Statement by

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On Report of the International Law Commission on the Work of its seventy first session

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Cluster II - Chps: VI (Protection of the environment in relation to armed conflicts), VIII (Immunity of State officials from foreign criminal jurisdiction)

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In the name of God, the Compassionate, the Merciful

Mr. Chairman,

We appreciate the Commission for the adoption of the draft principles and its commentaries on the first reading On "Protection of the environment in relation to armed conflicts". I would also like to thank the Special Rapporteur Ms. Marje Letho for preparation of the second report which focuses on the responsibility of states and non-states actors and the protection of natural resources.

As a general comment, we reiterate that the present Draft Principles and commentaries thereto would be merely limited to international armed conflicts, as its application to non-international armed conflicts, from a technical point of view, bring about some difficulties in the description of obligations of non-state actors and the threshold of non-international armed conflicts. Moreover, the international and non-international armed conflicts are different in nature and therefore, the application of related rules in the non-international domain would be different. The draft principles should take these differences into account. However, it should be noted that the acts of non-state actors/insurgents in a non-international armed conflict that causes damage to the environment entails the individual criminal responsibility of that non-state actor/insurgent under the national legal system.

On the question of protected zones, we further reiterate our understanding from the topic as aiming to fill the existing gaps in international humanitarian law concerning the protection of environment. In this regard, we believe that the list of vital infrastructures excluded from military targets in article 56 of the 1977 first Protocol Additional to the Geneva Conventions is merely illustrative. The exclusion of oil platforms and other oil production and storage facilities

especially those built in the continental shelf has proven to run counter to the purposes of the drafters of said article to protect the environment.

With regard to the definition of environment including natural resources, my delegation is of the view that natural resources are not limited to the mineral resources, but it includes the other high-value resources like water. It is noteworthy that the illegal exploitation of natural resources and diversion of the routes of the watercourses in occupied territories by occupying power can seriously impair the environment. In this regard, we emphasize that the principle of prohibition of pillage is applicable in situation of occupation as well as during and after the armed conflict.

In considering the definition of occupation in relation to armed conflict, we concur with the commission (stipulated in document A/74/10, p. 265) that the established understanding of the concept of occupation is based on article 42 of the Hague Regulations of 1907. In this context, we maintain that presence of armed forces is only one of requirement of the occupation and the criteria of control of territory without presence of armed forces also should be taken into account. This notion also has been confirmed and recognized by the International Court of Justice which has referred to it as the exclusive standard for determining the existence of a situation of occupation under the law of armed conflict.

On the Draft Principle 8 regarding the human displacement, we are of the view that this draft principle could be, under law of occupation, useful to apply to the situation of occupation. Furthermore, we believe that the occupying power has a duty to avoid the forced displacement of the population when they are not in a serious danger.

Mr. Chairman,

Turning to the topic "Immunity of State officials from foreign criminal jurisdiction", my delegation would like to thank the Special Rapporteur Ms. Concepción Escobar Hernández, for preparation of the seventh report which continues to address the consideration of procedural aspects of immunity.

At the outset, we make following comments on the draft article 7, as one of most controversial draft articles from methodological and substantive point of view.

1- We express again our disappointment with the manner in which draft article 7 has been provisionally drafted. The adoption of Articles through vote in the Commission is a matter of concern and not only may have an adverse impact on the working methods of the Commission but also indicates that there has been a

fundamental division of opinions on certain issues among members, raising difficulty to conclude whether draft article 7 reflects *lex lata*. Therefore, we believe that it is not possible to remedy through procedural safeguards the substantive flaws in draft article 7. Moreover, we believe that the Special Rapporteur has stepped into the path of progressive development of international law by proposing draft article 7 which does not benefit from sufficient, widespread, representative and consistent state practice. This is why we do not agree that the draft article represents an appropriate means of addressing the issue.

2- We would like to note that the immunity of officials is distinct from immunity of states. The commentary of draft article 7 makes reference to some cases and national legislations which are related to immunity of states to establish an exception to immunity of officials from foreign criminal jurisdiction. Obviously, such legislation and cases could not help the ILC to show a clear trend towards considering the commission of international crimes as a bar to the application of immunity *ratione materiae* of State officials from foreign criminal jurisdiction.

3- We are of the view that, instead of enlisting specific crimes, such exception is best to be applied solely with regard to the most serious crimes of international concern, as there is doubt whether State practice and jurisprudence support the inclusion of crimes such as torture, enforced disappearance under the scope of exceptions to the immunity *ratione materie* from foreign criminal jurisdiction.

4- With regard to the question whether there is a conflict between immunity and jus cogens norms in the case of immunity of State officials from foreign criminal jurisdiction in relation to the commission of international crimes, we believe that it is difficult to see how could this conflict come to happen. It is not possible to assume that the existence of criminal responsibility for any crimes under international law committed by a State official automatically precludes immunity from foreign criminal jurisdiction; and that further, immunity does not depend on the gravity of the act in question. In other words, there is no recognized obligation, as a jus cogens norms, on third states to prosecute international crimes as well as to provide a civil remedy, even if there may be a right to do so. Undoubtedly, it would be implausible if the obligation of third states to prosecute the international crimes in their national courts, itself constitute a rule of jus cogens.

Mr. Chairman

Against this backdrop, my delegation would like to make some comments on the topic including its procedural aspects.

We reiterate that the discussion on procedural issues is essential to ensure that immunities are respected in order to safeguard the stability of international relations as well as respect for the sovereign equality of States.

While the immunity of State officials from foreign criminal jurisdiction continues to remain great importance to States, we are of the view that the focus of the Commission would be on the need to establish procedural safeguards to avoid the politicization and abuse of criminal jurisdiction in respect of foreign officials. The significance in the procedural aspects of immunity from foreign criminal jurisdiction has thus indicated itself to be closely linked to the safeguarding and strengthening of immunity and of the principle of the sovereign equality of State. In other words, the Commission needs to strike a balance, in its work, between the principle of the sovereign equality of States and the fight against impunity for the most serious international crimes. However, the proposed draft articles in the seventh report are hardly representing such a balance. For example, according to proposed draft article 10, the forum state has the authority to decide *proprio motu* on the determination of immunity of a foreign official who enjoy immunity *ratione personae*.

Finally, with regard to the draft article 11, there is a need for more elaboration on the concept of "express and clear" waiver of immunity. We are of the view that waiver of immunity as a procedural rule is the exclusive right of sovereign States which shall be declared by the State concerned in a manner that manifests the will of that State to waive the immunity of its official. Therefore, state of the concerned official has an exclusive authority to invoke and waive the immunity of its officials, and the waiver should be express and clear and should mention the official whose immunity is being waived. In relation to article 11(4), we cannot concur with the Special Rapporteur about a general obligation deducted from a treaty on a substantial matter related to individual responsibility that can be deemed as an express waiver. As it bolstered by the International Court of Justice in the *Arrest Warrant* case, the substantial rules of international law cannot overcome procedural rules. Thus, while we admit that immunity does not mean lack of responsibility, at the same time, we are of the view that the responsibility of State officials based on a treaty provision does not contain a waiver of immunity and could not be deemed an express waiver.

I thank you Mr. Chairman.