



SIXTH COMMITTEE

CHECK AGAINST DELIVERY

Statement by

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ILC Cluster I

Chps: I,II,III,IV

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

Chps: V

Identification of Customary International Law

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Other decisions

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Mr. Chairperson,

With regard to the subject of "Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties," Israel congratulates the Special Rapporteur, Professor Georg Nolte, on the Fifth Report on the subject.

Treaties are concluded, *inter alia*, for the purpose of stability and clarity. These principles are reflected in certain articles of treaties, such as provisions regarding amendments and modifications, which allow for changes to be made to a treaty, but only in accordance with a specific, previously agreed upon procedure. Israel is of the view that a mechanism or arrangement that affects the interpretation of the provisions of a treaty created subsequently to a treaty's entry into force, which does not include all of the States party to that treaty, undermines this very purpose.

Therefore, we believe that it is important that states retain their discretion as to whether to accept a certain agreement or practice that would affect their obligation under a treaty or the interpretation of its provisions, and subsequent agreements and subsequent practice should be binding only upon those states that have actively and unequivocally agreed to them.

Mr. Chairperson,

Turning to the topic of "Identification of Customary International Law," 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 on this subject. Israel attributes great importance to the adoption of a thorough and rigorous approach to the identification of customary norms.

We acknowledge the efforts invested in this project and appreciate the dialogue that has taken place between the Commission and UN Member States on this matter throughout the past few years. Israel also values the consideration by the Commission of comments provided by Member States.

In this context, following the adoption of the earlier Draft Conclusions, Israel submitted extensive comments and observations to the Commission, and expressed its

views in previous discussions of this matter at the Sixth Committee. Israel wishes to take this opportunity to reiterate briefly its position.

Mr. Chairperson,

Israel believes that the Draft Conclusions and the Commentary thereto, as adopted by the Commission during the second reading, address important and challenging topics arising in the identification of customary international law. Among these issues, Israel appreciates the Commission's insistence on the need for State practice and corresponding *opinio juris* for customary international law to emerge. Most importantly, we see as essential the emphasis in the updated version of the Draft Conclusions and the Commentary on the primacy of States in the establishment of customary international law.

In addition, Israel welcomes the determination made in the Commentary that the practice and *opinio juris* of specially affected States, that are particularly involved in the relevant activity or most likely to be concerned with the alleged rule, are indispensable for the creation of custom. Israel supports the legal precision of the Commission on these issues and believes it better reflects the current state of the law than the previous version of the Draft Conclusions and the Commentary thereto.

At the same time, Israel would like to point out the following non-exhaustive reservations.

First, and as a general comment, it is Israel's view that the desired product of the present project should reflect broad agreement between States so as to enable wide acceptance of the Draft Conclusions. Israel believes that such wide support may only be achieved by reflecting well-established principles concerning the identification of customary international law. However, as reflected in its comments and as expressed by other States, Israel believes that some of the Draft Conclusions and the Commentary thereto create confusion as to whether they purport to codify existing law or propose the progressive development of the law.

One example is the overly broad role of international organizations in the formation or expression of a customary rule in the Commentary. It is Israel's position that the

Commentary's approach does not reflect the current state of law. We believe that the role granted to international organizations in the identification of customary international law is limited to the Commentary's observations regarding matters pertaining to the internal function of the international organization or its relations with States, or when States explicitly delegate to a particular international organization exclusive competence on the matter concerned.

Mr. Chairperson,

Israel's reservations also apply in connection to the issue of inaction in the Draft Conclusions. Israel and other States believe that a clarification should have been included in the text of the Draft Conclusions, according to which inaction may be taken into account as practice only when it is deliberate. Moreover, we believe that the Commentary should have been more detailed in explaining that the deliberate inaction referred to must stem from a sense of customary legal obligation and not from diplomatic, political, strategic or other non-legal considerations, which while deliberate, does not contribute to the emergence of customary international law. For this reason as well, Israel would like to express its serious reservation to the statement in the Commentary that *opinio juris* could be deduced from a State's silence 'where the practice is one that affects – usually unfavorably – the interests or rights of the State failing or refusing to act'. Only express evidence explaining the State's reasoning for refraining from acting, or its silence, out of a sense of customary legal obligation, can indicate the existence of a negative practice or an *opinio juris*, respectively.

In addition, Israel notes that the Commission's assertion on "temporary" acts which are not final, definitive and conclusive (such as draft legislation or lower State court decisions still subject to appeal), as evidence for State practice, is incorrect and may also lead to great uncertainty and contradicting outcomes.

Israel is also concerned with the relatively central role granted by the Commission to treaties that are not yet in force or which have yet to obtain widespread participation. Bearing in mind the increase in the total number of treaties, and the tendency to require only a minimal number of ratifications for a treaty to enter into force, our view

is that any reliance on such treaties for the identification of customary international law is of limited value (if any at all).

Furthermore, Israel would like to reiterate its concern with respect to the passages in the Draft Conclusions and the Commentary relating to persistent objection to a rule of customary international law. As we stated before, it would have been appropriate to include clear criteria not only for persistent objection, but also for the retraction of such an objection. In addition, we believe that the Draft Conclusions should have clarified that an objection clearly expressed by a State during the formation of a customary rule is sufficient to establish that objection, and does not generally need to be repeated to remain in effect.

Mr. Chairperson,

With respect to the Commission's recommendation that the General Assembly take note of the Draft Conclusions, Israel wishes to note the non-legally binding nature of General Assembly resolutions. Israel believes that the Draft Conclusions and the Commentary are a valuable collection of available approaches to the identification of customary international law. However, as the comments it submitted to the Commission indicate, Israel has reservations, some of them significant, regarding the Draft Conclusions and the Commentary thereto, and we believe the text would have required some further revision in order to accurately reflect international law as it stands.

It is important to make clear that in Israel's view, future reliance on the Draft Conclusions must take into account their nature as an outcome of the work of the Commission and not as an expression of the views of UN Member States. In this respect, it would also be critical to relate not only to the text of the Draft Conclusions but also to the Commentary and States' relevant observations as submitted to the Commission and as reflected in statements made in the Sixth Committee and elsewhere.

Mr. Chairperson,

We refer States to Israel's submission of its non-exhaustive comments and observations on this topic to the International Law Commission, in order to receive an extensive view of Israel's position on the identification of customary international law. We intend to load this submission on the 6th committee platform to make it available to all the States.

Israel wishes to reiterate its appreciation for the careful deliberation of the Commission, the dedication, diligence and extraordinary contribution of the Special Rapporteur, and the meaningful discourse between States regarding this important project, and thanks all parties involved.

Mr. Chairperson,

Regarding Universal Jurisdiction, As Israel already stated during the 6th Committee's discussion of "The Scope and Application of the Principle of Universal Jurisdiction", we have concerns with regard to the decision of the ILC to include this topic in its long-term programme of work. Our concerns relate to the significant challenge of identifying state practice with relation to this topic, where merely a small portion of the overall legal data is publicly available, which could lead to a distorted picture of State practice and a poor basis for proper legal analysis; the fact that the ILC is currently dealing with 3 other closely linked topics which we believe should be finalized before even considering addressing this complex topic; and above all, the obvious sensitivity, as all too often universal jurisdiction is used primarily to advance a political agenda or to attract media attention, rather than to genuinely promote the rule of law .

We refer you to Israel's statement in the 6th committee for further elaboration on this issue.

Mr. Chairperson,

As for the subject of Sea-level rise, The State of Israel welcomes the Commission's decision to include in its long-term program of work the topic 'Sea-level rise in relation to international law'. As noted in the report, sea-level rise has become a significant matter of attention and concern for the international community. It poses a concrete threat, especially to coastal areas and low-lying coastal countries, and thus the international community should make efforts to prepare for and adapt to potential implications of this phenomenon and others.

Israel therefore encourages the examination of the legal aspects of sea-level rise and related issues, including such complex questions regarding maritime law, statehood issues, and protection of persons affected by sea-level rise.

Mr. Chairperson,

Since sea-level rise – including the legal aspects thereof – is a relatively new topic on the international agenda, Israel sees value in mapping the key legal questions arising from it and outlining the necessary considerations to be taken into account. Israel notes, however, that in addressing the legal issues related to sea-level rise, it would be prudent to address each issue according to the legal framework applicable to it, rather than adopt an integrative approach. Furthermore, as noted in the proposed syllabus, any product of the Study Group should rely upon the application of existing principles of customary international law, rather than develop new legal principles, and should not propose modification to existing international law.

Mr. Chairperson,

The State of Israel wishes the members of the Commission success in this project.

Thank you, Mr. Chairperson.