(Check against delivery)

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

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 chapters 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 **"[illegible]".**

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 offici**

Mr. Chairman,

As alluded to earlier, this year's session wa

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 Commission 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

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.

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 concernsthe **Use of terms**. The first thing to noticeis 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 subparagrau</MCs

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

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 a 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. hTd0.0w 1.52 0 Td

"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 13. 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

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

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

Governments. The rep

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.

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 ju-14(3 Td (o j)s /TT2 1 Tf 0 Tw04 Tc 0.204 Tw -31.4.85d*

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

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 sometimes the extent to which they are 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

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 it made reference to earlier, the Secretariat has invited Governments to provide information regarding their

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,

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 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, 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 IV of the report, as well as the first cluster of issues.

Thank you very much for your kind attention.