Statement by

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before

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on

Report of the International Law Commission
on the work of its sixty-eighth session
(agenda item 78)

Cluster I
(Chapters I, II, III, IV, V, VI and VIII)

Protection of persons in the event of disasters
Identification of customary international law
Subsequent agreements and subsequent practice in relation to the interpretation of treaites
Other decisions and conclusions of the Commission

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In the name of God the Most Compassionate the Most Merciful

In the first place, I wish to thank the Chairman of the International Law Commission, Mr. Pedro Comissário Afonso, for his lucid presentation on the work of the ILC of its Sixty-eighth session, which shed further light on the detailed annual report contained in document A/71/10. I should also like to thank the Members of the Commission for their hard work in the past year.

From all the topics on the agenda of the International Law Commission, our initial remarks at the present session will be limited to four topics: "Protection of persons in the event of disasters", "identification of customary international law", "subsequent agreements and subsequent practice in relation to the interpretation of treaties" and "other decisions and conclusions of the Commission".

As regards the topic of **"Protection of persons in the event of disasters"**, I would like to congratulate and thank the Special Rapporteur Mr. Eduardo Valencia Ospina for his valuable efforts in the elaboration of the draft articles. We further take note of consideration, by the Commission, of the eighth report of the Special Rapporteur and the comments and observations of Governments, international organizations and other entities and the consequent adoption of the draft articles by the Commission on the second reading. While some of our comments have been reflected in the final draft, we remain uncertain whether the time is ripe for convening a diplomatic conference and adopting the provisions in the form of a treaty; however, we continue to observe carefully comments made by other Member States in this regard. Now, I would like to reiterate some of our previous remarks with regard to the draft articles.

International cooperation plays a crucial role in managing disasters. We are of the view that the affected State has the exclusive right for the recognition of the threshold of disaster and thus may affirm that a disaster has disrupted the functioning of the society.

Whereas draft Article 13 (2) states that "consent to external assistance (by the State victim to the disaster) shall not be withheld arbitrarily", we still believe that such a stipulation depends on an evidently subjective criterion, i.e. the free choice of humanitarian actors. Such a determination risks being influenced by political factors which may potentially entail legal consequences for the affected States; it seems more appropriate to leave it to the affected State to determine its own capacities of reaction in the face of disasters and to decide whether it is in a position to implement the necessary means to confront them.

On the topic of **"identification of customary international law"**, I would like to thank the Special Rapporteur, Sir Michael Wood, for his considerable efforts on the topic. We also welcome consideration, by the Commission, of the fourth report of the Special Rapporteur as well as the memorandum by the Secretariat concerning the role of decisions of national courts in the case-law of international courts and tribunals of a universal character for the purpose of the determination of customary international law. We also take note of adoption, on first reading, of the 16 draft conclusions, by the Commission. We continue to observe the work done and will attempt to contribute thereto by providing our comments by 1 January 2018. However, I would like to touch upon our main concerns in this regard.

Practice demonstrated by Member States is central to identification of customary international law. Decisions of international courts and tribunals and the writings of publicists remain subsidiary even as evidence of identification of custom, comparable to the stipulation in article 38 of the Statute of the International Court of Justice concerning sources of international law. Also, practice of States party to an international organization and that of the organization by itself need to be considered separately and only proven practice by States can be considered as evidence. In this connection, as previously noted, inaction cannot be considered as contributing to State practice as it is more often the

result of political convenience; what is especially witnessed when it comes to adoption of resolutions by consensus at international organizations. This, of course, raises doubt as to the evidentiary basis of resolutions of international organizations as to custom, since these are at times adopted by political organs and do not reflect *opinio juris* of Member States.

Now turning to the topic of **"subsequent agreements and subsequent practice in relation to the interpretation of treaties"**, we thank the Special Rapporteur Mr. Georg Nolte for his fourth report on the topic and take note of the conclusion of the first reading of the draft conclusions 1 to 13 by the Commission. As we have previously stated, subsequent agreements and subsequent practice in relation to the interpretation of treaties are understood to be confined within the framework of articles 31 and 32 of the Vienna Convention on the Law of Treaties.

While Article 31 sets forth general rule of interpretation, Article 32 refers to supplementary means of interpretation which includes the preparatory work of the treaty and the circumstances of its conclusion; these may embrace any memoranda or statements and observations of governments, diplomatic exchanges, negotiation records, minutes of commission and plenary proceedings, we well as the circumstances of the conclusion of the treaty including the political, social and cultural factors – or the *milieu* – surrounding the treaty's conclusion. Even more broadly, other elements not expressly stipulated in article 32 may include *travaux preparatoires* of an earlier version of the treaty, agreements and practices among a subgroup of parties to a treaty not falling within the ambit of authentic interpretation in Article 31 (2), and 31 (3) (a) and (b) and non-authentic translations of the authenticated text.

Therefore, recourse to "supplementary" means of interpretation after employing the means of the general rule of interpretation as prescribed in article 31 is aimed at providing further evidence of, or shedding further light on, the intentions of the parties, and their common understanding regarding the meaning of treaty terms. As such, it can only serve as means to aid the process of interpretation and in the words of the Commission – as recorded in its Report in 1966 – recourse to these means is "discretionary rather than obligatory". Yet, we have difficulty understanding the rationale behind the recurrent use of the term "other subsequent practice under article 32" in draft conclusions 2, 4, 6, 7, 12 and 13.

Mr. Chairman, we cannot concur with the Special Rapporteur that a pronouncement of an expert treaty body can give rise or refer to a subsequent agreement or subsequent practice by parties under article 31 (3) or more categorically under article 32. While subsequent practice or agreement is understood to refer to actual practice or agreement of all the States Parties to a treaty, pronouncements of experts serving in their personal capacity cannot be regarded as such.

All that said, we need to more carefully analyze the draft conclusions and will submit our comments and observations by 1 January 2018.

Finally, I would like to comment briefly on **other decisions and conclusions of the Commission**. My delegation takes note of Commission's recommendation regarding inclusion of two topics (namely the settlement of international disputes to which international organizations are parties and succession of States in respect of State responsibility) in its long-term programme of work. The lucid presentation of the two topics by Sir Michael Wood and Mr. Pavel Sturma is indicative of the need for the topics to be included in the ILC's agenda.

Furthermore, we note with interest the Commission's recommendation to hold the seventieth anniversary session during the first part of its seventieth session in New York and look forward to it. On the question of holding other future sessions in New York, we are of the view that due to the necessity of preserving consistency in the work of the Commission, it seems desirable to hold the regular sessions in Geneva, except on a case by case basis and upon recommendation by Members of the Commission.