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Report of the International Law Commission

on the Work of its 67th Session

**Cluster 3: Chapters IX, X, & XI (Protection of the environment in
relation to armed conflicts; Immunity of State officials from foreign
criminal jurisdiction; Provisional application of treaties)**

Statement by

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My delegation is grateful to Special Rapporteur Marie Jacobsson for her second report dealing with a broad range of issues relating to the topic of the "**Protection of the environment in relation to armed conflicts**". The Special Rapporteur proposed a number of definitions, including a definition of armed conflict, that was left pending by the Drafting Committee for the time being. Concerning this definition, my delegation has already stated last year that it is in favour of applying the definition used in international humanitarian law; we are not convinced of the usefulness of a new definition of armed conflict for the purposes of these draft articles.

Concerning the draft principles provisionally adopted by the Drafting Committee I would like to start with a few general remarks. We do not regard it as necessary in this context to address the relationship between human rights and humanitarian law, since this would exceed the scope of the present topic. What is needed, however, are explanations concerning the relationship between environmental law and humanitarian law.

The introductory provision on the scope of the draft principles, i.e. that they apply to the protection of the environment before, during or after an armed conflict, is far too broad and seems to address environmental law in its entirety. We also question the phrase that the principles "apply to the protection of the environment", as the protection of the environment is the objective of these principles and not its field of application.

We would also like to draw attention to the issue referred to in paragraph 148 of the report of the Commission, relating to nuclear weapons and other weapons of mass destruction. Such weapons undoubtedly have a major detrimental effect on the environment, as was already recognized by International Court of Justice in its advisory opinion on the use of nuclear weapons. Last year, this issue was also discussed by the Vienna Conference on the Humanitarian Impact of Nuclear Weapons, organized by Austria in December 2014. We believe that the draft principles should also apply to nuclear weapons and other weapons of mass destruction.

Draft principle I-(x) referring to the designation of protected zones in a general manner raises problems since state practice in the field of international humanitarian law shows the existence of a wide variety of protected zones with different legal consequences. Examples for such zones are nuclear weapons free zones, demilitarized zones, hospital and safety zones, neutralized zones or open towns and non-defended localities. The term "protected zone" does not yet exist in international humanitarian law. If this term were to be used, it would be necessary to define its relationship with already existing special zones. A particular issue that also needs discussion is to what extent the designation of protected zones, in particular those unilaterally declared, affects third states.

We agree that it was appropriate for the Drafting Committee to concentrate immediately on the phase during armed conflict, since this is the very core of the principles. However, the absence of a definition of the environment makes it difficult to assess the scope of the principles drafted so far, and it seems that the Commission has not yet reached a clear position whether it should address the natural or the human environment. Since the various existing instruments use different definitions of the environment, it is even more important to agree on a definition of the environment that would be the basis for these draft principles. Otherwise, the draft principles could hardly be interpreted clearly.

As to paragraph 2 of draft principle II-1 on the general protection of the environment during armed conflict, my delegation would favour to use, also in this paragraph, the wording of Article 55 paragraph 1 of Additional Protocol I that directly addresses warfare and is therefore more focused on the conduct in armed conflicts than the general obligation now to be found in paragraph 2 of draft principle II-1. Paragraph 3 on the prohibition to attack parts of the environment also suffers from the absence of a definition of the environment.

For my delegation it is not clear why draft principle II-2 on the application of the law of armed conflict to the environment specifically refers to the principles and rules of distinction, proportionality, military necessity and precautions in attack. In our understanding the law of armed conflict necessarily contains these principles and rules, which makes it superfluous to reiterate them in this context, unless it is for a specific reason. It would be sufficient to state in this principle that the law of armed conflict shall be applied to the environment, with a view to its protection. Such an understanding coincides with the objective of draft principle II-3 on environmental considerations, which would suggest a merger of these two provisions.

As to draft principle II-4 on the prohibition of reprisals, my delegation is in favour of this new general prohibition. We believe that it should apply to all forms of armed conflicts, including those of a non-international nature. This is also necessary in view of the growing difficulty to distinguish international from non-international armed conflicts and it is equally in line with the clear tendency to apply the same rules to all kinds of armed conflicts.

Draft principle II-5 on protected zones seems to presuppose an understanding that all protected zones are of the same legal nature. But in view of the differences between protected zones, to which we have already referred, a more differentiated approach seems advisable.

Mr. Chairman,

For Austria, as for many other states, the topic of **"Immunity of state officials from foreign criminal jurisdiction"** is of particular practical relevance. Therefore, every year we are very interested to see which progress has been made on this important subject by the Special Rapporteur and the Commission. My delegation is grateful to Special Rapporteur Concepción Escobar Hernández for her fourth report on this topic, which provides a lot of material for further discussion and clearly shows the complexity of defining "acts performed in an official capacity".

The draft definition which the Special Rapporteur had presented to the Commission in draft article 2 (f) defined an "act performed in an official capacity" as an act which "by its nature, constitutes a crime". This was open to a misunderstanding, as it could have been read as implying that all such acts were necessarily crimes. The possibility of such a misunderstanding has been recognized by the Commission and taken care of by the Drafting Committee.

Generally speaking, commenting on the considerations of the Special Rapporteur as reflected in the report and the discussion in the Commission, it must be emphasized that there are major differences between the rules governing immunity from civil jurisdiction and immunity from criminal jurisdiction. Immunity from civil jurisdiction addresses the state as an entity,

whereas immunity from criminal jurisdiction addresses individuals acting on behalf of the state. Criminal responsibility of juridical persons is only the exception, in certain states, for example in Austria, and only for certain crimes. Accordingly, references to state immunity from civil jurisdiction, as laid down in the UN Convention on Jurisdictional Immunities of States and their Property of 2004, are only of little help for the discussion of the present topic.

The issue of criminal jurisdiction for acts of the officials of a foreign state needs to be addressed irrespective of whether the acts concerned are acts *iure gestionis* or *iure imperii*. Therefore, the definition of an "act performed in an official capacity" should comprise all acts that are attributable to the state, and not only those performed in the exercise of state authority, a limitation which the Drafting Committee has proposed in its draft Article 2 (f). Whether an act was performed in the exercise of state authority depends on the internal rules of the state concerned, which means that the borderline between acts performed in the exercise of state authority and other acts attributable to the state can differ from state to state. If an "act performed in an official capacity" comprises all acts attributable to a state, there is no need to distinguish between acts performed as part of the sovereignty of the state or its governmental authority, as it is done, for instance, in paragraph 189 of the ILC report, and other acts. However, a broad approach to "official acts" requires a thorough discussion of the exceptions from the immunity for such acts. This discussion will probably show that many, but not all acts *iure gestionis* are outside the immunity enjoyed by state officials from foreign criminal jurisdiction.

The Memorandum of the Secretariat on "Immunity of State officials from foreign criminal jurisdiction", submitted in 2005, emphasized that state practice offers reasonable grounds for considering that *acta iure gestionis* performed by a state organ would still qualify as "official". It referred to a decision of the Austrian Supreme Court of 1964 which held that, contrary to state immunity, the immunity of heads of state also covered *acta iure gestionis*. This decision proves, irrespective of the fact that it concerned a head of state, that *acta iure gestionis* may be considered not as private, but as official acts (*Supreme Court, Prince of X Road Accident Case, 1964, International Law Reports, vol. 65, p. 13*).

Accordingly, the Commission will have to put special emphasis on the criteria for the attribution of acts to a state. Although not all criteria employed in Articles 4 to 11 of the State Responsibility Articles can be used in the present context, they nevertheless serve as an appropriate starting point for the discussion. In particular, a discussion on acts performed by *de facto* officials will undoubtedly be needed.

For the time being, the scope of the draft articles under this topic seems to be limited by two conditions: the acts must have been performed by state officials – which excludes acts performed by persons who are not officials, but – for instance – act on instructions of a state, and they must be attributable to a state. The commentary on the definition of "State officials" adopted last year by the Commission indicated a relatively broad meaning to be given to this definition. Such broad meaning of the term "state officials" enlarges the number of acts performed in an official capacity. Therefore, it is even more important to develop clear criteria for the attribution of acts to a state.

Already last year we have pointed out that the issue whether persons acting in excess of authority (*ultra vires*) or in contravention of instructions should also enjoy immunity merits further consideration. We support the approach taken by some members of the Commission, see paragraph 199 of the report, that also this issue should be dealt with in the framework of the limitations or exceptions from immunity. The same is true for the issue of international crimes. This very important issue is to be dealt with once the exceptions to the immunity from criminal jurisdiction are under consideration.

Mr. Chairman,

The Austrian delegation wishes to congratulate Special Rapporteur Juan Manuel Gómez-Robledo for his work on the topic "**Provisional application of treaties**", which includes six draft guidelines attached to the Report of the Commission.

As to the form of the document to be elaborated we concur with the suggestion to produce draft guidelines which can be used by treaty-makers contemplating provisional application. The Austrian delegation takes note of the debate within the Commission with regard to the relevance of internal law. While we agree with the Special Rapporteur that it is not necessary to study in detail and on a broad comparative basis the different national constitutional provisions that address the possibility of provisionally applying treaties, we are of the firm view that the possibility of such provisional application always depends on the provisions of internal law.

With regard to draft guideline 1 as proposed by the Special Rapporteur, we would suggest that the Drafting Committee consider the following: The current formulation of this draft guideline appears like a presumption in favour of provisional applicability. In our view it should be reformulated in terms insisting that the possibility of provisional application depends on the provisions of internal law. This does not mean that a state could avoid its obligations once it has committed itself internationally to the provisional application of a treaty. However, whether or not such a commitment can be made is determined by its internal law.

The Austrian delegation supports the Special Rapporteur's approach in his draft guideline 5 to limit the instances of termination of the provisional application of treaties to those provided for in the Vienna Convention on the Law of Treaties and to abstain from introducing the vague additional grounds of a 'prolonged period' of provisional application and the "uncertainty of the entry-into-force" of the treaty.

With respect to the three draft guidelines provisionally adopted by the Drafting Committee, which seem to contain only general introductory language, my delegation understands draft guideline 1 as encompassing also the provisional application of treaties by international organizations and expects that this will be clarified in the commentary.

As to draft guideline 2 it must be made clear that the reference to "other rules of international law" does not detract from the purpose of these guidelines, which is to supplement the rules of the Vienna Convention and not to suggest changes to them.

As to draft guideline 3 my delegation thinks that some questions might arise with regard to the words "or if in some other manner it has been so agreed". This wording goes beyond Article 25 paragraph 1 subparagraph b of the Vienna Convention on the Law of Treaties, which only refers to the agreement of the negotiating states on provisional application. Thus, the provisional application by states which were not negotiating states is only possible if the treaty so provides or all the other negotiating states so agree. Similarly, if only some of the negotiating states agree on the provisional application, this provisional application must be qualified as an agreement that is separate from the original treaty.