definition of “crimes against humanity”** for the purpose of the draft articles. The first three paragraphs of draft article 3 establish a definition of “crime against humanity.” The text of these three paragraphs is verbatim the text of article 7 of the Rome Statute, except for three non-substantive changes, which are necessary given the different context in which the definition is being used. Various definitions of “crimes against humanity” have been used since 1945, both in international instruments and in national laws that have codified the crime. Article 7 of the Rome Statute definition of “crime against humanity” has been accepted by the more than 120 States Parties to the Statute and is now being used by many States when adopting or amending their national laws. The Commission considered article 7 as an appropriate basis for defining such crimes in paragraphs 1 to 3 of draft article 3.

The definition of “crimes against humanity” set forth in **paragraphs 1 to 3** contains three overarching requirements. The first requirement is that the acts must be committed as part of a “widespread or systematic” attack. The second requirement is that the act must be committed as part of an attack “directed against any civilian population.” The third requirement is that the perpetrator must commit the act “with knowledge of the attack.” These requirements, all of which appear in paragraph 1, have been illuminated through the case law of the ICC and other international or hybrid courts and tribunals. The definition also lists the underlying prohibited acts constituting crimes against humanity and defines several of the terms used within the definition. No doubt the evolving jurisprudence of the ICC and other international or hybrid courts and tribunals will continue to help inform national authorities, including courts, as to the meaning of this definition, and thereby will promote harmonized approaches at the national level. The Commission noted that relevant case law continues to develop over time, such that the discussion in the report is meant simply to indicate some of the parameters of these terms as of 2015.

**Paragraph 4** is a “without prejudice” clause which indicates that this definition does not affect any broader definitions provided for in international instruments or national laws. The Commission deemed it appropriate to adopt this paragraph, which is

meant to ensure that the definition of “crimes against humanity” set forth in draft article 3 does not call into question any broader definitions that may exist in other international instruments or national legislation. Thus, if a State wishes to adopt a broader definition in its national law, the present draft articles do not preclude it from doing so. At the same time, an important objective of the draft articles is the harmonization of national laws, so that they may serve as the basis for robust inter-State cooperation. Any elements adopted in a national law, which would not fall within the scope of the present draft articles, would not benefit from the provisions set forth within them, including on extradition and mutual legal assistance.

**Draft article 4** sets forth an **obligation of prevention with respect to crimes against humanity**. Treaty practice, jurisprudence, and the well-settled acceptance by States that crimes against humanity are crimes under international law that should be punished whether or not committed in time of armed conflict, and whether or not criminalized under national law, imply that States have undertaken an obligation to prevent crimes against humanity. As set forth in **paragraph 1**, this obligation of prevention either expressly or implicitly contains four elements. First, by this undertaking, States have an obligation not “to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law.” Second, States have an obligation “to employ the means at their disposal ... to prevent persons or groups not directly under their authority from committing” such acts. Third, paragraph 1 obliges States to pursue actively and in advance measures designed to help prevent the offence from occurring, such as by taking “effective legislative, administrative, judicial or other preventive measures in any territory under their jurisdiction or control,” as indicated in subparagraph (a). Fourth, States have an obligation to pursue certain forms of cooperation, not just with each other but also with organizations, such as the United Nations, the International Committee of the Red Cross, and the International Federation of Red Cross and Red Crescent Societies.

**Paragraph 2**, indicates that no exceptional circumstances may be invoked as a justification for the offence. This formulation with respect to crimes against humanity can

speak to the conduct of either State or non-State actors. At the same time, the paragraph addresses this issue only in the context of the obligation of prevention and not, for example, in relation to possible defences by an individual in a criminal proceeding or other grounds for excluding criminal responsibility, which will be addressed at a later stage.

Mr. Chairman,

Let me conclude my presentation of this Chapter VII by stating that the Commission would appreciate any additional information by 31 January 2016 on its request made previously to States: (a) on whether their national law at present expressly criminalizes “crimes against humanity” as such and, if so, to provide the text of the relevant criminal statute(s); (b) on conditions under which they are capable of exercising jurisdiction over an alleged offender for the commission of a crime against humanity (e.g. when the offence occurs within its territory or when the offense is by its national or resident); and (c) on decisions of their national courts that have adjudicated on questions concerning crimes against humanity.

***Chapter VIII: Subsequent agreements and subsequent practice in relation to the interpretation of treaties***

Mr. Chairman,

I will now turn to the last chapter in this second cluster, which concerns the topic “**Subsequent agreements and subsequent practice in relation to the interpretation of treaties**” in chapter VIII. This year, the Commission had before it the third report of the Special Rapporteur, Mr. Georg Nolte, containing one draft conclusion. The report was discussed in the plenary of the Commission and the draft conclusion proposed therein was referred to the Drafting Committee. Upon receipt of the report of the Drafting Committee, draft conclusion 11 was provisionally adopted by the Commission. The text of the provisionally adopted draft conclusion, together with commentary, can be found at **paragraph 129** of the report.

**Draft conclusion 11** is entitled “**Constituent instruments of international organizations.**” It refers to a particular type of treaty, namely constituent instruments of international organizations, and the way in which subsequent agreements or subsequent practice shall or may be taken into account in their interpretation under articles 31 and 32 of the Vienna Convention on the Law of Treaties.

It may be recalled that constituent instruments of international organizations are specifically addressed in article 5 of the Vienna Convention, which provides:

“The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization”

Draft conclusion 11 only refers to the interpretation of constituent instruments of international organizations. It does not address every aspect of the role of subsequent agreements and subsequent practice in relation to the interpretation of treaties involving international organizations. In particular, it does not apply to the interpretation of treaties adopted within an international organization or to treaties concluded by international organizations which are not themselves constituent instruments of international organizations. In addition, the draft conclusion does not apply to the interpretation of decisions by organs of international organizations as such, including to the interpretation of decisions by international courts, or to the effect of a “clear and constant jurisprudence” (“*jurisprudence constante*”) of courts or tribunals. Finally, it does not specifically address the questions relating to pronouncements by a treaty monitoring body consisting of independent experts, nor to the questions of the interpretation of decisions by organs of international organizations as such. Apart from subsequent agreements or subsequent practice which establish the agreement of all the parties under article 31 (3) (a) and (b), other subsequent practice by one or more parties in the application of the constituent instrument of an international organization may also be relevant for the interpretation of that treaty.

**Paragraph 1** recognizes the applicability of articles 31 and 32 of the Vienna Convention to treaties which are constituent instruments of international organizations.

**Paragraph 2** highlights a particular way in which subsequent agreements and subsequent practice under articles 31 (3) and 32 may arise or be expressed. Subsequent agreements and subsequent practice of States parties may “arise from” their reactions to the practice of an international organization in the application of a constituent instrument. Alternatively, subsequent agreements and subsequent practice of States parties to a constituent agreement may be “expressed in” the practice of an international organization in the application of a constituent instrument. “Arise from” is intended to encompass the generation and development of subsequent agreements and subsequent practice, while “expressed in” is used in the sense of reflecting and articulating such agreements and practice. Either variant of the practice in an international organization may reflect subsequent agreements or subsequent practice by the States parties to the constituent instrument of the organization.

**Paragraph 3** refers to another form of practice which may be relevant for the interpretation of a constituent instrument of an international organization: the practice of the organization *as such*, meaning its “own practice”, as distinguished from the practice of the Member States. The possible relevance of an international organization’s “own practice” can be derived from articles 31 (1) and 32 of the Vienna Convention. Those rules permit, in particular, taking into account practice of an organization itself, including by one or more of its organs, as being relevant for the determination of the object and purpose of the treaty, including the function of the international organization concerned, under article 31 (1).

**Paragraph 4** reflects article 5 of the Vienna Convention and its formulation borrows from that article. The paragraph applies to the situations covered under paragraphs 1 to 3 and ensures that the rules referred to therein are applicable, interpreted and applied “without prejudice to any relevant rules of the organization”. It implies, *inter alia*, that more specific “relevant rules” of interpretation which may be contained in a

constituent instrument of an international organization may take precedence over the general rules of interpretation under the Vienna Convention.

As noted in Chapter III, it would assist the further work of the Commission if States and international organizations could provide it with: (a) any examples of decisions of national courts in which a subsequent agreement or subsequent practice has contributed to the interpretation of a treaty; and (b) any examples where pronouncements or other action by a treaty body consisting of independent experts have been considered as giving rise to subsequent agreements or subsequent practice relevant for the interpretation of a treaty.

This completes the introduction of Chapter VIII and of the Part II of my statement  
Thank you very much for your kind attention.

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