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SEXTA COMISIÓN

INFORME DE LA COMISIÓN DE DERECHO INTERNACIONAL

PARTE III: Capítulos X (Identificación del Derecho Internacional Consuetudinario), XI (Protección del medio ambiente en relación con los conflictos armados), XII (Aplicación provisional de los tratados) y XIII (cláusula de la nación más favorecida)

INTERVENCIÓN PRONUNCIADA POR EL PROFESOR

JOSÉ MARTÍN y PÉREZ DE NANCLARES

JEFE DE LA ASESORÍA JURÍDICA INTERNACIONAL DEL MINISTERIO DE ASUNTOS EXTERIORES Y DE COOPERACIÓN

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(Cotejar con la intervención definitiva)

UNITED NATIONS GENERAL ASSEMBL Y 69TH SESSION SIXTH COMISSION

INTERNATIONAL LAW COMISSION REPORT

PART III: CHAPTERS X (Identification of Customary International Law), XI (Protection of environment in relation with armed conflicts), XII (Provisional application of Treaties) and XIII (Most favoured nation clause)

STATEMENT BY PROFESSOR JOSÉ MARTÍN Y PEREZ DE NANCLARES HEAD OF THE INTERNATIONAL LAW DIVISION OF THE MINISTRY OF FOREIGN AFFAIRS AND COOPERATION

New York, 3rd November 2014

(Check against delivery)

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Sr./Sra. Presidente/a.

En mi tercera intervención ante esta VI Comisión centraremos nuestra exposición principal en los capítulos X a XIII del Informe de la Comisión de Derecho Internacional (CDI) y concluiremos con unas breves reflexiones sobre el funcionamiento de la Comisión.

Querríamos, igualmente, dejar constancia expresa de que mi delegación respalda plenamente la intervención realizada por la Unión Europea a propósito de los capítulos X y XII.

Sr./Sra. Presidente/a.

Capítulo X

En relación con la identificación del Derecho Internacional consuetudinario mi delegación desearía felicitar al Relator Especial, Sr. Michael Wood, por el excelente trabajo realizado en su segundo informe que ahora se somete a nuestra consideración junto con 11 proyectos provisionales de conclusión (reducidos a 8 tras su paso por el Comité de Redacción). A pesar de ser un tema extraordinariamente complejo en la práctica y estar revestido también de problemas teóricos profundos, el enfoque y la calidad del análisis realizado por el Relator General auspician un resultado altamente positivo, si bien el calendario propuesto podría resultar excesivamente ambicioso. Nos permitiremos, además, insistir en que el resultado final debe ser esencialmente de carácter práctico. Las conclusiones y sus comentarios han de servir por encima de todo para ofrecer asistencia a los profesionales en la interpretación y aplicación del Derecho Internacional, teniendo además en cuenta que muchos de ellos no siempre son especialistas en la materia. La forma de guía práctica parece, pues, la más razonable.

Por lo que respecta al contenido concreto del Informe y de los proyectos de conclusiones, mi delegación comparte plenamente el 'enfoque de dos elementos' seguido por el Relator General. Compartimos, igualmente, que el objetivo del análisis no ha de ser el de identificar las normas sustantivas de Derecho Internacional consuetudinario -tarea además probablemente condenada al fracaso desde su inicio-, sino el enfoque para identificar tales normas. Y también estamos de acuerdo, en que existen cuestiones como las de 'objetor persistente', la 'costumbre regional, local y bilateral', 'la carga de la prueba' o la relación entre el Derecho Consuetudinario y los principios generales que deberán ser estudiadas con minuciosidad en futuros informes.

No obstante, mi delegación desearía realizar también algunas observaciones críticas.

En relación con el proyecto de conclusión 1 sobre el alcance, no terminamos de considerar satisfactorio que los proyectos de conclusión se hagan girar en torno a la *metodología* para determinar la existencia y el contenido de las normas de Derecho Internacional consuetudinario. Sin duda, como ya hemos indicado, el objetivo es efectivamente determinar la forma de identificar tales normas, pero el uso del término 'metodología' creemos que no es del todo preciso y que puede introducir cierta

confusión. Confesamos, no obstante, que tampoco tenemos una propuesta alternativa adecuada, ya que las propuestas presentadas por algunos miembros de la CDI para sustituirlo por el término 'método' (o mejor dicho, 'métodos' en plural) tampoco nos parece del todo acertada, dado que el tema afecta a algo más que el método. Como tampoco nos parecen óptimas ni las propuestas de sustitución por reglas ('*rules)*', que reabriría un debate sobre su naturaleza, ni por 'elementos y factores', que probablemente no resultan suficientemente precisos.

Por lo que concierne al proyecto de conclusión 2 sobre términos empleados, no creemos que sea necesario incluir las definiciones de Derecho Internacional consuetudinario y de organización internacional. Introducir la definición del término que es objeto de un conjunto completo de conclusiones resulta innecesario y, lejos de producir claridad, podría crear confusión. Igualmente, no concurren tampoco elementos que justifiquen ofrecer una definición de organización internacional diferente a la que pudiera encontrarse en cualquier manual de Derecho Internacional al uso o, en su caso, en los artículos sobre responsabilidad internacional de las organizaciones internacionales. Bastaría, pues, con hacer referencia a ambos términos en los comentarios.

A propósito del proyecto de conclusión 3 sobre el enfoque básico, acaso por nuestra deformación académica, nos parece pertinente mantener la terminología clásica de la '*opinio iuris*'. Creemos que la expresión 'una práctica generalmente aceptada como Derecho' plantea innecesariamente problemas añadidos y no añade ninguna ventaja. Igualmente convendría quizá profundizar en los aspectos temporales de los dos elementos y, sobre todo, en la relación entre ellos.

En el proyecto de conclusión 4 sobre valoración de la prueba, no vemos qué añade la referencia a las 'circunstancias que rodean el caso' cuando ya se ha hecho referencia expresa a que habrá de tenerse en cuenta el 'contexto'. Y, desde la perspectiva de resultar útil en la práctica, quizá adolece de una formulación algo general y vaga.

Por lo que respecta al proyecto de conclusión 5sobre función de la práctica, nadie duda que el papel de los Estados es crucial en la formación de Derecho Internacional consuetudinario. Pero existen organizaciones internacionales que han alcanzado un grado de desarrollo interno y un papel protagonista en las relaciones internacionales que recomienda ser tenido en cuenta. Esta posición resulta particularmente patente en el caso de la Unión Europea como consecuencia de que, además de estar revestida de personalidad jurídica propia y gozar de un amplia capacidad para celebrar tratados internacionales (*treaty making power*), existen ámbitos de su actuación internacional en los que goza incluso de competencia exclusiva propia, quedando por tanto excluida cualquier posible intervención de sus Estados miembros (ej. política comercial común o conservación de los recursos biológicos marinos). A nuestro entender, resulta por tanto absolutamente imprescindible que esta actividad de las organizaciones internacionales sea debidamente tenida en cuenta y se profundice en la posibilidad de identificar Derecho consuetudinario en ámbitos relacionados, por ejemplo, con el Derecho interno

o con el régimen de privilegios e inmunidades. Lo dicho resulta igualmente aplicable a otras conclusiones

En relación con el proyecto de conclusión 6 sobre atribución del comportamiento, coincidimos con George Nolte en que resulta dudoso que las normas sobre responsabilidad de los Estados resulten aplicables en este contexto ya que el objetivo fundamental de aquellas era específicamente el de identificar y atribuir responsabilidad como consecuencia de actos internacionalmente ilícitos.

A propósito del proyecto de conclusión 7 sobre formas de la práctica, mi delegación subrayó ya en su intervención del año pasado la importancia que concedemos a un más profundo análisis de las cuestiones sobre la inacción y la relación entre la costumbre y la aquiescencia.

En lo que se refiere al proyecto de conclusión 9 sobre la práctica pertinente, querríamos simplemente dejar constancia de la importancia trascendental que debe darse a la exigencia de que la práctica sea inequívoca, suficientemente generalizad y uniforme. Por otro lado, como también indicamos en nuestra intervención de 2013, nos permitiremos sugerir que convendría prestar atención a la costumbre bilateral como posible base de derechos y obligaciones internacionales recíprocos, pues tiene gran importancia en los contenciosos territoriales y de delimitación marítima o, como se ha visto recientemente, en las controversias relativas a los derechos de navegación (véase el *asunto de la controversia relativa a derechos de navegación y derechos conexos Costa Rica c. Nicaragua*, resuelto por fallo del TIJ de 12 de julio de 2009).

Capítulo XI

Sr./Sra. Presidente/a.

Por lo que concierne a la protección del medio ambiente en relación con los conflictos armados, desearíamos comenzar felicitando a la Relatora Especial, Sra. Jacobsson, por la presentación de su informe preliminar. Mi delegación desea insistir en la idea ya manifestada en el pasado de que el tema plantea dificultades de muy diversa índole ya que, entre otros aspectos, su objeto es de muy compleja delimitación, no resulta sencillo trazar una línea divisoria entre las tres fases de estudio propuestas por la Relatora Especial (antes, durante y después del conflicto armado) y probablemente el calendario previsto resulte demasiado ajustado. En todo caso, mi delegación ve con buenos ojos la aproximación prudente que realiza la Relatora General.

Con todo, existen algunos elementos concretos sobre los que querríamos expresar nuestras dudas. En primer lugar, no alcanzamos a comprender el sentido que pueda tener el 'desarrollo sostenible' con la materia en cuestión, ya que aquél se refiere al ámbito del desarrollo económico en tiempos de paz y la referencia al principio 24 de la Declaración de Río no termina de resultar convincente. Nos levantan igualmente dudas la insistencia de la Relatora General en los conflictos internos. En realidad, no alcanzamos a comprender cómo podrá la Comisión identificar obligaciones sobre

protección del medio ambiente en conflictos armados internos, sin caer en labor de desarrollar tales obligaciones, cuando este tipo de conflictos no está cubierto por el actual Derecho Internacional. Y reiteramos, finalmente, nuestras dudas sobre la metodología de las tres fases ya que forzosamente habrá elementos, como por ejemplo, el de la responsabilidad que aflorarán en las tres fases.

Capítulo XII

En relación con la cuestión de la aplicación provisional de los tratados, mi delegación desea dejar constancia de nuestra felicitación al Relator Especial, Sr. Juan Manuel Gómez-Robledo, por la presentación de su segundo informe, que contiene un valioso estudio sobre los efectos jurídicos de la aplicación provisional. Sin duda, nos encontramos ante un tema de la mayor transcendencia práctica.

Como punto de partida, querríamos insistir en que a la postre el consentimiento de un Estado contratante es el elemento decisivo, por lo que no debe ser tarea de la Comisión adentrarse en la delicada senda de alentar o desalentar su uso ni probablemente tampoco en la de valorar normas internas de los Estados. No en vano, una vez aplicado provisionalmente un tratado, el Estado se somete a la norma del artículo 27 del Convenio de Viena relativa a que no cabe alegar el Derecho interno para justificar el incumplimiento de las obligaciones internacionales, aun si éstas se han contraído provisionalmente. Precisamente por eso, en el proyecto de ley de tratados y otros acuerdos internacionales que acaba de aprobar el Senado español el pasado miércoles (y que entrará en vigor en apenas unas semanas) se fijan algunas cautelas y limitaciones al uso de la aplicación provisional. Por cierto, creemos a este respecto que el Relator Especial debería acometer un más profundo estudio de la práctica de los Estados y hacer un mayor uso del método inductivo porque le podría resultar muy útil en la materia.

Querríamos, igualmente, llamar la atención sobre la importancia que la práctica de organizaciones internacionales como la Unión Europea tiene sobre esta cuestión, ya que el uso que se hace de la previsión de aplicación provisional recogida en el artículo 218.5 del Tratado de Funcionamiento de la Unión Europea ha sido amplio. Y, por cierto, también interesante. Por ejemplo, en relación a algunos acuerdos mixtos (de la Unión y sus Estados miembros con un Estado tercero) en los que tan sólo se aplica provisionalmente la parte del acuerdo que corresponde a competencias de la Unión.

En otro orden de cosas, tenemos dudas a propósito de que la decisión de aplicar provisionalmente un tratado pueda ser considerada como un acto unilateral cuando la Convención de Viena la considera expresamente como un acuerdo entre Estados. Creemos que buena parte de las reflexiones aportadas por el Relator Especial a este respecto deberían ser cuidadosamente reexaminadas y, en su caso, revisadas.

Tampoco podemos aceptar sin más la afirmación de que una aplicación provisional no puede ser revocada de forma arbitraria. Creemos que tal consideración precisaría una detallada argumentación. Sin poner, obviamente, en tela de juicio la importancia del principio de *bona fides*, cuando un Estado signatario comunique a otro Estado signatario

su intención de dar por finalizada la aplicación provisional de un tratado no tiene por qué ofrecer una justificación argumentada del porqué. Puede deberse a motivos muy diferentes entre los que puede resultar perfectamente legítimo que se incluya el de un cambio político interno que conduzca a tal decisión. No creemos que ello pueda ser considerado una violación de la *bona fides*.

Finalmente, quizá el Relator Especial debería plantearse en profundidad si las normas de Derecho Internacional consuetudinario sobre aplicación provisional son, en realidad, las mismas que las recogidas en la Convención de Viena.

Sr. Presidente,

Por último, antes de concluir mi tercer y última intervención ante la VI Comisión en este periodo de sesiones, permítame una sucinta consideración final a propósito del funcionamiento de la CDI, acompañada de una sugerencia por parte de nuestra delegación. A la vista de nuestra experiencia en la VI Comisión en los últimos tres años, creemos que la CDI debería replantearse muy seriamente algunas cuestiones que afectan no sólo a su funcionamiento interno, sobre lo que probablemente no incumba a mi delegación pronunciarse, sino que afectan también al papel que nos corresponde a los Estados en nuestra interacción con la CDI en esta VI Comisión. En nuestra opinión, la CDI tiene en estos momentos un excesivo número de temas en su agenda, lo que nos impide profundizar como sería deseable en los temas sometidos a nuestra consideración cada año. Igualmente, como consecuencia de ello, resultan también excesivas las peticiones de información a los Estados. En concreto, en este momento se nos solicita información sobre 7 de los 11 temas tratados, algunos de ellos no precisamente sencillos. Igualmente, el instrumento habitual y permanente de interacción entre la CDI y los Estados –esto es, la página web- es susceptible de clara mejora, puntual actualización y cierto recordatorio del principio de igualdad de las lenguas.

Por tanto, creemos que la CDI debería quizá pensar seriamente en ir reduciendo el número de temas (y no el de sesiones). Debería ser más selectiva y concisa en las peticiones de información a los Estados. Debería tener bien presente el principio de la igualdad de los idiomas. Debería prestar también mayor atención a su página web. Y, por cierto, no debería plantearse en modo alguno limitar o eliminar los resúmenes de los debates internos ya que son una fuente de conocimiento de gran importancia para el adecuado seguimiento de los trabajos de la Comisión por parte de los Estados.

Muchas gracias, Sr. Presidente.

Mr Chairman,

During my third intervention before the Sixth Commission, we will focus on chapters X to XIII of the Report of the International Law Commission (ILC) and we will conclude with some brief considerations on the functioning of the Commission itself.

We would like as well to stress that my delegation fully supports the intervention of the European Union regarding Chapters X and XII.

Chapter X

In relation to the identification of the customary international law, my delegation would like to congratulate the Special Rapporteur, Mr. Michael Wood, for his excellent work on his second report that now is submitted to our consideration together with 11 conclusion draft projects (which have been reduced to 8 after going through the Drafting Committee). In spite of being, in practice, an extraordinarily complex topic that has also deep theoretical problems, the approach and the quality of the analysis made by the General Rapporteur predict a highly positive result, even though the proposed calendar could be excessively ambitious. We should also insist on the fact that the final result should be essentially practical. The conclusions and the commentaries have to be, above all, useful elements to help professionals in the interpretation and implementation of international law, taking into account that a lot of them are not always specialists on the matter. A practical guide would, therefore, seem the most reasonable way of doing it.

In what makes reference to the specific content of the Report and of the draft conclusions, my delegation totally shares the "two-element approach" followed by the General Rapporteur. We also share that the aim of the analysis has not got to be the identification of the substantive rules of customary international law –a task that would probably be a failure since its very beginning-, but the approach in order to identify such rules. And we also agree on the fact that there are matters such as the "persistent objector", "the regional, local and bilateral custom", "burden of proof" or the relation between the customary law and the general principles that have to be minutely studied in future reports.

Nevertheless, my delegation would also like to make some critic observations.

In relation to the draft conclusion 1 on the scope, we do not think it is completely satisfactory that the basic element of the draft conclusions is the methodology in order to determine the existence and content of the customary international law rules. Without doubt, as we have already pointed out, the aim is to determine the way of identifying such rules, but the use of the term "methodology" is not completely precise and it can introduce certain confusion. However, we have to confess that we do not have an adequate alternative proposal, taking into account that the one presented by some of the members of the ILC in order to replace it by the term "method" (or, really, "methods", in plural), does not seem completely right, because the topic makes reference to something more than a method. We do not think either that the proposals of replacing it by "rules", term that would open again a debate on its nature, or by "elements and factors", expression that probably is not precise enough, would be good.

In what makes reference to the draft conclusion 2 on the used terms, we do not think it is necessary to add the definitions of customary international law and of international organization. Introducing the definition of the term which is subject to a complete group of conclusions is unnecessary and, instead of clarifying, it could create confusion. There are not either elements which justify giving a definition of international organization which is different to the one that could be find in whatever handbook of International Law or, if it was the case, in the articles of international responsibility of international organizations. It would be enough to make reference to both terms in the commentaries.

Regarding draft conclusion 4 on assessment of evidence, we consider that the reference to the "circumstances of the case" does not add up much when there is already a reference to the need of taking account of the "overall context". Furthermore, from the practice prospective and the need to be useful, the formulation used might be vague and general.

As far as the draft conclusion 5 is concerned regarding the "requirement of practice", nobody doubts about the crucial role the States have in the formation of customary international law. Nevertheless there exist International Organisations whose internal development level and protagonist role in the international arena needs to be duly acknowledged. This position reveals itself as particularly evident in the case of European Union. Not only has she a juridical personality and a large treaty making power but enjoys also an area of international intervention where her competence is exclusive, being excluded any possible participation of the Member States (ex. Common commercial policy or conservation of biological maritime resources). In our opinion, this practice of the International organizations should be duly considered. It is necessary that the ILC consider more deeply the possibility of identifying customary law within the spheres related for example with the internal law or with the privileges and immunities regime. What has been said here is applicable as well to other conclusions.

In relation to draft conclusion 6 regarding "practice attribution", we share George Nolte's view in the sense that the application of the rules on State responsibility within this context may be doubtful. The reason is that the fundamental objective of those rules was specifically to identify and establish the responsibility as a consequence of internationally wrongful acts.

Regarding draft conclusion 7 about "forms of practice", mi delegation already stressed during its intervention last year that we consider very important to carry out a deeper analysis of the questions related with inaction and the relation between custom and acquiescence.

As far as the draft conclusion 9 is concerned, about the "pertinent practice", we would like to put on the record the essential importance that should be given to the need that the practice should be unambiguous and sufficiently general and uniform. On another aspect, we allow ourselves to suggest, as we did in our intervention in 2013, that it would be convenient to pay attention to the bilateral custom as a possible source of

reciprocal international rights and obligations. It has a very important role in the territorial disputes and in maritime delimitation or, as we have seen recently, in the differences related with navigation rights (vid. Case related to navigation and connected rights Costa Rica vs. Nicaragua settled by ICJ decision 12th July 2009)

Chapter XI

Mr/Ms. Chairperson,

Concerning the topic "protection of the environment in relation to armed conflicts", we wish to start congratulating the Special Rapporteur, Ms. Jacobsson, for the submission of her preliminary report. My delegation wants to insist on the idea, already expressed in past years, that this topic poses several problems of very diverse nature. Among other issues, its object is very difficult to define, it is not easy to draw a dividing line between the three study phases proposed by the Special Rapporteur (before, during and after the armed conflict) and, probably, the foreseen schedule will be too tight. In any case, my delegation appreciates the cautious approach taken by the Special Rapporteur.

Anyway, there are some particular elements we would like to express our doubts about. First, we are not able to understand the meaning of "sustainable development" in relation to the topic, because the former refers to the economic development in peacetime and the reference to Principle 24 of the Rio Declaration does not turn out to be convincing. The insistence of the Special Rapporteur on internal conflicts raises also some doubts in our minds. Indeed, we wonder how the Commission will be able to identify obligations about the protection of the environment in internal armed conflicts, without having to expand on such obligations, taking into account that this type of conflicts is not covered by current International Law. And we reiterate, finally, our doubts about the three-phase-methodology, as there will be elements that are going to come up in all three phases

Chapter XII

Mr. Chairman,

On the topic of the provisional application of treaties, my delegation would like to express its congratulations to the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, on the introduction of his second report containing a remarkable study on the legal effects of provisional application. This is certainly an issue of great practical importance.

As a starting point, we would like to emphasise that the consent of a contracting State is ultimately the decisive element. Therefore the Commission should not embark on the sensitive task of encouraging or discouraging the use of provisional application. Nor, probably, should the Commission consider domestic provisions of States relating to this topic. After all, once a treaty is being provisionally applied, States abide by the rule set out in article 27 of the Vienna Convention according to which they may not invoke the provisions of their internal law as justification for their failure to comply with their

international obligations even those provisionally undertaken. And that is precisely the reason why the *Bill on treaties and other international agreements* that the Spanish Senate approved last Wednesday and that will enter into force in a matter of weeks contains specific safeguards and limits regarding provisional application. By the way, in our opinion, the Special Rapporteur might undertake a more detailed study of State practice. A more inductive approach would certainly be very useful to address this issue.

We would also like to draw attention to the importance of the practice of International Organizations on this issue, namely the European Union which has made extensive and quite interesting use of the provisional application of treaties as provided for in article 218.5 of the Treaty on the Functioning of the E.U. This is the case, for example, of some mixed agreements (between the Unión and its member States, on the one hand, and a third party on the other hand) in which only the parts affecting matters within the Union's competence are provisionally applied.

Furthermore, we have doubts as to whether or not the decision to provisionally apply a treaty can be characterized as a unilateral act taking into account that the Vienna Convention specifically considers it as the result of an agreement between States. In our view, many of the ideas put forward by the Special Rapporteur on this issue should be carefully examined and, if necessary, revised.

We also can not accept the assertion that provisional application of a treaty could not be undertaken arbitrarily. In our view, such an assertion requires a detailed explanation. Without questioning the importance of the principle of good faith, when a signatory State notifies another signatory State of its intention to terminate the provisional application of a treaty, the former is under no legal obligation to provide the latter with a reasoned justification of its decision. There might be a number of legitimate reasons behind it, including a domestic political change. In our opinion, this could not be considered as a breach of good faith. The Special Rapporteur should maybe reconsider whether the rules of customary international law on provisional application are the same as those laid down in the Vienna Convention.

Mr. Chairman,

Finally, to conclude my third and last intervention before the Sixth Commission in this session, allow me to make a brief comment along with a suggestion, on behalf or my Delegation. In light of our experience in the Sixth Commission for the past three years, we believe that the International Law Commission should seriously reconsider some issues that affect not only its internal functioning, something on which my Delegation will not comment, but also the role that States should play in their interaction with the ILC in the framework of the Sixth Commission.

In our view, there are far too many topics in the Commission's Programme of Work right now. This makes it difficult for us to consider the issues which are submitted every year in as much detail as we would wish. Also, as a consequence, the States receive too

many requests for information. To be precise, at the moment we have been requested to provide information on 7 out of the 11 topics under consideration, some of which are not particularly easy. Equally importantly, the usual and permanent tool for interaction between the Commission and the States – that is, the web site – could certainly be improved as well as regularly updated. Additionally, the site should be managed in accordance with the principle of equality of the languages

In summary, in our view the International Law Commission should seriously consider reducing the number of topics (but not the number of sessions). The requests for information should be more selective and precise. The Commission should always bear in mind the principle of equality of the languages and pay more attention to its web site. On the contrary, in no way, should the Commission reduce or eliminate the summaries of internal debates since they are a major source of information that facilitates the follow-up of the Commission's activities.

Thank you very much, Mr. Chairman.

Mr Chairman,

During my third intervention before the Sixth Commission, we will focus on chapters X to XIII of the Report of the International Law Commission (ILC) and we will conclude with some brief considerations on the functioning of the Commission itself.

We would like as well to stress that my delegation fully supports the intervention of the European Union regarding Chapters X and XII.

Chapter X

In relation to the identification of the customary international law, my delegation would like to congratulate the Special Rapporteur, Mr. Michael Wood, for his excellent work on his second report that now is submitted to our consideration together with 11 conclusion draft projects (which have been reduced to 8 after going through the Drafting Committee). In spite of being, in practice, an extraordinarily complex topic that has also deep theoretical problems, the approach and the quality of the analysis made by the General Rapporteur predict a highly positive result, even though the proposed calendar could be excessively ambitious. We should also insist on the fact that the final result should be essentially practical. The conclusions and the commentaries have to be, above all, useful elements to help professionals in the interpretation and implementation of international law, taking into account that a lot of them are not always specialists on the matter. A practical guide would, therefore, seem the most reasonable way of doing it.

In what makes reference to the specific content of the Report and of the draft conclusions, my delegation totally shares the "two-element approach" followed by the General Rapporteur. We also share that the aim of the analysis has not got to be the identification of the substantive rules of customary international law –a task that would probably be a failure since its very beginning-, but the approach in order to identify

such rules. And we also agree on the fact that there are matters such as the "persistent objector", "the regional, local and bilateral custom", "burden of proof" or the relation between the customary law and the general principles that have to be minutely studied in future reports.

Nevertheless, my delegation would also like to make some critic observations.

In relation to the draft conclusion 1 on the scope, we do not think it is completely satisfactory that the basic element of the draft conclusions is the methodology in order to determine the existence and content of the customary international law rules. Without doubt, as we have already pointed out, the aim is to determine the way of identifying such rules, but the use of the term "methodology" is not completely precise and it can introduce certain confusion. However, we have to confess that we do not have an adequate alternative proposal, taking into account that the one presented by some of the members of the ILC in order to replace it by the term "method" (or, really, "methods", in plural), does not seem completely right, because the topic makes reference to something more than a method. We do not think either that the proposals of replacing it by "rules", term that would open again a debate on its nature, or by "elements and factors", expression that probably is not precise enough, would be good.

In what makes reference to the draft conclusion 2 on the used terms, we do not think it is necessary to add the definitions of customary international law and of international organization. Introducing the definition of the term which is subject to a complete group of conclusions is unnecessary and, instead of clarifying, it could create confusion. There are not either elements which justify giving a definition of international organization which is different to the one that could be find in whatever handbook of International Law or, if it was the case, in the articles of international responsibility of international organizations. It would be enough to make reference to both terms in the commentaries.

Regarding draft conclusion 4 on assessment of evidence, we consider that the reference to the "circumstances of the case" does not add up much when there is already a reference to the need of taking account of the "overall context". Furthermore, from the practice prospective and the need to be useful, the formulation used might be vague and general.

As far as the draft conclusion 5 is concerned regarding the "requirement of practice", nobody doubts about the crucial role the States have in the formation of customary international law. Nevertheless there exist International Organisations whose internal development level and protagonist role in the international arena needs to be duly acknowledged. This position reveals itself as particularly evident in the case of European Union. Not only has she a juridical personality and a large treaty making power but enjoys also an area of international intervention where her competence is exclusive, being excluded any possible participation of the Member States (ex. Common commercial policy or conservation of biological maritime resources). In our opinion, this practice of the International organizations should be duly considered. It is necessary that the ILC consider more deeply the possibility of identifying customary law within the spheres related for example with the internal law or with the privileges

and immunities regime. What has been said here is applicable as well to other conclusions.

In relation to draft conclusion 6 regarding "practice attribution", we share George Nolte's view in the sense that the application of the rules on State responsibility within this context may be doubtful. The reason is that the fundamental objective of those rules was specifically to identify and establish the responsibility as a consequence of internationally wrongful acts.

Regarding draft conclusion 7 about "forms of practice", mi delegation already stressed during its intervention last year that we consider very important to carry out a deeper analysis of the questions related with inaction and the relation between custom and acquiescence.

As far as the draft conclusion 9 is concerned, about the "pertinent practice", we would like to put on the record the essential importance that should be given to the need that the practice should be unambiguous and sufficiently general and uniform. On another aspect, we allow ourselves to suggest, as we did in our intervention in 2013, that it would be convenient to pay attention to the bilateral custom as a possible source of reciprocal international rights and obligations. It has a very important role in the territorial disputes and in maritime delimitation or, as we have seen recently, in the differences related with navigation rights (vid. Case related to navigation and connected rights Costa Rica vs. Nicaragua settled by ICJ decision 12th July 2009)

Chapter XI

Mr/Ms. Chairperson,

Concerning the topic "protection of the environment in relation to armed conflicts", we wish to start congratulating the Special Rapporteur, Ms. Jacobsson, for the submission of her preliminary report. My delegation wants to insist on the idea, already expressed in past years, that this topic poses several problems of very diverse nature. Among other issues, its object is very difficult to define, it is not easy to draw a dividing line between the three study phases proposed by the Special Rapporteur (before, during and after the armed conflict) and, probably, the foreseen schedule will be too tight. In any case, my delegation appreciates the cautious approach taken by the Special Rapporteur.

Anyway, there are some particular elements we would like to express our doubts about. First, we are not able to understand the meaning of "sustainable development" in relation to the topic, because the former refers to the economic development in peacetime and the reference to Principle 24 of the Rio Declaration does not turn out to be convincing. The insistence of the Special Rapporteur on internal conflicts raises also some doubts in our minds. Indeed, we wonder how the Commission will be able to identify obligations about the protection of the environment in internal armed conflicts, without having to expand on such obligations, taking into account that this type of

conflicts is not covered by current International Law. And we reiterate, finally, our doubts about the three-phase-methodology, as there will be elements that are going to come up in all three phases

Chapter XII

Mr. Chairman,

On the topic of the provisional application of treaties, my delegation would like to express its congratulations to the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, on the introduction of his second report containing a remarkable study on the legal effects of provisional application. This is certainly an issue of great practical importance.

As a starting point, we would like to emphasise that the consent of a contracting State is ultimately the decisive element. Therefore the Commission should not embark on the sensitive task of encouraging or discouraging the use of provisional application. Nor, probably, should the Commission consider domestic provisions of States relating to this topic. After all, once a treaty is being provisionally applied, States abide by the rule set out in article 27 of the Vienna Convention according to which they may not invoke the provisions of their internal law as justification for their failure to comply with their international obligations even those provisionally undertaken. And that is precisely the reason why the *Bill on treaties and other international agreements* that the Spanish Senate approved last Wednesday and that will enter into force in a matter of weeks contains specific safeguards and limits regarding provisional application. By the way, in our opinion, the Special Rapporteur might undertake a more detailed study of State practice. A more inductive approach would certainly be very useful to address this issue.

We would also like to draw attention to the importance of the practice of International Organizations on this issue, namely the European Union which has made extensive and quite interesting use of the provisional application of treaties as provided for in article 218.5 of the Treaty on the Functioning of the E.U. This is the case, for example, of some mixed agreements (between the Unión and its member States, on the one hand, and a third party on the other hand) in which only the parts affecting matters within the Union's competence are provisionally applied.

Furthermore, we have doubts as to whether or not the decision to provisionally apply a treaty can be characterized as a unilateral act taking into account that the Vienna Convention specifically considers it as the result of an agreement between States. In our view, many of the ideas put forward by the Special Rapporteur on this issue should be carefully examined and, if necessary, revised.

We also can not accept the assertion that provisional application of a treaty could not be undertaken arbitrarily. In our view, such an assertion requires a detailed explanation.

Without questioning the importance of the principle of good faith, when a signatory State notifies another signatory State of its intention to terminate the provisional application of a treaty, the former is under no legal obligation to provide the latter with a reasoned justification of its decision. There might be a number of legitimate reasons behind it, including a domestic political change. In our opinion, this could not be considered as a breach of good faith. The Special Rapporteur should maybe reconsider whether the rules of customary international law on provisional application are the same as those laid down in the Vienna Convention.

Mr. Chairman,

Finally, to conclude my third and last intervention before the Sixth Commission in this session, allow me to make a brief comment along with a suggestion, on behalf or my Delegation. In light of our experience in the Sixth Commission for the past three years, we believe that the International Law Commission should seriously reconsider some issues that affect not only its internal functioning, something on which my Delegation will not comment, but also the role that States should play in their interaction with the ILC in the framework of the Sixth Commission.

In our view, there are far too many topics in the Commission's Programme of Work right now. This makes it difficult for us to consider the issues which are submitted every year in as much detail as we would wish. Also, as a consequence, the States receive too many requests for information. To be precise, at the moment we have been requested to provide information on 7 out of the 11 topics under consideration, some of which are not particularly easy. Equally importantly, the usual and permanent tool for interaction between the Commission and the States – that is, the web site – could certainly be improved as well as regularly updated. Additionally, the site should be managed in accordance with the principle of equality of the languages

In summary, in our view the International Law Commission should seriously consider reducing the number of topics (but not the number of sessions). The requests for information should be more selective and precise. The Commission should always bear in mind the principle of equality of the languages and pay more attention to its web site. On the contrary, in no way, should the Commission reduce or eliminate the summaries of internal debates since they are a major source of information that facilitates the follow-up of the Commission's activities.

Thank you very much, Mr. Chairman.