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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 text 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 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

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 international law should enable the taking of appropriate measures.

Chapter VII: 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.

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 formal officials, as well as State conduct. There was also general support for the proposal to examine the jurisprudence of international, regional and subregional courts, in particular 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 practice 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 of the legislatures, courts and international organizations; and (b) decisions of national, regional and subregional courts..

Mr. Chairman,

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 expressl 0 Tde4n0.0146wg orbe

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 crime 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.

Chapter X: 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.

of the obligation in the work of the Commission, summarizes the work done thus far, and offers suggestions that might be useful to 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 1 July 2012 of the International Court of Justice in

This completes the introduction of Chapter IX.

Chapter XI: 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 İnşaat 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 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 would 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.