(***Check against delivery***)

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

Part Three

Chapters VI to XI and Annex A: ***Protection of persons in the event of disasters, Formation and evidence of customary international law; Provisional application of treaties: Protection of the environment in relation to armed conflicts; The Obligation to extradite or prosecute*** **(aut dedere aut judicare)*; The Most-Favoured-Nation clause***

Chapter VI: Protection of persons in the event of disasters

In this cluster I will begin with **Chapter VI** of the report, relating to the topic **"Protection of persons in the event of disasters".** The work undertaken at this year's session proceeded in two stages. First, the Commission adopted draft articles 5 *bis* and 12 to 15, which it had considered at last year's session. Next, the Commission considered the sixth report of the Special Rapporteur, Mr. Eduardo Valencia-Ospina, which dealt with aspects of prevention in the context of the protection of persons in the event of disasters, including disaster risk reduction, prevention as a principle of international law, and international cooperation on prevention. Proposals were made in the report for draft articles 5 *ter* (Cooperation for disaster risk reduction) and 16 (Duty to prevent). The Commission subsequently adopted draft articles 5 *ter* and 16, on the basis of the revised texts proposed by the Drafting Committee. The set of the draft articles provisionally adopted by the Commission thus far is contained in paragraph 61 of the report. Furthermore, the draft articles, together with commentaries, adopted at this year's session are to be found in paragraph 62 of the report.

Draft Article 5 *bis:* Forms of cooperation

Turning now to the draft articles adopted this year, **draft article 5 *bis*** seeks to clarify the various forms which cooperation between affected States, assisting States, and other assisting actors may take in the context of the protection of persons in the event of disasters. The provision is drawn from draft article 17 of the draft articles on the law of Transboundary Aquifers. While specific forms of cooperation are highlighted, the list is not meant to be exhaustive, but is instead illustrative of the principal areas in which cooperation may be appropriate according to the circumstances. Humanitarian assistance was intentionally placed first among the forms of cooperation mentioned, as the Commission considered this type of cooperation of paramount importance in the context of disaster relief. Other forms of cooperation not specified in the draft article include: financial support; assistance in technology in areas such as satellite imagery; training; information-sharing and joint simulation exercises and planning.

Draft Article 5 *ter:* Cooperation for disaster risk reduction

While draft article 5 *bis* dealt with the various forms which cooperation may take in the disaster relief or post-disaster phase of the disaster cycle, **draft article 5 *ter*** indicates that the scope of application *ratione temporis* of the duty to cooperate, enshrined in general terms in draft article 5, also covers the pre-disaster phase. Draft article 5 *ter* was provisionally adopted on the understanding that it was without prejudice to its final location in the set of draft articles, including, in particular, its being incorporated at the same time as draft article 5 *bis*, into a newly revised draft article 5.

Mr. Chairman,

Draft Article 12: Offers of assistance

Draft article 12 acknowledges the interest of the international community in the protection of persons in the event of disasters, which is to be viewed as complementary to the primary role of the affected State established in draft article 9. The commentary to the draft article clarifies that it is only concerned with "offers" of assistance, not with the actual "provision" thereof. Such offers cannot be discriminatory in nature nor be made

subject to conditions that are unacceptable to the affected State. Furthermore, offers of assistance which are consistent with the present draft articles cannot be regarded as interference in the affected State's internal affairs. A distinction is drawn in the draft article between offers of assistance made by States, the United Nations and other competent intergovernmental organizations; and those made by non-governmental organizations, which is the subject of the second sentence. As regards the former, States, the United Nations and intergovernmental organizations are considered to be not only entitled but are also encouraged to make offers of assistance to the affected State. When referring to non-governmental organizations, the Commission adopted a formulation which stressed the distinction, in terms of nature and legal status, that exists between the position of those organizations and that of States and intergovernmental organizations.

Article 13: Conditions on the provision of external assistance

Draft article 13 addresses the establishment of conditions by affected States on the provision of external assistance on their territory. It affirms the right of affected States to place conditions on such assistance, in accordance with the draft articles and applicable rules of international and national law. The draft article indicates how such conditions are to be determined. The identified needs of the persons affected by disasters and the quality of the assistance guide the nature of the conditions. The provision also requires the affected State, when formulating conditions, to indicate the scope and type of assistance sought.

Mr. Chairman,

Article 14: Facilitation of external assistance

Draft article 14 concerns the facilitation of external assistance. Its purpose is to ensure that national law accommodates the provision of prompt and effective assistance. To that effect, it further requires the affected State to ensure that its relevant legislation and regulations are readily accessible to assisting actors. The draft article outlines

examples of areas of assistance in which national law should enable the taking of appropriate measures. **Subparagraph (a)** envisages relief personnel. **Subparagraph (b)** addresses goods and equipment, which encompasses any and all supplies, tools, machines, foodstuffs, medicines, and other objects necessary for relief operations. The **second paragraph** of the draft article requires that all relevant legislation and regulations be made readily accessible to assisting actors, by which what is intended is ease of access to such laws without creating the burden on the affected State to physically provide this information separately to all assisting actors.

Article 15: Termination of external assistance

Draft article 15 deals with the question of termination of external assistance. The **first sentence** of the draft article concerns the requirement that the affected State, the assisting State, and as appropriate other assisting actors consult each other as regards the termination of the external assistance, including the modalities of such termination. The **second sentence** sets out the requirement that parties wishing to terminate assistance provide appropriate notification.

Article 16: Duty to reduce the risk of disasters

Draft article 16 deals with the duty to reduce the risk of disasters. **Paragraph 1** of the draft article establishes the basic obligation to reduce the risk of disasters by taking certain measures, and **paragraph 2** provides an indicative list of such measures. Draft article 16 was included in the draft articles in recognition of the importance attached by the international community to contemporary efforts aimed at the reduction of the risk of disasters.

Mr. Chairman,

This concludes my introduction of Chapter VI of the report of the Commission.

<u>Chapter VII:</u> Formation and evidence of customary international law

I shall now turn to **Chapter VII** of the report, which concerns the topic "**Formation and evidence of customary international law"**. Last year, the Commission decided to place the topic on its current programme of work. This year, the Commission had before it the first report of the Special Rapporteur, as well as a memorandum of the Secretariat on the topic.

At the outset, it should be mentioned that the Commission has decided to change the name of the topic to "Identification of customary international law" to more clearly indicate the Commission's proposed focus on the method of identifying rules of customary of international law; the decision was largely due to some confusion regarding the scope of the topic caused by the reference to "formation" in the title. Nevertheless, it is understood that work on the topic will include an examination of the requirements for the formation of rules of customary international law, as well as the material evidence of such rules.

The first report of the Special Rapporteur, which was introductory in nature, aimed to provide a basis for future work and discussions on the topic, and set out in general terms the Special Rapporteur's proposed approach. The report presented, *inter alia*, a brief overview of the previous work of the Commission relevant to the topic; the proposed scope and outcome of the topic; the relationship of customary international law with other sources of international law; as well as the possible range of materials to be consulted by the Commission in its work. The report concluded by proposing a future programme of work on the topic. Paragraphs 66 to 72 of the report of the Commission summarize the introduction of the first report by the Special Rapporteur. The Special Rapporteur included two draft conclusions in his report, but considered them premature for consideration and referral to the Drafting Committee. Such a view was shared by members of the Commission.

The summary of debate in the Commission on the first report of the Special Rapporteur is contained in paragraphs 73 to 100 of the report. The debate addressed questions of scope and methodology, the range of materials to be consulted, the possible outcome of the topic, as well as the future programme of work.

With regard to scope and methodology, the general view was that the work of the Commission should be of an essentially practical nature, focused on the process of identifying rules of customary international law. There was general agreement that the Commission's work should aim to clarify a common, unified approach to identifying rules of customary international law by considering both the formation of customary international law, namely the elements that give rise to the existence of a rule of customary international law, as well as the requisite criteria for proving their existence. Broad support was expressed for the Special Rapporteur's proposal to examine the two widely accepted constituent elements of customary international law, State practice and *opinio juris sive necessitatis*, though there was recognition that the two elements might sometimes become closely entangled, and that the relative weight to be given to each might vary depending on the context.

Several members expressed the view, however, that a system-wide or unitary approach to the identification of customary international law should not be assumed, as the approach may vary according to the substantive area of international law. Some members were also sceptical that the largely theoretical questions relating to the formation of customary international law were necessary or relevant to the Commission's work on the topic.

There was general agreement that the Commission should study the relationship between customary international law and other sources of international law, but should not undertake a study of *jus cogens* within the scope of this topic, as *jus cogens* presented its own peculiarities in terms of formation and evidence.

As to the range of materials to be consulted, there was broad support for a careful examination of the practice of States, including materials on State practice from all regions of the world. Several members suggested that the Commission research the decisions of national courts, statements of national officials, as well as State conduct. There was also general support for the proposal to examine the jurisprudence of international, regional and subregional courts, particularly the jurisprudence of the International Court of Justice. The general view was that the role of the practice of international and regional organizations merited consideration as well.

With regard to the possible outcome of the Commission's work on the topic, there was broad support for the development of a set of conclusions with commentaries. The general view was that such an outcome would be of practical use to lawyers and judges, particularly those who are not experts in international law. Several members also expressed support for the proposed effort to build a common understanding and usage of terminology by developing a glossary of terms in all languages, while other members were of the view that a rigid lexicon of terms was not advisable. General support was also expressed for the plan of work for the quinquennium proposed by the Special Rapporteur, though several members indicated that the plan may not be feasible given the inherent difficulties of the topic.

Finally, as the Special Rapporteur noted in his concluding remarks, which are summarized in paragraphs 101 to 107 of the report, there was general support for a renewed call to States for information on their approach to the identification of customary international law. In Chapter III of the report, the Commission has requested that States provide information, by 31 January 2014, on their practice relating to the formation of customary international law and the types of evidence suitable for establishing such law in a given situation, as set out in (a) official statements before legislatures, courts and international organizations; and (b) decisions of national, regional and subregional courts..

Mr. Chairman,

This concludes my presentation on Chapter VII of the report.

Chapter VIII: ***Provisional application of treaties***

Mr. Chairman,

I now refer you to **Chapter VIII** of the report, which deals with the topic **"Provisional application of treaties**". This year, the Commission had before it the first report of the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, which sought to establish, in general terms, the principal legal issues that arose in the context of the provisional application of treaties by considering doctrinal approaches to the topic and briefly reviewing the existing State practice. The Commission also had before it a memorandum by the Secretariat which traced the negotiating history of article 25 of the Vienna Convention on the Law of Treaties both in the Commission and at the Vienna Conference of 1968–69, and included a brief analysis of some of the substantive issues raised during its consideration. The summary of the Commission's consideration of the first report is to be found at paragraphs 111 to 129 of the report.

Allow me to draw attention to several issues raised during the discussion. First, it should be noted that the Special Rapporteur indicated a preference for not considering the question of the provisional application of treaties by international organizations, as envisaged in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, of 1986.

Furthermore, the Commission held a preliminary exchange of views on the question of the legal effects of provisional application, at which time the Special Rapporteur, while indicating that much depended on the content of the substantive rule of international law being provisionally applied, nonetheless recalled that both Special Rapporteurs Fitzmaurice and Waldock had been of the view that the provisional application of a treaty gave rise to the same obligations that would arise upon the entry into force of the treaty. Several members were of the opinion that, unless the parties

agreed otherwise, agreement to provisionally apply a treaty implied that the parties concerned were bound by the rights and obligations under the treaty in the same way as if it were in force.

In providing a sketch of the issues to be considered in future reports, the Special Rapporteur pointed to the key features of the legal regime applicable to provisional application of treaties, namely: that it may be envisaged expressly in a treaty, or provided for by means of a separate agreement between the parties; that States may express their intention to provisionally apply a treaty either expressly or tacitly; and that termination of provisional application may be undertaken unilaterally or by agreement between the parties. The Special Rapporteur was further encouraged to ascertain whether the rules in article 25 were applicable, as rules of customary international law or otherwise, in cases where the Vienna Convention did not apply. A further suggestion was to consider the extent to which the fact that a treaty was being provisionally applied might contribute to the formation of rules of customary international law. Several other suggestions for future consideration, made during the debate, are recorded in paragraph 123 of the report.

The debate this year also revealed differences of view as regards the purpose of provisional application of treaties, and, by extension, the nature of the task facing the Commission. Hence, the view was expressed that it was inappropriate, as a matter of legal policy, for the Commission to seek to promote the provisional application of treaties; and examples were cited where the provisional application of treaties had discouraged their ratification. Other members were of the view that it was not for the Commission to encourage or discourage recourse to provisional application, which was essentially a policy matter for States; and that, far from being a means of undermining treaties, the drafters of article 25 had viewed it as a practical way of ensuring legal security.

A further concern raised during the debate pertained to the possibility of the circumvention of established domestic procedures, including constitutional requirements, for participation in treaties. Once again, not all members shared such concerns: it was observed during the debate that States were free to establish rules, under their respective internal legal systems, on how to engage at the international level, and that the Commission had to proceed from the assumption that the provisional application of

treaties was undertaken in conformity with the internal laws of the State in question. Accordingly, the Commission's task was simply to consider the extent to which contemporary international law was required to take into account limitations under domestic laws, without considering those limitations themselves.

As regards the final outcome of the topic, the Special Rapporteur expressed his preliminary view that it was best suited for the development of guidelines or model clauses aimed at providing guidance to governments. The general sense of the Commission, which emerged from the debate, was that it was too early to take a position on the eventual outcome of the topic. Nonetheless, some suggestions were made, including developing conclusions with commentaries as well as developing a practical guide for States when they negotiated new clauses on provisional application, or when they interpreted and applied existing clauses.

As indicated in paragraph 127 of the report, it is the Special Rapporteur's intention to consider, in future reports, the relationship between article 25 and other provisions of the Vienna Convention, including those on the expression of consent, the entering of reservations, the effects on third States, the applicability of the rules on interpretation, application and termination of treaties, the invalidity of treaties, and the temporal component of provisional application. An analysis of the legal effect of provisional application in the context of treaty rules establishing the rights of individuals is also planned. It would certainly assist the Commission in its further work on the topic, if States, as noted in Chapter III of the report, were to provide information, by 31 January 2014, on their practice concerning the provisional application of treaties, with examples, in particular in relation to:

(a) the decision to provisionally apply a treaty;

(b) the termination of such provisional application; and

(c) the legal effects of provisional application.

Mr. Chairman,

I now draw your attention to **Chapter IX** of the report, which concerns the topic, the "**Protection of the environment in relation to armed conflicts**". The Commission included the topic in its long-term programme of work in 2011 This year the Commission decided to include the topic in its programme of work and appointed Ms. Marie Jacobsson as Special Rapporteur who, following her appointment, presented a series of informal working papers with a view to initiating an informal dialogue with members of the Commission on a number of issues that could be relevant in the development and consideration of the work on the topic. A preliminary exchange of views was therefore held in the framework of informal consultations, which offered members of the Commission an opportunity to reflect and comment on the way forward. A summary of the oral report on the informal consultations, as presented by the Special Rapporteur, is to be found in paragraphs 133 to 144 of the report.

While keeping in mind the preliminary nature of the discussions held thus far, it may be highlighted that the informal consultations focused in particular on the scope and methodology, the timetable and possible outcome of the Commission's work, as well as on a number of substantive issues relating to the topic. With regard to the scope and methodology, the Special Rapporteur proposed to address the topic holistically in temporal phases rather than considering each regime individually as a distinct category, it being understood that there could not be a strict dividing line between the different phases. The temporal phases would address the legal measures taken to protect the environment before, during and after an armed conflict, including obligations of relevance to a potential armed conflict (Phase I), an analysis of the relevant existing laws of war (Phase II) and obligations relating to reparation for damage, reconstruction, responsibility, liability and compensation (Phase III). The Special Rapporteur also proposed a three-year timetable, with one report to be submitted for the Commission's consideration each year, focusing on each of the three phases, respectively. It is anticipated that the first report will be submitted next year. As regards the final outcome, the Special Rapporteur indicated that she considered this topic more suited to the development of non-binding guidelines than to a draft convention.

To assist in the consideration of future work on this topic, as indicated in paragraph 28 of the report, the Commission would appreciate receiving information from States on whether, in their practice, international or domestic environmental law has been interpreted as applicable in relation to international or non-international armed conflict. In this context, it would be particularly useful if the Commission could receive examples of:

(a) treaties, particularly relevant regional or bilateral treaties;

(b) national legislation relevant to the topic, including legislation implementing regional or bilateral treaties; and

(c) case law in which international or domestic environmental law was applied to disputes arising from situations of armed conflict.

Mr. Chairman,

This concludes my introduction of Chapter IX.

<u>Chapter X:</u> The Obligation to extradite or prosecute* (aut dedere aut judicare*)

Allow me at this point to draw your attention to **Chapter X,** concerning **"The obligation to extradite or prosecute (*aut dedere aut judicare*)".** This topic has been on the Commission's programme of work since 2005. Last year and this year, the Commission has dealt with this topic primarily in the context of a Working Group under the chairmanship of Mr. Kriangsak Kittichaisaree, with a view essentially to evaluating the progress and work of the Commission thus far on this topic, particularly in light of the judgment of the International Court of Justice of 20 July 2012 in the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* case. The Working Group held 7 meetings and its report, which the Commission took note of, appears as Annex A to the report of the Commission. The report of the Working Group is intended to summarize and highlight particular aspects of the work of the Commission on the topic.

The report contextualizes the topic by placing it within the broader framework of efforts to combat impunity, while respecting the rule of law. It also recalls the importance

of the obligation in the work of the Commission, summarizes the work done thus far, and offers suggestions that might be useful for States parties to conventions containing the obligation. The report addresses the issues relevant to the topic against the background of the Secretariat Survey (2010) and the Judgment of 20 July 2012 of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal).* In doing so, the Working Group did not consider it necessary to delve further into the question of customary international law.

The report presents a typology of provisions containing the obligation to extradite or prosecute in multilateral instruments bearing in mind the Survey by the Secretariat, as well as the separate opinion of Judge Yusuf in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*. Given the diversity in the formulation, content, and scope of the obligation to extradite or prosecute in conventional practice, it was considered of doubtful utility to seek to harmonize the various treaty clauses containing the obligation, as each is negotiated within the context of a particular treaty regime. Thus, the scope of the obligation under the relevant treaty regimes ought to be analyzed on a case-by-case basis. It may be noted however that there are some general trends and common features in the more recent instruments containing the obligation, especially those modeled on the Hague formula. Accordingly, the report, predominantly drawing upon the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, offers a set of considerations regarding the implementation of the obligation which might be useful for States in appreciating the kinds of obligations that may be assumed when they become party to particular conventional regimes containing the obligation to extradite or prosecute. These considerations relate to criminalization of the relevant offences at the national level, and the attendant consequences of delay, the establishment of jurisdiction, the obligation to investigate, the obligation to prosecute, the obligation to extradite and the consequences of non-compliance.

In presenting the report, the Working Group did so with a view to assisting States and facilitating discussion on the topic in the Sixth Committee.

This completes the introduction of Chapter IX.

<u>Chapter XI</u>: The Most-Favoured-Nation clause

Chapter XI, concerning the topic **"The Most-Favoured-nation clause",** is the last substantive chapter in this year's report. The topic was included in the programme of work of the Commission in 2008. Since 2009, the Commission has each year constituted a Study Group to work on the topic. At this year's session of the Commission once again established a Study Group. However, its chairman, Mr. Donald McRae, was unable to attend the session and, in his absence, Mr. Mathias Forteau chaired the Study Group meetings.

The Commission's examination of this topic remains a work in progress. The Study Group held 4 meetings. It had before it a working paper titled "A BIT on Mixed Tribunals: Legal Character of Investment Dispute Settlements" by Mr. S. Murase, as well as a working paper titled "Survey of MFN language and the Maffezini-related Jurisprudence" by Mr. M.D. Hmoud." The Study Group also continued to examine contemporary practice and jurisprudence relevant to the interpretation of MFN clauses. In this connection, it had before it recent awards, together with dissenting and separate opinions, with particular attention paid to an analysis of two awards, namely *Daimler Financial Services AG v. Argentine Republic,* dispatched to the parties on 22 August 2012 and *Kılıç Ĭnşaat Ĭthalat Ĭhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan,* dispatched to the parties on 2 July 2013. Although it was aware of the ICSID decision on the objection to jurisdiction for lack of consent in *Garanti Koza LLP v. Turkmenistan* of 3 July 2013, the Study Group did not have ample time to analyze it. The two awards address similar issues of contention as the *Maffezini* award and therefore throw some additional light on the various factors that tribunals take into account in the interpretation of MFN clauses.The various elements raised in the awards could be of relevance to the work of the Study Group, considering that in 2012 it had addressed the various factors that tribunals take into account in the interpretation of MFN clauses. In particular, the

Study Group recognized that the interpretative approaches of the arbitral tribunals to the MFN clause and the relevance of the Vienna Convention on the Law of Treaties for this purpose were of particular interest.

It may be recalled that the overall objective of the Study Group is to seek to safeguard against fragmentation of international law and to stress the importance of greater coherence in the approaches taken in the arbitral decisions in the area of investment particularly in relation to MFN provisions. The Study Group continues to work towards making a contribution in assuring greater certainty and stability in the field of investment law. It intends to elaborate an outcome that would be of practical use to those involved in the investment field and to policymakers. While the focus of the work of the Study Group is in the area of investment, it is recognized that the issues under discussion would best be located within a broader normative framework. Accordingly, the final report would provide a general background to the work within the broader framework of general international law, in the light of subsequent developments, including following the adoption of the 1978 Draft articles on the MFN clauses by the Commission. The report would also seek to address contemporary issues concerning MFN clauses, analyzing in that regard such aspects as the contemporary relevance of MFN provisions, the work on MFN provisions done by other bodies, and the different approaches taken in the interpretation of MFN provisions. The final report of the Study Group might also address broadly the question of the interpretation of MFN provisions in investment agreements in respect of dispute settlement, analyzing the various factors that are relevant to this process and presenting, as appropriate, guidelines and examples of model clauses for the negotiation of MFN provisions, based on State practice. The Vienna Convention of the Law of Treaties will continue to serve as a useful point of departure, and the possibility of developing, for the final report, guidelines and model clauses remains a desired objective, even though the risks of any outcome being overly prescriptive have been duly appreciated. Thus, one possibility would be to catalogue the examples that have arisen in the practice relating to treaties and to draw the attention of States to the interpretation that various awards have given to a variety of provisions.

Mr. Chairman

This completes the introduction of Chapter XI and of the entire report of the Commission on its 2013 session. Thank you very much for your kind attention.