PEOPLE'S REPUBLIC OF CHINA
MISSION TO THE UNITED NATIONS

350 EAST 35TH STREET, NEW YORK, NY 10016
http://www.china-un.org

PLEASE CHECK AGAINST DELIVERY

(translation)

Statement by Mr. XU Hong

Director-General of the Department

of Treaty and Law of the Ministry of Foreign Affairs of China

At the 72nd Session of the UN General Assembly

On Agenda Item 81

Report of the International Law Commission on the work of its 69th session

Cluster 2: Chapters VI and VII & Cluster 3: Chapters VIII, IX and X

New York, 27 October 2017

Mr. Chairman,

I would like to present China's views on some of the topics under the consideration of the International Law Commission.

With respect to "**Protection of the atmosphere**", the Chinese delegation thanks the Commission and Mr. Shinya Murase, the Special Rapporteur, for the work done. The Commission adopted at this year's session draft guideline 9 "Interrelationship among relevant rules", the purpose of which is to ensure the harmonization and systemic integration of the rules of international law relating to the protection of the atmosphere with other relevant rules of international law, including, inter alia, those of international trade and investment law, the law of the sea and international human rights law, in accordance with the rules set forth in the *Vienna Convention on the Law of Treaties* regarding the application and interpretation of treaties. We are of the view, however, that in order for this draft guideline to apply, there would need to be existing rules of international law on the protection of the atmosphere, and there is no generally applicable international treaty in this field at present. Therefore, the afore-mentioned conclusion lacks the backing of international practice. While the draft guideline may have some utility for theoretical purposes, it does not offer much practical value. The Commission may wish to further consider the necessity to retain this provision.

Mr. Chairman,

With respect to "**Immunity of State officials from foreign criminal jurisdiction**", the Chinese delegation thanks the Commission and the Special Rapporteur for their efforts. At this year's session, the Commission adopted by vote draft article 7, which identifies six crimes under international law as exceptions to the immunity *ratione materiae* of State officials, namely crime of genocide, crimes against humanity, war crimes, crime of apartheid, torture and enforced disappearance. In our opinion, this

draft article is very problematic, and we wish to make the following comments.

First of all, the hasty adoption of the draft article without thorough discussion seems inappropriate. We have noted that before the deliberation on this issue could run its course, the Commission rushed to a vote and adopted the draft article with almost one third of the members voting against it. We suggest that the Commission proceed with caution and prudence, and continue with in-depth exchange of views on the issue of exceptions to seek the broadest possible consensus. The Commission should avoid tabling a draft article on which there exists extensive controversy since it may undermine the authority of any potential outcome in this regard.

Secondly, the six exceptions to immunity provided for in this draft article are not grounded in general international practice. When arguing for the exceptions to immunity, the fifth report of the Special Rapporteur and the relevant commentaries of the Commission cite very few domestic cases, and the only examples that have been examined are mostly from European and American jurisdictions. The practice of Asian States is not fully taken into consideration.

Thirdly, the methodology used in the study is marred by tendentious selectiveness. For instance, many of the examples cited in the fifth report and commentaries in support of the establishment of exceptions to immunity are related to State immunity legislation or decisions of civil proceedings, and are irrelevant to the immunity of State officials from foreign criminal jurisdiction. Furthermore, there is a strong tendency toward selective invocation of international practice and judicial decisions, giving lopsided weight to a handful of cases in which immunity was denied while ignoring much more numerous instances of State practice and judicial decisions that upheld immunity. In addition, the references to certain judicial decisions selectively highlight the minority opinions against immunity, whereas the majority opinions in favour of immunity are not given due attention.

In light of the above, China does not believe that the provisions of draft article 7 qualify as codification or progressive development of customary international law. The unfair denial of immunity of State officials will seriously undermine the principle of sovereign equality and very likely become a tool for politically motivated litigations, which will result in grave damage to the stability of international relations. The Commission must fully recognize the seriousness of this issue and its potential harm, focus on comprehensively analyzing existing international practice and proceed in a cautious and prudent manner.

Mr. Chairman,

Since I will not be here to participate in the discussions next week, I'd like to present China's views on Cluster 3 as well.

With respect to **" Peremptory norms of general international law (*jus cogens*)"**, the Chinese delegation thanks the Commission and Mr. Tladi, the Special Rapporteur, for their hard work. We are of the view that this topic should be based on article 53 of the *Vienna Convention on the Law of Treaties* as well as State practice, and avoid relying excessively on theoretical deduction. With regard to certain specific issues covered by the topic, the Chinese delegation wishes to make the following comments:

First, on the basic elements of *jus cogens*. The Chinese delegation pointed out last year that the three basic elements proposed by the Special Rapporteur in his first report, namely that norms of *jus cogens* are universally applicable, are hierarchically superior to other norms of international law and protect the fundamental values of the international community, are at considerable variance with the elements set forth in article 53 of the *Vienna Convention on the Law of Treaties*. The proposed elements not only go beyond the framework of the afore-mentioned article, but also lack the backing of State practice. We have noted that in response to

our concern, the Special Rapporteur explains in paragraph 18 of his latest report that his proposal should be seen as "descriptive and characteristic elements", as opposed to the "constituent elements (or criteria) of norms of *jus cogens*" contained in article 53 of the Vienna Convention, and argues for a distinction between the two sets of elements. However, this explanation is still less than convincing to my delegation, since the purported difference is an ambiguous one, distinguishable only in theoretical abstraction and not supported by positive law. More importantly, the three proposed elements are subject to controversies themselves. For instance, the specific meaning of the so-called "fundamental values" can be very difficult to define in an international community with diverse civilizations and multiple value systems. Another example is the conclusion about the hierarchical superiority of *jus cogens*, which also lacks the support of sufficient and coherent State and international judicial practice. With regard to such issues as whether *jus cogens* norms have priority over procedural rules such as immunity of State officials from foreign criminal jurisdiction or over obligations of Members States under the *Charter of the United Nations*, there is no consensus yet in the international community.

Second, on the bases of *jus cogens*. Draft conclusion 5 proposes that general principles of law can serve as the basis for *jus cogens* norms. We take the view that given the lack of consensus in the international community as to which norms fall within the category of general principles of law, and a paucity of State practice relating to the elevation of a general principle of law to a *jus cogens* norm, further studies seem warranted in order to determine whether general principles of law can indeed form the basis of *jus cogens*. We would like to seek clarification from the Special Rapporteur in this regard.

Third, on how to interpret the phrase "the international community of States as a whole" contained in the criteria of identification of *jus cogens*. We believe that whether it is interpreted as "a large majority of States" or "a very large majority of States", such a definition would be very difficult to

implement in practice. Since the same vague quantitative criterion can also be employed to identify customary international law, it would be difficult to ascertain the difference, if any, in the manner in which the criterion is used to identify *jus cogens* norms. Considering that an accurate definition of "the international community of States as a whole" is crucial for the determination as to whether a norm of international law constitutes a norm of *jus cogens*, we believe that more in-depth studies are required on this issue.

Mr. Chairman,

With respect to "**Succession of States in respect of State responsibility**", the Chinese delegation appreciates the work carried out by the Commission, and thanks the Special Rapporteur for his first report. We are of the view that given the limited international practice relating to the succession of State responsibility, as well as the complex political and historical contexts in which such limited practice occurred, it is foreseeable that the codification of rules of international law in this field will be very difficult. In addition, it is also worth further discussion as to whether there is real urgency for the Commission to embark on the codification of the topic at the current stage.

With regard to the issue of "scope" addressed by draft article 1, we endorse limiting the scope of this topic to State responsibility and succession of States, excluding responsibility of international organizations and succession of governments. At the same time, we propose that rules of international law on "State liability" should also be kept out of the scope of the topic, and that the topic should focus entirely on secondary rules of "State responsibility".

Thank you, Mr. Chairman.