Statement by H.E. Mr. Ferry Adamhar
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on Agenda Item 83
Report of the International Law Commission
on the work of its sixty-seventh session (Cluster 2 and 3)

New York, 9 November 2015

Mr. Chairman,

At the outset, my Delegation would like to express our appreciation to the International Law Commission for its laudable achievements in continuing its important contribution to the promotion of the progressive development of international law and its codification. I would also like to express my appreciation to the Chairman of the ILC, Mr. Narinder Singh, for his eloquent presentation on the work of the Commission during its 67th session.

Allow me now to make a few comments and observations on several issues contained in cluster 2 and then continue to a few topics on cluster 3 of the report.

Identification of customary international law

Mr. Chairman,

With regard to the work of the commission on identification of customary international law, the Indonesian Delegation commends the Special Rapporteur, Mr. Michael Wood for his third report on identification of customary international law and finds that his extensive research as well as the draft conclusions presented in the report is quite helpful.

There are now a few comments that I would like to make on the draft conclusions. Nevertheless, I wish first to emphasize that whatever conclusions that the Commission is preparing, it is necessary to ensure that the conclusions would be written in a clear language so that the practitioners, especially those who are not too familiar with customary international law, would comperhend the meaning of each of the conclusions.

Concerning the draft Conclusion 3, paragraph 2 on assessment of evidence for the two elements, my delegation is of the view that the Special Rapporteur has managed to clarify further the relationship between the two constituent elements. It comes to an understanding that while the two elements are indeed inseparable, the existence of each of the two elements has to be considered and verified separately, as stated in paragraph 2 of draft conclusion 3. We, however, have some doubt about the assertion of the Special Rapporteur in his report that when assessing to identify the existence of a rule of customary international law, evidence of the relevant practice should generally not serve as evidence of *opinio juris* as well. My delegation considers that such a rigid separation of the way the existing evidence is being evaluated might undermine the existing circumstances relevant as evidence for both elements. With these comments, my delegation agrees to the formulation of paragraph 2 of draft conclusion 3 which provides that "Each element is to be separately ascertained. This generally requires an assessment of specific evidence for each element". We, however, have some difficulty with the word "generally" in the second sentence of the paragraph, which in our view could create uncertainty for those interpreting the facts at hand. We believe that the second sentence of paragraph 2 will be clearer if the word "generally" is deleted.

As regards the draft Conclusion 4, paragraph 3 concerning the requirement of practice, we share the view that acts of international organizations may reflect the practice and convictions of their member States and thus be State practice or evidence of *opinio juris*. However, we fail to observe that the report contains sufficient analysis specifically pertaining to the proposed paragraph 3 dealing with the conduct by other non-State actors. Nevertheless, we consider that the paragraph serves as an important exclusionary clause that ensure that the conduct by other non-State actors is not practice for the purposes of formation or identification of customary international law. Paragraph 3 therefore will complete the provisions of draft conclusion 4.

With regard to the draft conclusion 11, paragraph 3 on evidence of acceptance as law, our delegation views that inaction stated in the paragraph may serve as evidence of acceptance as law. Inaction is a form of practice that (when general and coupled with acceptance as law) may give rise to a rule of customary international law. At the same time, it is true that inaction at times be difficult to identify and qualify. Looking the way it is drafted, it is neccessary to seek some clarification especially on the second part of the sentence which states "provided that the circumstances call for some reaction" is rather vague. To serve as a conclusion, it has be drafted in a more narrative fashion in order to be easily understood. We would like to suggest that the paragraph be redrafted in order to reflect the essence of the three conditions contained in paragraphs of the report, namely : inaction of a State could only be relevant for establishing concurrence where reaction in the relevant practice is called for; the State concerned must have had actual knowledge of the practice in question; and the need for the inaction to be maintained over a sufficient period of time.

Regarding the draft conclusion 12 on treaties, we note that the draft deals with the important role of treaties in the identification of customary international law. The analysis of the Special Rapporteur on this question led to the three ways in which a treaty provision could form a rule of customary international law as reflected in draft conclusion 12. My delegation have no difficulty with paragraph (a) and (b) but, we have some doubt whether the formulation of paragraph (c) would be sufficiently clear for those who interpret the conslusion, especially the phrase "by giving rise to a general practice accepted as law."

Turning to draft conclusion 13 on resolutions of international organizations and conferences, it is agreed that the resolutions adopted by international organizations and at international conferences in the formation and identification of customary international law have played an important role and are widely noted. At the same time it is necessary to ensure that before a resolution or any form of normative position adopted by Member States at an international organization or at international conference is reflecting customary international law, a certain process of examination concerning practice of the Member States and degree of its acceptance as law is necessary. The last part of the provision of Draft conclusion 13 in paragraph

54 of the report that says that resolutions cannot, in and of themselves, constitute customary international law, justifies the need for caution.

With regard to draft conclusion 14 on judicial decisions and writings, my delegation wish to emphasize the important of the real effect of judicial decisions depending on the weight given to each of the decisions. It is also equal with the case of the effect of the writings of individual authors. My delegation would like to appreciate that these matters have been taken care of in the drafting of conclusion 14.

Concerning draft conclusion 15 on particular custom, our delegation would like to appreciate the work of the Special Rapporteur on the inclusion of conclusion on particular custom. While there are limited number of such cases, it is important that there is a provision concerning the formation and identification of customary international with regional and bilateral application that accommodate particular custom. We therefore welcome draft conclusion 15. However, as the paragraph 1 does not indicate the scope of application of the particular custom concerned that would clarify those interpreting conclusion 15, we hence would like to suggest that paragraph 1 should be reformulated so as to read : "A particular custom manifesting regional or local custom is a rule of customary international law that only be invoked by and against certain States."

With regard to the draft conclusion 16 on Persistent objector, my delegation would like to share a view that both judicial decisions and State practice have confirmed that a State is not bound by an emerging rule of customary international law to which that State has persistently objected and maintains its objection after the rule has crystallized. The rule of persistent objector is important for preserving the consensual nature of customary international law. With this note, we support the draft conclusion 16.

<u>Crimes against humanity</u>

Mr. Chairman,

Moving on to the topic of crimes against humanity, let me begin by expressing my delegation's appreciation to Mr. Sean Murphy, the Special Rapporteur for the topic Crime Against Humanity for his excellent first report and for his lucid introduction to the topic.

A convention on crimes against humanity is essential as part of the effort of the international community to fight impunity. My delegation takes note of the Special Rapporteur's statement in his report that "a global convention on prevention, punishment and inter-State cooperation with respect to crimes against humanity appears to be a key missing piece in the current framework of international law and, in particular, international humanitarian law, international criminal law and international human rights law."

The convention could in our view provide regulation on inter-State relations in addressing crimes against humanity, focusing on obligation of States to prevent crimes against humanity, promoting national capacity building in the prevention and punishment of such crimes and the obligation of States Parties to exercise jurisdiction over an offender, including non-national present in its territory. Furthermore, it is also important to ensure that such a convention should be realistic and workable.

In addition, my delegation considers that the convention should also contain provisions on the obligation to prevent that would clarify the criteria as to how a failure of preventing the acts of crimes against humanity would incur State responsibility. That is why in this connection that we suggest that the question of State responsibility related to the obligation to prevent deserves further elaboration by the Special Rapporteur and discussion by the Commission.

The Protection of the Environment in Relation to Armed Conflicts

Mr. Chairman,

As regards the protection of the environment in relation to armed conflicts, I wish to thank the Special Rapporteur, Ms. Marie Jacobsson, for her exceptional second report and for her eloquent introduction. The report has provided us with valuable materials, including the result of an extensive research as well as analysis on practice of States and international organizations, legal cases and judgments, law applicable during armed

conflicts and protected zones and areas. The Special Rapporteur has also proposed five draft principles which also deserve our appreciation.

My delegation would also like to thank the Drafting Committee for the draft principles presented to the commission meeting on 30 July 2015. We are looking forward to hear the commentaries made by the commission to the draft principles that will be considered at the next session.

Immunity of State Officials from Foreign Criminal Jurisdiction

Mr. Chairman,

On the Topic of Immunity of State Officials from Foreign Criminal Jurisdiction, let me begin by expressing my delegation's appreciation to the Special Rapporteur, Ms. Escobar Hernandes, for her excellent report on especially regarding the concept of a "act performed in an official capacity", and on the temporal scope of immunity *"ratione materiae"*.The result of the research and the analysis have helped to understand the development of the two draft articles presented by the Drafting Committee in the commission on 4 August 2015.

I would like to give brief comment on draft article 2 (f) provisionally adopted by the Drafting Committee at the sixty-seventh session which stated as follow: an "act performed in an official capacity" means any act performed by a State official in the exercise of State authority".

My delegation considers that one important point related to immunity from foreign criminal jurisdicton relies on the prerequisite link between an act performed as an official capacity and the attribution of the act to a State, and ultimately to its sovereignty, as the act constitutes a manifestation of sovereignty in the form of exercise of state authority. Therefore, the word "Exercise of state authority" in the draft article 2 (f) adopted by the drafting committee is important as a part of the elements of the notion of "acts performed as an official capacity". In this regard, we would like to share the same view with the conclusion presented by the Special Rapporteur in her report that definition of exercise of state authority should be based on two elements, namely : (i) certain activities which, by their nature, are considered

to be expression of, or inherent to sovereignty; and (ii) certain activities occurring during the implementation of State policies and decisions that involve the exercise of sovereignty and are therefore linked to sovereignty in functional terms. It is certainly true that the application of such a definition has to be done in a case-by-case basis.

Before I conclude, **Mr. Chairman,**

My delegation wishes to reiterate the view that in order to contribute to the work on international law, it is imperative that we should continue to foster even stronger and more intensive engagement between the ILC and the 6th Committee.

I thank you.

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