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STATEMENT BY

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Mr. Chairman,

In this second intervention of the Italian Delegation we will address some Chapters provided for under "Cluster II and Cluster III" of the examination of agenda item 83 Report of the International Law Commission.

In this statement I will address the topics "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" (Chapter VIII), "Protection of the Environment in relation to armed conflicts" (Chapter IX), and "Immunity of State Officials from Foreign Criminal Jurisdiction" (Chapter X).

Mr Chairman,

As far as the topic "**Subsequent agreements and subsequent practice in relation to the interpretation of treaties**" is concerned, first of all, the Italian delegation wishes to congratulate Professor Nolte on his excellent examination of the topic in relation to constituent instruments of international organizations contained in his third report. We found the thorough analysis presented there of Article 5 VCLT on the topic in issue, together with that of the relevant provisions contained in Articles 31, paragraph 3, and 32 VCLT, in itself a very useful working tool.

The Italian delegation supports Draft conclusion 11 and wishes to express its appreciation for the choice to focus this conclusion on the interpretation of treaties that are the constituent instruments of international organizations. Accordingly, we are pleased with the exclusion from the scope of this draft conclusion of the role of agreements and subsequent practice in relation to the interpretation treaties concluded by international organizations which are not constituent instruments of international organizations. Indeed, constituent treaties of international organizations are treaties with specific features, as authoritatively recognized by the International Court of Justice repeatedly (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151, at p. 157 ; and *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 75, para. 19). Therefore, they require separate consideration for the present purposes

We see the merits of having separate paragraphs 2 and 3, the former referring to the practice of Member States within one or more organs of the organization, the latter referring to the practice of the organization as such, for the purposes of the application of different provisions on interpretation under VCLT. While the rationale of this distinction appears clearly from the commentary, the language of the text of the conclusion could be improved.

We note that the notion of 'practice' of an international organization in paragraph 3 is not accompanied by any qualification, such as 'established'. We can go along with such flexibility without prejudice to further consideration of the point in issue at a future stage of the debate.

Finally, Mr. President, Italy supports paragraph 4, as a safeguard clause with respect to specific 'relevant rules' of interpretation that may, however rarely, be contained in a constituent instrument. We agree that such rules should take precedence over the general rules of interpretation, also in line with article 5 1969 VCLT, as well as with Article 2, paragraph 1(j), of the 1986 VCLT and Article 2(b) of the 2011 articles on responsibility of international organizations. We also support that the 'established practice of the organization' be recognized on a par with a 'rule of the organization' for the same purpose. Indeed, for the purposes of the present provision, it is only appropriate that the notion of "practice" be qualified as "established", differently from the purposes of paragraph 3.

Mr Chairman,

I will now turn to Chapter IX of the Report on "**Protection of the Environment in relation to Armed Conflicts**". Italy wishes to commend the Special Rapporteur, Ms Marie Jacobsson, for her second report including a set of draft preambular paragraphs and five draft principles. As we see the work on this topic making progress we are pleased to support the three-phase approach which has been taken, whereas we would like to reserve our position about the format of the end-product of the exercise. While at the present stage we are prepared to go along with the idea of a set of draft principles as a working method, we consider that this should be without prejudice to the possibility of the choice of a different format to be taken in due course. My delegation has also taken note with interest of the draft introductory provisions and draft principles presented by the Drafting Committee. However, since the commentaries thereto – which we regard as an integral part of the exercise – will be considered by the Commission only at the next session, our remarks will be mostly based the work by the Special Rapporteur.

Mr. Chairman,

Italy appreciates that the main purpose of the second report was to identify the existing rules of international humanitarian law (IHL) applicable to the protection of the environment in time of armed conflict. However, we would also welcome the study of the applicability in relation to armed conflict of the international rules and principles of international environmental law, both of treaty and customary law nature. In the same vein and in line with the suggestion made by the Commission in 2006 "[...] that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations"[1], we would encourage further study of the interrelation between IHL and environmental law, as well as with human rights law in relation to the protection of the environment and the right to health in armed conflict. In connection with this, deeper examination would be welcome of the contours of the *lex specialis* character of IHL during armed conflict, as well as of the effects of armed conflict on environmental agreements.

As to the scope of the topic, the Italian delegation is pleased to see language referring to "armed conflict", so as to encompass international and non-international armed conflicts. At the same time, we share the view of those who favour retaining throughout the text the term "environment" without the qualification "natural" before it. Likewise, in the draft-Preamble, concerning the Purpose of the draft-Principles, we would favour the expression "[...] minimizing damage to the environment" deleting the word "collateral" before "damage".

We acknowledge that qualifying the environment as "civilian in nature" allows for the operation of the principle of distinction as it emerges from draft-Principle 1. To that end, however, we would welcome the elaboration of some guiding specifications concerning the conditions under which the environment, or portions of it, may become a military objective. As to the degree of damage to be prevented, guidance may be found incorporating the expression "widespread, long-term and severe damage" as provided for in Articles 35, paragraph 3, and 55, paragraph 1, of the Additional Protocol I. It would seem appropriate that additional reference be made, in draft- Principle 2, or 3, to the prohibition of hostile environmental modification techniques.

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1 "Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law" (A/61/10), 2006, p 2.

My delegation supports the language in draft-Principle 3. We also favour the prohibition of reprisals against the environment set out in draft-Principle 4 in line with Article 55, paragraph 2, of Additional Protocol I, even acknowledging that the customary law nature of the prohibition in point is not generally recognized. We find the designation of areas of major ecological importance as demilitarized, or protected, zones, appropriate as set out in draft-principle 5, to be possibly integrated by reference also to areas of cultural importance, as proposed by the Drafting Committee.

We look forward to the discussion on this topic in the coming year.

Mr Chairman,

I will now address Chapter X of the Report on the topic **"Immunity of State officials from foreign criminal jurisdiction".** Italy congratulate the Special Rapporteur, Professor Escobar Hernandez, for her Fourth report including two draft Articles. We also wish to reiterate the importance that Italy attach to a comprehensive and in-depth analysis of this topic, which touches upon several issues of critical relevance in today's State and judicial practice. At this stage, we shall confine our comments to the two draft articles provisionally adopted by the Commission based on the fourth report of the Special Rapporteur addressing, respectively, the crucial issues of the definition of "acts performed in an official capacity" and the scope of immunity *ratione materiae*.

Mr. Chairman,

Pursuant to draft article 2(f) "[a]n 'act performed in an official capacity' means an act performed by a State official exercising elements of the governmental authority that, by its nature, constitutes a crime in respect to which the forum State could exercise its criminal jurisdiction". We support the view expressed in the commentary whereby this definition does not coincide with that of *acta jure imperii*, just as much as the distinction between acts performed in an official capacity and acts performed in a private capacity is not meant to be equivalent to that between *acta jure imperii* and *acta jure gestionis*.

We note with favour that, in her Report, the Special Rapporteur, in order to determine when an act is performed in an official capacity, has referred to the concept of "elements of governmental authority" elaborated by the ILC in the commentary to Article 5 of the Articles on the Responsibility of States for Internationally Wrongful Acts, according to which "[b]eyond a certain limit, what is regarded as "governmental" depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise" (A/CN.4/686, para. 83). We are pleased that, during the debate on the report of the Special Rapporteur, the Commission acknowledged this point with approval (A/70/10, para. 222). We find that the rich national and international case law researched by the Special Rapporteur is widely sufficient to corroborate the point in issue, including case law pertaining to civil claims relevant to criminal case law.

The Italian Delegation appreciates the inclusion, in the commentaries of both the Special Rapporteur and the Commission, of the exercise of police powers and activities of the armed force among the categories which are widely acknowledged by judicial practice as

falling within the notion of exercise of "governmental, or State, authority" for the purposes of determining the application of immunity *ratione materiae*.

Last year, Italy stressed her view that activities of armed forces fall within the scope of "acts performed in an official capacity" for the purposes of the application of immunity *ratione materiae*. We are pleased to see this point corroborated both in the Report of the Special Rapporteur (A/CN.4/686, para. 119) and in that of the Commission (A/70/10, para. 192).

Mr. Chairman,

Italy supports the substance of draft article 6 on the scope of immunity *ratione materiae* as evidence of international customary law, both with regard to the objective scope and time limit of application of functional immunity.

Having regard to the debate in the Commission concerning the drafting draft article 6, we are happy with the order of paragraphs 1 and 2, whereas paragraph 3 could be deleted, so as to avoid duplication with in draft article 4, paragraph 3.

We look forward to further progress on the various aspects of this important topic.