STATEMENT BY TURKEY AT THE SIXTH COMMITTEE
AGENDA ITEM 82
REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS SEVENTIETH SESSION
Cluster I
(Chapter I, II, III, IV, V, XII, and XIII)
(23 OCTOBER 2018-PaperSmart)

Mr. Chairman, H.E. Mr. Michel Xavier Biang,

It is a great pleasure and honor to be here together with the distinguished members of the Sixth Committee and the law experts in this special year, which marks the 70th anniversary of the International Law Commission. Prior to commencing our remarks, I would like to seize the opportunity to congratulate the esteemed members of the Commission.

Mr. Chairman,

We, all the delegates from Member States, are striving for the same ultimate object and purpose as a peaceful, stable and prosperous world that can be possible through an international legal order. An order can only be achieved by means of rules which we all together have to develop and have to compromise upon. In this regard, making the rules, we have achieved to date, palpable with their codification and, helping us establish the newest ones, the International Law Commission deserves great respect and gratitude of the international community.

On that account, my delegation would like to thank all the members of the International Law Commission from past to today for their enormous contributions to international law order over the Commission's history of 70 years.

Mr. Chairman,

Celebrating such a pleasing occasion, there is, however, one deplorable thing that I wish to touch upon. That is, even after as many as 70 years, only four

of the Commission's members are women and the total number throughout its history is just 7. States should work towards better gender balance in all parts of work life and ILC is not an exception of this common goal.

Proud of being a country from which one of the four women members is, we are also very contented that the attached special importance, the raised and confirmed awareness by the participants on the issue in the seventieth anniversary session of the Commission and the side events therewith.

I hope that this anniversary would be a turning point. We call upon all Member States to take gender balance into consideration in their future nominations. make composition of the Commission exemplary to the other public bodies.

Mr. Chairman,

Before moving on to current topics, let me share our observations about the two new topics which were included into the Commission's long-term program, namely universal criminal jurisdiction, and sea level rise in relation to international law,

Being a state, penal law of which accepts universal criminal jurisdiction in some serious crimes of international concern, the developments in universal criminal jurisdiction issue is being followed by us with great attention and interest. We believe that in this regard the work of the Commission would yield a result capable of filling the gaps of impunity.

By the same token, we also expect that such an outcome would concomitantly secure the legality principle, non-retroactivity of penal provisions, acknowledgement of certain prescription period for crimes and penalties, and last but not least the demarcation of the scope as criminal law from civil jurisdiction by the exclusion of civil claims, which are of utmost importance for the prevention of the abuse of this institution.

Concerning sea level rise which has a wide range of impacts, we look forward to which dimensions of the issue the Commission would ultimately address : its relationship with global warming, or its consequences on various areas such as, inter alia, environmental concept of statehood, mobility, human rights, instability of geographical condition, and variable land and maritime boundaries. It should be noted that an excessive broad topic could be counterproductive and distracting effects can be arisen out of political sensitiveness.

Therefore, it could be the most viable option to focus on environmental causes and effects, which are of the highest urgency. The physical and technical preventive and administrative set of rules and policies should be adopted in due course to tackle this environmental issue, but also we should get ready to face its consequences in the sense of firstly the modification of the current rules and the adoption of the newest ones in environmental law. No doubt that in this setting the Commission's work would be a very instrumental and influential, which would create driving force for further preparatory regulation efforts.

Chapter IV-V

* Subsequent agreements and subsequent practice in relation to the interpretation of treaties
* Identification of customary international law.

As regards the topics under Cluster I, at the outset, I would like to congratulate the Commission for the adoption of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties and for the adoption of the draft conclusions on identification of customary international law, together with the commentaries thereto. I would also like to extend our thanks for the contribution of the Special Rapporteurs: Mr. Georg Nolte and Sir Michael Wood respectively

It is true that we have some divergent views and thoughts on particular draft conclusions on both topics as we formerly set out and which can also be pointed out herein.

On the first topic: draft conclusion 2, last sentence of paragraph 1, draft conclusion 4; draft conclusion 5, paragraph 2; draft conclusion 10, paragraph 2 constitute, inter alia, the parts for which we are dubious most:

* CHAPTER IV: Subsequent agreements and subsequent practice in relation to the interpretation of treaties

* Conclusion 2, paragraph 1, last sentence
General rule and means of treaty interpretation

1. Articles 31 and 32 of the Vienna Convention on the law of treaties set forth, respectively, the general rule of interpretation and the recourse to supplementary means of interpretation. <u>These rules also apply as customary international law.</u>

<u>Our comments:</u> Such a phrase that Article 31 and 32 of the Vienna Convention on the law of treaties are applicable to the customary international law does not exist in the Convention itself. Most of the

judgements with respect to upholding this argument is weak in language and mostly relates to Article 31. Besides, as affirmed in draft conclusion 14 on the identification of customary international law, decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are not authoritative but rather only subsidiary means for the determination of such rules.

* Conclusion 4
Definition of subsequent agreement and subsequent practice

1. A subsequent agreement as an authentic means of interpretation under article 31, paragraph 3 (a), is an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions.

2. A subsequent practice as an authentic means of interpretation under article 31, paragraph 3 (b), consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.

3. A subsequent practice as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.

Our comments: In contrast with paragraph 2 of commentary to Conclusion 4 "the term 'conclusion' in the meaning of the starting point for acts that may constitute subsequent agreements and practice in relation to interpretation of treaties, should be interpreted as "actual enter into force of treaty" rather than "its signing."

*Conclusion 5, paragraph 2

Conduct as subsequent practice

2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.

Our comments: As having international legal personality, only the states and international organs of legal competence can become a party to treaty. Consequently, apart from those, conducts of non-state actors which lacks international legal personality, and which is vague in its scope and definition should not be taken into consideration for the interpretation of treaty.

*Conclusion 10, paragraph 2, last sentence
Agreement of the parties regarding the interpretation of a treaty

2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction.

Our comments: In order to protect the principle of "free consent of states" recognized universally, it is more secure approach to accept the only active conducts of states, to create subsequent agreements on the interpretation of a treaty and exclusion of, silence which could create unwanted results for a state against its will as a consequence of its negligence.

* CHAPTERV: Identification of customary international law

Concerning the second topic on identification of customary international law, draft conclusion 4, paragraph 2, 3 and the certain parts of draft conclusions from 11 to 15 are, among others, the items that we have taken different approaches from the Commission:

*Conclusion 4, paragraph 2, 3
Requirement of practice

2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.

3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.

Our comments: The term other actors are broad and indefinite in a manner likely to be expanded to non-state actors inappropriately. International organizations in a wide variety of forms are as well unclear in its scope. It could be construed as covering distinct international non-governmental organizations, other than conventional international governmental organizations, such as the UN, Only the states as the main actors of international community can primarily form customary international law with their practices.

*Part Five titled "Significance of certain materials for the identification of customary international law. Draft Conclusions from 11 to 14

Our comments: Draft Conclusion 11 (treaties), paragraph 1(a) might be invoked to argue that all provisions of the Vienna Convention on the Law of Treaties are completely customary international law. Nevertheless, a statement in a treaty provision that the rule in that provision is a customary international law does not automatically make it as such. General state practice and opinio juris are necessary. Paragraph 1(a) might be possibly used to bolster the aforesaid undesirable approach.

Draft Conclusion 12, 13, 14 (resolutions of international organisations and intergovernmental conferences, decisions of courts and tribunals, teachings)

Our comments: State conducts can form or reflect customary international law exclusively. For the determination of customary international law, one must refer to cite solely genuine state conduct as evidence respectively. In this sense, draft articles 12 to 14, acknowledging some other materials' capability to provide evidence, as well as state acts, bear the risk that certain biased decisions of courts, tribunals, or domestic courts, resolution of international organizations, teaching of highly qualified publicist of subjective nature, not based on genuine practices or intent, of related states, can be quoted.

Mr. Chairman,

Notwithstanding the foregoing, it is our firm belief that a considerable content of two sets of draft conclusions would be very supportive and useful source during the development of international law further ahead in the respective fields.

And last but not least with regard to the second topic, a specific purpose for which is foreseen in Article 24 of the Commission's statute, I would like to offer our deep appreciation to the Secretariat for its assistance to the Commission for the fulfillment of that purpose, with the Memorandum on ways and means for making the evidence of customary international law more readily available which we think would be very instrumental.