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Statement by Mr. JIA Guide

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At the Sixth Committee of the 74th Session of the UN General Assembly

On Agenda Item 79

Report of the International Law Commission on the work of its 71st session

Cluster II: Chapters VI, VIII and X &

Cluster III: Chapters VII and IX

New York, 31 October 2019

Mr. Chairman,

With respect to "**Protection of the environment in relation to armed conflicts**", the Chinese delegation congratulates the Commission on its adoption of 28 draft principles and commentaries thereto on first reading. We commend the two Special Rapporteurs for their efforts devoted to this topic, which we believe will positively contribute to enhancing the protection of the environment in relation to armed conflicts. The Chinese delegations understands that it is the intention of the Commission to develop relevant rules in order to better regulate non-international armed conflicts. We wish to reiterate, however, that it is not appropriate to make the draft principles applicable, without any differentiation, in both international and non-international armed conflicts. In particular, it is inadvisable to simply copy certain rules governing international armed conflicts, and apply them directly in situations of non-international armed conflicts. For instance, draft principle 19, which prohibits the use of environmental modification techniques, has been modelled on the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. In the commentary to draft principle 19, it was conceded that the relevant provisions of the said Convention, and the obligations under customary international law referred to therein, are only applicable in international armed conflicts. No further clarification was given as to whether such prohibition rules could be applicable in a non-international armed conflict.

There is a clear distinction between international and non-international armed conflicts in terms of their nature, armed actors and extent of harm. The rules of international humanitarian law applicable in those two settings constitute two distinctive systems. The Commission should give full consideration to such differences and analyze respective State practice in those two scenarios.

With respect to **"Immunity of State officials from foreign criminal jurisdiction"**, the Chinese delegation has noted that two years after the Commission provisionally adopted draft article 7 by a recorded vote, the exceptions to immunity *ratione materiae* addressed by this article remain the most contentious, high-profile issue of this topic. During the deliberation of the Sixth Committee at the two previous sessions, many countries voiced their objection to the exceptions set out in draft article 7. Several ILC members also maintained their reservations on this draft article and requested a fresh review of draft article 7 and its commentary. We advise the Commission to pay attention to those views.

This year the Special Rapporteur submitted the seventh report, which examined, inter alia, procedural safeguards related to immunity of State officials from foreign criminal jurisdiction and proposed nine draft articles. At present, the Commission is yet to reach agreement on the institutional framework and specific content of procedural safeguards. Such safeguards are of crucial importance to the inviolability of immunity of State officials, particularly in the context of avoiding abusive or politically motivated proceedings, thereby protecting the dignity of foreign State officials, ensuring unimpeded performance of their functions and contributing to the maintenance of stable relations among States. The Chinese delegation believes that the Commission should pay full attention to the comments and suggestions regarding the strengthening of procedural guarantees, including full respect by the forum State for the primacy of the jurisdiction of the State of the official; the establishment of a stringent threshold for the initiation of criminal proceedings against foreign State officials; full communication between the forum State and the State of the official and the assurance that the latter is fully informed of the case and has the opportunity to express concern; as well as the formulation of specific safeguard clauses to address the concerns regarding the controversial draft article 7.

To conclude on this topic, we would like to emphasize that rules of

procedural safeguards are different in nature from rules of immunity of State officials. No procedural safeguards, however well designed they are, can compensate for the flaw in the substantive rule presented by draft article 7 regarding exceptions to immunity *ratione materiae* of State officials. It is therefore necessary to reexamine draft article 7 in order to come up with a correct solution solidly grounded in general State practice and *opinio juris*.

With respect to "**Sea-level rise in relation to international law**", the Chinese delegation has noted that the Commission has decided at its current session to include this topic in its programme of work, and established a Study Group to work on three subtopics, namely issues related to the law of the sea, statehood and the protection of persons affected by sea-level rise.

Sea-level rise affects the vital interests of costal States in general. It is a new phenomenon that goes beyond the current scope of the law of the sea and requires examination in conjunction with many other departments of international law in light of the development of emerging State practice. We hope that the Commission, with a full recognition of the complexity of this topic, will thoroughly analyze various State practice across the spectrum as well as related legal questions in order to produce objective, balanced and valuable outcomes.

The root cause of Sea-level rise is climate change. China stands ready to work with other countries to promote the comprehensive and effective implementation of the Paris Agreement, and strengthen regional cooperation with neighbouring costal states to explore effective ways of response.

Mr. Chairman,

Since I will not be able to participate in the Committee's deliberations next week due to prior commitments, please allow me to present my delegation's views on two topics in Cluster III as well.

With respect to "**Succession of States in respect of State responsibility**", the Chinese delegation would like to reiterate the following points: there is very scarce State practice in this area, and what little evidence that is available reflects complex political and historical considerations that vary from one case to another. Many examples of State practice cited by the Special Rapporteur in his report are context-specific, often featuring the signing of special agreements as a means to address relevant issues. Such *ad hoc* arrangements hardly attest to a universal practice or an *opinio juris* of States. Neither do they lend themselves easily to codification by the Commission. The paucity of State practice on this topic has led to the over-reliance on academic literature in the work of the Commission and the Special Rapporteur. In view of this, we advise that the Commission seriously consider whether it is still necessary to continue the work on this topic, or whether to aim for alternative forms of outcome, such as draft guidelines or an analytical report.

With respect to "**General principles of law**", the Chinese delegation welcomes the initiation of this topic by the Commission. Given the significance of general principles of law as a source of international law, a study that begins from Article 38, paragraph 1 (c), of the Statute of the International Court of Justice and builds on cautious, rigorous analysis of extensive State practice and jurisprudence of international judicial bodies will contribute to clarifying the nature and source of general principles of law, the criteria for their identification as well as their relationship with other sources of international law, thereby giving full play to the functions of those principles and improving the international legal system as a whole.

The Special Rapporteur proposed three draft conclusions in his first report. The Drafting Committee provisionally adopted draft conclusion 1, which defined the scope of this project and paved the way for future work. With regard to the relevant substantive issues covered by the report, the Chinese

delegation has two major comments.

First, the identification of general principles of law should meet clearly-defined, strict and objective criteria. Whether a principle satisfies the condition of being "recognized by civilized nations" as set out in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, the analysis should be rigorous, thorough and anchored in State practice. The principles of domestic law recognized by a small minority of States, by States from certain region or by individual legal systems should not be identified as general principles of law.

Second, the criteria for the identification of general principles of law should be as strict as those for the identification of customary international law. "General principles of law" are generally understood as universally applicable rules that originated from national legal systems and serve to compensate for the inadequacy of rules of international law. In certain exceptional cases, general principles of law can also arise from international law *per se*. Given the similarity between general principles of law and customary international law, particularly the fact that the practice in question must be universal in nature and widely accepted in order to qualify for either test, the criteria for the identification of general principles of law should at least be as strict as those for customary international law. In other words, practice that fails to qualify as customary international law should not be identified as a general principle of law.

Thank you, Mr. Chairman.