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UNGA 78 Sixth Committee / Agenda item: 79 - Report of the International Law Commission on the work of its seventy-first session: Cluster I

Statement by Permanent Mission of Armenia to the United Nations

Mr Chairman,

At the outset, we thank the International Law Commission for presenting their annual report for which we would like to offer the following remarks.

Mr Chairman,

Concerning the project ‘general principles of law’, we prefer the final product to be ‘draft articles with commentaries’ rather than ‘draft conclusions’. Overall, in our assessment, the project may yet require further elaboration to fulfil the Commission’s intention to conclude it by 2025.

Regarding draft Conclusion 5, it could be beneficial to provide further clarification in the commentary concerning the meaning of ‘a comparative analysis of national legal systems’. In particular, a distinction could be drawn between national practice that is substantively about ‘internal law’ as opposed to practice that concerns international law questions that are decided in the national legal system of a State. A universal definition of ‘State property’, for example, seemingly does not exist in international law.¹ Amidst wide diversity amongst national legal systems in the world on that issue, there exists an essential distinction between definitions adopted in internal law within its particular framework and definitions adopted in cases in which an international law issue is engaged (for example, succession to State property and debt).² Whereas the identification of a quantitative threshold for the formation of a general principle of law would be difficult, as is the case for customary international law, it is important to identify with precision the qualitative nature of the ‘national practice’ that would count towards the formation.

¹ E.g. – *Seizure of Certain Documents and Data (Timor-Leste v. Australia)(Provisional Measures)*, Order of 3 March 2014, [2014] ICJ Rep. 147, para. 1.

² The ILC was unable to adopt a general definition of ‘State property’ for the 1983 Vienna Convention on the Succession of States in relation to State Property, Archives and Debt; instead, it relied on internal law – Draft articles on Succession of States in respect of State Property, Archives and Debts with commentaries 1981, II *ILC Yearbook* (1981), Part Two, 20, 25-26 (paras 8-9). See further: Sarvarian, *The Law of State Succession: Principles and Practice* (Oxford University Press, Monographs in International Law Series, 2024).

Concerning draft Conclusions 2, 7 and 8 on the identification of general principles of law formed within the international legal system, we would like to raise some questions regarding the premise of recognition of a general principle by the community of nations as intrinsic to the international legal system. The underpinning studies do not evince the process by which such recognition is supposed to have taken place. Rather, we consider that general principles of law of this type are recognised by international courts and tribunals, not as subsidiary means but as the primary means. Whereas the transposition of general principles of law from the national system of law to the international legal system, as in the case of ‘estoppel’, is important, the autonomous development of general principles of law in the international legal system as predicates of law. Examples might include the general principles of law *ex injuria jus non oritur*, good faith, equity, acquiescence, *lex specialis* and *lex posterior*.³

In practice, the principal source for the identification of general principles of law has not been States but rather international courts and tribunals. For example, the procedural law of international courts and tribunals contains many examples of judge-made rules originating from national systems of law (e.g. – estoppel and acquiescence) as well as logical deductions from the international legal systems (e.g. – *lex specialis*). These fill gaps in the statutes of international courts and tribunals (treaty law) concerning which no customary law exists, it being a specialised area on which States would rarely find occasion to act outside of international litigation. This distinguishes general principles of law from treaty law and customary international law.

The rationale that ‘there was insufficient State practice to support it’ illustrates the continuing theoretical ambiguity on the role of judge-made law in the international legal system – a task for which the Commission is well-placed. In examining this question, the Commission could make a significant contribution to the methodology of the exercise of judicial discretion; for example, in the identification and elaboration of general principles of law as logical deductions or predicates from treaty law and customary law. The true question is therefore *how* judges have identified such general principles of law as forming within the international legal system. While disputing parties have likely exercised an influence in the way they have pleaded in the key precedents, it is also probable that judges have relied on logical predicates to fill gaps in the body of rules.

Mr Chairman,

Concerning the topic ‘sea level rise in relation to international law’, as well as the scope of the work and the potential products, we would welcome the Commission’s decision in the near future to enable it to effectively plan and structure its work. For certain aspects of the project, such as Statehood and the protection of displaced persons, a report might be the best medium through which to communicate its findings, as was done for the

³ International Law Commission, Report on the Work of the Seventy-Fourth Session (2023), UN Doc. A/78/10, p.30.

‘Fragmentation of International Law’ project. In this regard, we note that it might be that other questions, such as maritime entitlements, would be suitable to more tangible proposals for legal reform, such as treaty amendment proposals where adaption by reinterpretation would be insufficient to achieve the necessary objective.

We support the views of those Members of the Commission who opined that ‘the principle of *uti possidetis juris* was not helpful or relevant within the context of the topic.’⁴ That rule of customary international law for State succession to existing international boundaries⁵ did not find analogous application to the distinct context of loss or alteration of maritime boundaries in consequence of submergence of the land on which they depended. As borders have a ‘real’ character independent of the delimitation treaty that create them,⁶ the deliberations of the Working Group might focus on analogies from the law of territory, such as the accretion of boundaries and the adaptation of riparian boundaries due to course changes, rather than the law of treaties.⁷ We welcome the intention of the Working Group to focus on Statehood and the protection of affected persons in 2024.

Mr Chairman,

Regarding the other decisions and conclusions taken by the Commission, Armenia welcomes the decision to appoint Mr Matthias Forteau as Special Rapporteur for the topic ‘non-legally binding international agreements’. We see merit in taking due time to reflect on the scope and utility of the topic before determining whether it should be included in the main programme of work. Considering the syllabus proposed by the Special Rapporteur in 2022,⁸ there appear to be two principal issues identified therein: 1) the definition of such agreements, which can be viewed as the converse of the definition of a ‘treaty’; and 2) the direct or indirect effects in law of such agreements, which appears to be linked to the pending project on ‘subsidiary means of interpretation’. Though interesting, the project would thus appear to have relatively narrow parameters that might not be sufficient to facilitate a substantial product. If to pursue the project, may we suggest that a report could offer a more suitable format than draft conclusions or model guidelines.⁹

On the topic ‘Immunity of State officials from foreign criminal jurisdiction’, we welcome the appointment of Mr Claudio Grossman Gutloff as Special Rapporteur to take up the excellent work done by Ms Concepción Escobar Hernández. Armenia also welcomes the intention of the Commission in its work programme to pursue its classical model to complete draft articles with commentaries on second reading. As requested by the Commission, Armenia recalls its substantive comments on the draft at first reading, which are repeated in the written version of this statement:

⁴ Ibid., para. 167.

⁵ Sarvarian (note 2).

⁶ Ibid.

⁷ A/74/10 (note 3), paras 170-182.

⁸ International Law Commission, ‘Report on the Work of the Seventy-Third Session’ (2022), UN Doc. A/77/10, Annex I.

⁹ Ibid., para. 28.

‘We emphasise the importance of avoiding potential conflicts of obligations.¹⁰ This pertains not only to substantive drafting but also to dispute settlement.¹¹ In this regard, we commend draft Article 18 to provide means to resolve potential conflicts of jurisdiction.

We support the retention of draft Article 7 concerning crimes of international law in which immunity *ratione materiae* will not apply with respect to genocide, crimes against humanity, war crimes, apartheid, torture and enforced disappearance. We note the listing of treaties annexed to clarify the scope of these crimes.¹² Concerning draft Article 4, paragraph 2, one may question whether immunity *ratione personae* ‘covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or *prior to* their term of office’.¹³

¹⁰ A/74/10 (note 3), p.318 (para. 147); A/CN.4/729, pp.6 (para. 10), 8 (para. 15), 9-10 (para. 17).

¹¹ The dispute settlement mechanism in Article 119 of the Rome Statute has arguably proven to be ineffective to deal with situations that have arisen since the creation of the ICC in which a State Party of the Rome Statute considers that the ICC has exceeded its authority with respect to its interpretation of the Rome Statute. A proposal to amend Article 119 to permit two or more States to submit a dispute concerning interpretation or application of the Statute to the ICJ, instead of the referral by the Assembly of States Parties, might be a more effective means of resolving such problems.

¹² A/74/10 (note 3), p.319 (para. 151); A/CN.4/729, p.7 (para. 12).

¹³ A/CN.4/729, p.69 (Annex I)(emphasis added). See, e.g. – *Arrest Warrant of 11 April 2000 Case (Democratic Republic of the Congo v. Belgium)* (Judgment) [2002] ICJ Rep. 3, 19-20 (para. 47), 22 (paras 54-55).