ILC Draft Conclusions on Identification of Customary International Law

– Comments and Observations by the Kingdom of the Netherlands –

1. In accordance with paragraph 60 of the Report of the International Law Commission (ILC) at its 68th Session (A/71/10), the Kingdom of the Netherlands appreciates the opportunity to submit its comments and observations on the ILC Draft Articles on Identification of Customary International Law. The Kingdom of the Netherlands would like to express its profound gratitude to the Special Rapporteur, Sir Michael Wood, as well as the ILC as a whole, and commend them for their work on the topic of the identification of customary international law. The Kingdom of the Netherlands considers this an important topic, given that this is a key aspect of the use of the sources of international law. The work of the ILC could contribute in significant ways to the development of practice.

General comments

2. We cannot but note that the role of international organizations in relation to the formation and identification of international law has been a controversial issue in the drafting of the conclusions on this topic. In our view, international organizations can and do play such a role in their own right. We therefore welcome the inclusion of draft conclusion 4 (2), which reflects this. The possibility for international organizations to contribute to the formation, or expression, of customary international law is a consequence of their status as international legal persons, separate from their member States.

3. Draft conclusion 4 (2) limits the role that practice of international organizations plays in the formation or expression of rules of customary international law to "certain cases". The commentary suggests that these cases are (exclusively): (a) where member States have transferred exclusive competences to the international organization, or (b) in certain cases where member States have not transferred exclusive competences, but have conferred powers upon the international organization that are functionally equivalent to the powers exercised by States.

4. If it is the separate international legal personality of an international organization that determines whether that organization can play a role in the formation and identification of international law, it is unclear why this role should be limited to these two cases. The legal basis for such a limitation remains unclear. It suggests a view of international organizations as mere agents of States rather than as international actors in their own right, and calls into question the idea of international legal personality of such organizations (see below for additional comments on draft conclusion 4).

5. The draft conclusions and the related commentary frequently refer to the identification or determination of the "existence and content" of customary international law. It does not become clear whether the process for identifying the existence of a rule is the same as the process for determining the content of that rule. In our view, this is not necessarily the case. For example, in the identification of the content of a particular rule, any underlying principles of international law may need to be taken into account in accordance with draft conclusion 3 (1), whereas this may not be the case when identifying the existence of the rule. We suggest it would be helpful to make this explicit in the commentary.

Comments and observations on specific draft conclusions

Draft conclusion 3

6. Paragraph 4 of the commentary to draft conclusion 3 states that "where prohibitive rules are concerned (such as the prohibition of torture) it may sometimes be difficult to find positive State practice (as opposed to inaction); cases involving such rules will most likely turn on evaluating whether the practice (being deliberate inaction) is accepted as law." Insofar as this statement refers to prohibitive rules that already exist, we are of the view that the wording "affirmative State practice" is preferable over "positive State practice." We note that such affirmative State practice may include condemnation by a State of conduct of another State that is considered to be in breach of an existing rule of customary international law.

Draft conclusion 4

7. As a general matter, the current draft conclusion and commentary leave open a number of questions concerning the role of international organizations in the formation and expression of customary international law (see also general comments above). We suggest to develop this further in the commentary. In particular, it would be helpful if the question of how to distinguish practice of the organization from practice of States within the organization would be addressed, as well as how to identify *opinio iuris* of international organizations.

8. Paragraph 8 of the commentary to this draft conclusion states that "[a]s a general rule, the more directly a practice of an international organization is carried out on behalf of its member States or endorsed by them, and the larger the number of such member States, the greater weight it may have in relation to the formation, or expression, of rules of customary international law." We propose to delete this sentence, because it does not adequately reflect the fact that this paragraph deals with the practice of international organizations with an international legal personality separate from that of their member States. This separate legal personality stands in the way of taking into account the number of member States when weighing the practice of an international organization. We do, however, agree with the commentary that a relevant factor in weighing the practice of an international organization is the nature of that organization, in particular whether the organization is of a universal character or not.

Draft conclusion 6

9. Paragraph 1 of this draft conclusion states that practice may, under certain circumstances, include inaction. The commentary to this draft conclusion clarifies that the words "under certain circumstances" seek to caution that only deliberate abstention from acting may serve such a role. We attach much importance to this important clarification. We therefore suggest that the requirement that inaction must be deliberate, be reflected in the text of the draft conclusion, and not only in the commentary.

Draft conclusions 8 and 9

10. We note that the commentary to draft conclusion 8 makes reference to specially affected States, but does not clearly define the role of such States. We consider that the importance of specially affected States in the formation and identification of customary international law should be further elucidated. As the International Court of Justice held in its judgment in the North Sea Continental Shelf case: "an indispensable requirement would be that within the period in question, short though it might be, State practice, *including that of States whose interests are specially affected*, should have been both extensive and virtually uniform" (emphasis added).

11. We suggest that a reference to specially affected States be included in draft conclusions 8 and 9 themselves, and not only in the commentary. More specifically, we propose that the draft

conclusions makes clear that practice and *opinio iuris* of such States is an indispensable element in identifying the existence of a rule of customary international law. In addition, we propose to state explicitly that practice and *opinio iuris* of such States must be given greater weight than that of other States.

Draft conclusion 10

12. Draft conclusion 10 includes decisions of national courts as a form of evidence of *opinio iuris*. In our view, this should be qualified. Decisions of national courts can only form evidence of *opinio iuris* when such decisions are not rejected by the State's executive. Such rejection can be said to exist when the executive considers and externally presents such decisions as not representing the State's position on the issue. This qualification follows from the proposition that *opinio iuris* requires consistency of the different branches of government.

13. Draft conclusion 10, in paragraph 3, refers to failure to react to a practice as evidence of *opinio iuris*. We appreciate the generally careful approach against drawing too many conclusions from the silence or inaction of States, and for underlining that what is essential is that consequences may only be attached to the absence of a reaction where such a reaction would be expected. This implies that the rule is not that silence implies acquiescence, but rather that in a particular situation in which it was clear that reaction was called for, no such reaction came. We suggest that the commentary in this context take into account the role of explanations that States may at a later stage give for certain positions and their possible silence. We also suggest that the commentary pay attention to the possibility that a State does protest but does so in a confidential, or at least not public, manner. In the latter case, we are of the view that the fact that there is no public reaction to certain conduct cannot be taken as evidence of acceptance as law of that conduct.

14. Draft conclusion 10 does not make any reference to *opinio iuris* of international organizations. We suggest that such a reference be included in the commentary, making clear that there is also the possibility of *opinio iuris* of an international organization. This follows from the international legal personality of such organizations, already referred to above.

Draft conclusion 15

15. We would like to reiterate our persistent objection, first made during the discussion of the ILC report in the Sixth Committee in 2015, to the requirement in draft conclusion 15 that an objection must be "maintained persistently." We would question where this requirement comes from, as it does not seem to be theoretically or logically correct. At the heart of the notion of persistent objector is the notion that international law is a consensual system. While the need for explicit consent is visible in the establishment of treaties, this is much less the case in customary international law. In the formation of customary international law, no explicit consent is needed for States to become bound. On the contrary, only explicit, consistent and clearly expressed objections will prevent a State from becoming bound. On one crucial condition: these objections must be made during the formation of the rule, objections afterward will not have the desired effect of not being bound. If this is the case, then it stands to reason that – once the position of persistent objector has been acquired through the required steps, and the customary rule has been established – this position does not require any further maintenance in the form of continuing objections. There cannot be an obligation to repeat the desire not to be bound, if the State has made its wish not to be bound sufficiently clear during the formative period of the rule. We would suggest that the rule is in fact the opposite: only when there is subsequent practice, or expressions of legal opinion by the persistent objector in support of the "new" rule, and in deviation from its original position as persistent objector, will it lose that position. We therefore suggest that with regard to persistent objectors, the draft commentary make clear that, as a rule, an objection clearly

expressed during the formation of a rule is sufficient to render the State a persistent objector, unless and until such time as there is subsequent practice, or expressions of legal opinion by the persistent objector, in support of the "new" rule and in deviation from its original position as persistent objector.

Draft conclusion 16

16. Draft conclusion 16 refers to a rule of customary international law "that applies among a limited number of States". We are of the view that the use of the verb "apply" could lead to confusion in this context. We suggest to replace the phrase with "that binds only a limited number of States".