



IRELAND

Statement by

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at the

Sixth Committee
United Nations General Assembly 70th Session

Agenda Item 83:

The Report of the International Law Commission on the Work of its 67th Session

PART 2 – Ch VI (Identification of customary international law), Ch VII (Crimes against humanity) and Ch VIII (Subsequent agreements and subsequent practice in relation to the interpretation of treaties)

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Mr. Chair,

Identification of customary international law

1. Ireland welcomes the continued work of the Commission on the topic of the identification of customary international law, and thanks the Special Rapporteur, Michael Wood, for a richly detailed third report, and the Drafting Committee for its careful consideration of the draft conclusions submitted to it.
2. Last year, my delegation supported engaging in a deeper analysis of the relationship between the two constituent elements of general practice and acceptance as law. We very much welcome, therefore, the further analysis and refinement provided by the Special Rapporteur. We agree with the addition of draft conclusion 3, paragraph 2, as provisionally adopted by the Drafting Committee. Like many aspects of this topic, we believe that this paragraph will benefit from further elucidation in accompanying commentaries, the basis for which might already be found in the Special Rapporteur's report.
3. As my delegation had also encouraged it in its comments on the topic last year, we are particularly pleased with the further examination of the practice of international organisations, and Ireland aligns itself with the statement delivered by the European Union addressing this issue. Regarding the practice of actors other than states or international organisations, we support the proposal by the Drafting Committee to soften the general exclusion of such practice in draft Conclusion 4, paragraph 3, by noting that it may, nonetheless, be relevant when assessing the practice of states or international organisations.

Mr Chair,

4. We welcome the further consideration afforded to the question of inaction as practice and/or as evidence of acceptance as law. As previously stated, we believe a cautious approach to inaction is required, for the reason succinctly put by Ms Marie Jacobsson, quoted on page 11 of the report: "while it is possible that inaction may serve as evidence of acceptance of law, the reverse may also be true: namely that inaction may not be interpreted as acceptance". We would, therefore, echo the suggestion that consideration be given to including, within the text of draft conclusion 11 itself, the specific criteria to be taken into account to qualify inaction as evidence of acceptance as law.
5. My delegation supports the cautious approach taken in the text of draft conclusion 11, and in particular the reference to the fact that treaties "*may reflect*" a rule of customary international law, provided that certain matters are established. As stated by the Chairman of the Drafting Committee, in and of itself a treaty does not create customary international law or conclusively attest to it. This note of caution has been further strengthened by the proposal by the Special Rapporteur to include a second

paragraph, in which it is highlighted that the fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that it reflects a rule of customary international law. We note the reference in the Special Rapporteur's report to the requirement expressed by the ICJ in the *North Sea Continental Shelf Case* that the treaty provision concerned should be of "a fundamentally norm-creating character", and would suggest that this element might benefit from some further consideration and elaboration. To similar effect, we support the alteration made to draft conclusion 12 so as to place, as paragraph 1, a statement to the effect that resolutions of international organisations or intergovernmental conferences cannot, of themselves, create a rule of customary international law.

6. Regarding draft conclusion 13, we support the separation out as between, first, decisions of courts and tribunals and teachings and, secondly, as between decisions of international courts and tribunals and decisions of national courts. Once again, this is an area where the succinctness of the draft conclusions may benefit from further guidance within the commentaries. The singling out of the International Court of Justice is, in our view, justified, as is the cautionary reference to having regard to decisions of national courts "as appropriate".
7. Both draft conclusion 15, on persistent objector, and 16, on particular customary international law, have a certain sensitivity, touching upon, as they do, the issue of fragmentation of international law. Whilst my delegation can express support, in principle, for the draft conclusions, we look forward to reading the relevant draft commentaries, which will be no less important in setting out a common understanding on these two significant questions.
8. Finally, Mr Chair, I wish to welcome the suggestion by the Special Rapporteur to include, within his next report, a consideration of practical means of enhancing the availability of materials on the basis of which a general practice and acceptance as law may be determined, and we very much look forward to this fourth report.