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Statement by Mark Simonoff, Minister Counselor, Legal Affairs, United States Mission to the United Nations at a General Assembly Sixth Committee Session on November 4, 2013. Agenda Item 81–Report of the International Law Commission on the Work of its 63rd and 65th Sessions: Part III: 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 / Extradite or Prosecute / Most-Favored Nations Clause

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Thank You, Mr. Chairman. I would like to thank the Chairman of the Commission, Professor Bernd Niehaus, for his introduction of the Commission's report. I appreciate the opportunity to comment on the topics that are currently before the Committee.

Protection of Persons in the Event of Disasters

Mr. Chairman, turning first to the topic of "Protection of Persons in the Event of Disasters," the United States appreciates the Commission's ongoing work and in particular the efforts of the Special Rapporteur, Mr. Eduardo Valencia-Ospina.

We appreciate the Commission's continued work on Draft Article 12, addressing "Offers of Assistance," and in particular the recognition in the commentary that offers of assistance are "essentially voluntary and should not be construed as recognition of the existence of a legal duty to assist." We also value the commentary's affirmation that offers of assistance made in accordance with the present draft articles may not be discriminatory in nature, and that offers of assistance in accordance with the draft articles cannot be regarded as interference in the affected State's internal affairs.

We believe additional consideration is merited, however, of the distinction in this draft article between the relative prerogatives of assisting actors. Draft Article 12 provides that States, the United Nations, and other competent intergovernmental organizations have the "right" to offer assistance, whereas relevant non-governmental organizations "may" also offer assistance. The commentary suggests this different wording was used for reasons of

emphasis, in order to stress that States, the United Nations, and intergovernmental organizations are not only entitled but encouraged to make offers of assistance, while non-governmental organizations have a different nature and legal status. We suggest eliminating the distinction and providing instead that States, the United Nations, intergovernmental organizations, and non-governmental organizations "may" offer assistance to the affected State, in accordance with international law and applicable domestic laws. While there is no doubt that States, the United Nations, and intergovernmental organizations have a different nature and legal status than that of non-governmental organizations, that fact does not affect the capacity of non-governmental organizations to offer assistance to an affected State, in accordance with applicable law. The United States also believes that non-governmental organizations should be encouraged – like States, the United Nations, and competent intergovernmental organizations – to make offers of assistance to affected States, in accordance with applicable law.

More generally, we remain concerned with an overall approach to the topic that appears to be based on legal "rights" and "obligations." We would continue to emphasize our view that the Commission could best contribute in this area not by focusing on legal rights and duties, but by providing practical guidance to countries in need of, or providing, disaster relief.

For example, although the United States greatly values individual and multilateral measures by States to reduce the risk of disasters, and we have implemented such measures domestically, we do not accept the assertion in Draft Article 16 that each State has an obligation under international law to take the necessary and appropriate measures to prevent, mitigate, and prepare for disasters. The voluminous information gathered by the Commission describing national and international efforts to reduce the risk of disasters is impressive and valuable, but we do not believe that such information establishes widespread state practice undertaken out of a sense of legal obligation; rather, national laws are adopted for national reasons and the relevant international instruments typically are not legally binding. As such, there is no basis to conclude that this is a rule of customary international law. To the extent this article reflects progressive development of the law, it ought to be identified as such in the commentary to this article. Moreover, we question the practical impact of such a rule considering that it would be up to each State to determine what risk reduction measures are necessary and appropriate. Finally, the draft article should be re-titled "Reduction of risk of disasters," to align it with similar articles such as draft articles 14 ("Facilitation of external assistance") and 15 ("Termination of external assistance").

We have similar concerns regarding Draft Article 14, though we commend the Commission and the Rapporteur for their work on the draft article in other respects, including the emphasis it places on the importance of the affected State taking the necessary measures within its national law to facilitate the prompt and effective provision of external assistance regarding relief personnel, goods, and equipment – in particular, among other things, with respect to customs requirements, taxation and tariffs. Such steps can address a major and avoidable obstacle to effective assistance. Indeed, while

we agree with the idea that it is generally beneficial for an affected state to take steps to exempt external disaster-related assistance goods and equipment from tariffs and taxes in order to reduce costs and prevent delay of goods, we would suggest eliminating the notion in the commentary that might encourage states as an alternative to lessen such tariffs and taxes. Along similar lines the draft article contains an illustrative list of measures for facilitating the prompt and effective provision of external assistance; without prejudice to our views about whether the article should be framed as being based on legal rights and obligations, we suggest adding to that list measures providing for the efficient and appropriate withdrawal and exit of relief personnel, goods and equipment upon termination of external assistance. States and other assisting actors may be more likely to offer assistance if they are confident that, when the job is done, their personnel, goods and equipment will be able to exit without unnecessary obstacles.

Identification of customary international law

Mr. Chairman, with respect to the topic "Identification of Customary International Law," the United States extends our compliments to Sir Michael Wood for his excellent work on the topic in his first report as Special Rapporteur. Mr. Wood's initial Note on this topic set forth an excellent road map for how the Commission might tackle this issue and highlights that there are still many unsettled questions in this area that could benefit from the attention of States and the Commission.

Mr. Wood's report this year provides an important review of relevant authority in this area, in particular regarding relevant decisions from international courts and tribunals. This will serve as a valuable foundation as the work on the topic moves ahead. The report also highlights the difficulty of analyzing state practice due to the paucity of publicly available materials. We believe that state practice is a critical ingredient to the Commission's work in this area, and would hope to see it play a larger role as this topic progresses. To that end, as we have stated previously, we are reviewing United States practice with respect to the formation and development of customary international law with a view to providing materials that may be useful to the Commission, and we anticipate being able to respond by the requested deadline in January 2014.

The report canvassed a diverse array of views on questions related to the formation and evidence of customary international law. Recognizing that the work is in its early stages and that covering all viewpoints provides an important foundation for the work to progress, we hope that, ultimately, such diversity will not obscure areas that should be clear, such as the importance of both state practice and *opiniojuris* in the formation of customary international law.

With respect to the inclusion of *jus cogens*, we agree with the Special Rapporteur that it is better not to deal with that issue as part of the current topic.

In general, we echo the observation in Mr. Wood's initial report that, as work on this topic proceeds, it is critically important that the results of the Commission's work not be overly prescriptive.

Once again, we commend Mr. Wood for his work on this topic thus far, and welcome its further elaboration according to the plan established in his initial note.

Provisional application of treaties

Mr. Chairman, turning to the topic, "Provisional Application of Treaties," the United States thanks Mr. Juan Manuel Gómez-Robledo for his first report.

The work on this topic appears to be at an early stage. As such, we can offer general reactions in anticipation of more detailed interaction as the Commission's work evolves. As we have previously noted in discussing this topic, our approach begins with the basic proposition that provisional application means that states agree to apply a treaty, or certain provisions, as legally binding prior to its entry into force, the key distinction being that the obligation to apply the treaty – or provisions – in the period of provisional application can be more easily terminated than is the case after entry into force. We hope that the result of this work is clear on this basic definition.

As we have in the past, the United States urges caution in putting forward any proposal that could create tension with the clear language in Article 25 of the Vienna Convention on the Law of Treaties as it relates to provisional application.

The current report touches on the interaction between domestic law and the international law regarding provisional application. As the Special Rapporteur notes, domestic law is not, in principle, a bar to provisional application, but it seems equally plain to us that a State's domestic law may indeed determine the circumstances in which provisional application is appropriate for that State. The Special Rapporteur also alluded to concerns that provisional application may be used to sidestep domestic legal requirements regarding the conclusion of international agreements. The appropriateness of provisional application under a State's domestic law is a question for that State to consider. In this regard, the United States does not agree with the Special Rapporteur's characterization of the provisional application of a certain maritime boundary treaty mentioned in the report. In our own practice, we examine our ability under domestic law to implement a given provision or agreement pending entry into force before we agree to apply it provisionally, and do so only consistent with our domestic law.

We note the Special Rapporteur describes the goal of his work on this topic to "encourage" and provide "incentives" for the use of provisional application. This appears to reflect his conclusion that provision application is rarely used, and that this fact suggests that States are "unaware of its potential." In our view, the question of whether States make use of provisional application or not depends on the particular circumstances of a given agreement or situation. For purposes of this report, the frequency of use seems to be a separate and secondary issue compared to clarifying the nature of provisional application and how to make use of it clearly and effectively.

Although bringing additional clarity to this area of the law may indeed result in more frequent use of provisional application, we would urge the Special Rapporteur to focus on provisional application itself rather than on increasing its use.

Protection of the Environment in Relation to Armed Conflict

The United States congratulates Ms. Marie Jacobsson on her appointment as the Special Rapporteur for the topic entitled "Protection of the environment in relation to armed conflicts," which has now been included in the ILC's program of work. We recognize the deleterious effects armed conflict has had on the natural environment, and we believe this is an issue of great importance. The U.S. military has long made it a priority to protect the environment not only to ensure the availability of land, water, and airspace needed to sustain military readiness, but also to preserve irreplaceable resources for future generations. Indeed, we reaffirm that protection of the environment during armed conflict is desirable as a matter of policy for a broad range of reasons, including for military, civilian health, and economic welfare-related reasons, in addition to environmental ones as such.

However, we are concerned that this topic encompasses broad and potentially controversial issues that could have ramifications far beyond the topic of environmental protection in relation to armed conflict, such as the issue of concurrent application of bodies of law other than the law of armed conflict during armed conflict. Any effort to come to conclusions about *lexspecialis*in general or the applicability of environmental law in relation to armed conflict in particular – especially in the abstract – is likely to be difficult and controversial among States.

We therefore concur in the Special Rapporteur's view that this topic is not well-suited to a draft convention and we welcome her decision to focus on identifying existing rules and principles of the law of armed conflict related to the protection of the environment. We anticipate that this review will demonstrate that the law of armed conflict contains a body of rules and principles relevant to environmental protection. For example, under the principle of distinction, parts of the natural environment cannot be made the object of attack unless they constitute military objectives, as traditionally defined, and parts of the natural environment may not be destroyed unless required by military necessity. However, certain treaty provisions related to the protection of the environment during armed conflict have not gained universal acceptance among States either as a matter of treaty law or customary international law. We also note the suggestion that it is "not the task of the Commission to modify . . . existing legal regimes," in particular the law of war. We urge the ILC to continue to take that consideration into account as it continues its work on this topic.

The Obligation to Extradite or Prosecute (*Autdedereautjudicare*)

Mr. Chairman, with respect to the topic entitled "The Obligation to Extradite or Prosecute (*autdedereautjudicare*)," we would like to thank the ILC Working Group for the Report

found at Annex A of the ILC 2013 Annual Report for the sixty-fifth session. The report ably recounts the extensive work by the Commission on this topic since its inception in 2006, the diverse array of treaty instruments containing such an obligation, and important developments such as the International Court's 2012 judgment on *Questions relating to the Obligation to Prosecute or Extradite*. The United States agrees with the Working Group that "it would be futile for the Commission to engage in harmonizing the various treaty clauses on the obligation to extradite or prosecute" (Annex A, para. 18).

Further, while we consider extradite or prosecute provisions to be an integral and vital aspect of our collective efforts to deny terrorists a safe haven, and to fight impunity for such crimes as genocide, war crimes and torture, there is no obligation under customary international law to extradite or prosecute individuals for offenses not covered by treaties containing such an obligation. Rather, as the Working Group notes, any efforts in this area should focus on specific "gaps in the present conventional regime" rather than a broad-based approach (*ibid.*,para. 20). Accordingly, we commend the Working Group for its report, which we think allows the Commission to bring to closure its work on this topic.

Most-Favored-Nation clause

As regards the Most-Favored-Nation Clause topic, we appreciate the extensive research and analysis undertaken by the Study Group, and wish to recognize Donald McRae in particular for his stewardship of this project as Chair of the Study Group, Mathias Forteau for his service as Chairman in Professor McRae's absence, as well as the other members of the Commission who have made important contributions in helping to illuminate the underlying issues.

We support the Study Group's decision not to prepare new draft articles or to revise the 1978 draft articles. MFN provisions are a product of specific treaty formation and tend to differ considerably in their structure, scope, and language. They also are dependent on other provisions in the specific agreements in which they are located, and thus resist a uniform approach. Given the nature of MFN provisions, we believe that including guidelines and model clauses in the final report risks an overly prescriptive outcome and therefore would not be appropriate. We continue to encourage the Study Group in its endeavors to study and describe current jurisprudence on questions related to the scope of MFN clauses in the context of dispute resolution. This research can serve as a useful resource for governments and practitioners who have an interest in this area, and we are interested to learn more about what areas beyond trade and investment the Study Group intends to explore.

Thank you, Mr. Chairman.