Islamic Republic of
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Permanent Mission to the United Nations

Statement by
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Report of the International Law Commission on the work of its sixty-sixth sessions

Chapters X and XI:
Identification of customary international law
Protection of the environment in relation to armed conflicts

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In the name of God, the Compassionate the Merciful

Mr. Chairman,

With respect to the topic of "identification of customary international law", I would like to begin by thanking the Special Repporteur, Sir. Michel Woods, for his contribution to this source-based topic of the Commission. As the Special Rapporteur underlined in his second report, this topic deals solely with methodological question of the identification of customary international law and has nothing to do with the question of hierarchy of sources of international law. The aim of the exercise is not to seek to codify rules for the formation of customary international law.

The question has been raised whether there might be different approaches to the identification of rules of customary international law in different fields of international law. It has been suggested that, for instance, regarding international humanitarian law or international human rights law, *opinio juris* may suffice in constituting customary international law and it will not be necessary to identify the existence of practice by States. We support the two-element approach that is assessment of both *opinio juris* and the existence of practice. The two-element approach remains dominant and avoids the fragmentation of international law.

It is the practice of states that contribute primarily to the creation of customary international law. The practice of international organizations can be subsidiary in the process of identification of rules of customary international law to the extent that it reflects the practice of States. As the ICJ has pointed out, the U.N. General Assembly Resolution can in certain

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circumstances provide evidence for establishing the existence of a rule or the emergence of an *opinio juris*. To this end, it is necessary to look at the content and the condition of the adoption of the pertinent Resolution (Advisory opinion on nuclear weapons PP. 254-255).

The conduct of non-governmental organizations and individuals cannot in our view be qualified as practice for the purpose of the formation or evidence of customary international law. Nevertheless, the ICJ can rely on "the teaching of the most highly qualified publicist of the various nations as subsidiary means for the determination of rules of law" (Article 38(d) of the Statute of the Court). Other individuals and the non-governmental organizations can indeed play, by their actions, an important role in the promotion and the observance of international law.

As for the question raised by the Special Rapporteur regarding the burden of proof, it seems that the State claiming or denying the rule has the burden to prove it. And finally, the assertion of the that "*opino juris* is not synonymous with "consent" or desire of States but rather means the belief that a given practice is followed because a right is being exercised or an obligation is being complied with in accordance with international law" needs some further elaboration.

Mr. Chairman,

On the topic of "Protection of environment in relation to armed conflicts" I would like to thank the Special Rapporteur Ms. Marie Jacobsson for her preliminary report on this important topic. Regarding the scope and methodology as discussed by the Commission, not only do we share the view of some of the members of the Commission that further elaboration of environmental obligations in armed conflict might be warranted, but we also believe that the study can provide an opportunity to fill the existing gaps in international humanitarian law concerning the protection of environment; an example thereof is the illustrative, and not exhaustive, list of vital infrastructure excluded from military targets in article 56 of the 1977 first Protocol Additional to the Geneva Conventions. The exclusion of oil platforms and other oil production and storage facilities especially those built in the continental shelf has proven to run counter to the purpose of the drafters of the protocol to protect the environment; the conflicts inflicting considerable damage to such constructions and the consequent environmental damage since the adoption of the protocols and lack of legal remedy to that effect is indicative of this gap.

Moreover, the cease of special protection accorded to nuclear electrical generating stations in article 56 (2) (b) has been repeatedly described as inappropriate given the dangerous nature of nuclear installations and the advances made ever since to attain full prohibition at the international level including, inter alia, by adopting UN General Assembly resolution A/RES/40/6 (dated 1 November 1985) condemning in the strongest terms 'all military attacks on all nuclear installations dedicated to peaceful purposes', and UN General Assembly Resolution 45/58 (dated 4 December 1990) on 'prohibition of attacks on nuclear facilities' and IAEA General Conference resolutions GC(XXIX)/RES/444 (dated 27 September 1985) and GC (XXXI)/RES/475 (dated 27 September 1985). The debate on the issue since 1985 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons and its evolution into a serious proposal to adopt a legally binding instrument to prohibit any military attacks on nuclear installations dedicated to peaceful purposes included in the final document of

the 2010 Review Conference suggests that the lifting of special protection provided for in article 56 (2) (b) should be described as outdated.

Mr. Chairman,

The report suggests that the commission needs to come up with a definition of the term "armed conflict" in order to facilitate the consideration of the work at hand. This is an appropriate approach if the commission confines the definition of the term to "international armed conflict" and considers it just as a working definition.

Expansion of the scope of the definition of armed conflict to include non-international armed conflict would seem to be problematic. The commission would have to consider the legal obligations of non-state actors, which may lead to expound upon a definition already fraught with ambiguities and disagreements; such an endeavor would also entail further attempts to determine the threshold of non-international armed conflicts. Both these require the modification of relevant provisions of international law of armed conflict far from the purpose of the work at hand.

Concerning the inclusion of the refugee matters in the exercise of the Commission, we have to reiterate that the issue is absolutely relevant. One of the immediate consequences of large scale war is the displacement of persons which may result in the mass influx of refugees. Provision of settlement in case of the surge of refugees calls the protection of environment into question.

I thank you.