



**PERMANENT MISSION OF SINGAPORE  
TO THE UNITED NATIONS**

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**STATEMENT BY MR PANG KHANG CHAU,  
DIRECTOR-GENERAL, INTERNATIONAL AFFAIRS DIVISION,  
ATTORNEY-GENERAL'S CHAMBERS OF SINGAPORE,  
ON AGENDA ITEM 83,  
ON THE PART II OF THE REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE  
WORK OF ITS SIXTY-SEVENTH SESSION (CHAPTERS VI, VII & VIII OF A/70/10),  
SIXTH COMMITTEE,  
4 NOVEMBER 2015**

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Mr Chairman,

Mr Chairman, our delegation thanks the Commission and all Special Rapporteurs responsible for the topics under consideration in this cluster for their sterling efforts in advancing the work of the Commission on several complex questions.

Identification of Customary International Law

2. On the topic "Identification of Customary International Law", we thank the Special Rapporteur, Sir Michael Wood for his third report and the eight proposed draft conclusions that outline the issues considered as well as the Drafting Committee for its work that has resulted in the provisional adoption of sixteen draft conclusions thus far. We wish to share our initial observations on the issues addressed in the third report.

3. We start by returning to the question of the relevance of acts of international organisations and appreciate the closer consideration of this issue in this report. Considerable caution is required in assessing the practice of international organisations

and the weight to be accorded given their wide variations, including organisational structures, mandates, composition of decision-making organs and manner in which decisions are taken. The distinction drawn in the third report between the practice of States within international organisations from that of the international organisation is an important one. Acts of the latter should not generally be assimilated to that of the States themselves. In that light we appreciate the Special Rapporteur's proposal to include a new paragraph 3 in draft conclusion 4[5] stipulating that the conduct by other non-State actors is not practice for the purpose of formation or identification of customary international law. This is an important reflection of the centrality of States in the customary process.

4. On the question of forms of practice, we share the view that there is no pre-determined hierarchy among the different forms of practice and that inaction can, in certain circumstances constitute practice (draft conclusion 11). Clarity on the applicable conditions under which such inaction can constitute practice is necessary as States cannot be expected to react to all instances of practice by other States. Further, the circumstance and evidence of *opinio juris* needs to be compelling, if such inaction is to form the basis of customary international law that binds a State.

5. On the role of resolutions adopted within international organisations and at international conferences, there is a degree of parallel with our comments on the relevance of international organisations. In our view, there is even greater variation in the range of resolutions adopted by States within international organisations and at international conferences. As noted in the Special Rapporteur's report, the General Assembly for instance, is a political organ in which "it is often far from clear that their acts carry juridical significance". Further, considerations like the language adopted, the body adopting the resolution, the circumstances surrounding the adoption including methodology of adoption, degree of support call for a multifaceted analysis. For that

reason, we urge caution in ascribing significance to their role in the formation or identification of customary international law.

6. On draft conclusion 16 on “persistent objector”, we welcome the affirmation of this important exception. The Special Rapporteur has described its essential elements as (a) objection must be clearly expressed; (b) objection is made known to other States and (c) objection must be maintained persistently. Insofar as the third element is concerned, we urge a pragmatic and balanced approach. In our view, it is unrealistic and indeed unwise to demand or expect total consistency or complete persistency, or to adopt a checklist approach. The increasing convergence of distinct disciplines and subject matter across different fora as well as the complex political considerations that manifest themselves in the external, observable practice, require a holistic and contextual approach in the analysis of this element.

#### Crimes Against Humanity

7. Next, Mr Chairman, on the topic of “Crimes Against Humanity”, my delegation thanks the Special Rapporteur, Mr Sean D. Murphy, in producing his first report on this topic, as well as for the work of the Commission, which has resulted in the provisional adoption of four draft articles that set out a definition of crimes against humanity and the obligation to prevent and punish such crimes. We appreciate the comprehensive manner in which the report surveys the historical development and background to crimes against humanity and the existing international legal framework that promotes the prevention, criminalization and inter-State cooperation with respect to crimes.

8. We note that this topic is still in its early stages and would benefit from further reflection and consideration. In this regard, we recall and echo the cautionary note expressed by some delegations at the 68<sup>th</sup> Session of this Committee to avoid any pre-

determined results and that any outcome would require further study. While the report seeks to address the potential benefits of developing draft articles that might serve as the basis of an international convention on crimes against humanity, there may be other outcomes that are ultimately more appropriate.

9. Our delegation continues to study the proposed draft articles with a view to providing more in-depth comments at a later stage. In this regard, questions such as the interaction of this topic with existing legal regimes will need to be carefully considered as duplication or conflict with existing regimes could lead to uncertainty.

#### Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties

10. On the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”, we thank the Special Rapporteur, Mr Georg Nolte for producing his third report, and the Commission for its work in provisionally adopting draft conclusion 11 and the accompanying commentary.

11. While subsequent practice can influence the interpretation of a Treaty, we would emphasize that the foundation and cornerstone of interpretation remain in the wording of the Treaty itself. Subsequent practice as a means of interpretation is a tool that should be applied prudently. The provisions of the Treaty are the explicit and most authoritative expression of the parties’ intentions and reflect the delicate and carefully considered balance following negotiations between the parties.

12. The implications of relying on subsequent practice in the interpretation of the treaty are perhaps even more significant when it concerns constituent instrument of an international organization. This is because the organization, with its distinct

separate legal personality, was created by the parties for specific purposes and not infrequently, with its own distinct functions and powers vis-à-vis the members of that organization. Membership of that organization can be fluid, with the subsequent entry of new member states that were not involved in the negotiations on the constituent instrument or the formation of the subsequent practice. While we are conscious of the imperative for flexibility and adaptability to changing circumstances that may sometimes be required to make the treaty work over time, we do need to proceed prudently to avoid taking “short-cuts” that inappropriately circumvent the amendment mechanisms within the constituent instrument. From the perspective of prospective new members, questions of transparency and legitimate expectations are also important considerations.

13. In this context, there is a need for robustness and precision as to what conduct constitutes “subsequent agreement” or “subsequent practice” for the purpose of Article 31 and Article 32 of the Vienna Convention on the Law of Treaties. This is particularly given the wide variation among the constituent treaties of international organisations, with consequential differences in their organisational structures, mandates, composition of decision-making organs and manner in which decisions are taken. For that reason, we urge caution in the identification of such relevant “subsequent agreement” or “subsequent practice”.

14. In this regard, we appreciate the various illustrations and explanations set out in the commentaries eg that draw a distinction between a practice that may reflect an agreement or the practice of the member states as parties to the treaty, and practice that “express or amount to” a subsequent practice under Art 31(3)(b). We also found useful, the careful consideration and treatment of the question as to whether and when acts of plenary organs of international organisations, eg resolutions of the General Assembly of the United Nations, amount to “subsequent agreement” or

“subsequent practice” under Article 31(3)(a) and Article 31(3)(b) respectively. These are particularly complex issues that warrant further reflection and we hope that the Commission will continue to update and compile such examples and the accompanying commentary, which will serve as a very useful practical guide.

15. Finally, we note that while the draft conclusion specifically does not address the questions relating to pronouncements by a treaty monitoring body consisting of independent experts, this is a matter which the Commission may deal with at a later stage. We would agree that it may be useful for the Commission to return to this question in the future, and assess if there is a need to address this in the draft conclusion. There are a range of treaty monitoring bodies with a range of responsibilities. Further, the effect and weight of pronouncements by such bodies depend on the provisions inscribed in the constituent documents themselves as well as the practice of parties in the application of the treaty pursuant to that pronouncement.

16. In conclusion, My Chairman, my delegation welcomes once again the work of the Commission on these issues and look forward to receiving its future deliberations on them, as well as other topics that are on its agenda.

17. Thank you, Mr Chairman.

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