# ESPAÑA

**68th SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY**

**SIXTH COMMITTEE**

**REPORT OF THE COMMITTEE ON INTERNATIONAL LAW**

**PART I: CHAPTERS I-III, IV (Further agreements and further practice regarding the interpretation of treaties), V (State officers' immunity from foreign criminal jurisdiction) y XII (Other matters).**

**PRESENTATION BY THE PROFESSOR**

**JOSÉ MARTÍN y PÉREZ DE NANCLARES**

**HEAD OF THE INTERNATIONAL LAW DIVISION OF THE MINISTRY OF FOREIGN AFFAIRS AND COOPERATION OF THE KINGDOM OF SPAIN**

New York, 28 October 2013

(Unofficial translation, check against delivery)

Mr Chairman,

Let me begin my presentation by expressing how greatly honoured I am by taking floor, once again, in front of Sixth Committee. Allow also to congratulate you and the other members of the Bureau for your dedicated efforts towards a fruitful result from this Session proceedings. Similarly, I would like to congratulate the International Law Commission for the significant efforts made during this 65th Session in order to advance in handling the various and complex issues included in its agenda.

**Chapters I through III and XII.**

In this context, the delegation of the Kingdom of Spain would like to celebrate the Committee's decision to include in its agenda the issues related to "Environmental Protection in connexion with Armed Conflicts" and the "atmosphere protection". Although the many difficulties of various natures that this undertaking will entail cannot be side-lined, we would like to express our best wishes for success to the Special Rapporteurs, Ms Marie G. Jacobson and Mr Shinya Murase.

We also deem appropriate, in principle, to consider the inclusion of the issue of "Crimes against Humanity" in the long-term agenda. And for good reason since, contrary to the other two categories of international crimes (war crimes and genocide), this issue is not covered by an international treaty binding the States to preventing and punishing such crimes as well as to cooperate towards this end. This issue, as Mr Sean D. Murphy has rightly suggested, would *prima facie* meet the selection criteria established by the Committee itself: it reflects Member States eventual needs towards the progressive development and codification of International Law; its practice currently is in a phase sufficiently advanced; and, it is a specific and, at least in appearance, feasible topic. This will neither be an easy task. And, should it be undertaken, it will require a careful analysis both of the specific limitation aspects to be included in the relevant Convention and, particularly, its precise relationship with the Rome Statute and the role of the International Criminal Court without overstepping their provisions. Therefore, we are not sure the Committee would be able to adopt at first reading a comprehensive project of articles before the end of the current five-year period.

**Chapter IV: Further agreements and further practice regarding the interpretation of treaties.**

Regarding Chapter IV, on further agreements and further practice regarding the interpretation of treaties, the delegation of the Kingdom of Spain would like, first, to congratulate the Special Rapporteur, Professor Nolte, for the significant work achieved in his first report, which we view in a very positive light. In our opinion, it is a report

with bold approached; with a detailed, systematic and extraordinarily well documented formulation on practice and case law, and with a convincing argumentation on international doctrine. In short, it is an excellent (and *gründlich*) and genuine German *Handkommentar* work.

However, we do not think the specific formulation of the conclusions finally submitted meets the expectations raised by the report, its findings being sometimes excessively general. In our opinion, without entering the discussion of the descriptive or prescriptive nature of these, it would be useful if they were more precise and had included sufficient normative content.

In this same context, and from a methodology standpoint, it would perhaps be more appropriate to consider a clearer distinction between bilateral and multilateral treaties. Similarly, we appreciate an insufficient consideration of the 1986 Convention and, accordingly, of the means of interpretation regarding international treaties concluded between States and International Bodies or those concluded between International Bodies. In that regard, the particularities of International Bodies regarding the conclusion, enforcement and interpretation of international treaties should be noted and from the outset taken into account in a greater detail both for any project of conclusions and when discussing international treaties. We are nonetheless aware that this issue may be tackled at a later stage.

Regarding the formulation of the five conclusions submitted together with their respective discussion, my delegation would like to make, in this presentation, just a few and very specific comments.

Regarding the project of conclusion 1, we believe that Articles 31 and 32 of the Vienna Convention on the Law of Treaties effectively reflect, without any doubt whatsoever, the Customary Law. However, we consider it would be interesting to clarify also whether the non-inclusion of Article 33 might *a contrario* mean that this provision of the Vienna Convention does not reflect the Customary Law; an interpretation with which we could not positively agree. And, by the way, the discussions of the 1966 Committee and the *travaux préparatoires* of the Vienna Convention might be useful for different aspects, even if only to reminds us of the variety of doctrinal and conceptual approaches existing in this matter. Similarly, this delegation is considering whether it might be useful to compile specific examples of means of interpretation and, if relevant, to classify them within the discussion in order to obtain an overview, although not necessarily a comprehensive one, of such means of interpretation.

Project of conclusion 2 deserves the support of this delegation, since we consider that the hierarchical organisation of the various means of interpretation could represent a distorting element for the development of the Parties' intention regarding the interpretation of the relevant treaty. We are, however, aware that the wording might result insufficient for those considering that the Parties' intention should prevail over other means of interpretation, especially where such an agreement constitutes "an authentic interpretation *that should be taken into account* for the purposes of the

interpretation of the treaty". Notwithstanding this, we consider the wording to be appropriate when considering interpretation as a single combined operation in which there is no hierarchy among the means of interpretation of Article 31.

Regarding conclusion 3, my Delegation attaches the highest relevance to the very delicate matter of Intertemporal Law. We share the opinion that most international courts have not recognised evolutionary interpretation as a separate form of interpretation, but that they have come to it, always on a case by case basis, as a result of applying Articles 31 and 32 of the Vienna Convention. Under no circumstances the specific jurisprudence of the ECHR on two cases, very specific in their factual background and very complex in their analysis of Intertemporal Law, can be extrapolated. Therefore, Spain would like to highlight the fact that the Commission requires that extreme caution should be exercised prior to applying and evolutionary approach in any specific case.

The definitions of further agreement and further practices contained in the project of conclusion 4 require a reflection on the role played by reciprocal behaviour among States, among States and International Bodies, or among International Bodies regarding the interpretation of treaties. This should be the case, for example, of acquiescence. Accordingly, this delegation thinks it might be useful to advance in the study of the behaviours observed in the enforcement of any treaty providing for the parties' agreement in the interpretation thereof referred to in point 2 of conclusion 4. Nevertheless, we are simply not quite sure of the concrete scope that might be attached to further practice in those cases where, for example, it might result in a modification of the initial agreement of the Parties reflected in the treaty being interpreted.

Lastly, regarding project of conclusion 5, my delegation also attaches the highest significance to the accurate definition of the role that might be played by lower-rank or local officers as further practice in the enforcement of treaties, provided, of course, that such a practice be clearly unequivocal and accepted by higher authorities.

**Chapter V: State officers' immunity from foreign criminal jurisdiction.**

Regarding the chapter on State officers' immunity from foreign criminal jurisdiction the Spanish delegation would like to congratulate the Special Rapporteur, our fellow countrywoman and predecessor in office, Concepción Escobar Hernández, for her excellent work in her second report on a quite complex matter. We think her report is clear, well organised and represents an objective, balanced and cautious approach ("stage by stage"). We also consider relevant the intention of distinguishing between *lex lata* and *lex ferenda*; it might not be relevant when drafting a project of treaty, but it does be relevant when the recipients are judges and lawyers. Additionally, after the intense discussion of her report by the Commission, the three projects of articles and comments finally approved represented a significant improvement on the six initially submitted.

However, the debate still remains on the difficult balance between the protection of sovereignty and inviolability of State's function, on the one hand, and need of punishing international crimes, on the other. Linked to this the doubt arises, for example, on whether there are exceptions to immunity from jurisdiction *ratione personae*. It must be borne in mind that, at the heart of the matter, lays the nature itself of the crimes that should be affected by the project of articles. A clarification is thus required on whether the most serious crimes (genocide, war crimes and crimes against humanity) are also covered by immunity. It is also likely that there remains a general necessity for a deeper advance in States' practice and jurisprudence and even in doctrine.

From the outset, regarding the project of article 1, where the merging of the two initially submitted provisions seems relevant this delegation would like to make four observations. Firstly, it is clear that the term "officers" raises serious issues. Notwithstanding the caution expressed in tackling its study at a later stage, doubts have arisen from the start and have been clearly reflected in the Commission debates. To begin with, the designation itself which, at least in the Spanish version, does not seem to be the more appropriate term and would eventually affect to the title of the corresponding chapter. Secondly, it does not seem easy either to avoid, at this initial stage, the controversial and extremely delicate matter of the obligation of cooperating with international criminal courts; quite a current issue, by the way. Thirdly, we have a genuinely positive view on the final decision of including armed forces in paragraph two referred to the special rules in International Law. And, finally, in connexion with the above mentioned necessity for a deeper study of practice, several matters arise regarding fundamental aspects such as the concept of State itself within International Law, not only for the purposes of determining the officers serving the State, but also for the purposes of exercising criminal jurisdiction and invoking immunity. Thus, the question can be asked regarding the eventual impact of the project of articles on a "State" recognised only by a reduced number of members of the international community. A legitimate doubt arises for non-recognising States regarding the exercise of criminal jurisdiction in cases where the officers of a non-recognised Stated invoke immunity. Notwithstanding the trend we think can be observed in the international practice, we believe the problem should deserve the Commission attention, either at this initial stage when determining the scope of application, or at a later stage. Along those lines, this reflexion could be extended to non-self-governing territories whose international relations depend of another State. Lastly, a reference might also be missing in the second paragraph to the by no means trivial matter of unilateral (by a State) granting of immunity from foreign criminal jurisdiction to a foreign officer.

Regarding the project of articles 3 and 4, this delegation, as we already pointed out in our last year presentation, considers appropriate the inclusion of the *troika* integrated by Heads of State, Heads of Government and Foreign Affairs Ministers as beneficiaries of immunity *ratione personae*. Spain considers that this perfectly reflects the current state of affairs in International Law in the matter of State representation; and we do not either believe that there are grounds for excluding Foreign Affairs Ministers. It may eventually

be appropriate, considering certain doubts that have been raised and some domestic Laws, to clarify that such immunity does not extend to relatives. However, regarding article 4.2, the question must again necessarily be posed regarding the definition of "official act". We are aware that this matter will be dealt with at a later stage, but it is really difficult to avoid now, even just from a fact-finding point of view, the minimum formal and material elements that made up this notion, already used in this precept; although it is true that given the absence of distinction regarding its consequences, the postponement of its study might be easier to justify than in the case of the concept of officer.

On the other hand, a treatment is perhaps missing (at least in the comments) of related matters of interest, such as the position of monarchy heirs; the position of elected Heads of State; the possibility of including State representatives, once they have left office, for crimes committed during their tenure, or even the possibility of extending to an individual indicted before taking office as president (or minister) the immunity attached to the office.

Finally, we share the Commission decision not to include yet the article on definitions, since, regardless of the relevance of such provisions, it is premature, it was likely to be incomplete, and assuredly, the controversial distinction between criminal *jurisdiction* and *immunity* from criminal jurisdiction is far from being a peaceful one. It is no coincidence that neither the Vienna Conventions on Diplomatic Relations and on Consular Relations no the Convention on Special Missions define the term criminal jurisdiction, although the issue was also raised at the time by the Commission.

Thank you very much.