

**United States of America**  
**71<sup>st</sup> General Assembly Sixth Committee**  
**Agenda Item 78: Report of the International Law Commission**  
**on the Work of its 68<sup>th</sup> Session**  
**Protection of Person in the Event of Disasters, Identification of Customary International**  
**Law, Subsequent Agreements and Subsequent Practice in Relation to Interpretation of**  
**Treaties**

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Mr. Chairman, I would like to thank the chairman of the Commission for his helpful and detailed Commission for a productive Session and for its extensive and valuable work and I look forward to our debate on these on these important topics of international law over the next two weeks.

Mr. Chairman, I appreciate the opportunity to comment on the topics that are currently before the committee and will in these remarks address more topics in Cluster 1.

**Protection of Person in the Event of Disasters**

Commission and the Special Rapporteur, Mr. Eduardo Valencia-Ospina, for their efforts. In particular, we appreciate their consideration of the comments of Member States, including the United States, on the draft articles adopted after first reading.

## Identification of customary international law

the United States would first like to express its thanks and great appreciation for the extraordinary contribution that the Special Rapporteur, Sir Michael Wood, and the Commission have made to international law through the draft conclusions and commentary that were adopted by the Commission this summer. They are already an important resource for practitioners and scholars alike.

We are in the process of conducting a detailed review of the draft conclusions and commentary and look forward to submitting comments and observations by the end of next year.

Although our review is not complete, we would like to note two areas of initial concern.

Our first comment relates to aspects of the draft conclusions and commentary that appear to go beyond the current state of international law such that the result is progressive development rather than codification on the particular issues. While recommendations regarding progressive development are appropriate in some ILC topics, we do not think that they are well-suited to this project, whose purpose and primary value, as we understand it, is to provide non-experts in international law, such as national court judges, with an easily understandable guide to the established rules regarding the identification of customary international law. Mixing elements of progressive development and established rules in this project risks confusing and misleading

ILC wishes to include recommendations with regard to progressive development in its conclusions and commentary on this topic, we believe it is essential that such recommendations be clearly identified as such and distinguished from elements that reflect the established state of the law.

In this regard, we are most focused on Draft Conclusion 4 and its discussion of the role of the practice of international organizations in contributing to the formation or expression of customary international law. We are concerned that it suggests that the practice of international organizations may serve as directly relevant practice, or play the same role as State practice, in the formation and identification of customary international law, at least in certain cases. We do not believe that the practice and *opinio juris* of States, or relevant case law, support the proposition that the conduct of international organizations as distinct from the practice of member States in the IOs contributes directly to the formation of customary rules. The commentary adopted by the Commission provides very little support for this proposition, and what is included does not appear to support the broad language of Draft Conclusion 4. Indeed, we believe that such language unnecessarily confuses matters by implying that every time one engages in an analysis of the existence of a rule of customary international law, it is necessary to analyze the practice of hundreds if not thousands of international organizations with widely varying competences and mandates. In this respect, we view Draft Conclusion 4 as essentially a proposal for progressive development of the law on this issue, raising the concerns noted earlier.

We encourage other States to give careful consideration to these issues as they review the draft conclusions and commentary.

The second topic that we expect to address in our comments on the draft conclusions and commentary relates to aspects of the text that we believe need adjustments to avoid potentially misleading the reader.

~~For example, the draft conclusions, as a whole, may leave the impression that customary international law is easily formed or identified. Because that is not the case, we believe that the commentary may need to reinforce the point that customary international law is formed only when the strict requirements for extensive and virtually uniform practice of States, including specially affected States, accompanied by *opinio juris* are met.~~

However, in light of the inapplicability of Article 31(3)(b), the draft conclusion states instead that