PERMANENT MISSION OF SOUTH AFRICA
TO THE UNITED NATIONS
333 EAST 38TH STREET 9TH FLOOR
NEW YORK, NY 10016
Tel: (212) 213-5583 Fax: (212) 692-2498
E-mail: pmun@southafrica-newyork.net

STATEMENT
BY

THEMBILE JOYINI,
LEGAL ADVISER OF THE
PERMANENT MISSION OF SOUTH AFRICA
TO THE UNITED NATIONS

IN THE
SIXTH COMMITTEE
OF THE GENERAL ASSEMBLY
UNDER THE
AGENDA ITEMS "PROTECTION OF PERSONS IN THE EVENT OF DISASTERS"; "FORMATION AND EVIDENCE OF CUSTOMARY INTERNATIONAL LAW"; "PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICT" AND "THE OBLIGATION TO EXTRADITE OR PROSECUTE (AUT DEDERE AUT JUCICARE)"

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Mr Chairman

Thank you for affording us the opportunity to share some thoughts on the agenda item "Protection of Persons in the event of disasters". Over the past year, South Africa has experienced many natural disasters and in certain isolated instances, loss of lives as a result of flooding, lightening, thunderstorms, wild fires and tornadoes. As a result, South Africa is well aware of the importance of this topic and we wish to thank, at the outset, the Commission and the Special Rapporteur, Mr Valencia Ospina, for work done on this topic.

To date, South Africa has been an active participant in the area of protection of persons in the event of disasters on the national, regional, continental and international planes. South Africa's domestic legislation on disaster management, the Disaster Management Act, 2002, is a comprehensive legally binding instrument which contains mandatory provisions that require the national, provincial and local spheres of government to comply with. The Disaster Management Act provides the foundation on which South Africa's disaster management is built and focuses on disaster risk deduction in the form of prevention, mitigation and preparedness, as well as effective response and post disaster recovery.

In addition, the establishment of the National Disaster Management Centre that facilitates the coordination and cooperation between the three spheres of government in the event of disasters, as well as with other assisting parties, forms the cornerstone of disaster management as a whole within the Republic.

The importance of the role that the National Disaster Management Centre plays in the areas of disaster risk detection, response and relief management was demonstrated during the recent floods experienced in the Republic's Eastern Cape Province. As a result of the cooperation between the NDMC and the South African Weather Services, early warnings were issued to the public and approximately 4000 thousand people were evacuated prior to the onslaught of the floods.

On the regional level, South Africa has ratified the Southern African Development Committee's Protocol on Politics, Defence and Security that advocates for an increase in regional disaster management capacity and coordination of international assistance.

Mr Chairman

We turn now to address the Draft Articles adopted by the Commission.

Draft article 5 *ter* – Cooperation for disaster risk reduction

Draft article 5 *ter* provides that: "*Cooperation shall extend to the taking of measures intended to reduce the risk of disasters*".

Draft article 5 *bis* read together with draft article 5, addresses the types of cooperation that may be undertaken after the occurrence of a disaster in the form of, for example, disaster relief and assistance. Article 5 *ter* read together with article 5 on the other hand, provides that cooperation also needs to be extended to include the area of disaster risk reduction prior to the onset of a disaster.

On its own, article 5 *ter* merely provides a broad, somewhat vague requirement for States and other role players to cooperate by the "*taking of measures intended to reduce the risk of disasters*" and therefore obviously cannot be seen as a stand-alone draft article. In order to give proper credibility to draft article 5 *ter*, it is proposed that it needs to be included in draft article 5. We therefore propose that the Commission consider incorporating Draft Article 5 *ter* into Draft Article 5, if not at the next session then certainly during the second reading.

Draft article 16 – Duty to reduce the risk of disasters

Draft article 16 provides that:

> *"1. Each State shall reduce the risk of disasters by taking the necessary and appropriate measures, including through legislation and regulations, to prevent, mitigate and prepare for disasters.*
>
> *2. Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems."*

The use of the word "*shall*" in the first sentence of paragraph 1 and the use of the word "*duty*" in the title of this draft article creates a legal mandatory obligation on States to take concrete steps or "*measures*" in order to reduce the risk of disasters. Paragraph 2 lists the kind of measures that are required to be taken in the prevention, mitigation of, and preparation for, disasters. Hence article 16 recognises the need to include in the draft articles on the protection of persons in the event of disasters, the pre-disaster duties of a State.

In its present form, the articles acknowledge that many States recognise their obligation to reduce the risk of disasters. This is evident by the various multilateral, regional and bilateral agreements that States enter into which deals in some form or the other with aspects relating to prevention, preparation and mitigation of disasters. Further recognition of this obligation may be gauged by a State's national legal framework that addresses, in particular, its capacity and resources to reduce the risk of disaster.

Paragraph 1 of article 16 creates an obligation on States to take "*measures*" to ensure disaster risk reduction. These measures must be "*necessary and appropriate through legislation and regulations*". Therefore, the primary or basic obligation to reduce the risk of disasters by way of enacting a relevant legal framework and the implementation thereof rests with the State. It must, however, be noted that not all States have the

capacity or resources to take necessary and appropriate measures, and as such, will fail to comply with this provision, especially when such States lack a national legal framework that regulates disaster risk reduction. In such circumstances, the State may not be in a position to fulfil its obligation to reduce the risk of disaster on the domestic level as required by paragraph 1 of draft article 16. Notwithstanding the above, the word "*the*" that precedes the words "*necessary and appropriate measures*" requires a State to take specific and concrete measures aimed at prevention, mitigation and preparation for disasters.

Although the Commission decided to retain the phrase "*including through legislation and regulations*" in paragraph 1 of article 16, it is strongly proposed that this should be rephrased to read as "*including, in particular, through legislation and regulations*". The inclusion of the words "*in particular*" will then place an obligation on States by emphasising that apart from any other options available, domestic legislation forms the cornerstone of disaster risk management. The lack of the words "*in particular*" in this paragraph allows the State discretion in deciding which option and/or legal framework tools it may utilise in attaining the objective of reducing the risk of disasters. The concern in allowing a State such discretion may defeat the purpose of paragraph 1 of article 16 in the event of any given State's lack of will in enacting national regulatory frameworks.

Although it has been contended that the word "*including*" does not purport to be exhaustive in nature, it is suggested that this word be followed by the words "*among others*" in order to provide absolute clarity with regard to the possibility of alternative measures that may be available, or become available in the future, to States that lack efficient and effective mechanisms to reduce the risk of disasters on a national level. It is also suggested that the words "*among others*" follow the word "*include*" in paragraph 2 of article 16 for the same reasons as put forth above.

Paragraph 1 of article 16 makes clear that certain measures are required to be put in place by States in order to ensure that the purpose of the draft article, being, to prevent, mitigate and prepare for disasters, is realised. In order to prevent a disaster, the adverse effects of the disaster need to be avoided. In many instances, this may not be completely avoidable and will therefore require a lessening or limitation of the adverse effects caused by the disaster. This is referred to as the mitigation of the disaster by implementing certain actions that result in the reduction of the adverse effects of the disaster.

In order to prevent and mitigate disasters in the first place, a State needs to ensure that it is prepared to effectively anticipate, and is adequately equipped, to respond to the adverse effects of a disaster prior to the advent thereof. Paragraph 2 of article 16 lists three categories of disaster risk reduction measures. Risk assessments are conducted to understand the circumstances and characteristics that surround a particular type of disaster. Without such information, States will experience difficulties in its ability to prepare effective measures to withstand the adverse effects of a disaster.

The second "step" in the prevention, mitigation and preparation for disaster risk management, is the collection and dissemination of information gained from the risk assessment. It is essential that this information is shared with the State's public at large and other stake holders so that proper disaster risk reduction strategies are developed and implemented when required.

The third measure or the third sphere of disaster risk reduction comprises of early warning systems and is a pre-requisite for effective preparedness and response.

South Africa generally accepts the provisions of paragraph 2 of draft article 6 which lists the three measures noted above. It is worth noting that one of the core objectives of South Africa's DMA is to provide for an integrated and co-ordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters and emergency preparedness, thereby reducing its exposure to the risk of disasters.

The Republic's DMA contains all the various elements of draft article 16 but is, however, more comprehensive and progressive in nature, in that it defines disaster management as a continuous and integrated multi-sectoral, multi-disciplinary process of planning and implementation measures aimed at preventing or reducing the risk of disasters, mitigating the severity or consequences of disasters and emergency preparedness. This aim has been accomplished by the establishment of disaster management centres throughout the Republic that act as the repository of, and conduit for, information concerning disasters and impending disasters. Such information is shared with all relevant institutions that deal with disaster risk reduction, both within the Republic as well as with foreign entities. The exchange of information allows for access to international expertise in this area.

South Africa's disaster management information system is an electronic data base that collects, processes and analyses information regarding disaster risk reduction, which is then disseminated to all relevant agencies, especially within the southern African region. This electronic database has repeatedly proved to be a crucial and essential instrument in the prevention and mitigation of disasters as it generates early warning systems. The DMA places such a great deal of emphasis on the importance of disaster risk reduction that it makes a total of 24 references on this aspect. As a result, it is safe to say that South Africa has made remarkable progress in the area of disaster risk reduction and continues to be a committed contributor in regional, continental and international forums that are tasked with the prevention, mitigation and preparedness to reduce the risk of disasters.

Finally, South Africa commends the ILC's efforts thus far in clarifying the specific legal framework pertaining to various issues on the protection of persons in the event of disasters, and in particular, in the field of disaster risk reduction. However, it is imperative that the Commission in finalising and adopting the draft articles, takes cognisance of current international practices in the area of protection of persons in the event of disasters; recommendations made by the International Federation of the Red

Cross; the Red Crescent Societies and similar recognised institutions in the field of disaster management; regional and continental instruments and bilateral agreements signed between States and other organisations or actors; and the current internal mechanisms and/or legislation that Member States have in relation to cooperation between States and other institutions in disaster prevention, mitigation and preparedness. In particular, the views expressed by Member States on previously adopted Draft Articles should be taken into account when the Commission finalises the Draft Articles. In particular the concern expressed by many states, including South Africa, concerning the inter-state right/duty approach should be taken into account when the Draft Articles are adopted on second reading.

Mr Chairman

Let me now turn to item "Formation and Evidence of Customary International Law". The Republic of South Africa has a deep appreciation for the work of the International Law Commission. We welcome the progress made in the topic "Formation and Evidence of Customary International Law" and we wish to applaud Special Rapporteur, Sir Michael Wood, for a very comprehensive and analytical report which we believe cover a lot of important issues. We would have liked to see Draft Conclusions already in this very report. However, we are hopeful that the very comprehensive report will assist the Commission as it proceeds on the very ambitious timetable set by the Special Rapporteur.

Mr Chairman

On the debate regarding the title of the topic, we agree that if the title were to be changed it is important to include both formation and evidence of customary international law into the scope of the topic. We have taken note of the Commission's decision to change the name of the topic from "formation and evidence of customary international law" to the "indication of customary international law." While we understand the reasons for this change, we would like to point out that the Commission should tackle both aspects relating to how customary international law is created and how its existence is shown i.e. *usus* and *opinion iuris* both as formative elements and as evidence.

Customary international law remains an important source of international law despite the great increase in the amount and scope of treaties. Treaty law, of course, also impacts on the formation and evidence of customary international law. In the light of this, we support the view of the Commission that consideration be taken regarding the relationship between customary international law and treaty law in the consideration of this topic although care should be taken not to stray into aspects of treaty law, such as the role of customary international law in treaty interpretation or the role of customary international law in the abrogation of treaty obligations. Thus, to the extent that treaty law may contribute to the formation or serve as evidence for customary international law, this should surely form part of the work of the Commission.

Mr Chairman

As to whether there are differences in approaches in the formation and evidence of customary international law depending on the specific field of international law, we are largely in agreement with the Commission. We think, however, that the Commission should not ignore the different approaches that courts, in particular the ICJ, take with respect to how the evidence is presented. It may be, as is suggested in the report, that this is just a reflection of the maxim *luranovit curia.* Nonetheless, differences in the approaches particularly where they happen in the same case and same judgement such as was the case in *Arrest Warrant case* may need deeper reflection.

Mr Chairman

We are of the view that there is a need to further engage governments from the outset and to examine the jurisprudence of international, regional and sub regional courts. In this regard South Africa commits to respond to the request from the Commission to provide information on the formation and evidence of customary international in our South African courts.

The Republic of South Africa's Constitution is very clear that customary international law is automatically part of our own domestic legal system. This is reflected in section 232 of the Constitution: "*Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.*" This makes this study of the Commission, particularly important for us.

Finally Chairperson, we fully support the decision of the Commission to exclude the study of *jus cogens* within the scope of the topic since this is an important topic whose peculiarities deserve to be studied separately and we thus support the Commission's consideration of the topic "Jus cogens".

As a result of the Republic of South Africa's Constitution, we will continue to be in support of this topic, since customary international law is an extremely underutilised yet significantly important source of substantive law in our domestic legal order.

Mr Chairman

Let me now turn to item "Protection of the Environment in relation to Armed Conflict". When considering this topic, one cannot fail to be struck by the fact that it is the meeting place of two of the great issues confronting humankind and which directly affect the future of humankind and our planet. It has been said that while truth is the first casualty of warfare, the environment is not far behind. The environment has also been called "the silent victim of modern warfare". Since ancient times the environment was a victim of armed conflict and an area of contestation between enemy forces. The technological innovations which increased the scope and intensity of warfare exponentially have multiplied the potential damage posed by warfare to the environment: this greater risk

not only emanates from nuclear weapons and other weapons of mass destruction, but also from conventional methods and means of warfare. Moreover, the environment can also be employed as a weapon of war. The effect of damage to and destruction of the environment on war-torn societies is not only limited to the immediate effects thereof, but also negatively influence post-conflict reconstruction and development. In Southern Africa, landmines to this day make large areas of the region uninhabitable and deny populations their livelihoods, and this is the reason why South Africa is such a strong supporter of the Ottawa Landmine Convention. We therefore wish to express our appreciation to the Commission for its decision to include this topic on its current agenda and we congratulate Madame Jacobsson for her appointment as Special Rapporteur for this very important topic. However, there fortunately exist sound foundation stones to build on. Article 35 and 55 of the 1977 First Additional Protocol to the 1949 Geneva Conventions contain specific provisions on the protection of the environment in international armed conflicts, Article 35 within the context of the methods of warfare and Article 55 in the context of the survival of the population.
This effect of warfare on the environment was also recognised in the Rio Declaration on Environment and Development of 1992, adopted by the Rio Conference on Environment and Development, which recognised that warfare is inherently destructive of sustainable development, calling upon States to respect international law providing protection for the environment in times of armed conflict and to cooperate in its further development.

Mr Chairman

We recognise that a considerable amount of preparatory work has already been done on this topic. A very succinct overview over the development of the norm of the protection of the environment in relation to armed conflict has been given in the Report of the International Law Commission to its sixty-third session. We also recognise the work that has been done in this respect by the International Committee of the Red Cross, the United Nations Environmental Programme, the Environmental Law Institute, the International Law Association, the International Union for the Conservation of Nature and other civil society groups.
The most important conclusions drawn from the preparatory work is that while considerable progress has been made in this respect in a number of instruments on International Humanitarian Law and also with the implementation thereof, other bodies of law besides IHL are also applicable. The 2009 UNEP Report *Protecting the Environment During Armed Conflict – An Inventory and Analysis on International Law* found international criminal law, international environmental law and human rights law to be also applicable. In this respect, it must be noticed that the International Criminal Court Rome Statute has criminalised the disproportionate causing of widespread, long-term and severe damage to the environment as a war crime (1), while the International Court of Justice held in the *Legal Consequences of the Construction of a Wall on the Occupied Palestinian Territory* Advisory Opinion that International Humanitarian Law may be applicable in situations of armed conflict as *lex specialis*, while human rights law can also be applicable. It is therefore to be welcomed that this topic has been carefully drafted to refer to the protection of the environment in relation to armed conflict and not

only during armed conflict. Other areas of international law that may be applicable include refugee law.

Mr Chairman

The topical nature of this matter is illustrated by the fact that it has lately become the subject of considerable academic attention. It is interesting to note that some authors argue that since the early 1990s a new rule of Customary International Law has developed which specifically prohibits excessive collateral damage to the environment during international armed conflict. This rule derives from a rule that prohibits the excessive collateral damage to civilian objects, and is a positive development in view thereof that some commentators are of the view that the threshold requirement of widespread, long-term and severe damage to the natural environment of Articles 35 and 55 of the First Additional Protocol is both too vague and too high. The relationship between these treaty provisions and a possible rule of Customary International Law may require further investigation.
Some commentators are also of the view that Customary International Law rules are developing which require the methods and means of warfare to be employed with due regard for the environment and that there was also an emerging legal obligation to co-operate in the post-conflict restoration of elements of the environment damaged by warfare.

Mr Chairman

We consider the proposal by the Special Rapporteur on how the ILC can undertake its analysis to provide the basic contours for further work in this regard. These are the following:

- The identification of the extent of the legal problem;
- The identification of any new developments in case law and Customary International Law;
- The possible applicability of and relationship between International Humanitarian Law, International Criminal Law, International Environmental Law and Human Rights Law. We are of the view that under the rubric of human rights law, one can also include refugee law and the law applicable to internally displaced persons. With respect to International Criminal Law, the issue of individual criminal responsibility will by necessity arise;
- Further development of the ILC's work on the Effect of Armed Conflict on Treaties;
- Clarification of the relationship between existing treaty law and new legal developments;
- The achievement of a uniform and coherent system of applicable law;
- The formulation of applicable rules and principles of general international law relevant to the topic.

Mr Chairman

To the above list which we believe to be non-exhaustive, it can be considered to add the applicability of such rules and principles during non-international armed conflict.

Mr Chairman

Let me now turn to the last item "the Obligation to Extradite or Prosecute (*Aut Dedere Aut Jucicare)".* The South African delegation wishes to thank the Commission and, in particular the Working Group on the obligation to extradite or prosecute and its chairman, Mr Kittichaisaree, for the work done in connection with this topic.

Mr Chairman

As it appears from the report of the Working Group, the obligation to extradite or prosecute is a single obligation in which the obligation to extradite and the obligation to prosecute form a composite, inextricably linked obligation. In so far as the issues facing the topic are concerned, our delegation agrees with the Commission that the harmonisation of multilateral treaty regimes would be less than meaningful exercise because of the complex nature of multilateral treaties dealing with the obligation to extradite or prosecute.
Similarly, we agree with the Commission that an assessment of the actual interpretation, application and implementation of the obligation to extradite or prosecute clauses in particular situation, such as *Belgium v Senegal* case before the International Court of Justice would not be useful to the development of the topic since the interpretation of a specific *aut dedere aut judicare* would be subject to the specific context in which the clause occurred.

Mr Chairman

It was suggested that the Commission might pursue a systematic survey and analysis of state practice to establish if there existed a customary rule reflecting a general obligation to extradite or prosecute for certain crimes, whether such an obligation was a general principle of law. It was also argued that such an exercise would be futile since the Commission had already completed, in 1996, the Draft Code of Crimes against the peace and security of mankind. Article 9 thereof already contains an obligation to extradite or prosecute for the core crimes. At the end it there was general consensus that exploring the possibility of obligation to extradite or prosecute as a general principle of international law would not advance the work on the topic any further than avenue of customary international law. As a result we wish to state that we agree with the members of the Working Group's conclusion.

Mr Chairman

The report of the Working Group touches on the question of universal jurisdiction. It is clear that an effective *aut dedere aut judicare* obligation must involve universal

jurisdiction in some form or the other. This is so particularly, as is the case with *aut dedere aut judicare* obligations in the form of Torture Convention, which, as the International Court of Justice observed, placed a primary obligation on the state to exercise jurisdiction. The future continuation of this project, as with any project in which the intention would be to create a classical *aut dedere aut judicare* obligation, should thus include, as a major element, universal jurisdiction or, at the very least, aspects of universal jurisdiction.

As to what should be done with this topic, we are of the view that the future of this topic should be dependent on the approach that the Commission decides to take with regard to the topic that has just been adopted on the long-term programme of work, namely crimes against humanity. We are not convinced about the efficiency of continuing with this topic if the Commission decides to include in its current agenda the topic, crimes against humanity, whose primary 'hard obligation', it appears, will be an *aut dedere* obligation for crimes against humanity.

Mr Chairman

Lastly, we wish to once again thank the Commission for its continued consideration of this item and assure it of South Africa's support in their work and future endeavours.

I thank you for your attention.