STATEMENT BY

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Chapter IX

(Protection of the environment in relation to armed conflict)

Mr. Chairman,

1. We would like to express our appreciation for the work of the Special Rapporteur, Marie Jacobsson, for her in-depth and comprehensive report on the protection of the environment in relation to armed conflicts,. At the same time, we note that this topic raises many complex questions that will need to be addressed in the future work of the Commission.
2. We have taken note of the discussion on the use of the term 'draft principles' versus 'draft articles'. We would prefer the use of 'principles', because this adequately reflects the intention not to develop a new convention.
3. The draft principles adopted so far by the Drafting Committee do not include a definition of 'armed conflict'. We continue to consider that there is no need for such a definition to be included in the study. An attempt to define that term would in our view unnecessarily complicate the work of the Commission. It could entail a risk of unintentionally lowering the protection of the natural environment by 'fixating' the definition of armed conflict and thereby the threshold of the application of International Humanitarian Law.
4. Concerning draft principle II-3, we note that it states, *inter alia*, that environmental considerations shall be taken into account when applying the

rules on military necessity. In view of my government, this raises some questions.

5. First, the scope of the term "rules on military necessity" is not clear. If the intention is to refer to a number of rules of IHL that refer to military necessity, usually in the context of the protection of a specific category of persons or objects, we would point out that military necessity is only one element of these rules. It is doubtful whether it is appropriate to refer to these as "rules on military necessity".

6. Secondly, it is not immediately clear how environmental considerations may be applied in determining military necessity. Military necessity, at least in a strict sense, refers to that which is necessary to reach a specific objective. It would seem that either something is necessary to reach that objective or it is not: it does not involve a weighing of different factors. In this regard, we note that the draft principle proposed on this issue by the Special Rapporteur is included under the heading "principle of proportionality". It would be useful if clarification would be provided as to the practical operation of the proposed principle.

7. Draft principle II-4 refers to "the [natural] environment" as a single entity, while draft principle II-1 refers to "**part of** the [natural] environment". The latter thus seems to start from a conception of the environment not as one single

entity but as made up of different parts, with which draft principle II-4 seems inconsistent. Underlying both draft principles appears to be an assumption that the natural environment, or its constituent parts, are "civilian objects". My government shares the concern of some members of the ILC that considering the natural environment as a whole as a civilian object would lead to significant difficulties when applying the principle of distinction.

8. This raises three separate kinds of questions: 1) what is the effect of the military use of any part of it for the status of the environment as a whole? 2) what are actually these parts? Are we, for instance, talking about forests, or individual trees? And 3) what is the effect of pollution, for instance through the exhaustion of fumes in the air, constituting an "attack" on the environment? These are just examples of the difficult questions which arise in relation to draft article II-1 in conjunction with the meaning of the term "natural environment".

9. Finally, I would like to raise some questions concerning draft principle II-5. In particular, we wonder what the added value is of this draft principle in relation to draft principle II-1 (3). In fact, draft principle II-5 appears to lower the protection afforded to the natural environment by principle II-1 (3), by requiring that an area be "of major environmental and cultural importance".

(Chapter X)

Immunity of state officials from foreign criminal jurisdiction

10. Now, turning to the topic of immunity of state officials from foreign criminal jurisdiction, my government would start with extending our congratulations to the Special Rapporteur, Concepción Escobar Hernandez. The topic remains one involving difficult conceptual issues, in particular the question of the relation between the law of immunities and the law of state responsibility. We would like to comment on two aspects of the report.

11. In support of some members of the Commission, my government would first question the methodological position that domestic legislation on the scope of an 'act performed in official capacity' should serve only as a 'complementary interpretive [sic] tool'. Domestic legislation is part of state practice (and occasionally *opinio juris*) to determine a rule of custom. It is thus important to determine the scope of an 'act performed in official capacity' under customary law. The Special Rapporteur has attached more weight to national judicial practice. While the overview is helpful, the Special Rapporteur rightly concluded that the approach of national courts has been diverse and does not demonstrate a consistent pattern. An overview of national legislation, in addition to court decisions would have perhaps have allowed for firmer conclusions.

12. Secondly, with respect to the relation between the law of state responsibility and the law of immunities, the issue of attribution, including in instances of conduct *ultra vires*, and immunity is particularly complex. My government would appreciate a more in-depth analysis here. An *ultra vires* act is attributable to a state under the law of state responsibility when performed by one of its organs, regardless of the nature of the act. The question is whether the individual appeared to act in official capacity, not whether the act was one instructed by his/her government. The official nature of the conduct makes it an act performed in official capacity, and hence one covered by immunity. What matters thus, is what really is an *ultra vires* act and what is an act in private capacity, or whether an *ultra vires* act is essentially an act in private capacity appearing to be official and committed by a state organ.

13. What this demonstrates is that an appropriate balance must be struck between the weight attached to the nature of the_'act' and to the person accomplishing the act. The presumption must be that a person acting in official capacity should enjoy immunity, even if the act itself is not immediately recognisable as an official act. The notion in the Articles on State Responsibility that States are also responsible for acts that they consider private acts but that are generally considered public acts (such as the security of prisons provided by a private corporation), may not be taken *a contrario* to deny

immunity to acts that are performed in official capacity but deemed by a foreign court not to be official acts. The scope of 'acting in official capacity' is broader than the 'official act' and it is the broader scope that must be covered by immunity *ratione materiae*.

14. The notion of dual responsibility does not entirely solve this problem. In particular, the notion of dual responsibility does not answer the question of jurisdiction. Even if an individual may be individually *responsible* for a crime for which the state of which he is an official is also responsible, a foreign court may still not have *jurisdiction* to prosecute the crime because of immunity enjoyed by this person.

Chapter XI
(Provisional Application of Treaties)

15. Turning to the topic of Provisional application of treaties, we express our appreciation to the Special Rapporteur, Juan Manuel Gómez-Robledo for his third report and also thank the Secretariat for its memorandum, providing useful background information.

16. The Special Rapporteur has provided us with an initial analysis of the relationship between the provisional application of treaties and other provisions

of the 1969 Vienna Convention, which we believe is useful for the purpose of clarification and delimitation.

17. We agree that the conceptual distinction must be maintained between the means of expressing consent to the bound to a treaty, aimed at becoming a Party to the treaty once it enters into force for the State concerned, and provisional application of a treaty which obliges a State having consented to it to give effect to treaty provisions for as long as it has not entered into force for that particular State, or for as long as that State has not indicated its wish of not becoming a Party to the treaty. The conceptual distinction is also relevant for other purposes, particularly in respect of termination.

18. We would also agree that provisional application of a treaty must be distinguished from the obligation not to defeat the object and purpose of the treaty. Although both relate to the phase prior to the entry into force of a treaty for a particular State, they differ in their objectives: whereas provisional application of a treaty aims at the execution of (parts of) the treaty "as though the treaty were in force", the obligation not to defeat its object and purpose is aimed at ensuring the proper execution of the treaty from the moment it enters into force.

19. Regarding the relationship between provisional application of a treaty and its entry into force, my government would question whether the notion, that the

provisional application of a treaty presumes that the treaty is not in force, is accurate. A treaty may very well have entered into force as such, for instance due to having obtained the required number of ratifications, while its entry into force may still be pending for a particular State which may then decide to apply it provisionally. Draft guideline 5 should be adjusted accordingly.

20. The position of the Netherlands with respect to the relevant provision in the VCLT has been that there can be no doubt that provisional application of a treaty has legal effects and, consequently, that any ensuing obligations must be observed. Contrary to what is suggested in para. 59 of the report and draft guideline 5, we would like to emphasise that any obligations incurred as a result of the provisional application of a treaty and, hence, the application of *pacta sunt servanda*, may not end with the termination of provisional application of a treaty. In situations where withdrawal of provisional application by a State would adversely affect third parties acting in good faith, obligations emanating from the provisional application of a treaty may well outlive its formal ending. This may require a transitional regime with respect to, or even the continuation of, obligations arising from the period of provisional application with respect to third parties acting in good faith.

21. In his third report the Special Rapporteur also dealt in some depth with different aspects of provisional application with regard to international organisations. We

thank the Special Rapporteur for the many examples of provisional application involving international organisations, demonstrating the frequency of provisional application with respect to treaties establishing international organisations or some type of international mechanism or "regime". These examples confirm that State practice on the interpretation and application of provisional application under article 25 of the 1969 Vienna Convention has been characterised by flexibility. In view of this flexibility, the formulation of draft guideline 2 describing the different forms of "agreement" regarding provisional application may take, may be too limited. States enjoy, and apply, considerable freedom and flexibility resulting in a pragmatic approach of reaching agreement on provisional application, including on the basis of a resolution by an international organisation. Such resolutions, however, cannot be equated to an agreement establishing provisional application.

22. Finally, we would like to note that the reference to the internal law of States or the rules of international organisations in draft guideline 1 would not seem appropriate. In our view, the topic of provisional application should be approached as an instrument under international law, well-established in the practice and international organisations.

Thank you, mr. President.