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STATEMENT OF THE CHAIR OF THE INTERNATIONAL LAW COMMISSION,

MR. EDUARDO VALENCIA-OSPINA

Cluster One

Chapters I-III, XII, XIII, IV and V: Introductory chapters; Commemoration of the seventieth anniversary of the Commission; Other decisions and conclusions of the Commission; Subsequent agreements and subsequent practice in relation to the interpretation of treaties; and Identification of customary international law

Mr. Chair,

I wish to begin my statement by thanking you most sincerely for your kind remarks about the International Law Commission. Allow me to convey to you, on behalf of the Commission, its best wishes to you all for a successful seventy-third session of the Sixth Committee. The tradition of interaction and collaboration between the Committee and the Commission in the progressive development of international law and its codification, is one that the Commission cherishes and desires to be fostered. For that reason, I am glad that the Commission held the first part of its session here in New York and also to see that many members of the Commission were able to be present in New York for International Law Week.

Mr. Chair,

The 70th session of the Commission was especially intense and productive, as demonstrated by the substantial report of the Commission contained in document A/73/10. This was also a landmark year for the International Law Commission, which celebrated its seventieth anniversary with events organized in New York and Geneva. This year was also exceptional, since the Commission held the first part of its session in New York and not at its seat in Geneva.

The present statement addresses the first cluster of issues in **chapters I** to **III and XII and XIII of the report,** as well as the substantive **chapters IV and V.**

Chapters I-III, XII and XIII: Introductory chapters; Commemoration of the seventieth anniversary of

the Commission and Other decisions and conclusions of the Commission

Mr. Chair,

First, let me note the change in the membership of the Commission that occurred further to the resignation of our esteemed colleague, Mr. Roman A. Kolodkin. Pursuant to its statute, it fell on the Commission to fill the casual vacancy occasioned by this resignation. Mr. Evgeny Zagaynov was elected by the Commission at the very beginning of the session.

As summarised in Chapter II, the Commission made significant progress during this session. First, the Commission concluded the second reading of the topics "**Subsequent agreements and subsequent practice in relation to the interpretation of treaties**" and "**Identification of customary international law**" by adopting two full sets of draft conclusions and commentaries thereto. Second, the Commission concluded its first reading on two other topics "**Protection of the atmosphere**" and "**Provisional application of treaties**", with the adoption of two full set of draft guidelines with commentaries. Third, it continued its consideration of four other topics, namely "**Peremptory norms of general international law (*jus cogens*)**", "**Protection of the environment in relation to armed conflicts**", "**Succession of States in respect of State responsibility**" and "**Immunity of State officials from foreign criminal jurisdiction**".

As for future work, a new topic, "**General principles of law**", was included in the programme of work of the Commission. Mr. Marcelo Vázquez-Bermúdez was appointed Special Rapporteur for the topic, the consideration of which will begin at the next session. In addition, the Commission included two new topics in its long-term programme of work, namely "**Universal criminal jurisdiction**" and "**Sea-level rise in relation to international law**". This decision does not mean that those topics are already on the active programme of work. Such further decision would only be taken after States have had occasion to comment on the advisability of placing those topics on the programme of work of the Commission. The Commission would therefore welcome views on the two new topics included this year in its long-term programme of work.

To facilitate the work of the Commission, **Chapter III** of the report draws attention to specific issues on which the comments of Governments would be of particular interest to the Commission.

Mr. Chair,

I had the great honour and privilege to chair the Commission for the celebration of its 70th anniversary under the overarching theme "70 years of the International Law Commission — Drawing a balance for the future". The events organized in New York and Geneva provided the occasion to reflect on the

achievements and prospects of the Commission. I am pleased that many esteemed speakers participated in the solemn meetings convened in New York and Geneva, and I am extremely grateful to all representatives of the Sixth Committee for their participation to the half-day conversation with members of the Commission organized in New York. I would also like to pay tribute to the legal advisers from States and other international law experts present in Geneva for a most interesting meeting focusing on various aspects of the work of the Commission in the progressive development of international law and its codification. The commemorative events in New York and Geneva were enriched by a large number of side events, in which the members of the Commission and representatives of States, international organizations and academic institutions participated.

It goes without saying that these commemorative events would not have been possible without the contributions of several Governments and an academic institution. The Commission is grateful for the generosity demonstrated by Austria, Chile, China, the Czech Republic, Finland, Germany, India, Ireland, Japan, Portugal, Qatar, the Republic of Korea, Romania, Singapore, Sri Lanka, Switzerland, Turkey, Viet Nam and the United Kingdom of Great Britain and Northern Ireland, as well as the Istanbul Bilgi University, who contributed financially or in kind towards the hosting of the various activities. I would like to reiterate the gratitude of the Commission to them. I would also like to reiterate the gratitude of the Commission to the Secretariat for organizing both commemorative meetings.

Mr. Chair,

Before turning to the substantive chapters of the annual report of the Commission, let me highlight certain other decisions and conclusions of the Commission.

In its report, the Commission commented on its current role in promoting the rule of law and reiterated its commitment to the rule of law in all of its activities. This is further to the invitation of the General Assembly in its resolution 72/119 of 7 December 2017 on the rule of law at the national and international levels.

The Commission also decided that its seventy-first session would be held in Geneva from 29 April to 7 June and from 8 July to 9 August 2019.

I would also like to express my satisfaction for the successful holding of the fifty-fourth session of the International Law Seminar, which was held at the Palais des Nations during the present session of the Commission.

Let me conclude this part by acknowledging the invaluable assistance of the Codification Division of

the Office of Legal Affairs for the substantive servicing of the Commission. In particular, at this session, the Commission expressed its appreciation to the Secretariat for its preparation of a memorandum on ways and means for making the evidence of customary international law more readily available, and requested that this memorandum be reissued to reflect the text of the draft conclusions and commentaries on identification of customary international law adopted on second reading. In addition, the Commission also requested from the Secretariat a memorandum providing information on treaties which may be of relevance to its future work on the topic "Succession of States in respect of State responsibility".

Chapter IV – *Subsequent agreements and subsequent practice in relation to the interpretation of treaties.*

Mr. Chair,

Let me now turn to the first substantive chapter of the report, which is chapter IV on the topic "**Subsequent agreements and subsequent practice in relation to the interpretation of treaties**". I am very pleased to report that the Commission concluded its work on this topic with the adoption of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties and commentaries thereto, which can be found at paragraphs 51 and 52 of the annual report. This was the culmination of ten years of work of the Commission since its decision to include the topic "Treaties over time" in its programme of work in 2008.

Allow me to reiterate the tribute paid by the Commission to the outstanding contribution of the Special Rapporteur, Mr. Georg Nolte, who made this outcome possible through his tireless efforts and devoted work. Mr. Nolte was the Chair of the Study Group from 2009 and 2012, and as Special Rapporteur, he submitted five reports from 2013 to 2018 on the basis of which the Commission made progress on the topic.

At this year's session, the Commission re-examined the texts adopted in 2016 on first reading in light of the comments and observations made by States. The draft conclusions were subsequently amended, although not significantly, and the commentaries were refined to take into account the comments and observations made.

You have now before you a complete set of 13 draft conclusions with commentaries thereto. These draft conclusions, which are based on the 1969 Vienna Convention on the Law of Treaties, seek to explain the role that subsequent agreements and subsequent practice play in the interpretation of treaties. Their

purpose is to facilitate the work of those who are called on to interpret treaties, in particular States, international organizations, and courts and tribunals at the international and national levels.

Mr. Chair,

The draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties are organized under four parts. **Part One**, entitled "Introduction", comprises draft conclusion 1 on the scope of the draft conclusions.

Part Two, which comprises four draft conclusions, addresses the basic rules and definitions. The purpose of draft conclusion 2, "General rule and means of treaty interpretation", is to situate subsequent agreements and subsequent practice as a means of treaty interpretation within the framework of the rules on the interpretation of treaties set forth in articles 31 and 32 of the 1969 Vienna Convention. Draft conclusion 3 is entitled "Subsequent agreements and subsequent practice as authentic means of interpretation". As indicated by its title, the purpose of this draft conclusion is to indicate that subsequent agreements and subsequent practice under article 31, paragraph 3, are significant for the interpretation of treaties since they constitute authentic means of interpretation. Under draft conclusion 4, the Commission provided the definitions of subsequent agreement and subsequent practice. Finally, draft conclusion 5, which is entitled "conduct as subsequent practice", addresses the question of the possible authors of subsequent practice under articles 31 and 32 of the 1969 Vienna Convention.

Part Three deals with the general aspects. It comprises five draft conclusions.

The title of draft conclusion 6 is "Identification of subsequent agreements and subsequent practice". It confirms that subsequent agreements and subsequent practice, as means of interpretation, must be identified. Draft conclusion 7 addresses the possible effects of subsequent agreements and subsequent practice in interpretation. This draft conclusion describes how subsequent agreements and subsequent practice may contribute to the clarification of the meaning of a treaty. Draft conclusion 8 is entitled "Interpretation of treaty terms as capable of evolving over time". It addresses the role that subsequent agreements and subsequent practice may play in the context of a more general question of whether the meaning of a term of a treaty is capable of evolving over time. Draft conclusion 9 concerns the weight of subsequent agreements and subsequent practice as a means of interpretation. This draft conclusion identifies criteria that may be helpful in determining the interpretative weight to be accorded to a specific subsequent agreement or subsequent practice in the process of interpretation in a particular case. The title of draft conclusion 10 is "Agreement of the parties regarding the interpretation of a treaty". Its purpose is to clarify the element of agreement, which distinguishes subsequent agreement and subsequent practice as authentic

means of interpretation under article 31, paragraph 3 (a) and (b), of the 1969 Vienna Convention from subsequent practice as a supplementary means of interpretation under article 32.

Let me now turn to **Part Four**, which addresses specific aspects. It comprises three draft conclusions.

Draft conclusion 11 deals with "Decisions adopted within the framework of a Conference of States Parties". This draft conclusion addresses such particular form of action that may result in a subsequent agreement or subsequent practice under article 31, paragraph 3, or subsequent practice under article 32. Draft conclusion 12 is entitled "Constituent instruments of international organizations". This draft conclusion refers to a particular type of treaty, namely constituent instruments of international organizations, and the way in which subsequent agreements or subsequent practice shall or may be taken into account in their interpretation. Finally, draft conclusion 13 addresses the role of pronouncements of expert treaty bodies in the interpretation of treaties.

Mr. Chair,

In accordance with article 23 of its statute, the Commission recommends that the General Assembly:

"(a) take note in a resolution of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, annex the draft conclusions to the resolution, and ensure their widest dissemination; and

(b) commend the draft conclusions, together with the commentaries thereto, to the attention of States and all who may be called upon to interpret treaties."

Chapter V – Identification of customary international law

Mr. Chair,

Let me now turn to the topic "**Identification of customary international law**" contained in Chapter V of the annual report.

I am extremely pleased to report that the Commission concluded its consideration of this topic with the adoption, on second reading, of the draft conclusions on identification of customary international law, and commentaries thereto, which can be found at paragraphs 65 and 66 of the report. Work on this topic began in 2012, when the Commission decided to include the topic in its programme of work and to appoint Sir Michael Wood as Special Rapporteur.

Allow me to reiterate the deep appreciation and warm congratulations expressed by the Commission to the Special Rapporteur, Sir Michael Wood, for the outstanding contribution he has made to the preparation of the draft conclusions through his tireless efforts and devoted work, and for the results achieved in the elaboration of the draft conclusions on identification of customary international law. Sir Michael submitted five reports on the topic from 2013 to 2018 on the basis of which the Commission the topic was considered. I shall also thank the Special Rapporteur for preparing an updated bibliography on the topic, which is comprised in an annex to his fifth report.

In addition to the comments and observations received from Governments and the fifth report of the Special Rapporteur, which analysed those comments and made suggestions on their basis, the Commission also had before it a memorandum by the Secretariat on ways and means for making the evidence of customary international law more readily available. That memorandum, which surveyed the present state of evidence of customary international law and made suggestions for its improvement, was also discussed during the plenary debate of the Commission on the topic.

The Commission adopted, on second reading, a full set of 16 draft conclusions, and commentaries thereto, which are now before you. As you can see, the text of the draft conclusions is not very far from the text provisionally adopted on first reading, although it has been refined, as have its commentaries, to reflect the views expressed by Governments over the years.

As indicated in the general commentary, the draft conclusions concern the methodology for identifying rules of customary international law. They seek to offer practical guidance on how the existence of rules of customary international law, and their content, are to be determined.

The 16 draft conclusions on identification of customary international law are divided into seven parts that I would like to present in turn.

I shall begin with **Part One**, entitled "Introduction", which deals with scope and purpose. It comprises a single draft conclusion. Draft conclusion 1 deals with the scope of the draft conclusions, outlining what they seek to cover and apply to, and what matters fall outside their scope.

Part Two sets out the basic approach to the identification of customary international law. It comprises two draft conclusions. Such approach is the object of draft conclusion 2. Under the "Two constituent elements" approach, the identification of a rule of customary international law requires an inquiry into two distinct, yet related, questions: whether there is a general practice, and whether such general practice is accepted as law (that is, accompanied by *opinio juris*). Draft conclusion 3 concerns the assessment of

evidence for the two constituent elements of customary international law. As indicated in the commentary, it offers general guidance for the process of determining the existence and content of a rule of customary international law from the various pieces of evidence available at the time of the assessment, which reflects both the systematic and rigorous analysis required and the dynamic nature of customary international law as a source of international law.

Mr. Chair,

Part Three offers more detailed guidance on the first of these two constituent elements of customary international law, "a general practice". It comprises five draft conclusions.

Draft conclusion 4 specifies whose practice is to be taken into account when ascertaining the existence of a general practice for purposes of determining whether a rule of customary international law exists, as well as the role of such practice. Draft conclusion 5 deals with "Conduct of the State as State practice". While in their international relations States most frequently act through the executive branch, draft conclusion 5 explains that State practice consists of any conduct of the State, whatever the branch concerned and functions at issue. The various forms of practice are addressed in draft conclusion 6. That draft conclusion indicates the types of conduct that are covered under the term "practice", providing examples thereof and stating that no form of practice has *a priori* primacy over another in the identification of customary international law. Draft conclusion 7 concerns the assessment of the practice of a particular State in order to determine the position of that State as part of assessing the existence of a general practice. Draft conclusion 8 concerns the requirement that the practice must be general.

I will now turn to **Part Four** entitled "Accepted as law (*opinio juris*)", which concerns the second constitutive element. It comprises two draft conclusions.

Draft conclusion 9 seeks to encapsulate the nature and function of the second constituent element of customary international law. Draft conclusion 10 concerns the evidence from which acceptance of a given practice as law (*opinio juris*) may be ascertained. It reflects the fact that acceptance as law may be made known through various manifestations of State behaviour.

Mr. Chair,

Let me now turn to **Part Five**, which addresses the significance of certain materials for the identification of customary international law. It comprises four draft conclusions.

Draft conclusion 11 concerns the significance of treaties for the identification of customary international law. This draft conclusion clarifies the way in which their provisions (and the processes of their adoption and application) may shed light on the content of customary international law. Draft conclusion 12 addresses the role that resolutions adopted by international organizations or at intergovernmental conferences may play in the determination of rules of customary international law. Draft conclusion 13 concerns the role of decisions of courts and tribunals, both international and national, as an aid in the identification of rules of customary international law. Indeed, such decisions may offer valuable guidance for determining the existence or otherwise of rules of customary international law. Draft conclusion 14 concerns the role of teachings in the identification of rules of customary international law. It provides that such works may be resorted to as a subsidiary means for determining rules of customary international law.

Let me now turn to **Part Six** - Persistent objector - **and Part Seven** - Particular customary international law - of the draft conclusions. Each part comprises a single draft conclusion.

Draft conclusion 15 concerns the persistent objector. It clarifies that when a State has persistently objected to an *emerging* rule of customary international law, and maintains its objection after the rule has crystallized, that rule is not opposable to it. Finally, while rules of general customary international law are binding on all States, draft conclusion 16 deals with the specific case of rules of particular customary international law applying among a limited number of States.

Mr. Chair,

Having adopted the draft conclusions on identification of customary international law, the Commission decided, in accordance with article 23 of its statute, to recommend that the General Assembly:

"(*a*) take note in a resolution of the draft conclusions on identification of customary international law, annex the draft conclusions to the resolution, and ensure their widest dissemination;

(*b*) commend the draft conclusions, together with the commentaries thereto, to the attention of States and all who may be called upon to identify rules of customary international law;

(*c*) note the bibliography prepared by the Special Rapporteur (A/CN.4/717/Add.1);

(*d*) note the Secretariat memorandum on ways and means for making the evidence of customary international law more readily available (A/CN.4/710), which surveys the present state of evidence of customary international law and makes suggestions for its improvement;

(*e*) follow up the suggestions in the Secretariat memorandum by:

(i) calling to the attention of States and international organizations the desirability of publishing digests and surveys of their practice relating to international law, of continuing to make the legislative, executive and judicial practice of States widely available, and of making every effort to support existing publications and libraries specialized in international law;

(ii) requesting the Secretariat to continue to develop and enhance United Nations publications providing evidence of customary international law, including their timely publication; and

(iii) also requesting the Secretariat to make available the information contained in the annexes to the memorandum on ways and means for making the evidence of customary international law more readily available (A/CN.4/710) through an online database to be updated periodically based on information received from States, international organizations and other entities concerned."

Mr. Chair,

This concludes my introduction of cluster one.
