

71ST SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY

SIXTH COMMITTEE

REPORT OF THE INTERNATIONAL LAW COMMISSION

Part III: CHAPTERS X (Protection of the environment in relation to armed conflicts), XI (Immunity of State officials from foreign criminal jurisdiction) and XII (Provisional application of treaties)

ADDRESS DELIVERED BY

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Mr Chairman,

On behalf of the Delegation of Spain, I would like to once again congratulate the International Law Commission on the quality of its work during its 68th session, in particular, on this occasion, with regard to the issues addressed in Chapters X to XII of its Report.

Chapter X: Protection of the environment in relation to armed conflicts

Mr Chairman,

With regard to Chapter X, on protection of the environment in relation to armed conflicts, the Spanish Delegation would like to begin this address by congratulating the Special Rapporteur, Ms Marie G. Jacobsson, on her third report. We think she has done an excellent job and, especially, a merit-worthy work of research on State doctrine, jurisprudence and practice. Knowing that she will not be continuing this coming five-year period we would also like to express our most sincere recognition for her most valuable contribution. These congratulations are also extended to the Commission on the lively debates held and the draft principles approved.

We would, however like to make some remarks.

To begin with, the excessive length of the report is noteworthy. The sheer amount of draft principles presented probably also exceeds what is reasonable; particularly, whereas the technical complexity and the very high specialization of the subject and the time (not much) we, the States, have to examine them. In addition, we are not certain that all the draft principles have been sufficiently analyzed. Each draft article should be accompanied by an explanation of the applicability of the rules of environmental law to armed conflicts. Moreover, environmental protection obligations should be specified very clearly for each of the three phases (before, during and after) of armed conflicts in a way that is compatible with the international law of armed conflict. In our opinion, it is not always easy to discern, in the use of the materials employed, which part serves to introduce the subject and which part justifies the draft principles at hand.

Another additional problem is the impossibility of drawing clear limits between the three phases of conflict. It is thus necessary to read the three reports of this five-year period jointly. The task, at least in my delegation's opinion, is not at all simple. The delimitation in time of the first and third phases appears to be particularly complicated.

The consequence is that it is very complex to establish the law governing the third phase, object of this report. The principles corresponding to the second phase (the conflict itself) are sufficiently laid down in the law of armed conflict. Conversely, the ones applicable to

the third phase are much more undetermined and difficult to specify. It should be recalled that peace accords or armistice agreements do not usually contain provisions for the protection of the environment. Practice is, therefore, scarce or practically non-existent. In addition, the report quite often inserts references to phases one and two.

It should also be mentioned that there are issues of far-reaching importance that demand greater attention and study. By way of example: The question of occupation, the practice of non-state actors, the indigenous peoples, the question of responsibility or the applicability of the precautionary principle.

As we said last year, all these problems and the many debates that are taking place at the Commission are clear proof of the difficulty involved in this issue. But they may also be a sign of a lack of the necessary maturity to address this matter.

With regard to specific aspects of the report and of the draft principles, my delegation applauds the new structure of the draft principles, which begin with general provisions applicable to the three phases of a conflict, and continue with provisions regarding the protection of the environment during a conflict. But even so, the criteria for placement of provisions in one part or another remains unclear. By way of example, *draft principle 9*, is located in Part Two ('Principles applicable during armed conflict'), even though the commentary states that paragraph 1 is "relevant during all three phases (before, during and after armed conflict)".

In *draft principle 1* ('Scope') it should expressly state that this instrument is applied to international and non-international armed conflicts. This issue is relevant enough to enable us to forget *ubi lex non distinguit...*

Draft principle 9 (*General protection of the natural environment during armed conflict*) contains three sections; each one of them states a specific provision. This draft is followed by another four, each of which includes a provision. Spain believes that it would be advisable to explain what determines the subsumption of a principle in draft principle 9 or in an *ad hoc* draft, even if it does not affect its value.

It would also be advisable to establish a relationship between recognition of the fact that part of the natural environment could be attacked if it becomes a military objective (resulting, *a contrario*, from paragraph 3 of *draft principle 9*) and the prohibition of attacks against the natural environment by way of reprisals (contained in *draft principle 12*). Perhaps it would be enough to include a "without prejudice clause" at the beginning of this second draft principle.

Chapter XI: Immunity of State officials from foreign criminal jurisdiction

Mr Chairman,

Regarding Chapter XI, on the immunity of State officials from foreign criminal jurisdiction, the Spanish Delegation wishes to begin its address by congratulating our fellow Spaniard Ms Concepción Escobar Hernández on the presentation of her fifth report. We would also like to congratulate the Commission on the analysis—albeit preliminary—that it has conducted and on the two draft articles provisionally approved.

Spain will focus its address on these two draft articles. Before getting into it, allow to mention that Spain has recently issued an Act regarding, *inter alia*, the immunity of the Head of States, Heads of Government and Ministers of Foreign Affairs.

With regard to *draft article 2 f)*, this Delegation agrees with the proposed definition of an “act performed in an official capacity”. This is so from three points of view: (i) we consider it necessary to be present in the draft; (ii) we consider the wording “State authority” to be correct; and (iii) we agree with the Commission in that it is not possible to draw up an exhaustive list of examples in the article, although we believe that the examples offered in the commentary are highly useful.

As regards *draft article 6* (*‘Scope of immunity ratione materiae’*), we have two observations, both about paragraph 3.

Firstly, we do not quite understand why immunity enjoyed by Heads of State, Heads of Government and Ministers for Foreign Affairs after the end of their term of office is not openly described as immunity *ratione materiae*. We do not see any difficulty in using this expression in that framework, especially bearing in mind two circumstances. On one hand, these three categories of persons fall within the definition of “State official” offered in draft article 2, letter d; as such, they undoubtedly enjoy immunity *ratione materiae*, under draft article 5. On the other, it is worth recalling that the expression immunity *ratione materiae* is used in paragraph 3 of draft article 4, which states that “The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*”.

Our second comment is linked to the above. To the extent that Heads of State, Heads of Government and Ministers for Foreign Affairs are considered “State officials”, then why not identify the subjects in paragraph 3 of article 6 not as “individuals” but rather as “officials”, more specifically as “Officials who enjoyed immunity *ratione personae* in accordance with draft article 4”? By doing so, there would be no incoherence whatsoever between draft article 5, which identifies officials as enjoying immunity *ratione materiae*, and paragraph 3 of draft article 6 which, without naming it, recognises the ongoing validity

of such immunity for former Heads of State, former Heads of Government and former Ministers for Foreign Affairs.

Chapter XII: Provisional application of treaties

Mr Chairman,

Proceeding to Chapter XII, on provisional application of treaties, the Spanish Delegation wishes to express its gratitude to the Special Rapporteur on this matter, Mr Juan Manuel Gómez-Robledo, for his fourth report to the Commission. We also thank the Commission for its work on this matter.

Our delegation wishes to make several comments on *draft guideline 10* (*‘Internal law and the observation of provisional application of all or part of a treaty’*), included in the Rapporteur’s Report.

Firstly, we consider that the title could be reduced to ‘Internal law and the observation of provisional application’. This would bring the title into line with those of the other draft guidelines, which merely refer to provisional application, without the words “of a treaty” and certainly not “of all or part of a treaty”.

Secondly, the fact that the draft guideline is limited to States is difficult to understand. As is the case of other draft guidelines (such as 6 or 7), international organisations should also be included. Such organisations are not able to cite their internal regulations to exempt themselves from complying with a treaty that has been applied provisionally.

Thirdly, it would be advisable to bring the wording of this draft guideline into line with Article 27 of the Vienna Convention on the Law of Treaties, and also with draft guideline 8 (*‘Responsibility for breach’*). With a wording that would more closely reflect these provisions, the draft guideline could say: “A State or international organization may not invoke the provisions of its internal law as justification for non-compliance with a provisionally applied treaty”.

Spain is pleased to note that some of the draft guidelines approved by the Drafting Committee in 2016 (such as 3 and 7) incorporate observations made by the Spanish delegation at last year’s Committee. Spain also notes that draft guideline 9 centres on one of the causes for termination of provisional application, namely: notification of intention not to become a party to the treaty in question. We assume that another draft guideline will be formulated, comprising other reasons for termination, and in particular, entry into force of the treaty.

In other considerations, with regard to the Commission's debates, my delegation considers that when addressing the matter of provisional application and reservations, a distinction should be made as to whether the treaty in question has been provisionally applied prior to or after a subject expresses their consent to being bound by said treaty. If a treaty is provisionally applied after being concluded, the reservations shall apply that are set out in the instrument expressing consent to being bound by said treaty. In contrast, if a treaty is provisionally applied prior to being concluded, the following would have to be determined: (i) whether reservations can be formulated; (ii) when such reservations can be formulated: when provisional application is agreed or when a treaty is first applied provisionally; and, (iii) whether such reservations should be confirmed when they are expressed in the consent to be bound, as is the case for reservations formulated at the time of signature, pursuant to Article 23.2 of the Vienna Convention on the Law of Treaties.

The Spanish Delegation still considers that it would be very complicated to include example clauses in the Commission's draft, given the huge potential variety.

Lastly, Spain wishes to reaffirm its confidence that the Commission will address other matters which we consider to be debatable or indeed problematic in relation to provisional application, specifically: May all treaties be applied provisionally, or are there certain treaties—either due to their subject matter or to the potential implications of provisional application—that cannot be applied provisionally? Is provisional application *inter partes* possible? Just for States? Is the period of provisional application included in the calculation of the duration of treaties whose period of application is pre-established? If the period of provisional application were to end without the treaty entering into force, would the effects be *ex tunc* or *ex nunc*?

Thank you very much Mr Chairman.