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Sixth Committee on Agenda Item 77: Report of the International Law Commission on the work of its seventy-fourth session (Cluster One)

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Thank you, Chair. We extend our gratitude to Professors Nilüfer Oral and Patrícia Galvão Teles for chairing the International Law Commission and to all members of the Commission for their productive work during the ILC's 74th session and the start of the new quinquennium.

The United States continues to strongly support the work of the International Law Commission. Over time, the ILC has provided products for this Committee's consideration that both codify international law and represent progressive development of international law. A number of these products have proved useful to the international community in determining the content of international law. Others have resulted in multilateral treaties.

Along these lines, the United States was proud last Fall to join over eighty other co-sponsors of UN General Assembly resolution 77/249, which provided for two resumed sessions of this Committee to further examine and exchange substantive views on the ILC's draft articles on the prevention and punishment of crimes against humanity. We were pleased to participate in the first session in April, where all Member States had the opportunity to engage in a thoughtful, robust exchange of views. The United States looks forward to submitting written comments and observations on the draft articles later this year and encourages other Member States to do so. We also look forward to next year's resumed session of the Sixth Committee, where we hope the rich exchange of views by Member States on this important topic will continue. As we have previously stated, a convention on crimes against humanity would fill an important gap in the international legal framework – one that is critical now more than ever.

I will now turn to address the specific topics on the agenda for this cluster, namely general principles of law, sea-level rise in relation to international law, and other decisions and conclusions of the Commission.

General Principles of Law

Turning first to the topic "General Principles of Law," I join others in thanking ILC Special Rapporteur Marcelo Vazquez-Bermudez for his clear exposition of the topic and the thoughtful work over the last several years. This is an important and challenging issue, and we welcome the Commission's efforts to address it. We are mindful, however, of the possibility that litigants in international disputes may draw upon the Commission's work to argue for obligations

in ways that states don't agree with or did not intend. Therefore, as some Members have recognized, the Commission should be careful not to engage in an exercise of progressive development on a topic concerning one of the sources of international law.

In this regard, and by way of example, I will highlight two areas of concern.

The first relates to Draft Conclusion 7, which provides that a particular principle “formed within the international legal system” may be considered a general principle of law.

We are not yet convinced that there is sufficient practice by States to assess whether or how general principles can be formed solely on the international plane. We note that some Members of the Commission expressed a similar concern. Given the differing views on the question of whether sufficient State practice exists to conclude that general principles may be formed within the international legal system, the better course of action may be to include a “without prejudice” conclusion that would allow the question to be addressed in the future if that practice were to evolve.

Separately, we question whether Draft Conclusion 7 sets out an appropriate test for determining whether a general principle of law has emerged. The “intrinsic” test that is currently discussed in the draft seems to have an element of automaticity to it that is difficult to square with the guidance in Draft Conclusion 2 that for a general principle of law to exist, it must be recognized by the community of nations. Given the Commission's acknowledgement in the draft that this second category of general principles may not exist, it would seem prudent to include in Draft Conclusion 7 an express requirement that states recognize a principle as legally binding—not simply that it is “intrinsic” to the international legal system.

An additional area of concern relates to the test for assessing whether principles of law from municipal systems have been transposed to the international plane. To be sure, the Commentary to Draft Conclusion 6 does acknowledge that recognition by states of transposition is “required.” However, the commentary goes on to say that such recognition by states is “implicit” whenever a principle is “compatible” with the international legal system. This suggests a level of automaticity that again we do not think is supported.

Under Article 38(1) of the ICJ Statute there is no hierarchy between treaties, customary international law, and general principles as sources of binding law. We therefore believe that state consent is required to find a general principle just as it is for states to be bound by treaties or customary international law, even if such consent may be manifested differently. We encourage the Commission to examine this issue further and revisit its conclusion. In our view, there needs to be some objective indication—in the form of state recognition of a principle through pleadings in international courts, for example—that states consider a rule to be applicable on the international plane before it may be considered to have reached the status of a general principle of law.

Notwithstanding these concerns I wish to reiterate that the United States very much welcomes that the Commission has taken this on. It is an important topic, and we look forward to continuing our engagement as the project develops.

Sea-Level Rise in Relation to International Law

With respect to the topic of “sea-level rise in relation to international law,” the United States appreciates the Commission’s continuing efforts with respect to issues related to the law of the sea. The issues under consideration are complex, and we recognize the Study Group’s efforts to find reliable solutions. The United States is committed to working with others to preserve the legitimacy of maritime zones, and associated rights and entitlements, that have been established consistent with international law as reflected in the UN Convention on the Law of the Sea and that are not subsequently updated despite sea-level rise caused by climate change.

The United States recognizes that new trends are developing in the practices and views of States on the need for stable maritime zones in the face of sea-level rise. We also emphasize the universal and unified character of the UN Convention on the Law of the Sea. The United States encourages States that have not yet done so to take steps now to determine, memorialize, and publish their coastal baselines in accordance with the international law of the sea as set out in the Convention.

Such actions will assist other States in implementing their policies on sea-level rise. In this respect, the United States notes its own commitment not to challenge lawfully established baselines and maritime zone limits that are not subsequently updated despite sea-level rise caused by climate change. The United States urges States that have not made similar commitments to do so to promote the stability, security, certainty, and predictability of maritime entitlements that are vulnerable to sea-level rise.

We recognize that sea-level rise poses a threat to more than just maritime entitlements; it also poses substantial threats to coastal communities and island States around the world. On a global scale, the combination of warming ocean waters and melting ice located on land is leading to sea-level rise that is occurring at an ever-increasing rate. For some States, particularly low-lying island States in the Pacific Ocean, increasing sea levels pose an existential threat. In recognition of this, the United States announced in September that it considers that sea-level rise driven by human-induced climate change should not cause any country to lose its statehood or its membership in the United Nations, its specialized agencies, or other international organizations. The United States is committed to working with Pacific Island States and others on issues relating to human-induced sea-level rise and statehood to advance those objectives.

Other Decisions and Conclusions of the Commission

I turn now to the last topic in cluster 1, namely, “other decisions and conclusions of the Commission.” We would like to make four brief points concerning the issues summarized in Chapter Ten of the ILC’s Report.

First, the United States notes the Commission’s decision to include the topic “non-legally binding international agreements” in its program of work and congratulates Mr. Mathias Forteau for his appointment as Special Rapporteur. We suggest, however, that the title for this topic be changed to “non-legally binding international instruments” to reflect the position of many States that the term “agreement” is reserved for those of a legally binding nature.

Second, we congratulate Mr. Claudio Grossman for his appointment as Special Rapporteur for the topic of “immunity of State officials from foreign criminal jurisdiction.” As the United

States has previously explained, we have longstanding concerns with these draft articles both in terms of the process by which they have been developed and the substance. We will not raise all of these concerns again here but highlight once again that we do not agree that Draft Article 7 is supported by consistent State practice and *opinio juris* and therefore do not agree that it reflects customary international law.

Despite the concerns that the United States and others have articulated, the Commission adopted the draft articles at the first reading last year. We expect to submit detailed written comments later this year. We appreciate the Special Rapporteur's emphasis on the importance of States' comments and welcome the Commission's commitment to reflect further on the concerns raised by States in their written submissions. If the articles are left unrevised, the commentary should indicate where such articles reflect a proposal for the progressive development of the law rather than codification. Further, the likelihood of the draft articles being adopted by States as an international convention will be greatly reduced if they continue not to reflect customary international law and diverge from the expressed views of States. We urge the Commission to reconsider the draft articles in this light, both in substance and in format.

Third, the United States takes note of the efforts of the working groups on the program, procedures and working methods of the Commission. In particular, we welcome the reconstitution of the Working Group on Methods of Work and congratulate Mr. Charles Jalloh on his election as its Chair.

In this connection, the United States has raised concerns in the past with the ILC's working methods. Such concerns include the lack of clarity between products that constitute codification and those that constitute progressive development, and confusion about how the Commission chooses the format of its work products. Both issues impact how the ILC's work products are developed by the ILC and are to be understood by the broader community.

We are therefore interested in proposals such as the possible development of guidance on the nomenclature of the texts and instruments adopted by the Commission. We gather that this guidance would include the meaning of output on topics described as draft articles, draft conclusions, draft guidelines, and draft principles. We are also interested in the proposal to establish a mechanism to review the reception by Member States of past products of the Commission.

Fourth, and finally, the United States notes the Commission's highly ambitious tentative schedule for its work programme over the next five years. We would urge the Commission to ensure that it takes a deliberative and measured approach to these important topics, including to allow sufficient time to receive and reflect the input of Member States.

The United States remains, as ever, supportive of the work of the International Law Commission, and congratulates its members on a very productive session.