Statement by Mr Narinder Singh,

Chairperson of the International Law Commission,

to the 50th meeting of the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe

(Strasbourg, 24 March 2015)

The work of the International Law Commission at its sixty-seventh session

Mr Chairman, distinguished Members of CAHDI and Observers, Madam Director,

It is a great pleasure to be here and to present to the Committee of Legal Advisers on Public International Law, CAHDI, the work of the International Law Commission's 2015 session.

This summer, the President of CAHDI, Mr Paul Rietjens, and Ms Marta Requena made the annual visit of CAHDI to the Commission to talk about the work of the CAHDI and of the Council of Europe as it relates to public international law. The members of the Commission appreciated this visit very much.

Apart from the highly valued visit from the Chair of the CAHDI, Mr Paul Rietjens, and the Secretary of the CAHDI, Ms Marta Requena, both of whom addressed the Commission, the Commission also received visits from the Asian-African Legal Consultative Organization (AALCO), the Inter-American Juridical Committee, and the African Union Commission on International Law.

The United Nations Legal Counsel, Mr Miguel de Serpa Soares, and the President of the International Court of Justice, Judge Ronnie Abraham, also made their annual visits and informed about recent developments in their respective institutions.

The United Nations High Commissioner for Human Rights also addressed the Commission. An informal exchange of views was held between members of the Commission and the International Committee of the Red Cross on topics of mutual interest. This included presentations on the preparations for the 32nd International Conference of the Red Cross and Red Crescent Movement, and the updating of the ICRC Commentaries on the Geneva Conventions and Additional Protocols. Presentations were also made on topics on the programme of work of the Commission, including the "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" and "Crimes against humanity."

Introduction

The International Law Commission held the first part of its sixty-seventh session from 4 May to 5 June 2015 and the second part from 6 July to 7 August 2015 at its seat at the United Nations Office at Geneva. This session was the fourth session of the quinquennium.

The composition of the Commission changed further to the resignation of Mr Kirill Gevorgian after his election as Member of the International Court of Justice. The Commission elected Mr Roman A. Kolodkin (Russian Federation) to fill the casual vacancy occasioned by this resignation.

The Commission considered the nine topics on its agenda for this session. The topic "Protection of persons in the event of disasters" was not considered in 2015, since the set of draft articles adopted on first reading in 2014 is currently being examined by Governments, competent

international organizations, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies.

I will present the work done on the topics on the agenda of the Commission in turn, as well as the other decisions taken by the Commission.

The Most-Favoured-Nation clause

The Study Group on The Most-Favoured-Nation (MFN) clause, which commenced it work in 2009, has completed its work by submitting its final report at the present session. The Study Group was chaired by Mr Donald M. McRae. The final report is annexed to the report of the Commission.

The Commission has received and welcomed the report with appreciation. Further, it has endorsed the summary conclusions of the Study Group. In the main:

(a) MFN clauses remain unchanged in character from the time the 1978 draft articles were concluded. The core provisions of the 1978 draft articles continue to be the basis for the interpretation and application of MFN clauses today. However, these draft articles do not provide answers to all the interpretative issues that can arise with MFN clauses.

(b) The Vienna Convention of the Law of Treaties (VCLT) is important and relevant, as a point of departure, in the interpretation of investment treaties. The interpretation of MFN clauses is to be undertaken on the basis of the rules for the interpretation of treaties as set out in the VCLT.

(c) The central interpretative issue in respect of the MFN clauses relates to the scope of the clause and the application of the *ejusdem generis* principle. In other words, the scope and nature of the benefit that can be obtained under an MFN provision depends on the interpretation of the MFN provision itself.

(d) Even though the application of MFN clauses to dispute settlement provisions in investment treaty arbitration, rather than limiting them to substantive obligations, has brought a new dimension to thinking about MFN provisions and perhaps consequences that had not been foreseen by parties when they negotiated their investment agreements, the matter remains one of treaty interpretation.

(e) Whether MFN clauses are to encompass dispute settlement provisions is ultimately up to the States that negotiate such clauses. Explicit language can ensure that an MFN provision does or does not apply to dispute settlement provisions. Otherwise the matter will be left to dispute settlement tribunals to interpret MFN clauses on a case-by-case basis.

The Commission also highlighted that the interpretative techniques reviewed in the report of the Study Group are designed to assist in the interpretation and application of MFN provisions.

The Commission has commended the final report to the attention of the General Assembly, and encouraged its widest possible dissemination.

The Commission has thus concluded its consideration of the topic.

Protection of the atmosphere

The Commission had before it the second report of the Special Rapporteur, Mr Shinya Murase, (A/CN.4/681 and Corr.1 (Chinese only)). The report provided a further analysis of the draft guidelines submitted in the first report, and consequently presented a set of revised draft guidelines relating to the (a) use of terms; (b) the scope of the draft guidelines; and (c) the common

concern of humankind. Further, additional draft guidelines were presented on (a) the general obligation of States to protect the atmosphere and (b) international cooperation.

The debate in the Commission led to the referral by the Commission to the Drafting Committee of draft guidelines 1, 2, 3 and 5, as contained in the Special Rapporteur's second report. This was on the understanding that draft guideline 3, on the common concern of humankind, would be considered in the context of a possible preamble. The Commission decided to defer the referral of draft guideline on the general obligation of States to protect the environment since the Special Rapporteur intimated that he intends to undertake a further analysis of the matter for next year in the light of the debate in plenary.

Upon consideration of the report of the Drafting Committee (A/CN.4/L.851), the Commission provisionally adopted four preambular paragraphs, draft guideline 1, on use of terms, draft guideline 2, on scope, and draft guideline 5, on international cooperation, together with commentaries thereto.

The Commission seeks, through the progressive development of international law and its codification, to provide guidelines that may assist the international community as it addresses critical questions relating to transboundary and global protection of the atmosphere. In doing so, the Commission does not desire to interfere with relevant political negotiations, including those on long-range transboundary air pollution, ozone depletion and climate change, seek to "fill" gaps in treaty regimes nor to impose on current treaty regimes legal rules or legal principles not already contained therein.

The Commission also recognised that this topic straddles law and science. Accordingly, a dialogue between scientists and the Commission was organized by the Special Rapporteur during which presentations were made regarding various aspects concerning the atmosphere and its interaction with the global environment.

Last year, the Commission requested States to provide relevant information on domestic legislation and the judicial decisions of the domestic courts. Any additional informational information would be appreciated.

Identification of customary international law

The Commission had before it the third report of the Special Rapporteur (A/CN.4/682), Sir Michael Wood, which contained, *inter alia*, additional paragraphs to three of the draft conclusions proposed in the second report and five new draft conclusions relating respectively to the relationship between the two constituent elements of customary international law, the role of inaction, the role of treaties and resolutions, judicial decisions and writings, the relevance of international organizations and non-State actors, as well as particular custom and the persistent objector. The report of the Commission for this year reflects the debate of the Commission on the third report.

The Commission referred the draft conclusions contained in the third report of the Special Rapporteur to the Drafting Committee. The Drafting Committee examined the two draft conclusions on acceptance as law (*opinio juris*) as contained in the second report by the Special Rapporteur (A/CN.4/672) and left pending from last year, as well as those presented in his third report this year. The Drafting Committee provisionally adopted, in total, 16 draft conclusions on the identification of customary international law structured in seven parts (A/CN.4/L869). The Introductory Part One contains one draft conclusion on scope. Part Two, with two draft conclusions, sets out the basic approach to the identification of customary international law, consisting of an inquiry into the two constituent elements, and the assessment of evidence in that respect. Parts Three, with five draft conclusions, and Four, containing two draft conclusions, address the basic approach by explaining further the two constituent elements, namely a general practice and accepted as law (*opinio juris*). Part Five then addresses, in four draft conclusions, the significance of certain materials for the identification of customary international law. Finally, Parts

Six and Seven, each containing one draft conclusion, address, respectively, the persistent objector and particular customary international law.

Further to the presentation of the report of the Drafting Committee (A/CN.4/L.869), the Commission took note of the 16 draft conclusions contained therein. It is anticipated that the Commission will, at its next session, consider the provisional adoption of the draft conclusions as well as the commentaries thereto.

In addition, the Commission recalled its request for information made in the previous report (A/69/10) and indicated that it would welcome any additional information.

Crimes against humanity

At its sixty-sixth session (2014), the Commission decided to include the topic in its programme of work and appointed Mr Sean D. Murphy as Special Rapporteur for the topic. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/680).

In his first report, the Special Rapporteur, after assessing the potential benefits of developing a convention on crimes against humanity (section II), provided a general background synopsis with respect to crimes against humanity (section III) and addressed some aspects of the existing multilateral conventions that promote prevention, criminalization and inter-State cooperation with respect to crimes (section IV). Furthermore, the Special Rapporteur examined the general obligation that existed in various treaty regimes for States to prevent and punish such crimes (section V) and the definition of "crimes against humanity" for the purpose of the topic (section VI). The report also contained information as to the future programme of work on the topic (section VII). The Special Rapporteur proposed two draft articles corresponding to the issues addressed in sections V and VI, respectively, which were referred to the Drafting Committee.

The Drafting Committee examined the two draft articles initially proposed by the Special Rapporteur in his first report (A/CN.4/680), together with a number of suggested reformulations that were presented by the Special Rapporteur to the Drafting Committee in order to respond to suggestions made, or concerns raised, during the debate in Plenary. The Drafting Committee provisionally adopted four draft articles as a result of the break-up of the provisions contained in one of the draft articles initially proposed by the Special Rapporteur, as well as the creation of a new draft article. Draft article 1 constitutes the traditional provision on the "scope" of the draft articles on crimes against humanity. Draft article 2, "General Obligation", identifies as the title suggests, a general obligation of prevention and punishment of crimes against humanity that is applicable to the entire set of draft articles. Draft article 3, entitled "Definition of crimes against humanity", provides a definition of crimes against humanity which reproduces essentially Article 7 of the Rome Statute. It contains also a "without prejudice" clause to any broader definition provided for in any international instrument or national law. Finally, draft article 4 "Obligation of prevention", set out the various elements that collectively promote the prevention of crimes against humanity.

Upon consideration of the report of the Drafting Committee (A/CN.4/L.853), the Commission provisionally adopted draft articles 1, 2, 3 and 4, as well as commentaries thereto. These draft articles, together with commentaries, are reproduced in the report of the Commission.

Furthermore, the Commission recalled its request for information made in the previous report (A/69/10) and indicated that it would welcome any additional information.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties.

At the present session, the Commission had before it the third report of the Special Rapporteur, Mr Georg Nolte (A/CN.4/683), which offered an analysis of the role of subsequent agreements and subsequent practice in relation to treaties that are the constituent instruments of international organizations and which proposed draft conclusion 11 on the issue. In particular, after addressing

Article 5 of the Vienna Convention on the Law of Treaties (Treaties constituting international organizations and treaties adopted within an international organization), the third report turned to questions related to the application of the rules of the Vienna Convention on treaty interpretation to constituent instruments of international organizations. It also dealt with several issues relating to subsequent agreements under article 31, paragraph 3 (a) and (b), as well as article 32, of the Vienna Convention on the Law of Treaties, as a means of interpretation of constituent instruments of international organizations.

The Commission decided to refer draft conclusion 11 to the Drafting Committee. The Drafting Committee examined this draft conclusion, together with a reformulation that was presented by the Special Rapporteur to the Drafting Committee in order to respond to suggestions made, or concerns raised, during the Plenary with respect to that draft conclusion.

Further to the presentation of the Report of the Drafting Committee (A/CN.4/L.854), the Commission provisionally adopted draft conclusion 11, as well as the commentary thereto, which are reproduced in the Report of the Commission.

In addition, the Commission requested States and international organizations to provide it with:

(a) any examples of decisions of national courts in which a subsequent agreement or subsequent practice has contributed to the interpretation of a treaty; and

(b) any examples where pronouncements or other action by a treaty body consisting of independent experts have been considered as giving rise to subsequent agreements or subsequent practice relevant for the interpretation of a treaty.

Protection of the environment in relation to armed conflicts

The Commission had before it the second report of the Special Rapporteur, Ms Marie Jacobsson (A/CN.4/685). It should be recalled that this topic is examined from the perspective of three temporal phases, before, during and after armed conflict. Last year's report was dedicated to the first phase, the phase dealing with the relevant rules and principles applicable to a potential armed conflict (peacetime obligations). This year's report dealt with the second phase (during armed conflict) and identified and examined existing rules of armed conflict directly relevant to the protection of the environment in relation to armed conflict.

The report contained five draft principles relating to these questions and three draft preambular paragraphs relating to the scope and purpose of the draft principles as well as use of terms.

Following the debate in Plenary, the Commission decided to refer the draft preambular paragraphs and the draft principles to the Drafting Committee, with the understanding that the provision on use of terms was referred for the purpose of facilitating discussions and was to be left pending by the Drafting Committee.

The Commission subsequently received the report of the Drafting Committee (A/CN.4/L.870), which structured the draft principles bearing in mind the temporal phases of the topic. The report contained two draft introductory provisions (previously entitled Preamble) on the scope and purpose of the topic and six draft principles, provisionally adopted by the Drafting Committee. Whereas one draft principle dealt with measures to be taken during peacetime, namely the designation of protected zones, the five remaining draft principles addressed principles applicable during armed conflict. These latter draft principles addressed matters relating to (i) the general protection of the environment during armed conflict, (ii) the application of the law of armed conflict to the environment, (iii) environmental considerations with respect to the application of the principle of proportionality and the rules on military necessity, (iv) prohibition of reprisals, and (v) protected zones. It emphasized that the draft principles had been prepared on the general understanding that they would normally apply to both international and non-international armed conflicts.

The report of the Commission for this year reflects the debate of the Commission on these draft principles and preambular paragraphs presented by the Special Rapporteur.

The Commission is expected to adopt these draft provisions and principles together with commentaries next year.

In addition, the Commission indicated that it would appreciate being provided by States with information on whether, in their practice, international or domestic environmental law has been interpreted as applicable in relation to international or non-international armed conflict. It also invited information from States as to whether they have any instruments aimed at protecting the environment in relation to armed conflict, for example, national legislation and regulations; military manuals, standard operating procedures, Rules of Engagement or Status of Forces Agreements applicable during international operations; and environmental management policies related to defence-related activities. The Commission would, in particular, be interested in instruments related to preventive and remedial measures.

Immunity of State officials from foreign criminal jurisdiction

The Commission had before it the fourth report of the Special Rapporteur (A/CN.4/686), Ms Concepción Escobar Hernández. Since last year's report addressed the subjective scope of immunity *ratione materiae*, the report this year was devoted to the consideration of the remaining material scope namely what constituted an "act performed in an official capacity", and its temporal scope.

The report contained proposals for draft article 2, subparagraph (f), defining an "act performed in an official capacity" and draft article 6 on the scope of immunity *ratione materiae*.

The report of the Commission for this year reflects the debate of the Commission on these two draft articles presented by the Special Rapporteur.

Following the debate, the Commission decided to refer the two draft articles to the Drafting Committee.

The Commission subsequently received the report of the Drafting Committee (A/CN.4/L.865), and took note of draft articles 2, subparagraph (f), and 6, provisionally adopted by the Drafting Committee. The Commission is expected to adopt these articles together with commentaries next year.

Next year, the Commission will deal with the question of limitations and exception. It would appreciate being provided by States with information on their legislation and practice, in particular judicial practice, related to limits and exceptions to the immunity of State officials from foreign criminal jurisdiction. For that purpose, the Commission indicated that it would appreciate being provided by States with information on their legislation and practice, in particular judicial practice, related to limits and exceptions to the immunity of State officials from foreign criminal jurisdiction.

Provisional application of treaties

The Commission has been considering the topic since its inclusion in the programme of work in 2012. At this year's session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/687), Mr Juan Manuel Gómez-Robledo, which considered the relationship of provisional application to other provisions of the Vienna Convention on the Law of Treaties of 1969, and the question of provisional application with regard to international organizations. The Commission also had before it a memorandum (A/CN.4/676), prepared by the Secretariat, on provisional application under the Vienna Convention on the Law of Treaties between States and

International Organizations or between International Organizations of 1986. The Special Rapporteur further proposed six draft guidelines in his report.

The report of the Commission for this year reflects the debate of the Commission on the third report of the Special Rapporteur.

The Commission referred the six draft guidelines proposed by the Special Rapporteur to the Drafting Committee. The Commission subsequently received an interim oral report, presented by the Chairman of the Drafting Committee, on draft guidelines 1 to 3, provisionally adopted by the Drafting Committee, and which was presented to the Commission for information only. It is expected that the Drafting Committee will continue its consideration of the draft guidelines at the next session, in 2016.

In addition, the Commission indicated that it would appreciate being provided by States with information on their practice concerning the provisional application of treaties, including domestic legislation pertaining thereto, with examples, in particular in relation to:

(a) the decision to provisionally apply a treaty;
(b) the termination of such provisional application; and
(c) the legal effects of provisional application.

Rule of Law

I would just like to highlight that since its sixtieth session in 2008, the Commission has responded annually to the General Assembly's invitation to comment, in its report to the General Assembly, on its current role in promoting the rule of law. The Commission recalls that the rule of law constitutes the essence of the Commission and that the Commission has in mind the Rule of Law in all its work.

Jus Cogens - New topic

The Commission decided to include the topic "*Jus cogens*" in its programme of work, and to appoint Mr Dire Tladi as Special Rapporteur for the topic. As noted in the proposal for the topic, the Commission could make a useful contribution to the progressive development and codification of international law by analysing the state of international law on *jus cogens* and providing an authoritative statement of the nature of *jus cogens*, the requirements for characterising a norm as jus cogens and the consequences or effects or *jus cogens*. The Commission could also provide an illustrative list of existing *jus cogens* norms. The consideration of the topic by the Commission could, therefore, focus on the following elements: (a) the nature of *jus cogens*; (b) requirements for the identification of a norm as *jus cogens*; (c) an illustrative list of norms which have achieved the status of *jus cogens*; (d) consequences or effects of *jus cogens*.

Other decisions and conclusions of the Commission

The Commission recommended that its sixty-eighth session be held in Geneva from 2 May to 10 June and 4 July to 12 August 2016.

The Commission also discussed the possibility of convening a segment of future sessions in New York and recommended that its sixty-eighth session be held in Geneva from 2 May to 10 June and 4 July to 12 August 2016. Based on the information made available, the Commission has recommended that preparatory work and estimates proceed on the basis that the first segment of its seventieth session (2018) would be convened at the United Nations Headquarters in New York.

International Law Seminar

This year the International Law seminar held its 51st session. Twenty-four participants of different nationalities, from all regional groups took part in the session. The participants attended plenary meetings of the Commission, specially arranged lectures, and participated in working groups on specific topics.

The Commission attaches the highest importance to the Seminar, which is intended for young lawyers specializing in international law, young professors or government officials pursuing an academic or diplomatic career in posts in the civil service of their country, especially from developing countries, to familiarize themselves with the work of the International Law Commission and of the status of codification and progressive development of international law, as well as the work of the many International Organizations based in Geneva.

Since 1965, the year of the Seminar inception, 1163 participants, representing 171 nationalities, have taken part in the Seminar. 713 have received a fellowship. It is a matter of concern that against an average of about 22 fellowships a year over the last 50 years, this year only fourteen fellowships (nine for travel and living expenses, three for living expenses only and two for travel expenses only) could be granted.

Since 2013 the Governments of Argentina, Austria, China, Finland, India, Ireland, Mexico, Sweden, Switzerland, and of the United Kingdom had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. The Commission has recommended that the General Assembly should again appeal to States to make voluntary contributions in order to secure the organization of the Seminar in 2016 with as broad participation as possible.

I request the members of CAHDI to kindly persuade their governments to contribute to the Seminar Trust Fund. This would be a very cost effective contribution to the rule of law at the international level, and considering the modest amounts involved, should not be too difficult.

This concludes my presentation, and I would like to thank you for your attention.