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Statement by
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Report of the International Law Commission
Cluster I

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Mr. Chairman,

Since I am taking the floor for the first time, I wish to congratulate you on your election as Chairman of the Sixth Committee.

Allow me also to thank the Chairman of the International Law Commission, Mr. Eduardo Valencia-Ospina, for presenting the Report on the work carried out by the Commission during its seventieth session.

In today's statement, we will begin by making some general comments on the Commission's work, including regarding the celebration of its seventieth anniversary. We will then address the topics 'Subsequent agreements and subsequent practice', and 'Identification of Customary international law'. The other topics of the Report will be addressed in the coming days, according to the clusters proposed.

Mr. Chairman,

Portugal has followed the work and outputs of the seventieth session of the International Law Commission held both in Geneva and in New York with much interest. We are of the view that having at least half a session in New York once in a quinquennium should be a practice to maintain, as it allows a closer dialogue and a better interaction between the ILC and the missions in New York.

Mr. Chairman,

We are very pleased to note the inclusion in the Commission's programme of work of a new topic: 'General principles of law'. The willingness of the Commission to revisit the sources of international law – as it has been doing – is welcomed. This is a topic of the upmost importance. General principles of law reflect the basic values of the international society and should, thus, inform not only legal norms but also the political action of the present. Although both doctrine and jurisprudence have contributed to clarify many aspects of this topic, general principles of law are sometimes a disputed mystery in what concerns its content and application.

We would also like to underline our satisfaction with the inclusion in the long-term programme of work of the topics 'Universal jurisdiction' and 'Sea-level rise in relation to international law'. The latter deals with a pressing challenge to humankind resulting from the process of climate change – a phenomenon that has been deeply affected and accelerated by human activity. Given the urgency of the matter and the need to find the fairest solutions in a reasonable time period, we encourage the Commission to include the 'Sea-level rise' topic in its regular programme of work already at the next session. In what concerns the 'Universal jurisdiction', we suggest that the Commission interacts and coordinates as closely as possible with the Sixth Committee, given that the matter is being discussed at that forum as well.

Mr. Chairman,

This year we celebrate the **seventieth anniversary** of the International Law Commission. Portugal wishes to congratulate the Commission and to praise the events

held to celebrate the occasion, notably the commemorative events held in New York and in Geneva.

As the Commission turns seventy, it is mandatory to recall its important legacy to International Law as we know it today. ILC's achievements have become such part of the daily life of International Law practitioners that one can easily forget their origin. It is thus only fair to recall that the ILC work has become a cornerstone of the international order and has contributed immensely to peace, security, justice and the protection and promotion of human rights throughout the world for the past seven decades.

Portugal avails itself of this opportunity to praise the contribution of the Office of Legal Affairs, an inseparable partner of the Commission, to the codification and progressive development of International Law.

Mr. Chairman,

As with any celebration, this anniversary should also be an opportunity to reflect on the future of the Commission. Every now and then we hear that the ILC mission is accomplished and that there are no further matters to deal with. We wish to disagree. The new challenges we face within the increasingly fast pace of international relations demand a constant adaptation of the International Law framework. This constant adaptation is crucial, and the Commission is a relevant setting to address those challenges from a legal point of view.

That, of course, also requires a commitment from States and the ILC to address those challenges at a speed that is different from the commitment that ~~one~~ the rhythm of international affairs allowed 70 years ago. Letting longstanding practice to form for many years before adopting international law rules – as is the classic case of the State Responsibility project –, is a luxury that we do not have anymore. This is probably one of the main challenges for the Commission.

Therefore, progressive development is an exercise that States and the ILC will have to embrace more and more. In our view, in the current state of affairs, the Commission is asked to be not just descriptive – through codification – but also increasingly innovative – through progressive development – in order to fill in the legal lacunae and avoid no-law zones on human activity and its effects.

Mr. Chairman,

Today we pay a deserved tribute to the ILC and to all those that have worked, assisted and interacted with it. We are confident that in 70 years we will have many more reasons to celebrate.

Mr. Chairman,

Allow me now to address Chapter V of the Commission's Report regarding the topic '**Identification of Customary International Law**'.

Portugal would like to praise the Commission on the submission of the draft conclusions on the identification of international customary law to the General Assembly. We would like to take the opportunity to pay tribute to the Special

Rapporteur, Mr. Michael Wood, for his work on this subject, which enabled the Commission to successfully conclude the draft conclusions.

Portugal commends the draft conclusions as a whole and considers that they will be of the utmost importance and of high practical value to scholars and practitioners alike. Having a set of concrete and simple conclusions, aiming at assisting in the identification of rules of customary law, is certainly a useful tool.

Considering the relevance of this topic and the draft conclusions thereto, we would like to offer some brief comments on it, essentially focused on methodology.

Mr. Chairman,

We are in the context of a spontaneous form of formulation of legal norms. Its specific meaning can only become visible through an empirical social process.

The *opinio juris sive necessitates* as the psychological or subjective element of customary International Law, is not easy to be inferred. But without this element, what remains is a mere practice and not a legal norm. It is our view that this element should be considered without any post-modern anxieties about the “mysteries of subjectivity”. The conviction that the non-compliance with a certain practice will result in international responsibility is one good indicator of *opinio juris*.

In relation to the balance between “formation” and “evidence”, we are of the opinion that despite the fact that both elements are important for the topic, a particular emphasis should be given to “formation”. Through the description of how International Customary Law was formed one will be able to better identify a methodology which will allow us to identify current and future norms of this source of Law. Therefore, the study on “formation” should precede the more practical issue of how the evidence of a customary rule is to be established.

Mr. Chairman

As to the value given to silence, it is our view that the failure to react, as a form of evidence of acceptance of law should be considered with extreme caution. To grant such relevance to a failure to act may create an excessive burden on states which have no means to react to certain measures. Even though the latest drafting attempts to balance the value to be given to the failure to act, we are of the opinion that it may foster inequality between states with different resources, even if unintentionally.

Mr. Chairman,

Therefore, even though the latest drafting of paragraph 1 of Conclusion 12 addresses some of the concerns of Portugal over the years, we would still prefer the deletion of this paragraph. It is our understanding that paragraphs 2 and 3 are sufficient to characterize the significance that resolutions of international organizations have for the identification of customary international law.

It is also our understanding that the decisions and resolutions of international organizations do play a role in the formation of customary international law, a different role from that of States, but still a significant one. Being so, we consider that the draft conclusions or the commentary should reflect this dimension of State activity, which can be assessed by examining different State actions, including voting in international

bodies, statements delivered and compliance with International Humanitarian Law. They should also reflect the contribution of State activity to the development of international customary law, namely by detailing the circumstances in which such resolutions may be evidence of customary international law or contribute to its development.

To conclude, Mr. Chairman, Portugal wishes to praise again the Commission for this accomplishment. We would like to convey our hope that these conclusions may help in practice to provide more certainty and clarity in the identification of Customary International Law.

Mr. Chairman,

I will now turn to the topic **Subsequent agreements and subsequent practice in relation to interpretation of treaties**. I would like at the outset to congratulate the Special Rapporteur, Mr. Georg Nolte, on his final report and to praise his work on this topic.

Now that the work on this topic has been concluded, Portugal extends its appreciation to the International Law Commission for having risen up to the challenge of debating such a dense and complex topic. The Commission's last take on the topic was an effortful consolidation achievement, as shown by the length and detail of the chapter in the Commission's report for this session.

Mr. Chairman,

Concerning Draft Conclusion 13, on the pronouncements of expert treaty bodies, we take good note that it applies only to bodies established under a treaty, excluding organs of international organizations. Portugal is convinced that these independent bodies are in a distinctive position to aid in the identification of subsequent practice.

Members of these expert treaty bodies are independent and thus not subject to instructions from States or international organizations. Therefore, we agree that these experts' input cannot be perceived as the practice of parties to a treaty. To say otherwise could question the main characteristics of independent expert treaty bodies and could risk their contributions as autonomous guardians of such treaties.

Mr. Chairman,

To conclude, Portugal is convinced that this exercise will provide valuable contributions to treaty interpretation in the years to come.

In this sense, the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the Commission at its historical seventieth session constitute a most honorable tribute to the Commission's role as an active contributor to the development and promotion of an international society based on International Law.