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- Part I -

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(Check against delivery)

Mr. Chairman,

Adverse weather conditions upset the agenda last year and unfortunately limited our discussions. I should like to thank the International Law Commission which, once again this year, has produced a very high-quality report, presenting work which is sure to provoke thought. On this point, I should like to thank all the experts for the work submitted for our consideration and the Secretariat for the richness of the various studies prepared. Today, I will make some general observations, followed by more specific remarks on the various subjects included in the Commission's programme.

General observations

I will start with some observations on subjects on which work is least advanced. I recall on this point that France is concerned for the Commission's workload, and call for the utmost vigilance to ensure that its long-term programme of work is not increased to little purpose.

On the subject of the "**Most-favoured-nation clause**", my delegation takes note of the new working documents produced and shares the concerns raised over the risk of an excessively prescriptive outcome. Although identifying and analysing examples of clauses is a long and useful business, it is not certain that an excessively prescriptive document or a document proposing model clauses is desirable.

The "**Obligation to extradite or prosecute**" was the subject of a presentation in the Working Group's report. I should like merely to recall that the concept of a *peremptory* norm should be treated with great caution; that in our opinion the obligation to extradite or prosecute is distinct from that of universal jurisdiction, the latter being widely debated and disputed among the States; and that the link between such an obligation and the mechanisms put in place by international jurisdictions does indeed deserve particular attention.

Concerning "**Protection of the environment in relation to armed conflict**", I congratulate Mrs Jacobsson on her appointment as Special Rapporteur. Nevertheless, I confirm the doubts already expressed by my delegation on the feasibility of work on such an issue. Leaving aside the time segmentation of the field of study, determining its objective seems less than self-evident. In all events, it seems neither desirable nor achievable to draw up guidelines or reach conclusions on the subject at this stage.

Concerning the Commission's inclusion of **new projects in its programme of work**, we can only repeat the concerns already expressed that the Commission should not overburden its programme of work. We query the inclusion of "**Crimes against humanity**" in the long-term programme of work. It is not clear that all the Commission's criteria on the choice of subjects are met. In this regard, France wonders whether the States really need to draw up a convention on the subject. At this point it seems preferable to encourage universalisation of the Rome Statute and the effectiveness of existing norms, which might well not favour the drafting of new sectoral norms. Furthermore, the call on a universal jurisdiction to try the perpetrators of crimes against humanity is far from being shared by a majority of States and merits further consideration. Lastly, the question could well arise of the compatibility of the obligations that would derive from any such convention with those imposed by existing conventions, which is why the urgency of work on the subject may be queried. As for the new subject concerning "**Protection of the atmosphere**", the limits imposed on the scope of the Commission's work, especially with regard

to existing work on climate change and the definition of outer space, seem to be wise precautions.

Mr. Chairman,

I should now like to make some more substantive remarks, starting with **"Identification of customary international law"**. On this point, I should like to thank Sir Michael Wood for his first report, which augurs well for the richness of subsequent work. My delegation shares the options outlined in his report, such as the change of title, which is now more explicit. I share the Rapporteur's reservations as to the place that could be allowed to the study of *jus cogens*. Giving too much consideration to this concept would risk leading the work down very long and complex pathways. The concept is difficult to identify, and its relations with the customary rule are another question which it does not seem necessary to consider at this stage. We also share the Rapporteur's conclusions concerning an essentially practical approach to the subject, helpfully enhanced by occasional theoretical studies, and concerning the need to establish a terminology.

Contributions from the States seem decisive in the identification of practice and we shall endeavour to contribute. In our opinion, however, the importance to be given to the case law of national courts in the matter should take account of the fact that constitutional requirements place the customary norm more or less high up in the hierarchy of norms imposed on domestic judges. Caution is also needed with regard to the consideration given to the acts of international organisations or non-governmental organisations. Their acts or studies are a mine of very useful information, but the fact remains that it is above all the acts of States which can attest to a customary rule binding them, if the subject of study remains strictly limited to the state customary norm. That leads me to say a few words about a tendency observed during discussions, which on occasion seeks to criticise a "conservative" view of how custom is formed. While it is necessary for concepts to evolve in order to adapt them to the needs of society and its regulation, it should be done only after ensuring that the conditions which justified them no longer prevail. I am thinking in particular about the recognition, still shared today, of the need to combine both constituent elements of a customary rule, namely practice and *opinio juris*. The combination of both elements must be maintained because it is a State's *opinio juris* which gives weight to the practice, and vice versa. A State can act in a certain way while clearly indicating that its conduct is not imposed on it by a norm but results solely from its will in that particular circumstance. We should not lose sight of these elements. It will encourage caution when we come to consider so-called "modern" theories or the scope allowed to soft law in the matter.

Concerning the relationship of the customary norm with other sources of law, it does indeed seem helpful to focus on the general principles of law, given the extent to which that source can remain indeterminate. In contrast, the relations between custom and treaty sources seem to me to be more clearly identified. I shall end on that point, reiterating my thanks to the Special Rapporteur.

On the **Protection of persons in the event of disasters**, France takes due note of the draft articles provisionally adopted.

First, I note that the new wording takes into account several comments made by the delegations. We support the amendments made to the wording, which improve both the clarity of the text and the correspondence between the different language versions. A good example of this is the replacement of the French term "*touché*" by "*affecté*" ("affected") to describe a State that is faced with a disaster. An improvement could also be made to **draft articles 7 and 10**: while it is certainly desirable to distinguish between international organisations and non-governmental organisations, the adjective "*appropriées*" ("appropriate") applied to the latter might be more fitting than "*pertinentes*" ("relevant").

Concerning the scope of the topic *ratione temporis*, the question of disaster prevention must not distract the Commission from the core issue, namely post-disaster assistance. Bearing in mind how useful it would be to identify the main measures which would facilitate the protection of persons, in particular by establishing an appropriate internal normative framework, I can only welcome the draft articles submitted on this matter. However, I feel that it will be difficult to go much further. There are indeed many bilateral and multilateral conventions, but these are very often the result of a specific commitment by States to deal with a particular risk, or of a strengthened collaboration, and cannot necessarily provide a basis for the establishment of obligations which States might not recognize as such. On this point, the title of **draft article 16** does not correspond precisely to the state of the law. It seems difficult to conclude that there is a general "*duty*" to reduce the risk of disasters, as the wording of the title suggests. Even though, as the Special Rapporteur noted, some case law suggests that States are under a positive obligation in this regard, it is an obligation of means not of result, which remains closely linked to the circumstances of each case.

Consequently, while the wording of **draft articles 5 *ter* and 16 § 1 and 2** seems appropriate, the title of **draft article 16** could be amended to avoid generalising too broadly with respect to existing law and undermining the principle of States' sovereignty. We therefore

propose simply "*Prévention des catastrophes*" (Disaster prevention). Lastly, I reaffirm the stance adopted by the French delegation on the articles examined in previous years, particularly concerning respect for the sovereignty of the affected State and the State offering assistance, and our reserves concerning the extent of their obligations. We hope that this will be taken into account during the second full reading of the draft articles

On the subject of "**Immunity of State officials from foreign criminal jurisdiction**", I should like to thank Mrs Concepción Escobar Hernandez for the quality of her second report. I also note with pleasure the Commission's provisional adoption of three draft articles relating to, respectively, the scope of the subject, the beneficiaries of immunity *ratione personae* and the extent of such immunity.

However, a query may be raised about the proposed, rather restrictive identification of those officials other than the "troika" who might benefit from immunity *ratione personae*. With particular regard to the judgments of the International Court of Justice in *Arrest Warrant* and *Certain Questions of Mutual Assistance in Criminal Matters*, the interpretation given in the report seems reductive and does not seem to take full account of recent practice and the opinions expressed by many delegations in 2012.

There is no doubt that a close link exists between the fact that troika members enjoy immunity *ratione personae* and that, by virtue of their functions, they are fully authorised to represent their State and are not required to produce full powers, as the Vienna Convention on the Law of Treaties puts it. However, this delegation considers that this fact should not serve as a pretext for sidestepping a more detailed examination of the other criteria envisaged by the International Court of Justice. The fact that "certain high-ranking officials" may benefit from the rules on immunity *ratione materiae* or special arrangements, such as those for special missions, when they are on an official visit to a third State does not exhaust the subject. In contrast, this delegation agrees with the view that in all events any extension of immunity *ratione personae* should benefit only a small circle of "high-ranking officials".

Mr. Chairman, I should now like to share some remarks on subjects relating to the law of treaties.

On the subject of "**Subsequent agreements and subsequent practice in relation to the interpretation of treaties**", I should like to thank Mr. Georg Nolte for having produced a very rich first report. To begin with, I should simply like to recall that, although practice is

precious in determining how States interpret or apply a treaty, we should not lose sight of the fact that it is the text itself which makes it possible to identify the parties' intention in the first place. The whole interest of a study on this subject lies in the fact that, in international law, the State is both the author and the subject of the norm. That may be stating the obvious, but the special status of the State in the international order makes analysis of the attitude it adopts all the more relevant. And it is of course on the practice of the States parties to a treaty that the study should focus, as the report emphasises.

I turn now to the provisionally adopted draft conclusions. **Draft conclusion 1** suggests that the rules set out at articles 31 and 32 of the Vienna Convention on the Law of Treaties have customary value, whereas such an assertion is perhaps not quite so self-evident, at least as far as article 31, paragraph 3 is concerned. In addition, the wording of paragraph 4 of the draft conclusion differs from that of article 32 of the Vienna Convention, since that article does not expressly refer to subsequent practice.

Concerning **draft conclusion 2**, I do not think that subsequent agreements and subsequent practice can be considered "objective evidence" of the parties' understanding as to the meaning of a treaty. I do not consider this term to be either necessary or helpful. States' interpretation of a treaty may evolve and vary according to need and circumstance. I believe it would be preferable not to describe the evidence as "objective", though this does not in the least detract from the relevance of giving consideration to subsequent agreements and subsequent practice in order to interpret a treaty. In contrast, I believe it would be helpful if future work were to draw a distinction among subsequent agreements between those that are binding and those that the parties do not acknowledge as such. The consequences in terms of the interpretation of a treaty cannot be similar.

An essentially semantic amendment should be made to **draft conclusion 3**, since the idea of the "presumed intention" of the parties does not seem to reflect the commentaries, whose purpose my delegation shares, namely to raise the question of the choice between a contemporaneous approach to the treaty and an evolutive approach in order to interpret a treaty.

I believe that a slight correction could also be made to **draft conclusion 4**. There is no difficulty with the definition of a "subsequent agreement". However, the definition of "subsequent practice" is more questionable. It cannot be defined as "conduct". A State's "conduct" is not necessarily consistent and continuous. It may be variable and contradictory. A State may apply a treaty in a particular way without considering it to be the only possible way. The definition should therefore be amended in order to dispel any doubt on the subject, and

should clearly state that it is only concordant and consistent conduct which establishes the parties' interpretation. That idea is contained in the commentaries, and even more so in those relating to draft conclusion 5 than to draft conclusion 4. It should be stipulated as soon as what constitutes "subsequent practice" is defined.

Concerning **draft conclusion 5**, I would simply recall that, although non-State actors have a useful part to play in identifying practices, it would be wrong to draw hasty conclusions from that, insofar as their presentation may be influenced by the purpose of the organisation or institution which prepares it. That is emphasised in the report, especially with regard to international humanitarian law, States having often reaffirmed that they are primarily responsible for the development of such law.

I shall finish on this point by expressing my support for the avenues for thought already announced, such as the question of the frequency of subsequent practice or of omission as an attitude which reveals an interpretation.

I shall end with a few words on the subject of "**Provisional application of treaties**". I thank the Special Rapporteur for his first report, which identifies the avenues to be explored. Study of the legal regime should indeed focus on the form of consent given to provisional application; in my opinion, the hypothesis of implicit intention should be approached with care. I believe that the primary aim of this work should be to examine the legal effects of provisional application, given the extent to which that question remains unclear. While I agree that there is not much to be gained from examining States' responsibility, the question of the legal consequences arising from a State's failure to comply with the provisions of a treaty which it has agreed to provisionally apply deserves further consideration. The situation appears to be different *a priori* in the case of failure to comply with an obligation in force. The question that arises is whether such acceptance entails only duties or also rights. Another question concerns the provisional establishment of bodies created by a treaty. I further believe that the subject could be usefully extended to include provisional accession. It also does not seem possible to utterly rule out any consideration of domestic law obligations, mainly of a constitutional nature. Although these requirements do not allow a State to escape its international obligations, the situation is perhaps not quite so clear-cut when it comes to the scope of a provisional undertaking, in particular because its performance could be rendered impossible in domestic law. Lastly, I would underline that the richness of work on this subject will inevitably depend on the material provided by the States concerning their practice in the matter.

I will end by stating that France will submit its observations on the subject of **"Expulsion of aliens"** to the Commission within the given time limit and will endeavour to produce the observations requested by the Commission on the subjects relating to **"Identification of customary international law"**. The **Guide to Practice on Reservations to Treaties** will be the subject of a separate address at the end of the week.

Thank you, Mr. Chairman.