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**Statement by the Principle Legal Adviser of the Ministry of Foreign Affairs**  
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Mr. Chairman,

Brazil aligns itself with the statement delivered by El Salvador on behalf of the Community of Latin American and Caribbean States (CELAC). I thank the members of the International Law Commission for their contribution to the progressive development and codification of international law, and for the report on its 70<sup>th</sup> Session. Brazil is proud that a Latin-American member chaired the Commission as it commemorated its 70<sup>th</sup> anniversary, and we take this opportunity to commend Mr. Eduardo Valencia-Ospina for his work during this session.

Brazil wishes to join previous speakers in expressing its deep appreciation for the decision of the ILC to hold its 70<sup>th</sup> Session both in New York and in Geneva. It had been 20 years since the Commission last met at the UN Headquarters. The 17 side events organized at the margins of the New York meetings are a measure of the interest of Member States to strengthen dialogue with the ILC. However informal, they provided valuable opportunities for the exchanges of views on topics related to the Commission's work. Brazil organized two of them – one recalling the convergence of the 70<sup>th</sup> anniversary of ILC with the 20<sup>th</sup> anniversary of one of its most relevant outcomes, the Statute of the International Criminal Court; and another one aimed at increasing inter-sessional dialogue on the future of the articles on the responsibility of States for internationally wrongful acts.

The title of one of these events was particularly striking: "Seven in women in seventy years". Out of the 229 members that the Commission had since 1948, only seven are women – that is, only 3%. This is the same proportion of women that participated in the San Francisco Conference, in 1945. And Brazil is always proud to recall that Bertha Lutz, a woman member of our delegation in San Francisco, actively contributed to ensuring that the UN Charter would proclaim the equal rights of women and men. Those were, of course, different days regarding women's rights. To mention just one example, in 1945 women had voting rights in 30 out of 50 countries represented at the San Francisco Conference. Over the past 73 years, the UN evolved significantly in terms of gender parity. The Secretary-General announced, last year, that full gender parity had been achieved at senior management level. I am stating this to highlight how striking it is to note that, when it comes to gender parity in its composition, the ILC seems to be stuck in 1948. As Member States, we should acknowledge this shortcoming and work to overcome it. One first step is to encourage female candidacies to be presented. This Assembly could also reflect on the possibility of including minimum voting requirements for women candidates in the elections for the Commission, similarly to what is done in the judicial elections of the ICC.

I also take this opportunity to address a separate issue regarding the rules governing the ILC elections. While Article 3 of its statute establishes that ILC members shall be elected by the General Assembly, Article 11 determines that, in the case of a vacancy, the Commission itself shall fill it. Brazil considers that this rule could be revisited. After all, ILC members are elected to act on their personal capacities – and it should be up to Member States to define its composition.

Mr. Chairman,

In the commemorative events of the 70<sup>th</sup> anniversary of the ILC, one issue that arose frequently is the need to revitalize the relationship between the General Assembly and the Commission. This requires that innovative measures be taken in both poles of the relationship.

Let me start with a few suggestions that could be taken from the side of the General Assembly. First, the revitalization of this very debate. Our statements here should aim at providing the Commission with clarity on our strategic and policy priorities regarding the codification and progressive development of international law. We should refrain from replicating the legal debates held within the ILC and should not equate these statements to the written comments that we can submit to the Commission. The Assembly can also do better when it comes to identifying – and even mandating – new topics to be examined by the Commission. This is particularly true this year, as the ILC concluded a large number of projects and will soon face the decision on what to study next.

Let me now turn to suggestions that could be implemented from the side of the Commission. It should listen attentively to the policy guidance from the General Assembly, so as to focus its energy on studies that will address the most pressing needs of the membership. After all, the success of the Commission is ultimately measured by the degree of acceptance and of usefulness of its projects to States. The ILC should also reflect on how to increase and diversify the engagement of States in their projects. Holding meetings more regularly in New York would be a step in this direction. Brazil also believes that the ILC could also explore ways to contribute building capacity in developing States, to ensure geographically balanced inputs, through measures such as strengthening the International Law Seminar. The Commission would make it easier to follow its activities if its reports are circulated in greater advance, a measure that could be implemented by publishing it in parts. It would also contribute to the increase diversity of inputs if, when studying a topic, the ILC prepared questionnaires with questions requiring simple and direct answers about State practice. For some countries, especially developing ones, the elaboration of written comments on the work of the ILC can be a challenging task.

Brazil would also like to propose one issue to be taken up by the Working Group on Working Methods. While the statute refers solely to articles as possible outcome of the discussions in the ILC, other types of products were created over the past years: principles, conclusions, guidelines *etc.* It would be useful if the Commission provided more clarity on the taxonomy of its products, including by clarifying which are the *criteria* it applies to decide when choosing between one and another form of its products.

Mr. Chairman,

I turn now to the future topics proposed for the ILC. Brazil welcomes the inclusion of "general principles of law" in the active agenda and congratulates Mr. Marcelo Vázquez-Bermúdez as Special Rapporteur. This topic is aligned with the Commission's useful work on the sources and will certainly contribute to reinforce the notion of unity of the system of international law, since general principles frequently serve as bridges to overcome the dangers of fragmentation. We encourage the ILC to focus on universality, that is, to ensure that their identification is based on all legal systems of the world. This topic also provides the opportunity to clarify that the clearly outdated word "civilized" contained in Article 38 of the ICJ Statute does not justify any hierarchy among States or legal systems.

Brazil also welcomes the inclusion of "universal criminal jurisdiction" in the Long-Term Programme of Work and encourages the Commission to bring it to its active agenda as early as possible. Should this happen, it would be the first time that the Sixth Committee and the Commission would be discussing the virtually same issue simultaneously. From our vantage point, this would be an opportunity to enhance the synergies between them. It would be possible, for instance, for the General Assembly to mandate the ILC to provide a legal analysis on one or a few specific questions, and to report back in the following session, rather than to replicate the multi-year approach that has been used for its other products.

We also take note with interest of the decision to also include in its Long-Term Programme of Work the topic "sea-level rise in relation to international law" – a decision that stems from the proposal made by a Member State and does address a pressing legal need of the international community. As indicated in the report, a study in this topic will necessarily touch on several different areas of international law and should be therefore undertaken with care.

Among the topics that were already inscribed in the Long-Term Programme of Work, Brazil would favor that the Commission include "extraterritorial jurisdiction" in its active agenda.

Mr. Chairman,

I turn now to the adoption of draft conclusions on "Identification of customary international law" and on "Subsequent agreement and subsequent practice in relation to the interpretation of treaties". I take this opportunity to express Brazil's recognition to the Special Rapporteurs Michael Wood and Georg Nolte for their dedicated work.

The draft conclusions on customary international law offer a valuable guidance on the identification of a sometimes elusive, but fundamental source of international law. Brazil agrees with the Commission's recommendations, particularly on the need to follow up the suggestions contained in the Secretariat memorandum on ways and means for making the evidence of customary international law more readily available. An online database with State practice relating to international law, based on information received from States, would constitute a positive step in this regard.

The draft conclusions strike a balance between precise guidance, on the one hand; and reasonable flexibility, on the other. They offer clear advice by reinforcing some basic notions that are occasionally forgotten: that both constituent elements of custom are equally required; that international law is a single legal system; that it is primarily the practice of States that is to be looked to; and that there is no such thing as "instant custom". On the flexibility side, the draft conclusions are not overly prescriptive on areas where precise answers are harder to be found, such as the weight of the practice of international organizations, or the highly controversial notion of "specially affected States". In both cases, it is key to ensure that general practice is indeed general – meaning that it represents a wide range of states from different regions and legal backgrounds.

Turning to the draft conclusions on "Subsequent agreement and subsequent practice", Brazil considers them to be a valuable toolkit. Subsequent agreements and subsequent practice correspond to means of interpretation that are particular to international law, and an in-depth study on it was indeed lacking. My delegation was pleased to see that, among others, the conclusion recognize that the interpretation of a treaty consists of a single combined operation, placing appropriate emphasis on the various means of interpretation indicated in Articles 31 and 32 of the Vienna Convention on the Law of the Treaties. Also, it was important that the ILC drew a line between the re-interpretation of a treaty and its amendment or modification, a distinction that has to be preserved given the need of Parliaments to approve new legal obligations entered into.

As the Assembly debates these draft conclusions, Brazil wishes to draw attention to the issue of the number of parties that must actively engage in subsequent practice in order to establish an agreement. While we acknowledge that this number may vary, it is important to qualify the statement that "silence on the part of one or more parties may constitute acceptance (...) when the circumstances call for some reaction". The first part of Draft Conclusion 10 alludes to "active engagement", so the role of silence should be seen as an exception – and therefore interpreted restrictively. Additionally, we cannot place an equal burden of reaction to all States if the resources for legally analyzing situations and reacting are distributed unevenly. Such an asymmetry can actually be seen in the ICJ sentence regarding the case *Preah Vihear*, where the ILC seems to have sought inspiration. Lastly, States may have sound political reasons to remain silent or to react in a different timeline, and such legitimate interests need to be taken into consideration.

Thank you, Mr. Chairman.