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Statement by:

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Mr. Chairman,

The Government of Israel would like to express its gratitude to the International Law Commission and the Special Rapporteur, Sir Michael Wood, for their invaluable work related to the **"Identification of Customary International Law"**. Israel attributes great importance to the formulation of a set of practical, simple conclusions and commentary that will aid practitioners in the identification of rules of customary international law.

The State of Israel concurs with the Rapporteur that it is necessary in each case to verify separately the existence of each element, general practice and *opinio juris*, before determining that a rule of customary international law does, indeed, exist. In addition, we support the notion that what is important is the presence of both elements, not their chronological order, and that generally, different evidence is required for each element.

We agree with draft conclusion 4 [5] that the conduct of non-State actors is not "practice" for the purposes of the formation or identification of customary international law. We believe that the standard of what constitutes or contributes to the formulation of customary law should be set high. We reiterate our government's past position that the establishment of custom should be state-driven and should exclude non-state actors, as opening the door to non-state actors would allow for possible polarization and politicization. Additionally, in such a scenario, the international community may be forced to determine which non-state actors are legitimate sources of custom and which are not.

Israel concurs with draft conclusion 11, which states that inaction may constitute a type of state practice and that it may serve as evidence of *opinio juris* when the circumstances demanded a reaction and the State had actual knowledge of the practice or could be deemed to have had such knowledge. Silence in these situations should only be considered acquiescence when such silence or inaction is intentional.

As far as the identification of customary international law via resolutions of international organizations and conferences and other written texts, the State of Israel takes note of the cautious and qualified language used in draft conclusion 13, which states, "[r]esolutions adopted at international organizations or at international conferences **may, in some circumstances** be evidence of customary international law or contribute to its development; they cannot, in and of themselves, constitute it" (Emphasis added). We maintain that these resolutions as a rule constitute "soft law", are prone to politicization, and tend to not accurately reflect binding

customary international law. Israel recommends proceeding with great caution on this point and proposes rejecting this approach, and emphasizing a state-driven tack.

Draft conclusion 14 states that "[j]udicial decisions and writings may serve as subsidiary means for the identification of rules of customary international law". In the International Court of Justice's 2002 *Arrest Warrant* decision,[1] the court treated national judicial decisions as evidence of states' beliefs on existing international law. We share this position. As we have stated in the past, jurisprudence of international courts should be relied upon as a subsidiary means of identification only when their decisions include a comprehensive review and analysis of state practice.

The State of Israel restates its concern that providing for particular custom in the manner done in draft conclusion 15 may serve to increase confusion and incoherence and cause greater discrepancies between States in an international legal system that is already disjointed.

We concur with draft conclusion 16 that a state that has persistently objected to a new rule of customary international law should not be bound by it. Such a rule safeguards the autonomy of individual states and helps ensure that customary international law does not become the domain of certain states to the disadvantage of others.

To conclude, Israel appreciates the careful deliberation of the Commission and the meaningful discourse between States regarding this important project and looks forward to the production of helpful guidelines regarding the identification of customary international law for courts and practitioners.

Mr. Chairman,

The Government of Israel would like to express its sincere appreciation to the International Law Commission and the Special Rapporteur, Mr. Sean Murphy, for their valuable work related to the codification of "**Crimes against Humanity**". Israel welcomes this process. This matter is of particular concern to our government given the history of the Jewish people and the genocide and barbaric crimes against humanity perpetrated against the Jews under the Nazi regime.

Since its inception, Israel has been, and still is, committed to international justice and to prevention and punishment of international crimes, including crimes against humanity. An

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[1] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 Feb. 2002, 2002 I.C.J. Rep.3, 24 para. 58.

illustrative example is that Israel was one of the first nations to join the Convention on the Prevention and Punishment of the Crime of Genocide and to adopt domestic legislation to that effect. Moreover, we wish to note a recent example of the same longstanding and continued commitment to these principles: following the recommendation of a Public Commission of Inquiry dated February 2013 established by the Israeli government, Israel is currently conducting an internal review to examine the compatibility of Israeli criminal legislation with definitions of serious international crimes under international law, including crimes against humanity. As part of this process, Israel is considering the adoption of domestic legislation that would explicitly address crimes against humanity.

A comprehensive, global codification of "crimes against humanity" would benefit the entire international community. It is the position of the State of Israel that such codification, including the list of crimes and their definition, should reflect customary international law on the subject and the widest possible consensus amongst states. Israel urges States to guard against any attempt to abuse existing enforcement mechanisms and to ensure that new mechanisms will be properly resilient to such abuse.

We wish to emphasize that the increased involvement of non-State actors in the commission of crimes against humanity should receive special attention. Any codification of "crimes against humanity" should cover crimes against humanity committed by States and non-State actors alike, and should address the specific issues related to the involvement of non-State actors in the commitment of crimes against humanity.

Since Israel continues to attach great importance to this topic, the Government of Israel would be honored to contribute to the drafting process of the new proposed treaty.