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STATEMENT OF THE CUBAN DELEGATION ON THE THEME "Report of the International Law Commission on the work of its 70th session (PARTI)".

New York, 24 October 2018

Mr. Chairman,

Allow me to congratulate the International Law Commission on the work carried out at the 70th session in order to advance its agenda items.

We convey our appreciation to Mr. Eduardo Valencia Ospina, Chairman of the International Law Commission. We are further honored that a Latin American presides over the Commission, especially on its 70th Anniversary.

With regard to the ILC's agenda, we are concerned about the number of items in its program, which we consider excessive. It is important to recognize that the analysis of each of them requires more time for experts and for better interaction between the ILC and the Sixth Committee of the General Assembly.

In addition, the ILC should be provided with translation in the six official languages of the United Nations.

With regard to new issues, the Cuban delegation is grateful for their inclusion in the long term programme of work. However, we believe that the topic of "Universal Criminal Jurisdiction" fails to meet one of the criteria agreed upon at the 50th session (1998), as it should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification. We believe that the issue requires further discussion by members within the framework of UNGA Sixth Committee before the Commission begins its work.

We also appreciate that the subject of the general principles of law has started the work programme, as it constitutes one of the key elements for international law operators, pursuant to article 38 section c) of the Statute of the International Court of Justice.

Mr. Chairman,

With regard to Chapter IV "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", we are grateful to Mr. Georg Nolte for preparing the draft conclusions on this topic.

Generally speaking, we consider that these means of interpretation can only be properly understood in the context of the set of rules for the interpretation of treaties, contained in the framework of articles 31 and 32 of the Vienna Convention. Their use should be made without precedence of one medium over another, as included in the commentaries to the draft and as a "single operation".

The regime laid down in the Vienna Convention on the Law of Treaties must be respected, as it reflects customary practice in the aspects it deals with.

At times, drafts are a repetition of the said Convention. However, on other occasions terms are incorporated, creating ambiguity or inaccuracy in the text. Commentaries largely clarify the draft, which by itself, adopted in an Assembly resolution, may be difficult to interpret.

In relation to draft conclusion 2, we consider that it does not provide any additional element to what is exactly stipulated in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. The work of the Commission makes it clear how, in this matter, what is reflected in the Vienna Convention has been customary law, since before the Convention was adopted, based on this recognition by judgments or awards of different international courts and tribunals.

As to paragraph 5 of draft conclusion No. 2, it clarifies the need to combine all means of interpretation of Articles 31 and 32 of the Vienna Convention, without giving priority to one means over another. In connection to that paragraph, the Commission considers that the interpreter must determine the relevance of the means to be used in a particular case and their interaction with the other means of interpretation, devoting due attention to them, in good faith, as required by the rule of the treaty to be applied. It is our understanding that good faith must prevail among the parties involved, on the understanding that at all times it must be carried out in accordance with law and justice, in a fair and timely manner.

With regard to draft conclusion No. 3, we consider that using the terms "authentic means" when referring to subsequent agreements and subsequent practice may create confusion relating to the authenticity that the other means of Article 31 also have, as general rules of treaty interpretation. In addition, it could create doubts about the importance of the complementary means of Article 32 of the Vienna Convention on the Law of Treaties, although this has

been recognized in the Commission's own commentaries. We agree that subsequent agreements and subsequent practice are not necessarily conclusive in the treaty interpretation process. This should be further carried out as a "combined operation" in which there is no hierarchy between them. That is clear in the commentaries but not in the draft conclusions, which only refer to the authenticity of subsequent agreements and subsequent practice without referring to the equal authenticity of the other means.

A "subsequent agreement between the parties on the interpretation of the treaty or the implementation of its provisions" may constitute a genuine interpretation, since it is the parties themselves who have agreed how it will be interpreted or applied. The "subsequent practice" is different, as it has to reflect "the common understanding of the parties as to the meaning of the terms that such practice reveals".

Concerning draft Conclusion 5 referring to conduct as a subsequent practice, we consider that it is not relevant to include in the interpretation of treaties the conduct of non-State actors when these are not recognized as a subject of international law, by which the parties to the treaty would be bound.

There are phrases that without the explanatory references in the commentaries would be seriously confusing, such as "inter alia" in draft conclusion 2; as well as reference to the "weight" of subsequent practice in draft conclusion 9.

Mr. Chairman,

With respect to the topic "Identification of customary international law", we are grateful for the fifth report of the Special Rapporteur, Sir Michael Wood, and the Commission for adopting draft conclusions with commentaries.

The report includes the Commission's recommendations on this draft, which we consider very timely as a reference for States, dissemination to all those who make use of customary international law, as well as for the teaching of international law. However, further clarification is required on the recommendation in paragraph 63(e) concerning follow-up to the suggestions contained in the Secretariat's Memorandum.

With regard to Project No. 2, we agree that in order to identify a rule of customary international law, there must be a general practice and its acceptance as a right or legal obligation by a number of States.

State behavior should only be limited to State practice, as a subject of international law, and not to the practice of other non-state actors, such as NGOs, transnational corporations, natural persons and non-state armed groups. In this sense, we agree with draft conclusion No. 4.

On draft conclusion No. 6, while referring to inaction as evidence of State practice, there is ambiguity in this formulation.

Draft conclusion No. 8 is apparently contradictory, because although it mandates constant practice, no specific duration is required. However, the time variable cannot be divorced from the concept of constancy.

We stress the fact that the Commission has appreciated as State practice the value of its public positions, both in its declarations and in resolutions and issues before international bodies.

Mr. Chairman,

To conclude, we reiterate the importance of this topic because of the doctrinal richness it contains, which constitutes a reference for the identification of customary international law.

Thank you