Sixth Committee Debate on the
Report of the International Law Commission on the Work of its 70th Session

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Cluster I - Subsequent agreements & subsequent practice, Identification of [redacted]

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Thank you, Mr. Chairman.

I would like to thank Mr. Eduardo Valencia-Ospina, Chairman of the Commission, for his introduction of the Commission's report. The U.S. delegation looks forward to this annual debate on these important areas of international law.

Mr. Chairman, I appreciate the opportunity to be here today to comment on the work of the Commission.

Before I begin, I would like to congratulate the Commission on its 70th anniversary. It was an honor to be part of the commemorative events here in New York in May. On behalf of the United States, I extend my thanks to the Members

States also have an important role to play to ensure the Commission's work

remains responsive to States and reflective of State practice. For its part, the United States has supported the work of the Commission by engaging with the full range of the topics on the Commission's agenda, commenting in this Committee on the Commission's work, and nominating highly qualified candidates for election to the Commission. We also encourage active engagement with the ILC by other governments. A productive relationship between governments and the ILC is vitally important to the relevance and continuing vitality of the Commission's work. In that regard, we were pleased that the ILC held half of its session in New York this year and we hope that this practice continues in the future, as I understand that the many side events during that period enabled worthwhile and stimulating informal discussions among ILC members and Sixth Committee delegates.

Mr. Chairman, I would like begin with the topic **Identification of Customary International Law**. The United States takes this opportunity to recognize and express its appreciation for the efforts of the Commission, and in particular its Special Rapporteur, Sir Michael Wood, on this important topic.

The United States also provided written comments earlier this year on the ILC's Draft Conclusions for this project. While we agree with many of the propositions in the Draft Conclusions and commentaries, we identified serious concerns regarding a few issues and these concerns remain. I will not reiterate each of the

As a general matter, the United States believes that identifying whether a rule has become customary international law requires a rigorous analysis to determine whether the strict requirements for formation – a general and consistent practice of States followed by them out of a sense of legal obligation – are met. Such State

codification and suggestions for progressive development creates risk that users of these materials will misunderstand them or afford them greater weight than is merited by the authority on which they are based. For these reasons, readers of

these materials will need to review them with careful scrutiny, noting what authority and state practice have been identified in support of the proposition

– may, in some cases, similarly contribute to the formation of customary international law. It is noteworthy in this regard that, unlike other of the draft conclusions in this project, there is virtually no support provided in the

Earlier this year, the United States provided extensive written comments on the ILC's Draft Conclusions for this project. The text of those Draft Conclusions [illegible]

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Convention Article 31(3)(b). The commentary to Draft Conclusion 13 appropriately emphasizes this important point, and nothing in Draft Conclusion 13 itself should be understood to the contrary. In general, the views of expert treaty bodies may be helpful to States parties to treaties to the extent that those views are

deliberation in the Sixth Committee, including in a working group, and are concerned about the parameters of any potential study. We do not consider this topic ripe for active consideration.

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With respect to the topic, "**sea-level rise in relation to international law**," we are concerned that the broad topic, as proposed to the ILC, does not meet two of the Commission's criteria for selection of a new topic, namely that "the topic should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification" and "the topic should be concrete and feasible for

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progressive development and codification." In particular, we question whether the issues of Statehood and protection of persons as specifically related to sea level rise are at a sufficiently advanced stage of State practice. We also share the concerns others have expressed regarding the number of topics on the Commission's active agenda. However, if the Commission does move this topic to

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lack of State practice in this area presents particular challenges, yet he does not appear to view that as a limiting principle with respect to several proposed draft conclusions. This is of particular concern where, as here, there has been insufficient engagement by the Commission with States on the topic to date, thereby precluding States from reacting either favorably or unfavorably to Commission-adopted text.

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Third Report, an absence of widespread or consistent State practice, and the lack of any mechanism to facilitate a clear expression of State consent to codification all point to a need for a cautious approach. In this regard, the United States observes that the proposal for the Commission to conclude a first reading of the draft conclusions at its next session appears quite premature.

More generally, the absence of state practice or jurisprudence on the vast bulk of the questions being addressed in this project has clear implications for the role and function of any Draft Conclusions that are ultimately adopted. Though framed as "Draft Conclusions," the statements contained in this project are not grounded in

of legitimacy, would be better served by greater adherence to traditional analytical principles.

For purposes of my remarks today, I will focus primarily on one of the draft

mentioned: draft conclusion 17.

Draft conclusion 17 states that binding resolutions of international organizations, including those of the UN Security Council, "do not establish binding obligations if they conflict with a peremptory norm of general international law". The Special

not apply has already been debated in the ILC's topic on "Immunity of State officials from foreign criminal jurisdiction." The United States is of the view that any discussion of this issue should be confined to that project.

Finally, with respect to future work, the United States takes note of the proposal to consider "regional *jus cogens*". We question the utility of such an effort and share

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that *jus cogens* norms are "accepted and recognized by the international community as a whole."

model clauses, in which case we wonder whether States will be provided sufficient time to comment on those clauses prior to a second reading.

In any event, as with other projects, we will be particularly interested in the extent to which the Draft Guide and commentaries accurately reflect existing state practice in this area. While careful, rigorous studies of state practice may serve as [redacted]

In contrast, as the United States noted last year, the approach that both the Fifth and Sixth Reports have taken with respect to immunity *ratione materiae* is not reflective of any settled customary international law on the issue. It is difficult to make generalizations from State practice, in part due to the sparsity of publically available State practice and *opinio juris* on this issue, and the complexity inherent in decisions involving prosecutorial discretion. The Commission's categorical pronouncements in terms of immunity *ratione materiae* cannot, then, be said to rest upon customary international law.

Notably, we do not agree that Draft Article 7 is based on any "clear trend" in State practice. We also take note of the unusual circumstances associated with the

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Rapporteur appears to recognize as varied State practice. Both with respect to the identity of the State entity tasked with making immunity determinations and the analytical steps that precede such a determination, State practice is inconsistent and precludes drawing conclusions of a universal nature. We would note in this regard

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We would also like to welcome the new Special Rapporteur on this topic, Ms. Marja Lehto, and express our thanks for her efforts in drafting a report that

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- Draft principle 8 purports to introduce new substantive legal obligations in respect of peace operations.

- Draft principle 16 purports to expand the obligations under the Convention on Certain Conventional Weapons to mark and clear, remove, or destroy explosive remnants of war to include "toxic or hazardous" remnants of war. The draft commentary appears to recognize that this principle exceeds existing legal requirements, noting, "Draft principle 16 aims to strengthen the protection of the environment in a post-conflict situation." Moreover, it correctly acknowledges that the term "toxic remnants of war" does not have a definition under international law.

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of occupation go beyond what is required by the law of occupation.

and Vienna Convention on Succession of States in Respect of State Property, Archives, and Debts.

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are complex, and careful and thoughtful consideration by governments will be required as the Special Rapporteur continues to develop the draft articles.

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