PHILIPPINES

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STATEMENT
Permanent Mission of the Republic of the Philippines to the United Nations
Agenda Item 77: Report of the International Law Commission on the work of its seventy-fourth session
Cluster I – Generally accepted principles of international law and Sea-level rise in relation to international law
27 October 2023
78th Session of the United Nations General Assembly

Mr. Chair,

The Philippines commends the International Law Commission (ILC) for its work at the 73rd and 74th sessions and thanks the Co-Chairs Patrícia Galvão Teles (Portugal) and Nilüfer Oral (Türkiye) for their substantive presentation to the Sixth Committee. We welcome the leadership of the Co-Chairs as women jurists of recognized competence in international law and in forging the path for more women to participate in this important forum shaping international law.

We also thank Mr. Marcelo Vázquez-Bermúdez as Special Rapporteur and co-chairs Mr. Bogdan Aurescu of Ms. Nilüfer Oral and the other distinguished members of the reconstituted Study Group for their contributions, respectively, on "General principles of law" and sea-level rise in relation to international law.

We welcome the completion of the first reading of 11 draft conclusions on general principles of law and progress on the Commission's deliberations on sea-level rise in relation to international law. We thank the Secretariat for their outstanding support to the ILC as well as the extensive briefing for the Sixth Committee delegates on the work of the Commission ahead of this meeting.

We wish to share the following general observations on the chapters on "General principles of law", "Sea-level rise in relation to international law" and "Other decisions and conclusions of the Commission", and the Commission's approach and working methods.

On "General principles of law"

Conclusion 1

With respect to Conclusion 1, we agree that the legal nature of general principles of law as one of the sources of international law is confirmed by their inclusion in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, together with treaties and customary

international law, as part of the "international law" that shall be applied by the Court to decide the disputes submitted to it.

Conclusion 2

On Conclusion 2, we support the proposition that to determine whether a general principle of law exists at a given point in time, it is necessary to examine all the available evidence showing that its recognition has taken place.

We welcome the use of the term "community of nations" as a substitute for "civilized nations" in Article 38, paragraph 1(c), of the Statute of the ICJ, noting that the emphasis is in line with the principle of sovereign equality under the Charter of the UN – and that, as noted by the Commission, 'all nations participate equally, without any kind of distinction, in the formation of general principles of law.'

Conclusion 3

On Conclusion 2, we also believe that Article 38, paragraph 1 (c), of the Statute of the International Court of Justice contemplates two categories of general principles of law comprised of: (1) those that that are *derived* from national legal systems; and (2) those that *may be formed* within the international legal system.

This would be consistent with Philippine practice. In our Constitution, under the chapter dealing with the Declaration of Principles and State Policies we have an incorporation clause, which sets out that:

> *The Philippines renounces war as an instrument of national policy,* ***adopts the generally accepted principles of international law as part of the law of the land*** *and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.*

Conclusion 4, 5, 6, and 7

We continue to consider Conclusion 4 on the identification of general principles of law derived from national legal systems and the two-step analysis therein to ascertain: (1) the existence of a principle common to the various legal systems of the world; and (2) its transposition to the international legal system – as well as the related Conclusions 5-7, noting the careful consideration done by the Commission.

We note the point that the two-step analysis is 'widely accepted in practice and is aimed at demonstrating that a general principle of law has been "recognized" and the assertion that 'it is an objective method to be applied by all those called upon to determine whether a given general principle of law exists at a specific point in time and what the content of that general principle of law is.'

Specifically, we continue to consider the implications of the two-step analysis as a legal solution to the 'some challenges' related to the 'general principles of law' as a concept under Article 38(1)(c) of the ICJ Statute, as noted by the Philippine jurist, Professor Merlin M. Magallona. He noted that under said article, international law is understood in this context as consisting of "general principles of law, together with international conventions and international

custom. Hence, when applied by the International Court of Justice, "general principles of law are assumed to have the status of international law, otherwise they would not qualify to be applied by the ICJ in the performance of its judicial function." He noted that such an interpretation 'militates against the view that Article 38(1)(c) means principles generally established and applied in national law; or those which are universally recognized in well-developed national legal systems; or they are extensions of general principles of national law.' He further noted that, before the reorganization of the Permanent Court of International Justice (PCIJ) at the San Francisco Conference in the establishment of the United Nations in 1947, into the International Court of Justice (ICJ), 'one current of thought pursued in the settlement of international disputes ran along this orientation.'

Professor Magallona noted that 'even then there seemed to be an assumption, as may have been suggested by Hermann Mosler, that this involves a process of transference of general principles of national law to the international regime through the legal reasoning employed by the individual international judge which appears to be a subjective process.'

He highlighted that 'a significant change introduced by the Court's reorganization was an amendment to Article 38(1) of its Statute, which added the words "in accordance with international law," clearly indicating as a result that the sources identified in items (a), (b) and (c) must have the status of international law.' Thus, Professor Magallona said that 'it would be a useful inquiry to find out if this amendment has struck a significant reorientation in the practice of international adjudication,' noting a jurist's comment hat that the amendment does not "add anything new to the meaning of the old text.., [although] they serve to clarify that all groups, including the general principles of law, form part of international law.".

Prescinding on this observation, and as a consequence of this clarification, his query is whether it is it now required that "general principles of law" even as they are 'recognized by civilized nations' should have the status of norms of international law at the time of their application by the ICJ? Or, would it suffice that even if at the time of application they form part of national legal systems, by the method of the ICJ's reasoning they are transmuted into general principles of international law? Should not the amendment referred be taken to clarify that Article 38(1)(c) should read: "the general principles of international law as recognized by civilized nations, in which their recognition relates to those principles as principles of international law'?

With the proper focus at the time of their application, the issue is whether at that particular moment they are so recognized as possessing the status of international law, not whether the process of their transmutation from national law to international law takes place at that moment. That this process operates at all may negate the existence of these principles as recognized principles of international law. In his veiw Article 38(1)(c) must be interpreted as requiring the being, not the becoming, of the said principles as general principles of international law, at the time they are applied by the ICJ.

Professor Magallona also cited a report of Brownlie:

The Belgian jurist, Baron Descamps, had natural law concepts in mind, and his draft referred to "the rules of international law recognized by the legal conscience of civilized peoples." Elihul Root considered that governments would have mistrust on the subjective concept of principles of justice. However, the committee realized that the Court must be

given a certain power to develop and define the principles of international jurisprudence. In the result a joint proposal by Root and [Walter] Phillimore was accepted and this is the text [in Article 38(1)(c)] we now have.

Root and Phillimore regarded the principles in terms of rules accepted in the domestic law of civilized states.

In the pre-amendment period, international tribunals did imbibe the national-law orientation and continue to engage in this practice, as though the amendment «in accordance with international law' does "not add anything new to the meaning of the old text."

Despite this, Brownlie subscribes to the view taken by Oppenheim: "The intention is to authorize the court to apply the general principles of municipal jurisprudence, in particular of private law, in so far as they are applicable to relations of States."

In conclusion, Professor Magallona noted that what has gained importance is the method or process by which in the application of national-law principles the ICJ, or any other international tribunal, may adapt those principles as elements of international law. He also noted the individual opinion in the South West Africa Case where Judge McNair cautioned: "The way in which international law borrows from this source is not by means of importing private law institutions lock, stock and barrel, ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of the general principles of law.'

Conclusions 8, 9

In any case, we welcome draft Conclusion 8 on the role of decisions of courts and tribunals, both international and national, as an aid in the identification of general principles of law. We agreed that decisions by national courts may be relied upon to identify general principles of law, to serve as part of the comparative analysis required to determine the existence of a principle common to the various legal systems of the world and as a subsidiary means for the determination of general principles of law when such decisions themselves examine the existence and content of a general principle of law.

We also support the understanding that “teachings” under Conclusion 9 refer to “writings” as well as teachings in non-written form, such as lectures and audiovisual materials, including those under the UN Audiovisual Library of International Law.

Conclusion 11

On Conclusion 11, we agree that general principles of law are not in a hierarchical relationship with treaties and customary international law following Article 38 of the Statute of the International Court of Justice.

We will continue to consider the draft Conclusions and hope to provide further comments, in this regard.

On “Sea-level rise in relation to international law”

As an archipelagic state highly vulnerable to sea-level rise and its effects, we continue to follow closely the work of the Commission on sea-level rise in relation to international law. We welcome the reconstitution of the Study Group on sea-level rise in relation to international law and their exchange of views.

We note that the Members of the Study Group have underscored the importance of sea-level rise for the international community with a large impact on people, and direct relevance to peace and security; emphasized the need for caution when interpreting the silence of affected States. We also note the observation that new concepts such as "climate displacement", "climate refugees" and “climate statelessness”, are undefined in international law, and the term "specially affected State" should be used with caution as many States, particularly developing countries, are affected.

We further note the Co-Chair’s observations, including that ‘Member States have emphasized the importance of interpreting the UNCLOS to effectively address sea-level rise and provide practical guidance to affected States. While the previous interpretation of the Convention suggested that baselines and outer limits of the territorial sea, contiguous zone and exclusive economic zone were ambulatory, there is a growing consensus among Member States that the Convention does not forbid or exclude fixing baselines, and they also stressed the importance of preserving maritime zones, noting that the Convention does not prohibit freezing of baselines.’

As well, that ‘few Member States had made references to customary international law, and that those States had considered that there was no obvious evidence of opinio juris concerning the existence of a custom regarding the fixing of baselines.’

The exchange of views and the Co-Chair’s observations indicate, at least to this delegation, that the Commission is listening closely and reacting to comments of Member States. We appreciate this dialogue, in written form, with the Commission.

The Philippines reiterates its view that this issue must be approached on the basis of legal stability, security, certainty, and predictability in international law. We articulated these points at the Security Council meeting on 14 February 2023 on the “Sea-level rise: implications for international peace and security.” We appreciated Mr. Aurescu’s briefing, in his capacity as Co-Chair, on the progress of the Commission’s work at the said meeting.

With respect to the issue of “legal stability” in relation to sea-level rise, with a focus on baselines and maritime zones, we reaffirm the observation that Member States had adopted a pragmatic approach, that legal stability ‘as inherently linked to the preservation of maritime zones.’

Indeed, Member States have underlined the need to interpret the United Nations Convention on the Law of the Sea in such a way as to effectively address the concerns that have been raised.

The UNCLOS is premised on the idea, highlighted in its preamble, that the ‘codification and progressive development of the law of the sea will contribute to the strengthening of, *inter*

alia, peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights and will promote the economic and social advancement of all peoples of the world, in accordance with the principles of the United Nations, as set forth in the Charter.

With respect to the possible use of subsequent agreements and practice as authentic means of interpreting the UNCLOS, in line with the Vienna Convention on the Law of Treaties, we will consider this in due course, noting that the UNCLOS, as constitution of the oceans, presents a carefully crafted balance of interests of states.

On "Other decisions and conclusions of the Commission"

We welcome the decision of the Commission to include the topic "Non-legally binding international agreements" in its programme of work and to appoint Mr. Mathias Forteau as Special Rapporteur.

The inclusion of this topic is long overdue and we look forward to the Commission's work on this subject matter. The Philippines notes the proliferation of non-legally binding international agreements in the conduct of its diplomatic relations and looks forward to contributing to this effort in terms of its state practice.

On the Commission's approach and working methods.

We also note the Planning Group's decision to establish the Working Group on the long-term programme of work for the quinquennium and welcome the election of Mr. Marcelo Vázquez-Bermúdez as Chair.

We further welcome the reconstitution of the Working Group on methods of work of the Commission and the election of Mr. Charles Chernor Jalloh as Chair, noting that it has held four meeting in the first semester. We look forward to the next steps in relation to the WG discussions on the possibility of establishing some mechanism for reviewing the reception by Member States of the past products of the Commission; and the role of the Special Rapporteurs. We also welcome the Commission's discussions on enhancing the interaction with the Sixth Committee and other legal bodies and the prioritization of the relationship between the Commission and the Sixth Committee.

We hope that the Commission will continue to work closely with the Sixth Committee and continue to build on this interactive and iterative process at this session, moving forward.

Mr. Chair,

We intend to revisit these general observations in relation to the Commission's work, including specifically its consideration of sea-level rise and international law. We look forward to further reports from the Commission. **END**