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STATEMENT OF THE CHAIRMAN OF THE INTERNATIONAL LAW COMMISSION, MR. NARINDER SINGH

Part Three

***Chapters IX-XI:** Protection of the environment in relation to armed conflicts; Immunity of State officials from foreign criminal jurisdiction; and Provisional application of treaties*

Thank you Mr. Chairman,

In this third and final cluster of issues, I will address the remaining chapters of the report, beginning with Chapter IX.

***Chapter IX:** Protection of the environment in relation to armed conflicts*

Chapter IX concerns the topic "**Protection of the environment in relation to armed conflicts**". This year, the Commission had before it the second report by the Special Rapporteur, Ms. Marie Jacobsson.

Let me begin by recalling that it is proposed to deal with this topic in temporal phases rather than considering each legal regime individually as a distinct category. The temporal phases would address the legal measures to be taken to protect the environment before, during and after an armed conflict: Phase I, phase II and phase III, respectively. The preliminary report last year provided an introductory overview of phase I, namely the environmental rules and principles applicable to a potential armed conflict, so-called "peacetime obligations". The second report this year sought to address 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. It proposed 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". The Commission referred the preambular paragraphs and the 5 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 to be left pending by the Drafting Committee at this stage. The Drafting Committee provisionally adopted the provisions on "scope" and "purpose", which are now part of an introductory section, and six draft principles, after having restructured the principles to correspond to the temporal phases. The Chairman of the Drafting Committee delivered a statement to the plenary of the Commission on 30 July on the work of the Drafting Committee on this topic, including a review of draft introductory provisions on "scope" and "purpose" and six draft principles provisionally adopted. The statement is available on the website of the Commission. The draft principles provisionally adopted by the Drafting Committee are also reproduced in **footnote 378** of the report. I would like to emphasize, however, that those provisions have not yet been considered or adopted by the Commission in full. It is anticipated that the Commission will consider those draft introductory provisions and draft principles, along with accompanying draft commentaries prepared by the Special Rapporteur, at its sixty-eighth session next year.

I will now provide an overview of the second report of the Special Rapporteur and the plenary debate on the topic at this year's session. Paragraphs **135 to 140** of the report summarize the introduction of the second report of the Special Rapporteur. As I have mentioned, the report identified and examined existing rules of armed conflict directly relevant to the protection of the environment in relation to armed conflict. It also addressed some aspects of methodology and sources and provided a brief recapitulation of the discussions within the Commission during the previous session, as well as information on views and practice of States and of select relevant case law.

The summary of the debate in the Commission on the second report is contained in paragraphs **141 to 164** of the report. The debate addressed in particular questions of methodology and the proposed draft introductory provisions and draft principles.

With regard to **methodology,** the detailed information on State practice and analysis of applicable rules was generally welcomed, though some members observed that it was not fully clear what conclusions could be drawn from it and how the information fed into the elaboration of the proposed principles. While some members acknowledged that the purpose of the second report was to identify rules of armed conflict relevant for the topic, they also stressed the need to methodologically examine rules and principles of international environmental law to consider their continued applicability during armed conflict and their relationship with that regime. This was considered key to the topic. Furthermore, a number of members cautioned against simply transposing provisions of the law of armed conflict as they applied with regard to the protection of civilians or civilian objects to the protection of the environment.

There was substantial discussion on the limitation of the **scope** of the topic. While there was widespread agreement that both international and non-international armed conflict should be covered by the topic, several members emphasized the need for further research on the practice of non-State actors, in the context of non-international armed conflicts. Divergent views were expressed whether or not the draft principles should address the question of specific weapons and whether natural and cultural heritage should be excluded. A number of members referred to what they considered to be certain *lacunae* in the proposed draft principles and various proposals concerning additional provisions were made. In this context, several members considered it important to reflect in the draft principles the prohibition to employ methods and means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

With regard to **draft principle 1**, which contained a provision on the protection of the environment during armed conflict, and was general in nature, several members expressed concern over the labelling of the environment as a whole as "civilian in nature". They considered this term too broad and ambiguous and it was suggested that it would be more appropriate to express the rule of environmental protection in terms of its specific parts or features.

Members agreed in general with the thrust of **draft principle 2,** which concerned the application of the law of armed conflict to the environment, though concern was expressed over the formulation "strongest possible protection". It was pointed out that the expression did not accurately reflect the requirements under international humanitarian law or recognize the factual circumstances on the ground.

Draft principle 3, which addressed the need to take into account environmental considerations when assessing what is necessary and proportionate in the pursuit of military objectives, received support from a number of members. They noted that the text of the draft principle had been drawn from the International Court of Justice's advisory opinion on *Nuclear Weapons*. A certain overlap between draft principles 2 and 3 was observed by some members and the possibility of merging the two draft principles was therefore put forward. However, it was also observed that draft principle 3 was more specific than draft principle 2 and should be retained as a separate provision.

The prohibition against reprisals set forth in **draft principle 4** received considerable attention. It was noted that the language mirrored the provision laid down in article 55, paragraph 2, of Additional Protocol 1 to the Geneva Conventions. Different views were expressed as to the appropriateness of including such an absolute prohibition in the draft principles in light of the fact that the prohibition against reprisals had not been generally accepted as a rule under customary international law. Moreover, it was observed that in exceptional cases, belligerent reprisals could be considered lawful when used as an enforcement measure in reaction to unlawful acts of the other party. Some members were therefore of the view that the draft principle would need to be redrafted with appropriate caveats. Several other members noted however that if the environment, or part thereof, became a military objective other rules applied concerning attacks against it – anything less than an absolute prohibition against reprisals did not seem warranted.

Whereas several members expressed support for the thrust of **draft principle 5**, on the designation of areas of major ecological importance as demilitarized zones, they

observed that it raised several important questions that required further examination, including the practical application of such a provision and its normative implications. Suggestions were also made to broaden the scope of the draft principle to include cultural and natural heritage sites, as well as to extend its temporal span to all temporal phases.

Concerning the **future programme of work**, the Special Rapporteur's proposal is to address in her third report issues that had not yet been examined during the second phase, the law applicable in post-conflict situations, and to provide a summary analysis of the three phases.

Finally, the importance of receiving information from States concerning legislation and regulation in force aimed at protecting the environment in relation to armed conflict was stressed. Accordingly, the Commission, in chapter III of its report, has reiterated its request to States to provide information, by 31 January 2016, on whether, in their practice, international or domestic environmental law has been interpreted as applicable in relation to international or non-international armed conflict. Furthermore, the Commission would like to receive information as to whether States have any instruments aimed at protecting the environment in relation to armed conflict, such as 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.

Mr. Chairman,

This concludes my introduction of Chapter IX of the report.

Chapter X: Immunity of State officials from foreign criminal jurisdiction

Mr. Chairman,

I shall now turn to **Chapter X,** concerning the topic **"Immunity of State officials from foreign criminal jurisdiction"**.

This year, the Commission had before it the fourth report of the Special Rapporteur. It will be recalled that last year, the third report addressed the subjective normative elements of immunity *ratione materiae*, namely the question of the beneficiaries of immunity *ratione materiae*. Accordingly, the fourth report, this year, canvassed issues relevant to the material scope of such immunity, namely "what" constituted an "act performed in an official capacity", as well as matters concerning 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 material and temporal scope of immunity *ratione materiae*. Following the plenary debate, the Commission decided to refer the two draft articles to the Drafting Committee. The Chairman of the Drafting Committee presented on 4 August 2015, the report of the Drafting Committee on the topic containing draft articles 2, subparagraph (f) and 6, provisionally adopted by the Drafting Committee, which can be found on the website of the Commission. The texts of these draft articles also appear in **footnote 390** of the report. It would be worthwhile to point out that the Commission is expected to adopt these articles together with commentaries thereto next year.

For the time being, the present report only reflects the plenary debate on these two draft articles, as presented by the Special Rapporteur in her fourth report. The introduction of the report by the Special Rapporteur is summarized in **paragraphs 177 to 192,** while the summary of the plenary debate is reflected in **paragraphs 193 to 231.** Moreover, a summary of the concluding remarks by the Special Rapporteur can be seen in paragraphs **232 to 243.**

In addition to the general comments made including on the methodology, the debate revolved around a number of central points. The first related to the question of the definition of "an act performed in an official capacity", encapsulated in draft article 2 (f). What constituted "an act performed in an official capacity" was considered a key question that distinguished the conduct based immunity *ratione materiae*. Different views, however, where expressed regarding whether a definition of the expression was required. While some members were not convinced that such a definition was required as this was not borne out by the practice, some other members viewed such definition, if properly drafted, as necessary or useful.

The proposed definition of the Special Rapporteur in draft article 2 (f) for **an act to be performed in an official capacity** offered three elements, namely (a) the link between the act and the criminal nature of the act; (b) the attribution of the act in some fashion to the State; (c) the link to sovereignty and the exercise of elements of governmental authority. As noted from the summary of the debate, each of these elements elicited a variety of views from the members of the Commission. I draw your particular attention to paragraphs **206 to 227**.

On the question concerning the link **between the act and whether or not it had to be criminal in nature**, for some members, the central issue which was determinative of an act performed in an official capacity for the purposes of immunity was not the nature of the act but the capacity in which one acted. Accordingly, the criminal nature of the act did not alter its official character. Indeed, the criminality of the act could be considered as an element of the definition of the act performed in an official capacity. The link was therefore considered excessive and unnecessary. In the view of some other members, the reference to "criminal nature" of the act merely sought to reflect a descriptive notion for the purposes of the present draft articles. It was not intended to mean that all official acts were "criminal" by nature.

On the **question of attribution**, there were those members who considered the reference, in the context of immunity *ratione materiae*, to the rules of attribution for State responsibility to be logical, as the immunity in question belonged solely to the State. However, some other members were not prepared to concede that the immunity of a State official from the criminal jurisdiction of another State was completely aligned with the immunity of the State. In their view, the differentiation sought to be made by the Special Rapporteur that any criminal act covered by immunity *ratione materiae* was not, strictly speaking, an act of the State itself, but an act of the individual by whom it was committed was useful and needed to be further explored.

Regarding **the link with sovereignty and the exercise of elements of governmental authority**, it was noted that the language was inspired by the draft articles relating to the attribution of conduct to a State of the 2001 *Articles on Responsibility of States for internationally wrongful acts.* At the same time, several members pointed to the difficulty of defining sovereignty and the exercise of elements of governmental authority. There was doubt expressed regarding the usefulness of the formulation "act performed by a State official exercising elements of governmental authority", viewing the words "elements" to be unclear and "governmental", question begging. It was questioned whether the language of the 2001 Articles was necessarily the most appropriate in the context of the immunity of State officials, given in particular the developments concerning individual criminal responsibility.

Turning now to draft article 6, on the **Scope of immunity *ratione materiae*** attention is drawn to **paragraphs 228 and 229** of the report, which reveal that on balance the debate on this point was largely uncontroversial. The draft sets out the material and temporal elements of immunity *ratione materiae*. For some members, it was considered crucial to stress the functional nature of immunity *ratione materiae* first before dealing with the temporal element. Obviously, draft article 6 has to be read together with draft article 5 provisionally adopted by the Commission last year according to which State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.

Let me conclude the introduction of this chapter by noting that the consideration of limitations and exceptions to immunity is considered a key aspect of the topic. In this respect, some members stressed the importance of a thorough analysis of the comments received from Governments, not only for the evidence of State practice but also for the nuance in the positions taken, including whether they viewed international law generally in this area as being settled. Some other members viewed the question of limitations and exceptions, the even though it has been often mentioned in previous reports with little discussion, as bound up to many of the issues discussed in the fourth report. They therefore regretted that the analysis of limitations and exceptions to immunity would only be addressed in 2016. In order to address some of the difficulties, the Special Rapporteur was encouraged by some members to address the question of limitations and exceptions together with questions of procedure not only because the two aspects were inter-related but also because to do so might ultimately assist the Commission overcome some of the thorny issues related to the topic as a whole.

Since next year, the Commission will deal with the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, it would appreciate receiving information from Governments on their legislation and practice, in particular judicial practice in that respect by 31 January 2016.

Chapter XI: Provisional application of treaties

Mr. Chairman,

I will now turn to chapter XI on the topic "provisional application of treaties". This year, the Commission had before it the third report of the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, which included proposals for six draft guidelines. The Commission also had before it a memorandum, 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.

Following the plenary debate, the Commission decided to refer the six draft guidelines, as proposed by the Special Rapporteur, to the Drafting Committee, but owing to a lack of time, the Committee was unable to conclude its work at this year's session. The Commission received on 4 August 2015 an interim progress report from the Chairman of the Drafting Committee, which has been made available on the Commission's website. It is anticipated that the Drafting Committee will continue and, hopefully, conclude its consideration of the draft guidelines at next year's session.

For the purposes of present statement, the focus is only on the plenary debate in the Commission. The third report of the Special Rapporteur continued the analysis of State practice, and considered the relationship of provisional application to other provisions of the 1969 Vienna Convention on the Law of Treaties, as well as the question of provisional application with regard to international organizations. The report also focused on several further aspects, namely, international organizations or international regimes created through the provisional application of treaties; the provisional application of treaties negotiated within international organizations, or at diplomatic conferences convened under the auspices of international organizations; and the provisional application of treaties of which international organizations were parties.

As regards the **relationship with other provisions of the 1969 Vienna Convention**, the Special Rapporteur focused on articles 11 (Means of expressing consent to be bound by a treaty), 18 (Obligation not to defeat the object and purpose of a treaty), 24 (Entry into force), 26 (*Pacta sunt servanda*) and 27 (Internal law and observance of treaties). Those provisions were chosen because they enjoyed a natural and close relationship with provisional application.

Concerning the **provisional application of treaties between States and international organizations, or among international organizations**, the Special Rapporteur, in his report, observed that the Secretariat's memorandum had clearly demonstrated that States had taken as valid the formulation adopted in the 1969 Vienna Convention. Nonetheless, he reiterated his view that an analysis of whether article 25 of

the 1969 Vienna Convention reflected customary international law would not affect the general approach to the topic.

The Commission's debate on the report is summarized at **paragraphs 257 to 279** of the report. There continued to be a range of views in the Commission as to the necessity of undertaking a study of the internal laws and practices of States applicable to the decision to provisionally apply treaties.

While there continued to be general agreement that the provisional application of treaties had legal effects and created rights and obligations, the Special Rapporteur was nonetheless called upon to further substantiate his conclusion that the legal effects of provisional application were the same as those after the entry into force of the treaty, and that such effects could not be subsequently called into question in view of the provisional nature of the treaty's application. Different views were expressed on this point. For example, the view was expressed that, while the legal effects of provisional application might be practically the same as those after entry into force of the treaty, provisional application was merely provisional, had legal effects for only those States that agreed to apply a treaty provisionally, and had such effects for only those parts of a treaty on which there was such agreement.

The Commission generally welcomed the treatment of the **relationship with other provisions of the 1969 Vienna Convention**. It was pointed out that other provisions of the Vienna Convention, such as article 60, were also of relevance. At the same time, the view was expressed that the focus ought to remain on article 25, and that it was not strictly necessary to undertake an exhaustive analysis of the relationship of the provision to other rules of the law of treaties.

Concerning the **provisional application of a treaty with the participation of international organizations,** doubts were expressed regarding the assertion that the 1986 Vienna Convention, in its entirety, reflected customary international law. More analysis into the question of the customary law basis of article 25 of that treaty was called for.

Reference was also made during the debate to some of the peculiarities of the provisional application of treaties involving the participation of international organizations, and it was suggested that it was worth investigating whether international organizations had considered or were considering provisional application as being a useful mechanism, and if such mechanism had been incorporated in their constituent rules.

As regards **possible future work**, suggestions included focusing on the legal regime and modalities for the termination and suspension of provisional application. It was also suggested that the Special Rapporteur could seek to identify the types of treaties, and provisions in treaties, which were often the subject of provisional application, and whether or not certain kinds of treaties addressed provisional application similarly. Likewise, the question of who the beneficiaries of provisional application were was considered worth discussing. It was also suggested that the Special Rapporteur could undertake an analysis of limitation clauses used to modulate the obligations being undertaken in order to comply with internal law, or conditioning provisional application on respect for internal law.

Members supported the approach taken by the Special Rapporteur of preparing draft guidelines for the purpose of providing States and international organizations with a practical tool. At the same time, a preference was expressed for presenting the draft guidelines as draft conclusions, which has been done in some of the other topics under consideration. I draw the attention of the Sixth Committee to the various drafting suggestions and substantive comments on the draft guidelines, made during the debate on the report, which are summarized at **paragraphs 274 to 279.**

Let me draw attention, as a final point, to chapter III of the report where the Commission 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.

Mr. Chairman,

This completes the introduction of Chapter XI and of the entire report on the work of the Commission at its sixty-seventh session.

I appreciate of your kind attention. And I thank you all.