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UNITED NATIONS GENERAL ASSEMBLY SIXTH COMMITTEE

INTERNATIONAL LAW COMMISSION (CLUSTER 1): THE IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW

24 October 2016

Statement by Sue Robertson

Mr Chairman,

Australia welcomes the adoption of the draft conclusions and accompanying commentaries on the identification of customary international law on first reading. Australia expresses its deep appreciation to the Special Rapporteur Sir Michael Wood for his extensive work on this topic, which will provide practical guidance to States in determining the existence and content of rules of customary international law.

The draft conclusions and their commentaries merit careful consideration as a package. Australia will offer its detailed written comments and observations prior to their second reading in 2018. We are happy to offer the following initial observations.

Mr Chairman,

Australia considers that the draft conclusions provide a flexible and practical methodology for the identification of rules of customary international law and their content. In our view, this flexibility is essential to ensure that the dynamism that characterises the formation and development of rules of custom is reflected in the Commission's guidance on this important topic.

In terms of how we characterise the results of the Commission's work, Australia agrees with the Special Rapporteur that, although a principal objective of the Commission's work on this topic is to provide practical guidance, the term 'conclusions' remains appropriate. This is because, as a matter of fact, the draft conclusions reflect the

Commission's conclusions on the state of the law governing the identification of customary international law.

We do not have a strong view on the suggestion that draft conclusion 1 on scope could instead be taken up in a general commentary. However, we stress that, if this suggestion is adopted, the current content of draft conclusion 1 should be prominently featured in the commentary, to avoid being lost.

Mr Chairman,

Australia supports the emphasis in the draft conclusions on the need for a separate assessment of evidence for the two constituent elements of customary international law, conducted carefully and in light of all the circumstances. Of course, we do not exclude the possibility that, in some cases, the same evidence might be used to ascertain both practice and acceptance as law (*opinio juris*). However, as the commentary to draft conclusion 3 rightly observes, the important point remains that the two elements of custom are conceptually distinct, and any relevant material must be examined as part of two distinct inquiries.

Regarding the inherent difficulty in determining when state practice has reached a critical mass such that customary international law is formed, we concur with the Special Rapporteur that it is not the purpose of the Commission's work to provide guidance on this point. Instead, we understand that the draft conclusions operate to provide guidance to practitioners as to how to determine the existence (or content) of a customary rule at a particular point in time.

Mr Chairman,

In this respect, Australia commends the helpful and practical guidance detailed in Part Three of the Draft Conclusions in evaluating whether 'a general practice' exists. We support the recognition that it is first and foremost the practice of States that contributes to the formation of customary international law.

In accordance with our previous remarks on this topic, Australia is also open to the possibility that the practice of international organisations might contribute to the formation of custom 'in certain cases', as is suggested by draft conclusion four. However, we emphasise that the role of international organizations in the formation of customary international law (including any assessment of the weight and relevance of their practice) is a matter to be approached with some caution. We appreciate the efforts of the Commission to give content to the phrase 'in certain cases' in the commentary to draft conclusion four, but stress that draft conclusion four, paragraph 2, will require careful further consideration in this context before its second reading – in particular, as to whether further caveats might be required in the drafting of that paragraph.

Mr Chairman,

Australia welcomes the efforts of the Commission to clarify the scope of draft conclusion 10, paragraph 3, with respect to inaction as a form of practice and/or evidence of acceptance as law (*opinio juris*). As previously stressed by Australia and others in this

forum, inaction should not be assumed as evidence of acceptance of law. A State would first need to know of a certain practice and have had a reasonable time to respond. However, we wish to emphasise again that States cannot be expected to react to everything, and that attributing legal significance to inaction must depend on all the relevant circumstances of the particular case.

Australia agrees that a resolution adopted by an international organization or at an intergovernmental conference cannot, of its own right create a rule of customary international law. We will carefully assess the commentary to draft conclusion 12 in this light.

Mr Chairman,

Australia thanks the Secretariat for its comprehensive and informative memorandum on the role of decisions of national courts in the case law of international courts and tribunals for the purpose of the determination of customary international law. The Commission's approach of regarding national court decisions as a form of State practice, a form of evidence as acceptance as law, and potentially as a "subsidiary means" for determining the existence of a customary rule is, in Australia's view, appropriately reflected in draft conclusions 6, 10, and 13.

We also thank the Special Rapporteur for his work in preparing a draft bibliography on identification of customary international law. This bibliography will be an excellent complement to the draft conclusions and commentaries.

Finally, Australia wishes to express its support for the Commission's future consideration of the question of ways and means for making the evidence of customary international law more readily available. To assist this process, it is vitally important that Governments, where possible, publicly communicate the legal reasoning underpinning their decisions. Such public explanations assist to identify common understandings of international law. They also serve identify those points on which the legal analysis of various States differs.

As the Special Rapporteur has pointed out, it is not always easy to identify the crystallisation of custom, and often the distinction between state practice and *opinio juris* is blurred. We consider it is therefore essential that States continue to proactively share views – between partners and publicly – in order to build a useful body of State practice and contribute to the crystallisation and development of customary international law.