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STATEMENT OF THE CHAIRMAN OF THE INTERNATIONAL LAW COMMISSION, MR. PEDRO COMISSÁRIO AFONSO

Part One

Chapters I-III, XIII, IV to VI: Introductory chapters; Other decisions and conclusions of the Commission; Protection of persons in the event of disasters; Identification of customary international law; and Subsequent agreements and subsequent practice in relation to the interpretation of treaties.

Mr. Chairman,

I am most grateful to you for the kind sentiments of appreciation for work of the International Law Commission. The Chairman of the International Law Commission has been appearing before this venerable Committee to report on its work annually for more than sixty years, thus bearing testimony to the long standing relationship that exists between the Commission and the Sixth Committee in our common and inter-related efforts for the progressive development of international law and its codification.

Like my predecessors before me, I bring with me the best wishes of the Commission for a successful session of the Committee. On behalf of the Commission, I congratulate you and the other members of the Bureau on your election and wish you all every success. In a world where we are often looking at the past to foster the future in a sustainable and equitable manner, the Commission which I represent will continue, as always, to assist the General Assembly in carrying out its mandate in the progressive development of international law and its codification. As will become evident momentarily, this is a continuing task, whose noble objectives, as you seek to renew the membership of the Commission this year, remain relevant today as they were when our forebears in the 19th century started the “codification movement”.

Mr. Chairman,

I was humbled to be the chairman of the sixty-eighth session of the Commission, this year, the last in the present quinquennium. The substantial report of the Commission on the work of its session is contained in document **A/71/10** and is before you. I propose to make three interventions to introduce the report in order to facilitate the debate of the Committee on it.

The present statement this morning will address the first cluster of issues, namely c**hapters I** to **III,** which are **"Introductory**" and **chapter XIII, "Other decisions and conclusions of the Commission".** Thereafter, I will deal with the first three substantive chapters. These concern the topics, "**Protection of persons in the event of disasters",** in **chapter IV;** the **"Identification of customary international law"** in **chapter V** and **"Subsequent agreements and subsequent practice in relation to the interpretation of treaties"** in **chapter VI.**

My second statement will deal with **chapters VII to IX,** which relate respectively, to the following topics: **"Crimes against humanity"; "Protection of the atmosphere"** and **"*Jus cogens*".**

The third statement will consider the remaining substantive **Chapters X to XII** covering, respectively, "**Protection of the environment in relation to armed conflicts"; "Immunity of State officials from foreign criminal jurisdiction";** and **"Provisional application of treaties."**

Mr. Chairman,

<u>Chapters I-III and XIII</u>: Introductory chapters and Other decisions and conclusions of the Commission

As alluded to earlier, this year's session was the last one in the Commission's present quinquennium. Important progress was made by the Commission, as reflected in Chapter II containing the summary of work of the Commission at the present session. The Commission completed work, on second reading, on the "**Protection of persons in the event of disasters",** by adopting a preamble and a set of 18 draft articles. The Commission recommended to the General Assembly the elaboration of a convention on the basis of the draft articles. It also completed two topics on first reading. It adopted 16 draft conclusions on **"Identification of customary international law"** and 13 draft conclusions on **"Subsequent agreements and subsequent practice in relation to the interpretation of treaties".** In both instances, Governments have been requested for comments and observations to be submitted to the Secretary-General by **1 January 2018.**

The Commission also made substantial progress on the topics, **"Crimes against humanity**", **"Protection of the atmosphere;" Protection of the environment in relation to armed conflicts"; "Immunity of State officials from foreign criminal jurisdiction"** and **"Provisional application of treaties.** It also began work on ***"Jus cogens"***, a topic placed on its programme of work last year. All these topics are at various stages of development and some of them will soon be completed on first reading.

As in the past, **Chapter III** of the report draws attention to specific issues on which the comments of Governments would be of particular interest to the Commission in the further development of the topics. These relate in particular to the requests for information on practice, made in 2014, on the topics **"Crimes against humanity"** and the **"Protection of the atmosphere**", as well as, in 2015, on the topics "**Provisional application of treaties**", and "***Jus cogens***". Moreover, I wish to note that the Commission has requested information on practice in relation to the topic **"Immunity of**

State officials from foreign criminal jurisdiction", focusing on the procedural aspects.

The Commission would also welcome views on the two new topics included on its long-term programme of work namely: (a) **The settlement of international disputes to which international organizations are parties**; and (b) **Succession of States in respect of State responsibility**. As has happened previously at the end of each quinquennium, the Commission has indicated that it would welcome any proposals that States may wish to make concerning possible topics for inclusion in its long-term programme of work. Such proposals should be accompanied by a statement of reasons in their support, taking into account the criteria of the Commission in the selection of new topics. As agreed upon in 1998, the Commission has stated that, for inclusion, a topic: (a) should reflect the needs of States in respect of the progressive development and codification of international law; (b) should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification; (c) should be concrete and feasible for progressive development and codification; and (d) that the Commission should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.

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Mr. Chairman,

The Commission reiterates its commitment to the rule of law in all of its activities.The Commission has continued its traditional exchanges with the International Court of Justice, as well as its cooperation with other bodies engaged in the progressive development of international law and its codification.

As noted earlier, the relationship between the Sixth Committee and the Committee is long-standing. But it is also unique, and the Commission values highly the feedback that it receives from the Sixth Committee and from Governments on all aspects

of its work as it progresses on each and every topic.

In accordance with paragraphs 9 to 12 of General Assembly resolution 70/236 of 23 December 2015, the Commission had a further exchange of views on the feasibility of holding part of its session in New York based on further information by the Secretariat related to estimated costs and relevant administrative, organizational and other factors. The Commission determined that it would be feasible to hold one half session in New York in the first year of the next quinquennium in 2017 or the second year in 2018. It considered that holding such a half session during its seventieth session in 2018 would be the most convenient for the new Commission. Accordingly, it has requested the Secretariat that preparatory work and estimates proceed on the basis that the first segment of the Commission's seventieth session in 2018 would be convened at the United Nations Headquarters in New York. Such a convening would also coincide with the seventieth session of the Commission. This obviously could be an occasion to celebrate and reflect further on achievements and challenges of the Commission. Accordingly, the Commission recommended the holding of commemorative events in both New York and Geneva which would be memorialized in a publication. The Commission has requested the Secretariat, in consultation with the Chairman of the Commission and the Chairman of the Planning Group, to commence making arrangements for the holding of such commemorative events.

Let me conclude this part by acknowledging the valuable assistance of the Codification Division of the Office of Legal Affairs for the substantive servicing of the Commission since it began work in the 1940s. I wish to note that for the current session, the Secretariat prepared two memoranda on 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 (A/CN.4/691*), and on Information on existing treaty-based monitoring mechanisms which may be of relevance to the future work of the International Law Commission (A/CN. 4/698). It also prepared six working papers on potential future topics for the Commission's long-term programme of work (A/CN. 4/679/Add.1). These six potential topics concern "General principles of law";

"International agreements concluded with or between subjects of international law other than States or international organizations"; "Recognition of States"; "Land boundary delimitation and demarcation"; "Compensation under international law"; and "Principles of evidence in international law". They will be further considered by the Working Group on the Long-term programme of work next year. The Commission has, this year, requested from the Secretariat two memorandums. The first request concerns ways and means for making the evidence of customary international law more readily available, which would survey the present state of the evidence of customary international law and make suggestions for its improvement. The second memorandum would analyse State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General, which provide for provisional application, including treaty actions related thereto.

Chapter IV: ***Protection of persons in the event of disasters***

Mr. Chairman,

I shall now move to the substantive chapters, starting with Chapter IV, on the **Protection of Persons in the event of Disasters,** a topic placed on the Commission's agenda in 2007. It is my pleasure to report that the Commission adopted, on second reading, the draft articles on the protection of persons in the event of disasters. The work on the topic was undertaken over a period of nine years, on the basis of eight reports by the Special Rapporteur, Mr. Eduardo Valencia-Ospina. I draw your attention to **paragraph 47** of the report, which records the tribute paid by the Commission to the Special Rapporteur. I would also like to recognize the contribution of the Secretariat of the United Nations on whose initiative the work was undertaken.

In accordance with article 23 of its statute, the Commission decided to recommend to the General Assembly the elaboration of a convention on the basis of the draft articles on the protection of persons in the event of disasters.

The text of the draft articles is to be found at **paragraph 48** of the report, followed by the commentaries at **paragraph 49**.

You have before you a text of 18 draft articles, together with a draft preamble. The reduction in number of articles in relation to the first reading text, adopted in 2014, resulted from the merging of several provisions as part of a streamlining process aimed at attaining greater overall coherence.

I will introduce the entire set of draft articles, with the focus being on modifications and additions to the version adopted on first reading.

The draft preamble to the draft articles is a new addition to the text. It is constituted of five preambular paragraphs. The first preambular paragraph recalls the mandate of the General Assembly under Article 13, paragraph 1, subparagraph (a), of the Charter of the United Nations. The second preambular paragraph calls attention to the frequency and severity of natural and human-made disasters, and their damaging impact. The third preambular paragraph deals with the question of the essential needs of the persons affected by disasters, and reiterates the need for the rights of those persons to be respected in the circumstances covered by the draft articles. The fourth preambular paragraph recalls the fundamental value of solidarity in international relations, and the importance of strengthening international cooperation in respect of all phases of a disaster, both of which are key concepts underlying the topic. The final preambular paragraph stresses the principle of the sovereignty of States, and reaffirms the primary role of the affected State in the provision of disaster relief assistance, which is a core element of the draft articles.

Draft article 1 deals with the **Scope of application** of the draft articles. No changes were made to the formulation adopted on first reading.

Draft article 2 deals with the **Purpose** of the draft articles. The text is presented largely in the form adopted on first reading, with the only substantive change being the inclusion of a reference to the “reduction of the risk of disasters”. Accordingly, while the

main emphasis of the draft articles is on the provision of adequate and effective response to disasters, the dimension of the reduction of the risk of disasters is also dealt with.

Draft article 3 concerns the **Use of terms**. The first thing to notice is that, following various recommendations made in the Sixth Committee and in the Commission, the definition of "disaster", which was located in a separate provision on first reading, was moved into draft article 3, and is now to be found **in subparagraph (a),** with the consequence that the subsequent subparagraphs were renumbered. This definition includes a reference to "mass displacement" as one of the consequences of a disaster. **Subparagraph (b)** deals with the definition of "affected State" which is central to the entire draft articles. Of all the definitions adopted on first reading, it was the one that was subject to the most reformulation. The Commission was particularly concerned with clarifying which States would be "affected States" for purposes of the draft articles. The first reading formulation was accordingly refined to make the territorial link more prominent. However, it is worth recalling that this was done solely for purposes of delimiting the scope of application of the draft articles, and is without prejudice to the possibility that a State may enjoy jurisdiction over its nationals present in other territories, for purposes of the application of other rules of international law, including those in international human rights treaties. The texts of the remaining definitions, in **subparagraphs (c) to (g**) were streamlined to take into account various suggestions made in the Sixth Committee and in the written comments that were received.

Draft article 4 concerns **Human dignity**. The provision was reformulated in a manner that leaves open which entities have the obligation to respect and protect. While the Commission understood that such obligation could be imposed on States, the comments on the first reading text had revealed a diversity of opinion on whether it was appropriate to refer to the possibility of non-State entities owing obligations, under international law, to protect the human dignity of an affected person.

Draft article 5 deals with the **Human rights** of persons affected by disasters. Two main changes were implemented. First, the formulation was aligned with

terminology typically found in international human rights treaties; and, second, a reference was added to human rights "in accordance with international law", which serves as a reminder that the draft articles operate within the framework of existing rules of international law.

Draft article 6, on applicable **Humanitarian principles**, was adopted with the formulation agreed to on first reading. Here, I wish to point out that while the Commission preferred not to reopen the compromise reached on first reading, it nonetheless added several further explanatory elements in the corresponding commentary, including on the intended meaning of the principle of neutrality, as well as on the significance of applying a gender-based approach.

I turn now to **draft article 7** on the **Duty to cooperate**. The first key development was the decision of the Commission to interpret the provision as being sufficiently broad to encapsulate cooperation for disaster risk reduction. Accordingly, former draft article 10, as adopted on first reading, concerning cooperation for disaster risk reduction, has been removed. I wish to make it clear, however, that the deletion of former draft article 10 should not be understood as the Commission changing its mind, but rather as a function of the second-reading streamlining of provisions that were adopted over several years during the first reading. The effect of such streamlining is that the forms of cooperation in the context of the response phase is now covered by draft article 8, and the types of disaster risk reduction measures, envisaged in the international cooperation referred to in draft article 7, are detailed in paragraph 2 of draft article 9.

As just mentioned, **draft article 8** deals with the **Forms of cooperation** in the specific context of disaster response. Despite some refinement in the formulation, the provision, as adopted on second reading, is substantively the same as that adopted on first reading. The Commission decided not to include a reference, among the forms of cooperation, to the provision of financial support, for fear of reopening the consensus text reached on first reading. This was done on the understanding that the list of forms in the

draft article is not exhaustive, and that other forms may exist, including the provision of financial assistance.

Draft article 9 deals with the **Duty to reduce the risk of disasters**. The extension of the scope of application of the draft articles to the pre-disaster phase took place towards the end of the first reading, with the introduction of what is now draft article 9. The Commission decided not only to retain such addition, but to further integrate the notion of the prevention of disaster risk more fully into the second reading text. Draft article 9, accordingly, is the key provision on the question. Despite several drafting improvements, the provision was adopted largely along the lines of the first reading text.

Draft article 10 deals with the **Role of the affected State**. The only modifications made were to **paragraph** 1. The first was the inclusion of the additional reference to "or in territory under its jurisdiction or control" at the end, which was inserted to align the text with the expanded scope of the term "affected State" defined in draft article 3. As consequence the reference in the first reading text to the affected State having a duty "by virtue of its sovereignty" no longer fully reflected the prevailing legal position. At the same time, the Commission was conscious of the fact that the phrase "by virtue of its sovereignty" had been key to the compromise reached on first reading, through which the emphasis was placed on the bond between sovereign rights and concomitant duties. The deletion of the phrase "by virtue of its sovereignty" in paragraph 1, should not be understood as the Commission changing its mind on the origin of the duty on the affected State in relation to the protection of persons on its own territory. Instead, it was simply motivated by the need to accommodate the expanded definition of affected State. It should also be recalled that a reference to the principle of sovereignty has been included in the draft preamble, which qualifies the entire draft articles.

Draft article 11 concerns the **Duty of the affected State to seek external assistance**. The provision underwent several drafting refinements but is largely the same as adopted on first reading. In particular, a new qualifier, "manifestly", was added before

"exceeds its national response capacity", in order to establish a new threshold requirement. Furthermore, the reference to the other potential assisting actors was aligned with the corresponding definition in draft article 3. I wish to point out that the decision to retain draft article 11 largely as adopted on first reading, subject to the drafting refinements just mentioned, was reached on the understanding that an appropriate provision be included in the draft articles on the obligations of potentially assisting States.

This aspect is one of the key features of **draft article 12**, which deals with **Offers of external assistance**. The corresponding provision was adopted on first reading as draft article 16. The Commission decided to move the provision after draft article 11 on the duty of the affected State to seek external assistance. The provision was redrafted and is now organized in two paragraphs, the first being based on the text of former draft article 16, and the second being new. **Paragraph 1** was retained largely in the form adopted on first reading with some drafting refinements. The Commission decided to include **paragraph 2** in response to concerns raised that the draft articles did not sufficiently cover the obligations of potentially assisting States and other assisting actors. The inclusion of the paragraph was, accordingly, motivated by a desire to introduce a greater balance within the text, by providing a parallel obligation to that in draft article 13, paragraph 3, namely the obligation of the affected State to make known its decision regarding an offer made to it in a timely manner.

Paragraph 2 has three components. First, the seeking of external assistance by the affected State triggers the application of the provision. While, in draft article 11, the duty on the affected State is a general duty to "seek" assistance, paragraph 2 of draft article 12 deals with the scenario where specific assistance is sought by the affected State "by means of a request addressed to" the enumerated list of potential assisting actors. Second, the paragraph refers to the addressees of a request for assistance, namely other States, the United Nations and other potentially assisting actors. The United Nations was singled out for special mention given the central role it plays in receiving requests for assistance. Third, there is an obligation on the addressee or addressees of the specific

request not only to give due consideration to the request, but also to inform the affected State of its or their reply thereto. The term "expeditiously", denotes an element of timeliness.

I turn now to **draft article 13**, on the **Consent of the affected State to external assistance.** Paragraphs 1 and 2 were adopted without change to the first reading text. The formulation of paragraph 3 was refined, particularly with a view to placing emphasis on the importance of receiving timely responses, in the context of the occurrence of a disaster.

Draft article 14 concerning the **Conditions on the provision of external assistance**, was adopted in the version agreed to on first reading.

Draft article 15 deals with the **Facilitation of external assistance**. The text remains substantially the same as that adopted, on first reading, with a technical modification in paragraph 1, subparagraph (a).

Draft article 16 concerns **Protection of relief personnel and their equipment and goods.** The provision is substantially the same as was done on first reading, including the understanding of the flexibility retained by the word "appropriate", which also refers to the question of the possibility of the affected State to perform the envisaged actions.

Draft article 17 deals with **Termination of external assistance**. The provision was restructured to take into account some concerns raised in regard to the first reading text. The draft article is now composed of three sentences: The first sentence confirms the basic right of the actors concerned, namely the affected State, the assisting State, the United Nations, or other assisting actor, to terminate external assistance at any time. It is understood that the reference to termination of assistance includes partial termination. The second sentence reflects the text of the last sentence of draft article 19, as adopted on first reading. It establishes the requirement of notification, with some drafting amendments. The third sentence reproduces, in substance, the text of the first sentence of the first reading version, requiring consultation between the actors involved.

I turn now to the last draft article. **Draft article 18**, on the **relationship of the draft articles to other rules of international law,** is the successor to draft articles 20

and 21, as adopted on first reading. The Commission accepted the suggestion of having only one provision to deal with the relationship both with other applicable rules, and the rules of international humanitarian law, but preferred to separate them into two paragraphs. **Paragraph 1** deals with the relationship of the draft articles with other applicable rules of international law, such as existing treaties dealing with response to disasters, or disaster risk reduction. While the provision continues to be formulated as a "without prejudice" clause, as was done on first reading, its drafting was simplified. **Paragraph 2** deals with the specific question of the relationship with the rules of international humanitarian law. This was the subject of extensive discussion in the comments and observations received. The Commission considered various alternatives, but decided to retain, in substance, the approach taken on first reading of indicating the relationship of the present draft articles to the rules of international humanitarian law, as opposed to providing a simple saving clause. The Commission drew inspiration from article 55 of the 2001 articles on the responsibility of States for internationally wrongful acts, in depicting the relationship with the rules of international humanitarian law in the formulation "do not apply to the extent that the response to a disaster is governed" by such rules. Accordingly, the draft articles could conceivably apply in contexts of armed conflict, to the extent that the rules of international humanitarian law do not apply. This would also allow for the parallel application of the draft articles in the context of "complex" emergencies.

This concludes my introduction of chapter IV of the report.

Chapter V: ***Identification of customary international law.***

Mr. Chairman,

I shall now turn to **Chapter V** of the report, which concerns the topic of the "**Identification of customary international law**". This year, the Commission had before it the fourth report of the Special Rapporteur, which contained, in particular, suggestions for the amendments of several draft conclusions in light of the comments by

Governments. The report also addressed ways and means to make the evidence of customary international law more readily available and provided a bibliography on the topic. In addition, the Commission had before it 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.

Following the consideration of the report, the plenary referred the amendments to the draft conclusions contained in the report to the Drafting Committee. The Commission also established an open-ended working group, under the Chairmanship of Mr. Marcelo Vázquez-Bermúdez, to assist the Special Rapporteur in the preparation of the draft commentaries to the draft conclusions to be adopted by the Commission.

Consequently, the Commission adopted a set of 16 draft conclusions on identification of customary international law on first reading with commentaries thereto. You will find these at **paragraphs 62 and 63** of the report. The Commission also expressed its deep appreciation to the Special Rapporteur, Sir Michael Wood, whose outstanding contribution has enabled it to bring to a successful conclusion its first reading of the draft conclusions on identification of customary international law.

Mr. Chairman,

I shall now provide an overview of the current structure and content of the draft conclusions. The draft conclusions concern the methodology for identifying rules of customary international law, and seek to offer practical guidance on how the existence (or non-existence) of rules of customary international law, and their content, are to be determined. The draft conclusions are divided into seven parts. **Part One** deals with scope and purpose. **Part Two** sets out the basic approach to the identification of customary international law, the "two element" approach. **Parts Three** and **Four** provide further guidance on the two constituent elements of customary international law, which also serve as the criteria for its identification, "a general practice" and "acceptance as law" (*opinio juris*). **Part Five** addresses certain categories of materials that are frequently

invoked in the identification of rules of customary international law. **Parts Six** and **Seven** deal with two exceptional cases: the persistent objector; and rules of particular customary international law that apply only among a limited number of States.

Mr. Chairman,

Let me begin by addressing **Parts One and Two**. **Part One** consists only of **Draft conclusion 1** – **"Scope"** –, an introductory provision asserting that the draft conclusions concern the way in which to identify the existence and content of rules of customary international law – in other words, the legal methodology for undertaking that exercise.

Part Two comprises two draft conclusions. **Draft conclusion 2** – **"Two constituent elements" -** sets out the basic approach concerning the two constituent elements of rules of customary international law, practice and acceptance as law. The identification of a rule of customary international law requires an inquiry into two distinct, yet related, questions: whether there is a general practice and whether such general practice is accepted as law (that is, accompanied by *opinio juris*). The two-element approach applies to the identification of the existence and content of rules of customary international law in all fields of international law

Draft conclusion 3 – "Assessment of evidence for the two constituent elements" - addresses the assessment of the evidence for the two constituent elements. **Paragraph 1** sets out an overarching principle that underlies all of the draft conclusions, namely that the assessment of any and all available evidence must be careful and contextual. **Paragraph 2** states that to identify the existence and content of a rule of customary international law each of the two constituent elements must be found to be present, and explains that this calls for an assessment of evidence for each element.

Mr. Chairman,

I will now turn to **Part Three,** which comprises five draft conclusions offering more detailed guidance on the first of the two constituent elements of customary international law, "a general practice".

Draft conclusion 4 – "Requirement of practice" - specifies whose practice is to be taken into account when determining the existence of a rule of customary international

law and the role of such practice: **paragraph 1** makes clear that it is primarily the practice of States that is to be looked to; **paragraph 2** indicates that in certain cases the practice of international organizations also contributes to the formation, or expression, of rules of customary international law; and **paragraph 3** makes explicit that the conduct of entities other than States and international organizations is neither creative nor expressive of customary international law.

Draft conclusion 5 – "Conduct of the State as State practice" – specifies that to qualify as State practice, the conduct in question must be that of the State, whether in the exercise of its executive, legislative, judicial or other functions.

Draft conclusion 6 concerns the various "**Forms of practice**". It comprises three paragraphs. **Paragraph 1 provides that practice may take a wide range of forms.** It clarifies that practice includes both physical and verbal acts and may, under certain circumstances, include inaction. **Paragraph 2** provides a non-exhaustive list of forms of practice that are often found to be useful for the identification of customary international law. **Paragraph 3** clarifies that in principle no form of practice has a higher probative value than others in the abstract.

Draft conclusion 7 – **"Assessing a State's practice"** - provides in **paragraph 1** that all the available practice of a particular State must be taken into account and assessed as a whole, and in **paragraph 2** that the weight to be given to the practice of a particular State may be reduced where the practice of that State varies.

Part Three concludes with **draft conclusion 8** which is entitled **"The practice must be general**". According to **paragraph 1**, the relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent. Furthermore, according to **paragraph 2**, provided that the practice is general, no particular duration is required.

Mr. Chairman,

I will now focus on **Part Four**, concerning the second constituent element of customary international law: the acceptance as law as to the binding character of the practice in question, also known as *opinio juris*. This comprises two draft conclusions.

Draft conclusion 9 – "Requirement of acceptance as law (*opinio juris*)" - seeks to encapsulate the nature and function of the acceptance as law element. **Paragraph 1** explains that acceptance as law (*opinio juris*), as a constituent element of customary international law, refers to the requirement that the relevant practice must be undertaken with a sense of legal right or obligation, that is, it must be accompanied by a conviction that it is permitted, required or prohibited by customary international law. For its part, **paragraph 2** emphasizes that, without acceptance as law (*opinio juris*), a general practice may not be considered as creative, or expressive, of customary international law, but would rather be deemed a mere usage or habit.

Draft conclusion 10 – "Forms of evidence of acceptance as law (*opinio juris*)" –concerns the evidence from which acceptance of a given practice as law (*opinio juris*) may be deduced: **paragraph 1** states the general proposition that acceptance as law (*opinio juris*) may be reflected in a wide variety of forms; **paragraph 2** provides a non-exhaustive list of forms of evidence of acceptance as law (*opinio juris*); and **paragraph 3** asserts that failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.

Mr. Chairman,

Let me now turn to **Part Five** of the draft conclusions, concerning the significance of certain materials for the identification of customary international law. This part comprises four draft conclusions.

Draft Conclusion 11 – "Treaties" - addresses the significance of treaties, especially widely ratified multilateral treaties, for the identification of customary international law. **Paragraph 1** states that a rule set forth in a treaty may reflect a rule of customary international law in three circumstances: first, if the treaty rule codified a rule of customary international law existing at the time when the treaty was concluded; second, if the treaty rule has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; third, and finally, if the treaty rule has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law. **Paragraph 2** then seeks to

caution that the existence of similar provisions in a considerable number of bilateral or other treaties, thus establishing similar rights and obligations for a broad array of States, does not necessarily indicate that a rule of customary international law is reflected in such provisions.

Draft conclusion 12 – "Resolutions of international organizations and intergovernmental conferences" – concerns the role that resolutions adopted by international organizations or at intergovernmental conferences may play in the determination of rules of customary international law. **Paragraph 1** makes clear that resolutions adopted by international organizations or at intergovernmental conferences cannot, of itself, constitute rules of customary international law. Nevertheless, as stated in **paragraph 2**, first, a resolution adopted by an international organization or at an intergovernmental conference may provide evidence for establishing the existence and content of a rule of customary international law, or contribute to its development. **Paragraph 3** clarifies that a provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).

Draft conclusion 13 – "Decisions of courts and tribunals" - addresses the role of decisions of courts and tribunals, both national and international. **Paragraph 1** stipulates that decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules. **Paragraph 2** affirms that regard may also be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules.

Part Five concludes with **draft conclusion 14**, which concerns the role of "**teachings**" in the identification of rules of customary international law. It specifies that the works of the most highly qualified publicists may be resorted to as a subsidiary means for determining rules of customary international law.

It is to be noted that the Commission decided not to include at this stage a separate conclusion on the output of the International Law Commission. As indicated in the commentary, such output does, however, merit special consideration in the present context. The commentary also points out that the weight to be given to the Commission's determinations depends, however, on various factors, including sources relied upon by the Commission, the stage reached in its work and above all upon States' reception of its output.

Mr. Chairman,

Part Six and **Part Seven** of the draft conclusions each comprise a single **draft conclusion.**

Part Six consists of **draft conclusion 15** focusing on the **"Persistent objector"**. **Paragraph 1** affirms that where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection. **Paragraph 2** clarifies that the objection must be clearly expressed, made known to other States, and maintained persistently.

Part Seven consists of **draft conclusion 16**, dealing with **"Particular customary international law"**, which is sometimes referred to as "regional custom" or "special custom". **Paragraph 1** defines this as a rule of customary international law that applies only among a limited number of States. **Paragraph 2** clarifies that to determine the existence and content of such a rule, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*).

Mr. Chairman,

This concludes my overview of the **draft conclusions on identification of customary international law**. Let me make two concluding remarks. First, I wish once more to draw the attention of the Committee to the recommendation of the Commission, made in accordance with articles 16 to 21 of its Statute, that the draft conclusions be transmitted, through the Secretary-General, to Governments for comments and

observations, and in particular to the request by the Commission that such comments and observations be submitted to the Secretary-General by **1 January 2018**.

Furthermore, with respect to the request to the Secretariat to prepare a memorandum on ways and means for making the evidence of customary international law more readily available, which I made reference to earlier, the Secretariat has invited Governments to provide information regarding their practice by replying to a questionnaire concerning available sources of such information. The Secretariat would appreciate receiving such information by **1 May 2017**.

This concludes my introduction of chapter IV of the report.

Chapter VI: ***Subsequent agreements and subsequent practice in relation to the interpretation of treaties***

Mr. Chairman,

Let me now turn to **Chapter VI** of the report **–** the last chapter in this first cluster **–** which concerns the topic "**Subsequent agreements and subsequent practice in relation to the interpretation of treaties**". This year, the Commission had before it the fourth report of the Special Rapporteur, Mr. Georg Nolte, which addressed the legal significance, for the purpose of interpretation and as forms of practice under a treaty, of pronouncements of expert treaty bodies and of decisions of domestic courts. The report proposed three new draft conclusions and a revision of one draft conclusion already provisionally adopted. It also considered the structure and scope of the draft conclusions.

Following the consideration of the fourth report, the Commission referred draft conclusions 1a and 12 to the Drafting Committee. Subsequently, upon consideration of the report of the Drafting Committee, the Commission provisionally adopted, on first reading, a set of 13 draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties. The draft conclusions, together with

commentaries thereto, are to be found in Chapter VI of the report, at **paragraphs 75 and 76.**

The Commission expresses its deep appreciation to the Special Rapporteur, Mr. Georg Nolte, whose outstanding contribution has enabled it to bring to a successful conclusion its first reading of the draft conclusions on identification of customary international law.

At the present session, the Commission adopted two new draft conclusions and reordered several others that had been adopted in previous years, with a view to improving the overall coherence of the text. The draft conclusions adopted on first reading have been divided into four parts. **Part One**, entitled **"Introduction",** consists of one draft conclusion with the same title. **Part Two**, entitled "**Basic rules and definitions"**, consists of four draft conclusions. These draft conclusions set out the general rule and means of treaty interpretation (draft conclusion 2); specify that subsequent agreements and subsequent practice constitute authentic means of interpretation (draft conclusion 3); provide a definition of subsequent agreement and subsequent practice (draft conclusion 4); and consider the question of attribution of subsequent practice (draft conclusion 5). Part Three contains five draft conclusions that deal with "General aspects", including the identification of subsequent agreements and subsequent practice (draft conclusion 6); their possible effect in interpretation (draft conclusion 7); their role in determining whether a particular treaty term is capable of evolving over time (draft conclusion 8); their weight as a means of interpretation (draft conclusion 9); and the requirements of an agreement under article 31, paragraph 3 (a) and (b) of the Vienna Convention (draft conclusion 10). Finally, the three draft conclusions in **Part Four** set out "Specific aspects", relating to decisions adopted within the framework of a Conference of States Parties (draft conclusion 11), constituent instruments of international organizations (draft conclusion 12); and, lastly, pronouncement of expert treaty bodies (draft conclusion 13). For ease of reference, the prior numbers of draft conclusions adopted at earlier sessions are indicated in square brackets.

Other than the reordering and a few technical adjustments, no substantive changes were made to the eleven draft conclusions adopted at previous sessions. Accordingly, the

rest of my statement on this topic will focus mainly on the two new draft conclusions adopted at this year's session, namely draft conclusions 1 and 13.

Mr. Chairman,

I will first turn to draft conclusion 1.

Draft conclusion 1 [1a], entitled **"Introduction"**, indicates that "The present draft conclusions concern the role of subsequent agreements and subsequent practice in the interpretation of treaties." The draft conclusions situate subsequent agreements and subsequent practice within the framework of the rules on interpretation of the 1969 Vienna Convention on the Law of Treaties, by identifying and elucidating relevant authorities and examples, and by addressing certain questions that may arise when applying those rules. The draft conclusions do not address all conceivable circumstances in which subsequent agreements and subsequent practice may play a role in the interpretation of treaties. As indicated in the commentary, the aim of the draft conclusions is to facilitate the work of treaty interpreters, be they international court and tribunals, national courts, Government officials, international organizations or non-State actors.

Mr. Chairman,

Draft conclusion 13 [12] is entitled **"Pronouncements of expert treaty bodies".** It provides that pronouncements of expert treaty bodies, as a form of practice under a treaty or otherwise, may be relevant for its interpretation, either in connection with the practice of States parties, or by themselves. It contains four paragraphs. **Paragraph 1** defines an expert treaty body as a body whose members serve in personal capacity. It is not concerned with bodies that consist of State representatives. Moreover, the paragraph excludes from its definition bodies that are organs of an international organization. As the paragraph indicates, expert treaty bodies must be "established under a treaty".

Paragraph 2 serves to emphasize that any possible legal effect of a pronouncement by an expert treaty body depends, first and foremost, on the specific rules of the applicable treaty itself. Such possible legal effects may therefore be very different. They must be determined by way of applying the rules on treaty interpretation set forth in the Vienna Convention. The ordinary meaning of the term by which a treaty designates a particular form of pronouncement, for example “views”, “recommendations” of “comments”, usually gives a clear indication that such pronouncements are not legally binding The general term “pronouncements” used in this paragraph is meant to cover all forms of action by expert treaty bodies.

The purpose of **paragraph 3** is to indicate the role that a pronouncement of an expert treaty body may perform with respect to a subsequent agreement or subsequent practice by the parties to a treaty. The first sentence of this paragraph provides that such pronouncements cannot, by themselves, constitute subsequent practice under article 31 (3) (a) or (b) of the Vienna Convention since this requires agreement of all treaty parties regarding the interpretation of the treaty. It may, however, give rise to, or refer to, a subsequent agreement or a subsequent practice by the parties which establish their agreement regarding the interpretation of the treaty. Here, the expression “may give rise to” addresses situations in which a pronouncement comes first and the practice and the possible agreement of the parties occur thereafter. The term “refer to”, on the other hand, covers situations in which the subsequent practice and a possible agreement of the parties have developed before the pronouncement, and where the pronouncement is only an indication of such an agreement or practice.

The second sentence of paragraph 3 sets out a presumption against silence as constituting acceptance of the pronouncement of an expert treaty body as subsequent practice under the Vienna Convention. It cannot usually be expected that States parties take a position with respect to every pronouncement by an expert treaty body, be it addressed to another State or to all States generally.

Apart from possibly giving rise to, or referring to, subsequent agreements or subsequent practice of the parties themselves under articles 31, paragraph 3 (a) and (b),

and 32, pronouncements by expert treaty bodies may also otherwise contribute to, and thus be relevant for, the interpretation of a treaty. **Paragraph 4** addresses this possibility by way of a without prejudice clause.

Mr. Chairman,

Let me conclude by drawing the attention of the Sixth Committee to the recommendation of the Commission, made in accordance with articles 16 to 21 of its Statute, that the draft articles be transmitted, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by **1 January 2018**.

This concludes my introduction of chapter VI of the report, as well as the first cluster of issues.

Thank you very much for your kind attention.