STATEMENT BY
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Chapters VI, VII, VIII, IX, X and XI

Chapter VI
(Protection of persons in the event of disasters)

Mr. Chairman,

1. My Government welcomes the sixth report of the Special Rapporteur, Mr. Valencia-Ospina, which comprehensively focusses on cooperation and prevention. The report cites many international, regional and national sources that are relevant for the topic under consideration. However, with reference to the plenary debate of the Commission on the sixth report, we can agree with the hesitations that were expressed by some ILC members with regard to section B of the report, on *"prevention as a principle of international law"*. In our view, the principle of prevention should indeed not be approached unduly broadly, in relation to all types of disaster. Also, while the reference to environmental law might be very useful, it should be born in mind that the duty to prevent harm in environmental law operates in a different context, in relation to transboundary harm.

2. Turning now to the proposed two new articles: draft article 5 *ter* (Cooperation for disaster risk reduction).This draft article extends the general duty to cooperate to the pre-disaster phase. We note the intention to merge this article into draft article 5 or 5 *bis*, which makes sense.

Leaving it as a separate article would in our view give too much prominence to the pre-disaster phase. As stated previously,we favor a clear focus of this study on the phase of the actual disaster, with reference to the title of the study.

3. Draft article 16 deals with the duty to reduce the risk of disasters. We consider the adjustments made to this article in the course of the Commission's deliberations as useful, as we were not fully convinced by the initial drafting of this article. The current wording better clarifies that the duty to reduce the risk of disasters applies to each state individually, implying measures primarily to be taken at the domestic level.

4. We look forward to hearing about the next steps of the Special Rapporteur with regard to this study. In this regard we would like to recall the intention of the Rapporteur, expressed last year, to elaborate his study on the protection of humanitarian assistance personnel. My Government supports this intention, as the protection of humanitarian personnel in the event of disasters is indeed an issue of concern, which would usefully supplement the current draft articles.

Chapter VII
(Formation and evidence of customary international law)

Mr. President,

1. We have read the Commission's discussion on customary law with great interest and congratulate the Special Rapporteur Michael Wood and the Commission with the initial thinking on this subject. I would like to make a few comments on the discussion so far.
2. My delegation supports the change of the title of the issue to the 'Identification of Customary Law'. This more appropriately describes a focus on improving transparency about the process of the establishment and development of customary law. This move towards greater transparency and providing an authoritative statement on how to identify customary international law is important for two reasons.
3. First of all, I would like to underline that the Commission's work may be of great relevance to national judges who at times may need to apply customary law. In particular, it is relevant to note that in many jurisdictions in the continental legal tradition customary law is frowned upon, if not looked at with suspicion. As tradition wants it, law must be codified in writing and a reference to international law in the shape of customary law is frequently misunderstood. The process of the

creation of international customary law is often so alien to the domestic judge that its application - even if relevant to a particular case - is frequently unsuccessful. An authoritative view on the identification of customary law will be helpful for the application of customary law in domestic jurisdictions.

4. A second aspect is also related to the better understanding of the creation of customary law. It would be useful if the Commission in the course of its work on the subject reflects on the publication and transparency of the different elements that make up customary law. There is after all no specific legal obligation for States to clarify or even publish their *opinio iuris*. Practice may be observed by the trained eye, but States may not wish to speak about their *opinio iuris* when this not required. It may be discerned from official publications or statements by ministers and high officials, but these will not always be available or accessible and may not cover all of the detailed rules of customary law. The confidentiality with which States at times treat their *opinion iuris*will make the identification of customary law rather difficult, and we are looking forward to the Special Rapporteur's views on this aspect.
5. The matter of *ius cogens* has been discussed by the Commission. Like the majority of its members, we would consider it advisable **not** to include this subject into the work on customary law. The specific characteristic of *ius cogens* is its hierarchically superior status within the system of international law, irrespective of

whether it takes the shape of written law or customary law. While *ius cogens* is much debated both in academia and between practitioners, we would consider that the identification of how a rule obtains the status of a peremptory norm from which deviation would not be legitimate, to be quite distinct from the identification of rules of customary law.

6. The central theme of the research is the identification of customary law. Clearly references to the law of treaties are relevant to this research, we have no doubts about that. At this stage however, we do not quite understand the reference to general principles of international law in the discussions. The general principles are understood to be secondary sources of international law, and so their relevance for the identification of customary law is not directly obvious. We would appreciate to better understand this approach and look forward to future work in this respect.

Chapter VIII
(Provisional application of treaties)

Mr. Chairman,

7. Turning to the topic of Provisional application of treaties, let me congratulate the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, on his first report. We have read the report as well as the subsequent discussion within the Commission with great interest, and

appreciate the memorandum provided by the Secretariat which provides relevant background information.

8. The Special Rapporteur sets out the main parameters of provisional application. While we view this approach as a necessary initial step to establish the framework for future work, we are not convinced whether the issues identified by the Special Rapporteur in paragraph 53 of the report are indeed the ones in need of further clarification and whether it provides the adequate framework for conducting the study.

9. Although we view the provisional application of treaties to be an instrument of practical relevance, we do not believe that, as the report seems to suggest, it is for the Commission to encourage greater use of it. In our opinion, the main purpose of the study at this stage should be to elucidate the concept of provisional application.

10. With the Special Rapporteur we agree that the Commission should not aim at changing the terms of the Vienna Convention, but rather thoroughly analyzeState practice in the light of the language of article 25 of the Convention. This is all the more relevant in light of determining the status of that provision under customary international law, which we believe the Special Rapporteur should reflect upon.

11. Furthermore, we would like the Commission to look into the ways in which States may express their consent to the provisional application of a treaty and the way it is terminated. As for the latter aspect the Special Rapporteur pointed out that article 25 of the Vienna Convention takes as a point of departure the scenario of provisional application while the treaty is not yet in force and that, consequently, one way in which the provisional application might end is with the entry into force of the instrument. Yet, in such cases provisional application may still continue in respect of those States which have not by then ratified it. The Commission may have to look into the different legal relations that such a situation gives rise to. Similarly, article 25 provides that the provisional application ends when a State notifies other States of its intention not to become a party. The Commission may look into the question of the significance of this specification from a legal perspective, since it could not prevent a State from joining the treaty at a later stage.

12. The Commission should also consider the question of the legal effect of the provisional application of treaties and its relationship to the principle of *pacta sunt servanda* laid down in article 26 of the Convention. In that respect it may be necessary to pay attention to

different situations, including the one relating to provisional application of treaty regimes that may only become fully effective after the entry into force of the treaty such as those providing for an institutional framework or a secretariat.

13. More generally, the Commission may find it necessary to clarify the effect of other provisions, including on reservations, of the Vienna Convention for the provisional application of treaties. Similarly, the concept should be delimited from, for example, the obligation not to defeat the object and purpose of a treaty prior to its entry into force as provided for in article 18 of the Vienna Convention.

14. A study on the provisional application of treaties cannot ignore the importance of domestic law. It is in accordance with its domestic system that a State may or may not be able to make use of the option of provisional application and such processes therefore determine to a great extent the scope and usefulness of provisional application as an instrument of treaty practice. It is only logical for the Commission to clarify this relationship, but we would like to reiterate our call for caution not to go beyond the mere stocking-taking of State law and practice.

15. Since the Commission has only just embarked upon exploring this topic, it may still be too early to discuss a preferred outcome. The study should give guidance to States on how to use the instrument of provisional application - if they so choose - and, in such cases, should inform them of the legal consequences thereof, without imposing a particular course action that might prejudice the flexibility of the instrument. As with other studies undertaken by the Commission practical utility should be the yardstick with which to measure its usefulness.

Thank you, Mr. Chairman