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Statement by
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On
Agenda Item: 78
“Report of the international law commission
On the work of its sixty-eighth session- cluster-1”

At the
Sixth Committee of the 71st Session of the
United Nations General Assembly

New York

October 26, 2016

Mr. Chairman,

At the outset, India joins others in thanking Mr. Pedro Comissario Afonso, Chairman of the sixty-eighth session of the International Law Commission, for the comprehensive introduction of the report and for guiding the work of the Commission at this session. We also thank all the Members of the Commission for their valuable contribution to the work of the Commission.

Mr. Chairman,

Among the topics of Cluster 1, our focus will be on some issues concerning "Identification of customary international law".

Mr. Chairman,

We would like to register our appreciation for the Special Rapporteur, Sir Michael Wood for his Fourth Report on the topic, 'Identification of customary international law', which addressed the suggestions of States on previously adopted draft resolutions as well as ways and means to make the evidence of customary international law more readily available. The Commission, in addition to this report, also considered a memorandum by the Secretariat concerning the role of decisions by the national courts in the case law of international courts and tribunals for the purpose of determining the customary international law.

The resulting 16 draft Conclusions out of this process, reflect the valuable efforts of the Commission on this topic. Draft Conclusion 4 (3) states that "Conduct of other actors" is not a practice that contributes to the formation, or expression of rules of customary international law, but may be relevant when assessing the practice of States or international organizations." Commentary to this draft conclusion in paragraph 9 includes 'non-State armed groups' as other actor along with NGOs, transnational corporations and private individuals and stipulates that the reaction of States to the conduct of non-State armed groups may be constitutive or expressive of customary international law. Our understanding, by reading both the draft conclusion and the commentary, is that the conduct of non-state armed groups is not at all constitutive or expressive of CIL.

Mr. Chairman,

We agree with draft Conclusion 8 that the "relevant practice must be general, meaning that it must be sufficiently widespread and representative as well

as consistent". Though universal participation is not required, it is important that participating States do represent the various geographical regions and are particularly involved in the relevant activity or those States that had an opportunity or possibility of applying the rule.

We also agree with the draft Conclusion 9 that the general practice be accepted as law (*Opinio Juris*) means that the practice in question must be undertaken with a sense of legal right or obligation.

Mr. Chairman,

Draft Conclusion 10, refers to government legal opinions as a form of evidence of acceptance as law. Although, we agree in principle in terms of the value of these opinions, however, it may be difficult to identify them as many countries do not publish the legal opinions of their law officers.

Draft Conclusion 11 concerns the significance of treaties, especially widely ratified multilateral treaties, for the identification of customary international law. We are of the view that all treaty provisions are not equally relevant as evidence of rules of customary international law. Only fundamental norm creating treaty provisions could generate such rules. Strong opposition to a particular treaty, though from a few countries, could be a factor which needs to be taken into account while identifying customary international law.

Mr. Chairman,

Further, we agree to the provision under draft Conclusion 12 that a resolution by an international organization or an intergovernmental conference cannot create a rule of customary international law.

I thank you very much.