STATEMENT BY

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ON

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STATEMENT BY EBENEZER APPREKU, ESQ, LEGAL ADVISER/DIRECTOR LEGAL AND CONSULAR BUREAU OF THE MINISTRY OF FOREIGN AFFAIRS AND REGIONAL INTEGRATION OF THE REPUBLIC OF GHANA ON AGENDA ITEM 79 REPORT OF THE INTERNATIONAL LAW COMMISSION, NEW YORK, UN GENERAL ASSEMBLY SIXTH LEGAL) COMMITTEE (INTERNATIONAL LAW WEEK) 67th SESSION.

At the outset I wish to commend the Chairperson and his Bureau for their able stewardship as well as the Secretariat for the valuable support. I also wish to congratulate the Chairman and Members of the Commission and wish to assure them of Ghana's cooperation in advancing its work on current and new topics selected for the next *quinquennium.* We subscribe to the view that achieving general agreement in chosing topics is not enough and that the ILC would accord priority to the topics which meet the necessity or desirability or ripeness test within the letter and spirit of the ILC Statute in order to enlist Commission's time and other resources in a more judicious manner during the quinquennium.

Mr Chairperson. Given the time constraints and the fact that previous speakers have already articulated some of our views on the topics I wish to pronounce myself on, I would endeavour to be very brief. This statement will be supplemented by additional written submissions to the Commission following ongoing national consultations on the relevant topics on the agenda of the Commission. We commend and appreciate the work of all Rapporteurs for their hard work and diligence.

CHAPTER V: EXPULSION OF ALIENS

On this topic of **Expulsion of Aliens,** we reiterate Ghana's views expressed in previous sessions and wish to underscore the overarching importance of the following elements: respecting the dignity of the person, regardless of residence, due process and the responsibility of states not to deny access to justice, the exhaustion of local remedies avoiding hasty expulsions whilst appeals are pending and allowing aliens facing imminent deportation to be given reasonable opportunity to carry along their personal belongings, which regardless of status they would have acquired through legal means; the avoidance of collective expulsion which have the tendency of undermining the availability of procedural guarantees. Principle of non-discrimination. Some of the principles enunciated by the ILC in its consideration of the treatment of aliens in its early years remain relevant including the view that it is not enough to respect the principle of non-discrimination if an expelling state fails to respect the minimum standards of human rights for both citizens and foreigners alike. Ensuring that procedures for the identification or determination of nationality of aliens avoids a tendency to reach arbitrary or hasty conclusion of an alien's nationality, bearing in mind that the mere possession of a travel document (passport) is only prima facie, and not conclusive, evidence of nationality as the ICJ posited in the *Nottebohm case.* The draft articles should not derogate from the provisions of the Migrant Workers Convention which strives to protect and balance the interests of both originating, destination and transit states in an equitable manner. Existing laws of Ghana applicable to aliens contain safeguards for the humane treatment of aliens who have unfettered access to the courts of Ghana. Ghana's comprehensive Migration Policy being developed has so far paid considerable attention to international human rights and humanitarian norms.

CHAPTER VI: PROTECTION OF PERSONS IN THE EVENT OF DISASTER

This topic is ripe for codification and progressive development in response to the various General Assembly resolutions concerning disasters and humanitarian emergencies including the countless resolutions and declarations including those recommended by the Third Committee. Various Guidelines have been adopted reflecting the perspectives of various stakeholders involved in humanitarian work and diplomacy such as the ICRC and the IFRCRC and the OCHA which are formulated as non-binding operating guidelines or practical manual. Very few, if any, of the Third Committee resolutions relevant to this topic make any reference to the ongoing work of the ILC on the topic. However, it is gratifying to note that in their introduction to the recent guidelines for UN and non-state actors carrying out humanitarian missions, the Special Coordinator for Humanitarian and Emergency Relief and the Special Representative on Internally-Displaced Persons took note of the ILC's work on this topic which they described as exploring additional Responsibilities of States in cases of Disasters and humanitarian emergencies. We believe that the ILC could add value by bringing greater legal clarity and precision to the soft law developed by disparate stakeholders taking account the fact the a number of Groups of States and regional organizations have already adopted binding treaties such as the African Union Convention on Protection and Assistance of Internally Displaced Persons, the Inter-American Convention on Disaster Assistance and the Food Aid Conventions which set out generally agreed legal principles including transparency, non-discrimination, impartiality, neutrality and information-sharing, non-interference, respect for the dignity of affected populations, sovereignty and territorial integrity, priority to be given to vulnerable goods and the duty of assisting States to avoid making food aid in times of emergency assistance undermine the sustainable long term development of agricultural and related economic sectors of the receiving or affected state; the primary duty of States to assist their populations and a correlated duty to request assistance where required assistance exceeds the national capacity of affected the States; the duty of neighbouring third states to facilitate and not impede humanitarian assistance passing through territorial to the affected state.. the right of affected populations discriminated against or deliberately deprived of humanitarian assistance for political reasons to directly request emergency or humanitarian assistance in times of disaster has been recognised in some of these instruments. The African Union Convention on Internally Displaced even confers a duty and right of Member States to intervene to assist and protect internally displaced persons in situations of threats to or breaches of international peace and security. It is our understanding that the definition of Disasters encompasses both natural and made-made causes of disasters.

CHAPTER VII: IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

In view of the persistent objections by many African States concerning the provisions of the Rome Statute of International Criminal Court, the African Union Commission on International Law (AUCIL) is also examining this subject. I am aware that some members of AUCIL have began general consultations with the ILC in keeping with their respective Statutes. In this spirit, the Special Rapporteur may wish to interact with the AUCIL Special Rapporteur to exchange views on this particular subject.

It is recalled that the ICC was established partly with the view to overcoming the deadlock in determining the scope of universal jurisdiction under customary international law in cases of genocide and other international crimes in the context of ensuring individual accountability for genocide, war crimes and crimes and crimes against humanity. During the process of negotiating

the Genocide Convention, the International community was divided on the question as to whether the Convention should give rise to a universal jurisdiction over Genocide for nationals of States Parties and non-States alike. The international community failed to achieve a consensus on whether a permanent international criminal court could be established for Genocide with possible exercise of universal jurisdiction. Thus, the General Assembly upon the recommendation of the Sixth Committee passed a resolution requesting the ILC to examine the possibility of establishing such a court separately or as a chamber of the ICJ. The *travaux preparatoire* also show that the controversy about universal jurisdiction under customary international law continued when the ILC was also considering the draft Code of Offences against the Peace and the Security of Mankind (1996). Neither the ILC and subsequently the sixth Committee achieved a consensus on this subject and thought that a treaty-based permanent international criminal court with universal membership will resolve the question of the controversy about the concept of universal jurisdiction under customary international law for Genocide and other serious crimes of the most concern to the international community. So it is not surprising that to ensure that no state becomes a haven for impunity and that no individual escapes accountability for such serious crimes, the Rome Statute system, besides the original jurisdiction of the ICC to commence prosecutions proprio motu, also confers the Security Council with powers to refer cases to the ICC under Chapter VII of the UN Charter and further allows non-States parties to avail themselves of the jurisdiction of the ICC. In the light of the trend where a number of state officials including ex-Heads of States have been prosecuted or held to account by national and international tribunals after leaving office, the questions the Special Rapporteur might wish to consider in her study should include the following:

Whether the framers of the Rome Statute deliberately intended to create a *lex specialis* when it comes to the immunity of Head of States and other state officials vis-a-vis the fight against impunity

What would have been the attitude of the ICJ in its recent decisions relating to the immunity of state officials if the states concerned complained not about an attempt by national courts in France and Belgium to exercise criminal jurisdiction over their state officials but rather the forum complained of was the ICC: this, given that the Rome Statute does not expressly makes exception for state officials including heads of State and only makes an ambiguous reference to the need to respect rules of international law.

What should or ought to be the attitude of the ICJ if the serious crime for which a court seeks to exercise jurisdiction over a state official was committed prior to the appointment of the state official concerned, be it a Foreign Minister or a Head of State or Government;

What should or ought to be the attitude of the ICJ or any national or international criminal tribunal or court in cases where the internal law or constitution of state makes it possible for a certain category of state officials who alleged to have perpetrated serious or grave crimes to stay in office for life with no term limits thereby putting them beyond the reach of accountability.

Since the Genocide Convention aims not just at punishing crimes but also preventing them, what is the guarantee that a state official alleged to have perpetrated genocide would not repeat the crime before he leaves office if he cannot be [prosecuted for the alleged crimes he or she is alleged to have committed at first.

CHAPTER IX THE OBIGATION TO EXTRADITE OR PROSECUTE *(AUT DEDERE AUT JUDICARE)*

As observed by members of the ILC this topic properly belongs to the avenue of customary international law and like Universal Jurisdiction, the obligation to extradite or prosecute *(aut dedere aut judicare* is less controversial make provisions if enshrined in a treaty binding states parties, such as the Genocide Convention, the Geneva Conventions on the Laws of War and Additional Protocols . The ICC Rome Statute also provides for prosecution by the ICC in default of prosecution by national authorities (known as the principle of complementarity) The difficulty encountered by the Committee of Legal Experts of the League of Nations(the predecessor of the ILC) when it considered the subject of the exercise of jurisdiction outside the territoriality principle seem to be present with us today, thus making any progress in studying or codifying these two, arguably, twin subjects a very difficult enterprise. The League of Nations Committee was reported to have decided to abandon the subject of the treatment of aliens despite the PCIJ (predecessor of the ICJ) dictum in the Lotus case, in which the Court said there was no rule of international law to prevent a State from exercising jurisdiction over aliens with regard to crimes committed abroad. According to a report of the ILC (1948) 'The reason underlying the recommendations of the Rapporteur and the decision of the Committee was that, in view of the diversity of national systems on the subject " the international regulation of this question by way of general convention, although desirable, would encounter grave political and other obstacles". In the light of this historical experience, the problems which have compelled the ILC to pause and reflect on whether or not to continue its consideration of the subject of the obligation to extradite or prosecute *(aut dedere aut judicare)* and its related subject of Universal Jurisdiction under international law in particular customary law, would seem to be a case of *déjà vu.* For example, it was thought that there was should be no controversy about the general view that piracy, one of the earliest crimes first to be recognised historically as a crime amenable to universal jurisdiction under customary international law, and, therefore, a veritable candidate for *aut dedere aut judicare.* But the current debates in the Sixth Committee on this subject suggest that not all states agree that piracy was generally accepted as *hostis humanis generis* under customary international law. Also the idea that torture could be another possible candidate for *aut dedere aut judicare* and Universal jurisdiction under customary international law because of the number of States Parties to the various treaties outlawing torture, and the fact that no State would accept that it carries out torture as a State policy, has also proved to be controversial as well within the ongoing debate in the Sixth Committee. Considering that historically universal jurisdiction has been going back and forth between the ILC and the Sixth Committee owing to the lack of consensus on its scope and even definition, the solution to the impasse facing the ILC on these twin subjects of *aut dedere aut judicare and universal jurisdiction* is not to refer the current work of the working group of the Sixth Committee on UJ back to the ILC. Rather the sixth committee's working group should focus on making progress directly within the sixth committee in determining the Scope and Application of Universal Jurisdiction. In the end, the answer might lie in the universality of the Rome Statute AS was originally intended by the framers of the Rome Statute with no State falling outside its membership.

CHAPTER VII: PROVISIONAL APPLICATION OF TREATIES

It is not uncommon o find States enquiring whether bilateral treaties Ghana ahs signed could enter into force provisionally in light of our national constitutional provision requiring all agreements to be ratified by Parliament. Despite this constitutional provision, Ghana has signed a number of treaties, including ECOWAS Protocols requiring provisional entry into force pending

compliance with national constitutional procedures legislative approval. Ghana endeavours to ratify such treaties as soon as possible after significance. But one Convention which the Rapporteur may wish to look at in his entered into force provisionally for a limited period (10), this grace period being part of the complicated set of compromises reached during the negotiations to facilitate the adoption of the UNCLOS. An examination of the legal effect of non ratification of the Part XI by States which are parties to the UNCLOS but are yet to ratify the Part XI agreement will be an interesting dimension worthy of the attention of the Special Rapporteur. And the Commission. But perhaps, any negative consequences of provisional application of treaties could be mitigated by the principle that a Signatory State to a Treaty is bound not to act in a manner that will defeat the object and purpose of the treaty even before ratification.

CHAPTER VIII. FORMATION AND EVIDENCE OF CUSTOMARY INTERNATIONAL LAW

We welcome this topic and intend to present a comprehensive written submission to the Commission by January 2014. But a few preliminary comments will suffice for now. We note that this subject was considered during the second session of the ILC under the title ways and means of identifying how evidence of customary international law may be made readily available'. The Special Rapporteur must avoid any pitfalls that might have been experienced by the ILC several decades ago. We would have wished the title had remained the same for consistency, lest we enter the realm of making a distinction without a difference. Formation could connote both a state of the law in evidence or the process of making the law. The methodology proposed by the Special Rapporteur is the right course as was followed in the ILC's earlier study in accordance with its Statute. But greater effort should be made to search for and reflect the State practice, precedents and doctrines of all nations and regional organizations from both developing and developed countries alike. We agree that the work cannot cover all aspects of customary law. We believe the topic should attempt to bring further clarity to *jus cogens* and not shy away a rigorous study of it.

The ultimate goal is not just to register existing rules of customary international law or just state or restate those rules but to strive to bring greater precision, clarify and certainty to existing rules of customary international law. The Rapporteur may also examine areas where despite the existence of established principles of customary international law, State practice is at variance with those established rules. Another question the Special Rapporteur might to wish to consider is whether there already exist an established or emerging rule of customary international law supporting the view that the right to life the abolition or a duty to abolish of the death penalty or whether torture is now a crime recognized customary international law as a crime against humanity judging by the number of states parties to various treaties prohibiting torture.

That the Convention on the Jurisdictional immunities of State and their Properties is not in force and it is at times difficult to identify which provisions represents codification of customary international law and which parts reflect progressive development of new rules became evident an on going case pending before the Courts of Ghana since October 2012 involving a private creditor and foreign State. This case is part of the reason special attention should be attached to the work of the Special Rapporteur whose conclusions should serve as useful guide to all practitioners and domestic courts.