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U.S. Remarks at a Meeting of the Sixth Committee on Agenda Item 77:
Report of the International Law Commission: Cluster One
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Thank you, Mr. Chairman. We extend our gratitude to Professor Dire Tladi for ably chairing the work of the Commission.

The United States remains strongly supportive of the work of the International Law Commission. Over time, the ILC has provided products for this Committee's consideration that both codify international law and represent progressive development of international law. Some of these products have proved useful to the international community in determining the content of international law. Others have resulted in multilateral treaties. Along these lines, it is our earnest hope that a decision is taken so that the ILC's draft articles on the prevention and punishment of crimes against humanity will be closely considered by an ad hoc committee. The ad hoc committee will give all states the opportunity to discuss and hopefully resolve our concerns with the draft so that it can serve as the basis for negotiation of a convention. As we have previously stated, a convention on crimes against humanity would fill an important gap in the international legal framework – one that is critical now more than ever.

As this was the final session of the quinquennium, before turning to the topics on our agenda for today, I would like to take a moment to thank the members of the Commission for their service to the international community and dedication to international law. We are aware that the members devote considerable time and effort to the intensive work of the Commission, which no doubt comes with some personal sacrifice. The United States would like to express its appreciation to Professor Sean Murphy for his 11 years of distinguished service on the Commission, including as Special Rapporteur for the crimes against humanity draft articles.

Jus Cogens

Turning to the draft conclusions on peremptory norms of international law (*jus cogens*), we express our appreciation to the Special Rapporteur, Professor Tladi. This topic concerns an overarching category of international law, which underscores the need to secure broad support from States as to the content of these conclusions. The United States and others submitted

extensive comments on these draft conclusions prior to their adoption by the Commission, noting a range of objections and concerns. We recognize that the Commission has addressed some of those concerns, including with respect to the adjusted placement of what is now draft conclusion 2 and with significant edits to draft conclusion 21 on recommended procedures. We also note the additional explanations included in the commentary to draft conclusion 16 that make clear that states cannot unilaterally invoke *jus cogens* to avoid binding Security Council resolutions, and that "it is highly unlikely that a Security Council resolution would, on its face, be in conflict with a" norm of *jus cogens*.

The United States nonetheless continues to disagree with several of the draft conclusions. We refer the Sixth Committee to our written comments and past statements in this Committee. Rather than reiterate those comments here, I will highlight our remaining concerns with five of the draft conclusions.

First, with respect to draft conclusion 7, which is arguably one of the most important elements of this project, we continue to disagree that acceptance by "the international community of States as a whole" – the correct standard – can be redefined as "acceptance and recognition by a very large and representative majority of States." We have previously indicated our concern with the "very large majority" framing and the addition of "representative" seems to introduce further uncertainty as to the requisite nature or degree of acceptance.

Second, we do not agree with draft conclusion 8, paragraph 2, that resolutions adopted by an international organization can necessarily be evidence of acceptance and recognition. As reflected in the Commission's draft articles on customary international law, the relevant evidence is the "conduct of States in connection with" such resolutions. A State's support for a resolution could reflect only political support; one would still need to look to that State's individual conduct or expression of views to determine the extent to which that resolution reflects that State's recognition or acceptance of a legal principle.

Next, I would like to return to draft conclusion 16 and the treatment of UN Security Council resolutions. Notwithstanding the useful clarifications in the commentary, we continue to disagree--given Articles 25 and 103 of the UN Charter--that a Security Council resolution can be rendered void due to a conflict with *jus cogens*.

Fourth, the provisions of draft conclusion 19 on consequences of *jus cogens* breaches on non-breaching states do not reflect customary international law. It is therefore inappropriate to suggest in this document, which will not be negotiated as a treaty, that such provisions are mandatory through use of the word "shall."

Finally, we continue to disagree with the inclusion and content of the non-exhaustive list in the Annex following draft conclusion 23. As we have previously noted in written comments to the ILC and in interventions in the Sixth Committee, this list is both over-inclusive – including norms that may be customary international law but are not peremptory – and underinclusive, omitting such peremptory norms as the prohibition of piracy. Moreover, it is difficult to see the practical value of including this list, as the ILC itself did not follow the methodology it lays out in the draft conclusions when compiling the list. And although the commentary acknowledges

that point, we are concerned that the list may be given undue weight by judges and practitioners who will review only the conclusions and annex, and not the lengthy commentary.

We recognize the challenge facing the ILC for this project, having to consider the often strongly divergent views of various States. As that divergence of State views remains on critical parts of this project, we support inclusion of references to the views of States in the resolution addressing the *jus cogens* conclusions.

Protection of the environment in relation to armed conflicts

Turning to the second topic finalized this past summer, the draft principles on protection of the environment in relation to armed conflicts, the United States would first like to express its appreciation to the Commission for its work on this important issue. We extend our thanks to the Special Rapporteur, Marja Lehto, as well as her predecessor, Marie Jacobsson, for their efforts in drafting reports that recognize the complexity of these issues.

The United States is deeply committed to the protection of the environment and compliance with international humanitarian law. The U.S. military has a robust program to implement the law of war during military operations, including those rules and principles that provide protection to the natural environment. Our military also has adopted a number of policies and practices to protect the environment in relation to military operations and activities. We note the Commission's adoption, on second reading, of the entire set of draft principles and we are appreciative that it has considered our previous comments on them. However, the United States continues to have concerns about the draft principles and their accompanying commentaries. We would like to emphasize three areas of concern.

First, the United States continues to have concerns about the intended legal status of the draft principles. A number of them remain phrased in mandatory terms that purport to dictate what states "shall" or "must" do, even though those principles do not codify existing international law. This is not appropriate particularly where draft principles are aimed at progressive development rather than codification of the law in a document that will not be considered for a treaty agreed to by States.

In this regard, we note that Draft Principle 5 was modified from the first reading and now appears to assert a new substantive legal obligation. While we appreciate the goals of this draft principle, the basis for asserting this as a mandatory rule of international law is not evident.

Second, while the United States appreciates the recognition in the commentaries that international humanitarian law is the *lex specialis* applicable to armed conflict, some of the draft principles assert rules that conflict with that law. For example, Draft Principles 8 and 14 appear to suggest prioritization of the protection of the environment over IHL rules concerning efforts to protect human life and alleviate human suffering during armed conflict, or to provide relief to persons displaced by armed conflict. This would not only conflict with existing international law, but would fail to reflect the humanitarian purpose of IHL. IHL, as reflected by the term

"humanitarian," is an anthropocentric body of law, which prescribes duties, rights, and liabilities for human beings and prioritizes the protection of human life. Attempts to apply IHL to the environment that deviate from this traditional focus could conflict with existing IHL requirements or diminish existing IHL protections for civilians, detainees, or other persons protected by IHL.

Third, we note that the draft principles include two recommendations on due diligence and liability of business enterprises. The draft principles do not address any other non-State actor such as insurgencies, militias, criminal organizations, and individuals, who have obligations under international humanitarian law. It is unclear to us why the Commission has singled out corporations for special attention given the several other categories of non-State actors, many of whom may have a more direct role in the conduct of armed conflict.

New Projects

Before concluding, let me offer a few words on the newest projects added to the ILC's programme of work. The United States supports all three new projects added to the programme, namely on piracy, settlement of disputes to which international organizations are party, and subsidiary means for the determination of international law.

In previous statements, the United States has outlined our concerns with the ILC's working methods, including lack of clarity between codification and progressive development, and confusion about how the Commission chooses the format of its work products, both of which impact how the ILC's work products are developed by the ILC and are to be understood by the broader community. I will not repeat those concerns today, but welcome indications from the ILC that it will begin to address them.

The United States remains, as ever, supportive of the work of the International Law Commission, and congratulates its members as it begins the new quinquennium.

Thank you, Mr. Chairman.