State of Israel מדינת ישראל

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ILC Draft Conclusions on Identification of Customary International Law – Israel's Comments and Observations

I. Introduction

1. In accordance with paragraph 60 of the Report of the International Law Commission ("ILC") at its 68th Session (A/71/10), the State of Israel is honored to submit its comments and observations on the ILC Draft Articles on Identification of Customary International Law.
2. Israel would like to express its gratitude and deep appreciation to the Special Rapporteur, Sir Michael Wood, as well as to the ILC as a whole, for their important work related to the identification of customary international law ("CIL"). Israel attributes great importance to the adoption of a thorough and rigorous approach to the identification of customary norms, and appreciates the work on the formulation of a set of practical conclusions and commentary towards this end.
3. Along these lines, Israel wishes to make a number of non-exhaustive comments regarding the Draft Conclusions ("DC") as follows:

II. States as Primary Actors of Customary International Law

4. Current text: DC 4(2) stipulates that "*[in] certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law*".
5. Comments:
   - As a rule, international law, including CIL, is **created almost exclusively by States**. Therefore, generally speaking, no practice or *opinio juris* of other entities, such as international organizations ("IOs"), should serve as the basis for the identification of CIL.
   - While we think that this principle, as well as the primacy of the role of States in relation to the role of IOs, are properly explained in the Commentary to the DC, the DC themselves, and particularly DC 4, do not always adequately reflect this important distinction.
   - Given the importance of avoiding the impression that the practice of IOs can

serve as the basis for identifying CIL in a more general sense, we believe that DC 4 itself should express the fact that it deals with more limited situations related to practice attributed to IOs themselves and not to the member States acting within them.

6. Suggested amendments:

- In light of the above, we suggest clarifying *in the body* of DC 4 that while IOs may, in certain circumstances, serve as relevant actors to identify CIL, this applies only with respect to practice attributed to the IOs themselves (rather than the States comprising them) and in limited situations:
  - **IOs' Internal Operation** – IOs can contribute to the formation and expression of CIL in matters pertaining to their internal operation (such as their internal governance) and in certain circumstances in matters relating to the relations of IOs with States (but not regarding matters that are ultimately under the exclusive authority of States, such as immunities provided in accordance with national law). In these situations, the duty-bearers of such CIL may be only IOs and not States.
  - **The Transfer of Exclusive Competence to IOs by their Member States** – IOs' practice and *opinio juris* can contribute to the identification of CIL regarding matters over which they exercise exclusive competence explicitly delegated to them by member States (such as the European Union), as is clarified in the Commentary to DC 4.

III. A Cumulative Requirement of Practice and *Opinio Juris*

7. Current text: When defining the *opinio juris* to be reviewed in order to identify a customary rule, paragraph 7 of the Commentary to DC 3 states that *opinio juris* will be sought not only with respect to those taking part in the practice, but also with respect to those who are "in a position to react to it".

8. Comments:

- General opinions offered by States who have *no practice* with regard to the rule in question are not relevant to the CIL identification process. If *opinio juris* is expressed on a theoretical level only, it is inadmissible for identifying customary rules, as custom only emerges following sufficient practice coupled,

in each instance, with *opinio juris* by the State engaged in that practice.

9. Suggested amendment:
   - We would like to suggest deleting the text referred to in paragraph 7 of the Commentary to DC 3 on this matter and clarifying instead that *opinio juris* concerning a certain rule is relevant only when it follows a practice by the same State.

IV. **Inaction as Practice**

10. Current text: DC 6(1) stipulates that practice "*may, under certain circumstances, include inaction*".
11. Comments:
    - With regard to the discussion in the DC as to whether inaction can serve as an indicator of State practice, we would like to see a clarification in the text of the DC that inaction may be taken into account as practice only when it is **deliberate**. While this element is properly reflected in the Commentary (see, e.g., paragraph 3 of the Commentary to DC 6), the DC themselves, at times, do not fully reflect this position which we believe is of sufficient importance to merit specific mention.
    - In addition, while the DC regarding *opinio juris* in Part Four would apply equally to practice that takes the form of deliberate inaction, we believe that specific mention in the Commentary to DC 6 of the need for the inaction to stem from a sense of customary legal obligation is warranted given the unique and complicated nature of inaction as a potential source of CIL.
12. Suggested amendments:
    - In addition to describing inaction as "deliberate" in the DC itself, we believe that the Commentary should be 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, should not be regarded as State practice for purposes of identifying CIL. This approach is also clearly reflected in ICJ judgements, which distinguish between State conduct that is performed out of a sense of customary legal obligation and that which does not derive from such an

obligation.[1]

V. Failure to React as *Opinio Juris*

13. Current text: DC 10 refers to the inference on the State's *opinio juris* from situations under which the State has "*failed to react*".

14. Comments:

- We believe that DC 10 does not adequately reflect the difficulty and complexity associated with relying on the failure to react as evidence of *opinio juris.*
- Admittedly, and in general terms, a *deliberate* failure to act *out of a sense of compliance with a rule of CIL* is indeed negative practice on the part of a State relevant to the identification of CIL. For example, when a State deliberately refrains from torture because it believes it is customarily obligated to do so, the failure to act constitutes State practice. However, mere failure to react does not, on its own, constitute practice to begin with: when a State simply refrains from acting, it *lacks* practice. For this reason, only express evidence explaining the State's reasons for refraining from acting can indicate whether it lacks practice *vis-à-vis* the alleged customary rule (as should be the default case), or whether it deliberately abstained due to *opinio juris* and thus had negative practice.
- This conclusion also applies, *mutatis mutandis*, to a State's failure to react to another State's practice in circumstances addressed in DC 10. *Opinio juris* is a subjective element, representing the actual belief of a State as to its rights and duties under customary international law, and it must therefore be pronounced actively and expressly. Accordingly, when a State fails to protest against another State fishing in its maritime zones, for example, its failure to react alone does not constitute *opinio juris* indicating that it views such fishing activity as permissible under international law. It may very well be that the motivation for not protesting and allowing the practice is political or diplomatic, or that the State is in fact protesting the practice but for various reasons only does so in a private and confidential manner. Consequently, silence by the State in these circumstances cannot in itself be seen as *opinio juris*.

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[1] North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) (ICJ 1969), para. 77.

- In other words – and contrary to DC 10(3) and paragraph 7 of its Commentary – failure to react requires more than a reaction being called for in the given circumstances and the State being in a position to react. It also requires evidence that the failure to react itself stemmed from a sense of customary legal obligation.

15. Suggested amendments:

- We would propose that DC 10 and its Commentary address the practical difficulty of ascertaining evidence of "negative" practice or "negative" *opinio juris*, and stress, in line with the comments above, that a State's failure to react cannot be interpreted in and of itself (and absent additional evidence) as indicating either practice or *opinio juris*.
- Alternatively, we propose that the situation of a State's failure to react not be directly addressed, as the type of evidence needed for ascertaining the two elements is not different than in other situations.

VI. Persistent Objection

16. Current text: Paragraph 9 of the Commentary to DC 15 interprets the idea that an objection must be "*maintained persistently*" as requiring that the objection should be "*reiterated when the circumstances are such that a restatement is called for*", while noting that this would occur in circumstances where silence or inaction may reasonably lead to the conclusion that the State has given up its objection.

17. Comments:

- We believe it is appropriate to include clear criteria not only for persistent objection, but also for the retraction of such objections. We suggest clarifying in the text of DC 15 that a retraction from an objection must be **clearly expressed** as an effective reconsideration of the State's *opinio juris*. It would be problematic to interpret retraction from mere silence; the lack of repeated reiterations of the position; or inaction (particularly because such silence or inaction may stem from other, non-legal, considerations). Indeed, in light of the principle of State sovereignty, it would be inappropriate to seek to nullify the clearly expressed objection of a sovereign State on the basis of the interpretation of its conduct alone.

- We are also concerned that the concept of "*maintained persistently*" in DC 15, when read together with the Draft Commentary, could be misread to suggest that an objection needs to be constantly repeated in order to have effect. Even if this is not the intention of the Commentary, it seems necessary and helpful – both as a matter of principle and with due regard to the efficient conduct of diplomatic relations and international conferences – to clarify that an objection clearly expressed by a sovereign State during the process of the formation of a customary rule is sufficient to establish that objection, and does not generally need to be repeated to remain in effect.

18. Suggested amendments:
    - In line with the spirit of the *Anglo-Norwegian Fisheries* case, we propose amending DC 15 so as to read: "… for so long as it *retains* its objection".
    - We recommend that the DC and the Commentary include clear criteria for the retraction of an objection, whereby it must be clearly expressed as a change in the State's *opinion juris* and made known to other States and not merely inferred. We also recommend that the Commentary clarify that, as a rule, an objection clearly expressed at the appropriate time is sufficient to render the State an objector to the formation of a given customary rule, and need not be constantly repeated. In this context, we would also propose to acknowledge, in paragraph 5 of the Commentary to DC 15, that it is difficult to recognize the exact moment of crystallization of a rule, because the process of formation is not clearly defined and delineated.

VII. National Acts and Statements, as Evidence of State Practice and *Opinio Juris*

A. Finality of Acts

19. Current text: The current text does not include an explicit requirement that acts be final and conclusive for them to serve as a potential source of CIL.

20. Comments:
    - As a general comment, we believe that the DC and their Commentary should clarify that acts (laws, judgements etc.) must be final and conclusive in order to qualify as evidence of CIL.

- We would not want the ILC to imply that non-definitive acts (such as bills and provisional measures) could possibly point to the existence of CIL.

21. Suggested amendments:
    - We suggest that, where relevant, the DC include a clarification that practice and *opinio juris* must be based on **final, definitive** and **conclusive** acts.

B. Higher National Courts' Decisions

22. Current text: According to the DC, decisions of national courts could be considered a form of State practice (DC 6(2)) and a form of evidence of *opinio juris* (DC 10(2)).
23. Comments:
    - We would like to stress that decisions of higher national courts are generally relevant only as secondary evidence of State practice or *opinio juris* (such as in the factual description of the State's conduct or legal view in a given case), and would only constitute practice or *opinio juris* in and of themselves when the issue in question concerns the conduct or view of judicial bodies (such as the dismissal of a lawsuit by reason of immunity).
    - In addition, with regard to reliance on national court decisions, we believe – in line with the abovementioned comment – that only higher courts' final and definitive decisions (i.e., that cannot be further appealed) should be taken into account or be considered reflective of the judicial view of the State in question.
    - In this context, we would like to note that generally speaking, higher national courts are more likely to have expertise in the interpretation and application of international law than lower ones – an important factor for the identification of CIL.
24. Suggested amendments:
    - We believe that the DC should clarify unambiguously that only higher courts' final and definitive decisions (i.e., that cannot be further appealed) should be taken into account or be considered reflective of the legal opinion of the State in question.
    - In addition, as noted above, we suggest that the DC clarify that the decisions of higher national courts only constitute practice or *opinio juris* in and of

themselves, as opposed merely to evidence of State practice or *opinio juris*, when the issue in question is the conduct or view of judicial bodies.

C. Authorized Representatives of the State

25. Current text: The current DC and their Commentary, when discussing the weight to be attributed to statements of representatives of States, lack clear criteria for ascertaining whether such persons or statements were authorized or made in an official capacity. Furthermore, paragraph 5 of the Commentary to DC 3 stipulates that "*statements made casually, or in the heat of the moment, will usually carry **less weight** than those that are carefully considered*" [*emphasis added*].

26. Comments:
    - In our view, the current text, when dealing with the weight to be attributed to statements delivered by State representatives, does not fully consider the issue of proper authorization of State officials.
    - The current wording of paragraph 5 of the Commentary to DC 3 does not entirely rule out that casual, unauthorized statements or statements made in the heat of the moment could be considered as practice or *opinio juris*, but rather proposes that they merely carry less weight. We believe that such casual or spontaneous statements made by officials cannot be used to establish State practice or *opinio juris* for the purposes of identification of CIL and should not be given any weight in this regard. Such statements, by their very nature, cannot be said to reflect the considered view of the State which is necessary for the purpose of identifying CIL and as such should not be part of a CIL analysis.

27. Suggested amendments:
    - We believe that the ILC should make clear that statements of State's representatives should be attributed to the State only if they were properly authorized and made in an official capacity. Those statements should be accorded weight while taking into account the relevant context and the circumstances in which they were made.
    - In addition, we would like the Commentary edited to reflect that casual, spontaneous or **"in the heat of the moment"** statements made by State officials are insufficient for the purposes of identification of CIL and should not be given

any weight in this regard.

VIII. Specially Affected States and General Practice

28. Current text:

- DC 8(1) refers to "*general*" practice as meaning it must be "*sufficiently, widespread and representative, as well as consistent*". Paragraph 3 to the Commentary of the DC 8 notes that universal participation is not required.
- When defining the need for relevant practice to be general, DC 8 does not include reference to the well-established concept of "**specially affected States**". The Commentary does make some reference to specially affected States, but it does not stipulate that their practice and *opinio juris* **must** exist for custom to evolve, and it does not adequately stress the importance of giving greater weight to specially affected States when examining State practice and *opinio juris*.
- In addition, Paragraph 2 of the Commentary to DC 15 states: "*The persistent objector is to be distinguished from a situation where the objection of a substantial number of States to the formation of a new rule of customary international law prevents its crystallization altogether (because there is no general practice accepted as law)*".
- Finally, paragraph 3 of the Commentary to DC 8 states: "*The participating States should include those that had an opportunity or possibility of applying the alleged rule*".

29. Comments:

- With respect to the need for practice to be "general" more broadly, we believe the current draft does not adequately reflect the high threshold State practice must meet for a rule to be identified as customary. While, as noted in the Commentary, the necessary number and distribution of States cannot be identified in the abstract, we believe it is clear that States taking part in the practice, accompanied by *opinio juris,* must be significantly and decisively greater than those not engaging in such practice, and that the Commentary should be more in line with the language and spirit of the *North Sea Continental Shelf* cases, which required the practice not only be widespread and

representative but also "virtually uniform".

- With respect to the concept of specially affected States, it is well accepted that specially affected States are crucial to the formation and, accordingly, the identification of customary rules. In cases in which the accumulation of practice and *opinio juris* of specially affected States is not in line with the proposed rule, or does not exist *vis-à-vis* such a rule (for example, because no practice of specially affected States can be identified), this should serve as evidence that no such rule exists. This approach is also reflected in paragraph 74 of the ICJ Judgement on the *North Sea Continental Shelf* case.
- Moreover, not only is the practice and *opinio juris* of specially affected States an indispensable element of identifying the existence of a customary international rule, but such practice and *opinio juris* must be given significantly greater weight than the practice of other States.
- With respect to paragraph 2 of the Commentary to DC 15 mentioned above, we are concerned that the reference to the need for a "substantial" number of states to object to a rule in order to prevent its emergence as customary law, could be misunderstood as reversing the burden well established in the in the *North Sea Continental Shelf* cases, which enables custom to emerge only following widespread, representative and virtually uniform practice.
- Regarding the reference in paragraph 3 of the Commentary to DC 8 to States that have an opportunity or possibility of applying the examined rule: while this may not be the intention of the Commentary, we are concerned that it could be misinterpreted to mean that even States that have no practice at all with respect to the examined rule are nevertheless relevant in the process of identifying its customary status, as long as they have the opportunity or possibility of applying it. As mentioned above in Section IV, inaction may be relevant as practice in limited circumstances only, while the wording of paragraph 3 of the Commentary to DC 8 could be misread as implying that such inaction on the part of these States is automatically relevant even if not deliberate and not stemming from a sense of customary obligation.

30. Suggested amendments:

- We propose amending DC 8(1) to better reflect the high threshold required for

State practice, so as to read: "The relevant practice must be general, meaning that it must be *widespread* and representative, as well as consistent *and virtually uniform. It must include the practice of specially affected States*".

- We also believe that DC 8 and DC 9 should be amended to properly reflect the established and critical concept of specially affected States and stipulate that: (a) practice is sufficiently general only when it includes both the practice and *opinio juris* of specially affected States (otherwise, no customary rule exists); (b) greater weight must be given in the customary rule identification process to the practice and *opinio juris* of specially affected States. We suggest amending the Commentary accordingly, including paragraph 2 to DC 8, so as to further emphasize and explain the importance of the practice and *opinio juris* of specially affected States to the process of CIL identification.
- Further to the comment above regarding paragraph 3 to DC 8, we propose amending this paragraph to read: "The necessary number and distribution of States taking part in the relevant practice (like the number of instances of practice) cannot be identified in the abstract. *It is clear, however, that the number of States taking part in the practice must be clearly and decisively greater than the number of relevant States not engaged in such practice*".
- In this context, we also believe that paragraph 4 to DC 8 which notes that "in many cases, all or virtually all States will be equally concerned" should be amended to avoid being an overstatement. We propose amending this paragraph to read as follows: "In *some* cases, all or virtually all States will be equally *affected. In appropriate cases, however, the practice of States that are affected the most must be accorded greater weight*".
- In addition, in order to avoid the misreading referred to above and taking into account the abovementioned comments regarding specially affected States, we propose amending paragraph 2 of the Commentary to DC 15 as follows: "the objection of a *sufficient* number of States to the formation of a new rule of customary international law prevents its crystallization altogether".
- Finally, with regard to the participating States under paragraph 3 of the Commentary to DC 8, we propose deleting this sentence or clarifying that the inaction of States which have the opportunity or possibility of applying an

alleged rule is relevant only when deliberate and accompanied by *opinio juris*.

IX. Other Topics

A. Applying the Two-Element Approach

31. Current text:

- Paragraph 2 of the Commentary to DC 2 states: "*The identification of such a [customary] rule thus involves a close examination of available evidence to establish their presence in any given case*".
- Paragraph 5 of the Commentary to DC 2 states: "*The two-element approach does not in fact preclude a measure of deduction…*".
- Several paragraphs of the Commentary to DC 3 refer, respectively, to applying the two-element approach with "*necessary flexibility*" (paragraph 2), taking into account "*underlying principles of international law*" (paragraph 3), "*adjusting*" evidence consulted to the situation (paragraph 3), and that the "*nature of the rule*" is relevant in considering "*different types*" of evidence for the two-element approach (paragraph 4).

32. Comments and Suggested amendments:

- With respect to paragraph 2 of the Commentary to DC 2, we believe that given that the DC set out to provide practice guidelines for the identification of CIL, it is important to clarify that this process must be **exhaustive, empirical, and objective**, as well as caution against a non-systematic or casual approach in ascertaining whether there is a general practice accepted as law. Accordingly, we recommend referring explicitly to the standard of thoroughness required by amending paragraph 2 of the Commentary to DC 2 so as to read: "The identification of such a rule thus involves an *exhaustive, empirical and objective* examination of available evidence to establish their presence in any given case". A similar amendment is recommended in paragraph 4 of the Commentary to DC 14 regarding the work of publicists which should also be exhaustive, empirical and objective in nature.
- With respect to paragraph 5 of the Commentary to DC 2, we are concerned that the use of the term deduction will be seen as undermining the empirical nature

of the examination process of CIL. Accordingly, we propose omitting the last sentence of this paragraph, i.e. deleting the text: "The two-element approach does not in fact preclude a measure of deduction, in particular when considering possible rules of customary international law that operate against the backdrop of rules framed in more general terms that themselves derive from and reflect a general practice accepted as law (accompanied by *opinio juris*), or when concluding that possible rules of international law form part of an "indivisible regime"."

- With respect to paragraphs 2, 3 and 4 to the Commentary to DC 3 mentioned above, we believe the drafting is not sufficiently precise and, in particular, may be misread to dilute the thoroughness and rigor required in applying the two-element approach to identify the existence of a customary rule, which applies equally to all fields of international law. Thus, we propose deleting the words "necessary flexibility" in paragraph 2, and amending paragraph 3 to read that the type of evidence consulted should be "reviewed", rather than "adjusted… in light of the particular circumstances of the situation". In addition, with respect to the reference to "underlying principles on international law" in paragraph 3, we would note that such principles may be relevant to determining the *content or scope* of an examined rule (as in the *Jurisdictional Immunities case,* cited in the footnote 265 of the Commentary), but not to the actual identification of the *existence* of a customary rule (i.e. evidence of practice and *opinio juris*). Accordingly, we recommend omitting the sentence referring to underlying principles from paragraph 3.
- Finally, with respect to paragraph 4, while we accept that the nature of a rule is relevant when considering different types of evidence, we believe this notion is only relevant with respect to prohibitive rules where evidence of inaction rather than action may be needed. We propose amending the paragraph accordingly to specify and limit its relevance to a rule that is prohibitive in nature.

B. Verbal Acts

33. Current text: DC 6 states that practice "*includes both physical and verbal acts*",

and paragraph 2 of the Commentary refers to the role of verbal acts as practice.

34. Comments and Suggested amendments:
    - In our view, DC 6 does not properly reflect that customary international law overwhelmingly regulates physical acts, whereas customary regulation of verbal conduct is rare. Verbal acts may be counted as practice, as opposed to serving as evidence of practice, only in those limited cases where they themselves comply with a rule or violate it (e.g. threatening to use force in violation of Article 2(4) of the United Nations Charter).
    - In this light, we propose rephrasing the second sentence of DC 6 as follows: "It includes physical and, *at times*, verbal acts". Likewise, we suggest rephrasing paragraph 2 of the Commentary to DC 6 so as to read: "Given that States exercise their powers in various ways and do not confine themselves only to some types of acts, paragraph 1 provides that practice may take a wide range of forms. *The words 'at times' emphasize that caution must be exercised when considering verbal conduct as practice.* While *the more common approach* is that it is only what States "do" rather than what they "say" that may count as practice for purposes of identifying customary international law, it is now generally accepted that verbal conduct (whether written or oral) may count as practice *when such conduct itself is regulated by the alleged customary rule*".

C. Inconsistent Practice by a Particular State

35. Current text: DC 7(2) states that "*[where] the practice of a particular State varies, the weight to be given to that practice may be reduced*". Paragraph 4 of the Commentary adds that in such situations "*that State's contribution to the 'general practice' element may be reduced or even nullified*".

36. Comments and Suggested amendments:
    - We are concerned that the abovementioned text may be misleading in the sense that inconsistent practice by a particular State, far from its weight being reduced or nullified in assessing the existence of a customary rule, may be important evidence that States do not view themselves as bound to act in a certain way. To avoid this interpretation, we believe DC 7(2) and paragraph 4 to Commentary should be omitted, or alternatively we propose rephrasing DC

7(2) so as to say: "[w]here the practice of a particular State varies, the weight to be given to that practice *depends on the circumstances*". In such a case, we would also suggest rephrasing paragraph 4 of the Commentary to DC 7 as follows: "... that State's contribution to the 'general practice' element *may be an indication that it believes no customary rule on the matter exists*".

D. Treaties as Evidence of Custom

37. Current text: DC 11 and its accompanying Commentary concern "*the significance of treaties, especially widely ratified multilateral treaties, for the identification of customary international law*". Paragraph 3 of the Commentary stresses that "*treaties that have obtained near-universal acceptance may be seen as particularly indicative in this respect*".

38. Comments and Suggested amendments:

- As DC 11 and its accompanying Commentary accurately state, treaties and custom are different sources of international law which must be kept separate. Indeed, States may choose to join treaties precisely because their normative characteristic is different (for example, while *ex post* withdrawal from custom is not possible, it is generally possible with respect to treaties).
- One important difference between treaties and custom has to do with the nature of State consent. When a State joins a treaty, it consents to take certain obligations *unto itself*. When a State articulates its *opinio juris*, however, it expresses its belief that *other States* are likewise bound. Consequently, it is impossible to use a State's consent to a treaty alone as evidence necessarily for *opinio juris*.
- While paragraph 7 of the Commentary to DC 11 accurately distinguishes between treaties and custom in this context, paragraph 3 of the Commentary may appear to conflate the two, especially with respect to treaties enjoying wide conventional acceptance, even though they do not necessarily reflect customary international law. Accordingly, we propose deleting paragraph 3 of the Commentary to DC 11. Alternatively, we suggest omitting the reference at the end of paragraph 3 of the Commentary to DC 11, to treaties that are not yet in force or which have not yet attained widespread participation.