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

Representative of China and Director-General of the Department of Treaty and Law of the Ministry of Foreign Affairs of China

At the Sixth Committee of the 73rd Session of the UN General Assembly

On Agenda Item 82

Report of the International Law Commission on the work of its 70th session

Cluster I: Chapters I, II, III, IV, V and XII

New York, 22 October 2018

Mr Chairperson,

This year marks the 70th anniversary of the International Law Commission. Over the past seven decades, the Commission has completed the consideration of 36 topics, and as many as 17 multilateral conventions have been concluded on the basis of the Commission's outcomes. Some important conventions, such as those in the fields of laws of diplomatic and consular relations, the law of treaties and the law of the sea, have become universally applicable international legal norms. They play an important role, in their respective fields, in maintaining healthy and stable relations between States.

Having delivered a whole raft of outcomes, the Commission is now confronted with some fresh challenges, in particular in such areas as selection of topics, working methods and interaction with States. The Chinese delegation believes that as a subsidiary body of the UN General Assembly, the Commission should bear in mind the goal of serving the UN Member States when selecting topics, prioritising legal questions that States urgently need answered in their practice. Its working methods should be such that they are based on well-established State practice and take into account the need to balance between codification and progressive development. When it comes to important but sensitive issues on which general consensus has yet to be achieved, bringing coherence and clarity to *lex lata* should take precedence and caution is advised in proposing and drafting new laws. Any outcomes of the Commission should, to the extent

possible, make a clear distinction between *lex lata* and *lex ferenda*. When interacting with States, the Commission should show greater commitment to heeding and taking on board the positions voiced by Member States in the Sixth Committee of the UN General Assembly and in other fora, to ensure that the outcomes of the Commission's work can best reflect the consensus and needs of States.

Mr Chairperson,

This year, the Commission adopted, on second reading, draft conclusions and commentaries thereto on two important topics, "Identification of customary international law" and "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". We would like to congratulate the Commission and applaud the efforts of Special Rapporteurs Sir Michael Wood and Professor Georg Nolte. We hope the two sets of draft conclusions will provide useful guidance to States in international practice. The work on the two topics proceeded smoothly and the final products were endorsed by all parties, precisely because the Commission had addressed the real-world needs of Member States, based its work in general State practice, consulted Member States in earnest and sought the broadest consensus possible. As we see it, the morals, as it were, of these success stories can be usefully drawn upon in the Commission's consideration of other topics.

Mr Chairperson,

The topic "Identification of customary international law" is one that China has been closely following. Through our statements at the Sixth Committee, our written comments and so on, we made known our position on a range of important issues covered in the draft conclusions, such as "specially affected States" and "persistent objector". Our inputs contributed constructively to the finalisation of the draft conclusions. Now that these conclusions have been adopted on second reading, we would like to re-emphasise that customary international law is an important source of international law and therefore its identification must be done in a rigorous and systematic manner by scrutinising general practice of State across the whole spectrum, while refraining from selectivity or recourse to a lowered threshold in favour of State-specific interests or needs. Admittedly, under certain circumstances, it is necessary to consider how the resolutions of international organisations, international judicial decisions and the teachings of authoritative publicists may be relevant to the identification of customary international law, but the primacy of State practice does and should apply at all times.

Mr Chairperson,

On the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", China's position has been articulated in the past. Chinese delegation also notes that the concept of "subsequent practice" referred to in the draft conclusions covers both the

"subsequent practice" as denoted in Article 31 (3) of the Vienna Convention on the Law of Treaties (VCLT) and the subsequent practice that is not explicitly mentioned in Article 32 of VCLT but is routinely relied upon as supplementary means of interpretation. In this regard, we wish to stress the following: only such subsequent practice that embodies an expression of the genuine, common intentions of the parties to a treaty regarding the interpretation of same can be used as authentic means of interpretation as defined in Article 31(3) of the VCLT. Any other subsequent practice may potentially play a part as supplementary means of interpretation as referred to in Article 32, but should be clearly distinguished from subsequent practice envisaged in Article 31(3).

Mr Chairperson,

This year, the Commission decided to include two topics in its long-term programme of work, namely, "Sea-level rise in relation to international law" and "Universal criminal jurisdiction". Regarding "Sea-level rise in relation to international law", the focus of our attention is on the changes to the circumstances in reality resulting from sea-level rise and we consider it useful to discuss how to manage the gap between these changes and the existing law-of-the-sea regime. We hope the Commission will take into full account the provisions and spirit of the existing international law, including the United Nations Convention on the Law of the Sea, while working on this topic, to maintain, to the extent possible, the stability and predictability of the existing law-of-the-sea regime and provide

legal guidance for the international community's effort to address sea-level rise properly.

As for "Universal criminal jurisdiction", we have repeatedly reiterated our basic position and concerns during the Sixth Committee's deliberations on the topic "The scope and application of the principle of universal jurisdiction". Judging by the discussions at the Sixth Committee, opinion is split over the concept of universal jurisdiction; a fair number of countries erroneously equate the "*aut dedere aut judicare*" clause in some international treaties and universal jurisdiction. Discussions at the Sixth Committee over the years have yielded no substantive progress and States remain divided over this issue. In our opinion, given this state of affairs, the conditions under which the Commission considers the topic are premature. China also emphasizes that the inclusion of the topic in the long-term programme of work of the Commission does not mean that there is a universal jurisdiction as a general rule in addition to piracy. In the future, if the Commission conducts any work on this topic, it should start by clarifying the very concept of universal jurisdiction per se, analyse *lex lata* in a rigorous manner on the basis of an in-depth survey of State practice and approach this topic with caution and care.

Thank you, Mr Chairperson.