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STATEMENT OF THE CHAIRMAN OF THE INTERNATIONAL LAW COMMISSION, MR. BERND H. NIEHAUS

Part One

Chapters I-III, XII, IV and V: Introductory Chapters; Other decisions and conclusions of the Commission; Subsequent agreements and subsequent practice in relation to the interpretation of treaties"; and Immunity of State officials from foreign criminal jurisdiction

Mr. Chairman,

On behalf of the International Law Commission, I wish to express my sincere congratulations to you, together with the other members, on your election to the Bureau of the Sixth Committee. I bring with me the best wishes of the Commission for an accomplished session of the Committee, considering particularly that it has currently before it several items that emanated from the work of the Commission. Let me also thank you most sincerely for your kind remarks. I cannot fail to acknowledge your kind sentiments of appreciation for the work of the Commission in the progressive development of international law and its codification.

Mr. Chairman,

It will be recalled that last year, because of the tragic disruptions caused by Hurricane Sandy, the Sixth Committee was unable to consider the Chapter on "Reservations to treaties" in the 2011 report of the Commission. This Chapter, as contained in document **A/66/10 and Add.1**, together with this year's report (**A/68/10**), will be taken up this year. Following previous practice aimed at facilitating debate, I will make three statements to introduce the report as a whole. In the present statement, I will

deal with the introductory **Chapters I** to **III** and **Chapter XII, "Other decisions and conclusions of the Commission"**, as well as the first two substantive chapters of the 2013 report, namely **Chapter IV** concerning "**Subsequent agreements and subsequent practice in relation to the interpretation of treaties"** and **Chapter V** relating to the topic **"Immunity of State officials from foreign criminal jurisdiction".** The second statement will be devoted solely to **"Reservations to treaties"** in the 2011 report**.** In my third and final statement I will revert to the 2013 report and address the remaining **Chapters VI** to **XI,** dealing, respectively, with **"Protection of persons in the event of disasters, "Formation and evidence of customary international law"; "Provisional application of treaties";** the **"Protection of the environment in relation to armed conflicts"; "The Obligation to extradite or prosecute (*aut dedere aut judicare*)"**,; and **"The Most-favoured-Nation clause".**

Mr. Chairman,

Chapters I-III and XII: Introductory Chapters and Other decisions and conclusions of the Commission

The Commission's session this year was the second of the present quinquennium. As is evident from the summary contained in Chapter II, the Commission took steady steps towards building upon last year's work. It commenced substantive consideration of the topic "**Subsequent agreements and subsequent practice in relation to the interpretation of treaties"**, following the appointment last year of a Special Rapporteur for the topic, and provisionally adopted draft conclusions on the topic**.** It also proceeded for the first time to adopt, provisionally, draft articles on the topic **"Immunity of State officials from foreign criminal jurisdiction",** as the Special Rapporteur in her second report built upon last year's preliminary report**.** The Commission continued to make marked progress on the "**Protection of persons in the event of disasters"** such that the completion, on first reading, of a set of draft articles on the topic is within the horizon. The Commission held a useful debate on the topic **"Formation and evidence of customary international law**", whose title has been changed to **"Identification of**

customary international law", as well as on the topic **"Provisional application of treaties".** The Commission, through its Working Group, continued to consider the issues related to the topic **"The obligation to extradite or prosecute (*aut dedere aut judicare*)",** bearing in mind the judgment of the International Court of Justice in *Belgium v. Senegal*; a detailed report of the Working Group appears as annex A to the report. The Commission, in the framework of its Study Group, also continued to advance further in its work on the topic, **"The Most-Favoured-Nation Clause".** The Commission also decided to include two new topics in its current programme of work, namely **"Protection of the environment in relation to armed conflicts"**, appointing Ms. Marie G. Jacobsson as the Special Rapporteur for the topic, and already commencing an exchange of views thereon, and the **"Protection of the Atmosphere",** for which Mr. Shinya Murase was appointed Special Rapporteur. The inclusion of the latter topic was on the understanding that:

(a) Work on this topic will proceed in a manner so as not to interfere with relevant political negotiations, including on climate change, ozone depletion, and long-range transboundary air pollution. The topic will not deal with, but is also without prejudice to, questions such as liability of States and their nationals, the polluter-pays-principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights;

(b) The topic will also not deal with specific substances, such as black carbon, tropospheric ozone, and other dual-impact substances, which are the subject of negotiations among States. The project will not seek to "fill" the gaps in the treaty regimes;

(c) Questions relating to outer space, including its delimitation, are not part of the topic;

(d) The outcome of the work on the topic will be draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein.

As work continues on the Commission's programme of work, the task of identifying new topics remains an on-going exercise for the Working Group on the Long term programme of work. At the current session, the Commission included in its long-term programme of work the topic **"Crimes against humanity**", on the basis of the proposal prepared by Mr. Sean D. Murphy. The syllabus appears in Annex B to the Commission's report.

As has been noted in the past, the Commission continues to rely on information on State practice that States submit. This is the kind of interaction that makes the processes of the Commission in the progressive development of international law and codification unique. In **Chapter III** of the report, attention is thus drawn to aspects of the Commission's work concerning which information on practice would be particularly useful as it proceeds with the consideration of various topics. In introducing the relevant chapters of the report, I will refer to the specific questions that were addressed to States by the Commission. Following previous practice, Chapters II and III of the report were circulated to missions in August some days after the completion of the work of the Commission. Needless to point out that the early submission of information referred to in Chapter III, preferably before the deadlines identified, would be immensely helpful to Special Rapporteurs and the Commission.

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Mr. Chairman,

It is pleasing to note that the Commission has continued its traditional exchanges with the International Court of Justice, as well as its cooperation with the Asian-African Legal Consultative Organization, the European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law of the Council of Europe, the Inter-American Juridical Committee; and, most recently, with the African Union Commission on International Law.

In the last forty-nine sessions, the work of the Commission has proceeded, in part, alongside the International Law Seminar. It is reflective of the Seminar's value that some members of the Commission and judges of the International Court of Justice have been its past participants. Its relevance and continued vitality depends on the sustained commitment of States who kindly make voluntary contributions. The Commission remains grateful for such acts of generosity and encourages more contributions. Next year, the Seminar will commemorate its fiftieth anniversary. Accordingly, the Commission, in cooperation with the Legal Liaison Office of the United Nations in Geneva, will organize an appropriate event, which would coincide with the annual visit of the President of the International Court of Justice to the Commission. Invitations will be issued once the dates of the visit are known,

The Commission has emphasized in the past that the work of the Codification Division, which serves as the Secretariat of the Commission, constitutes part and parcel of the working methods of the Commission. Its involvement in research projects on issues in the programme of work of the Commission remains invaluable. At the current session, the Secretariat prepared two memoranda on the topics **"Provisional application of treaties" (A/CN.4/658)** and **"Formation and evidence of customary international law" (A/CN.4/659),** for which the Commission is most appreciative.

Mr. Chairman,

I shall now move on to the substantive chapters of the report.

Chapter IV: Subsequent agreements and subsequent practice in relation to the interpretation of treaties

I will start first with **Chapter IV** of the report, which concerns the topic "**Subsequent agreements and subsequent practice in relation to the interpretation of treaties**". This year, the Commission had before it the first report of the Special Rapporteur , which contained four draft conclusions. The report was discussed in the

plenary of the Commission and the four draft conclusions proposed therein were referred to the Drafting Committee. The Drafting Committee decided to reformulate the four draft conclusions into five draft conclusions, which were then provisionally adopted by the Commission. The text of the provisionally adopted draft conclusions, together with commentaries, can be found at paragraphs 38 and 39 of the report.

The five conclusions are general in nature; other aspects of the topic will be addressed at a later stage of the work.

Draft conclusion 1: General rule and means of treaty interpretation

Draft conclusion 1 makes plain that the present topic is to be situated within the framework of the rules on the interpretation of treaties set forth in articles 31 and 32 of the Vienna Convention on the Law of Treaties. The conclusion recalls that article 31 of the Vienna Convention is, as a whole, the "general rule" of treaty interpretation, and addresses the interrelationship between articles 31 and 32, which together list a number of "means of interpretation". Whereas article 31 sets forth the general rule of treaty interpretation and the means of interpretation that *must* be taken into account, including certain subsequent agreements and subsequent practice, article 32 provides "supplementary means of interpretation" to which recourse *may* be had in the interpretation of a treaty. The conclusion emphasizes that both articles 31 and 32 must be read together as the process of treaty interpretation is a "single combined operation" in which "appropriate emphasis" is to be placed on the various means of interpretation provided by the Vienna Convention.

Draft conclusion 2: Subsequent agreements and subsequent practice as authentic means of interpretation

Draft conclusion 2 reaffirms that subsequent agreements and subsequent practice under article 31, paragraph 3(a) and (b) of the Vienna Convention are "authentic means of interpretation". The term "authentic" refers to different forms of objective evidence or proof of conduct of the parties which reflect the "common understanding of the parties"

as to the meaning of the treaty. The conclusion thus recognizes that the common will of the parties, where expressed through subsequent agreements and subsequent practice as defined in article 31, possesses a specific authority with respect to the identification of the meaning of the treaty, even after the conclusion of the treaty. The character of subsequent agreements and subsequent practice under article 31, paragraph 3 a) and (b) as "authentic means of interpretation" does not, however, imply that those means necessarily possess a conclusive, or legally binding, effect. As provided by article 31, paragraph 3, subsequent agreements and subsequent practice constitute only means of interpretation that shall "be taken into account" as part of the "single combined operation" of treaty interpretation.

Draft conclusion 3: Interpretation of treaty terms as capable of evolving over time

Draft conclusion 3 addresses the role which subsequent agreements and subsequent practice may play in the determination of whether or not the meaning of a term of a treaty is capable of evolving over time. The conclusion should not be read as taking any position regarding the appropriateness in general of a more contemporaneous or a more evolutive approach to treaty interpretation. Instead, the conclusion should be understood as indicating the need for some caution regarding the adoption of an evolutive approach. The conclusion emphasizes that subsequent agreements and subsequent practice, similar to other means of treaty interpretation, can support both a contemporaneous or evolutive interpretation, as appropriate. In other words, subsequent agreements and subsequent practice may provide useful indications to the interpreter for assessing, as part of the ordinary process of treaty interpretation, whether or not the meaning of a term is capable of evolving over time.

Draft conclusion 4: Definition of subsequent agreement and subsequent practice

Draft conclusion 4 defines the three different "subsequent" means of treaty interpretation, namely "subsequent agreement" under article 31(3)(a), "subsequent practice" under article 31, paragraph 3(b), and other subsequent practice under article 32.

For all three "means of interpretation", the term "subsequent" refers to acts occurring after the conclusion of a treaty, which is often earlier than a treaty's entry into force. A "subsequent agreement" under article 3, paragraph 3 (a) is an agreement between the parties regarding the interpretation of the treaty or the application of its provisions; such an agreement is not necessarily binding, however, and the question of when a subsequent agreement between the parties is binding or is merely one of several means of interpretation will be addressed at a later stage of the Commission's work. "Subsequent practice" under article 31, paragraph 3(b) encompasses all other relevant forms of subsequent conduct by the parties to a treaty which contribute to the identification of an agreement or understanding of the parties regarding the interpretation of the treaty. And "subsequent practice" under article 32 consists of conduct by one or more parties in the application of the treaty; that is to say, any practice in the application of the treaty that may provide indications as to how the treaty should be interpreted. "Subsequent practice" under article 32 must not necessarily be "regarding the interpretation" of the treaty, or reflect the agreement of all the parties.

Draft conclusion 5: Attribution of subsequent practice

Draft conclusion 5 addresses the question of possible authors of subsequent practice under articles 31 and 32. The conclusion defines positively whose conduct in the application of a treaty may constitute subsequent practice under articles 31 and 32, namely any conduct in the application of a treaty which is attributable to a party to that treaty under international law. The conclusion also provides the negative corollary: That "other conduct", including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such "other conduct" may, however, be relevant when assessing the existence of a subsequent practice of parties to a treaty and/or its legal significance. The conclusion thereby emphasizes the primary role of the States parties to a treaty, who are the masters of the treaty and are ultimately responsible for its application. This does not exclude that conduct by non-State actors, if attributable to a State party, may constitute relevant application of the treaty.

Mr. Chairman,

It is anticipated that the Special Rapporteur will present a second report at the Commission's sixty-sixth session next year.

This concludes my introduction of Chapter IV of the report.

***Chapter V*: Immunity of State officials from foreign criminal jurisdiction**

Mr. Chairman,

I shall now turn to **Chapter V** concerning the topic **"Immunity of State officials from foreign criminal jurisdiction"**. This topic was included in the programme of work of the Commission in 2007. Ms. Concepción Escobar Hernández was appointed Special Rapporteur last year to replace Mr. Roman Kolodkin, who had submitted three reports. At this session, the Commission had before it the second report of the present Special Rapporteur **(A/CN.4/661),** which set out to develop further on the methodological approaches suggested and general workplan contained in the preliminary report. It considered: (a) the scope of the topic and of the draft articles; (b) the concepts of immunity and jurisdiction; (c) the difference between immunity *ratione personae* and immunity *ratione materiae*; and (d) the identification of the normative elements of the regime of immunity *ratione personae*. On the basis of the analysis, six draft articles were presented for the consideration of the Commission. The report before you contains three draft articles provisionally adopted by the Commission, together with commentaries, in paragraphs 48 and 49.

Draft article 1: Scope of the present draft articles

Draft article 1 reflects the substance of draft articles 1 and 2, as proposed by the Special Rapporteur. It has both the inclusionary and the exclusionary elements of the

scope of the draft articles. As is clear from **paragraph 1**, the draft articles apply to the immunity of State officials from foreign criminal jurisdiction. It is understood that they only address State officials, and their immunity, in relation to criminal jurisdiction arising from the horizontal relationship between one State and another. It seeks to make clear at the outset that the draft articles refer to the immunity of State officials, such immunity is in respect of criminal jurisdiction; and such jurisdiction is the jurisdiction of another State. **Paragraph 2 of draft article 1** relates to regimes which are not prejudiced by the draft articles on account essentially that they are already covered by special rules of international law, some of which have been the subject of prior work by the Commission. It is cast as a saving clause. These are persons covered by diplomatic immunities; consular immunities; immunities in relation to special missions,; immunities concerning missions to international organizations, or delegations to organs of international organizations or to international conferences; immunities relating to international organizations; and other regimes, including those dealing with situations covered in particular by status of forces agreements and applicable customary international law. The particular rules on immunity contained in each special regime define the scope of the saving clause. As is also noted in the commentary, the use of "in particular" in the paragraph is intended to signal that the clause is not exclusive, as it is recognized that special rules in other areas may be found in practice, particularly in connection with the establishment in a State's territory of foreign institutions and centres for economic, technical, scientific and cultural cooperation, usually on the basis of specific headquarters agreements.

Before I turn to draft article 3, it may be noted that **draft article 2** as presented by the Special Rapporteur in her second report deals with the "**Use of terms"**. The Drafting Committee of the Commission proceeded on the general understanding that the draft article on possible definitions was a work in progress and will be subject to further consideration in the future. For the time being, the draft article remains in the Drafting Committee and a rolling text will continue to be considered and developed.

Draft article 3: Persons enjoying immunity *ratione personae*

Draft article 3 deals with persons enjoying immunity *ratione personae*, this type of immunity is status-based. The draft article confines itself to identifying the persons to whom this type of immunity applies, namely Heads of State, Heads of Government and Ministers for Foreign Affairs. It does not deal with the substantive scope of such immunity. Immunity *ratione personae* for the Heads of State, Heads of Government and Ministers for Foreign Affairs. is justified based on representational and functional considerations. The enjoyment of immunity *ratione personae* by the Heads of State, Heads of Government and Ministers for Foreign Affairs.is supported by State practice and jurisprudence. As will be recalled, in its judgment in the *Arrest Warrant* case, the International Court of Justice expressly stated that in international law it was firmly established that certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoyed immunities from jurisdiction in other States, both civil and criminal. This was reiterated by the Court in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*. The Commission is aware that the *Arrest Warrant* case has been the subject of critical commentary in relation to immunity *ratione personae* of the Minister for Foreign Affairs, as it was predicated on deductive reasoning rather than on an analysis of State practice, but it nevertheless considers that there are sufficient grounds in practice and in international law to conclude that the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunity *ratione personae* from foreign criminal jurisdiction.

Whether or not other "high-ranking officials" should enjoy immunity *ratione personae* for purposes of the present draft articles was a matter of detailed discussion in the Commission. In the final analysis, it was decided that such other "high-ranking officials" should not enjoy immunity *ratione personae* for purposes of the present draft articles. This is without prejudice to the rules pertaining to immunity *ratione materiae*, which will be the subject of consideration at a later stage. It is also noted that when such

officials are on official visits, they enjoy immunity from foreign criminal jurisdiction based on the rules of international law relating to special missions.

Unlike draft article 1, draft article 3, uses phrase "immunity from the exercise of" with respect to foreign criminal jurisdiction. This formulation best illustrates the relationship between immunity and foreign criminal jurisdiction and emphasizes the essentially procedural nature of the immunity. It will be recalled that in the *Jurisdictional Immunities of the State case (Germany v. Italy: Greece intervening,* (*I.C.J. Reports 2012,* para. 58), the International Court of Justice, in confirming the essentially procedural nature of the law of immunity, stated that it regulated the "exercise of jurisdiction in respect of particular conduct".

Draft article 4: Scope of immunity *ratione personae*

This **draft article** combines the substance of what was draft article 5 and draft article 6, as originally proposed by the Special Rapporteur in her second report. **Paragraph 1** deals with the temporal nature of immunity *ratione personae.* This status-based immunity subsists while the person to whom such immunity applies remains in office. While such immunity subsists it covers all acts performed, whether in a private or official capacity, or whether performed during or prior to the term of office of the person enjoying such immunity. This aspect is covered by **paragraph 2.** What this means is that after a person ceases to hold the office, he or she will no longer enjoy immunity *ratione personae*. Thus, if a court of one State has jurisdiction under international law, it may try a former holder of office of another State who may have enjoyed immunity *ratione personae* for acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity. This was confirmed in the *Arrest warrant case*. This is of course without prejudice to the application of immunity *ratione materiae.* Accordingly, **paragraph 3,** states that the

cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

Before I conclude my statement on this Chapter, I wish to draw your attention to Chapter III of the report. According to the work plan proposed by the Special Rapporteur, the Commission's consideration of the topic next year will be devoted to the consideration of aspects concerning immunity *ratione materiae*. Accordingly, the Commission requests the provision of information on the practice of State institutions, particularly judicial decisions, that elucidate the meaning given to the phrases "official acts" and "acts performed in an official capacity" in the context of the immunity of State officials from foreign criminal jurisdiction. It would be appreciated if such information were made available by 31 January 2014.

Mr. Chairman,

This concludes my introduction of chapter V of the report, as well as the first cluster of issues.

Thank you for you attention.