

COURTESY TRANSLATIONS

UNITED NATIONS GENERAL ASSEMBLY 70th SESSION

SIXTH COMMISSION

INTERNATIONAL LAW COMMISSION REPORT

PART I: CHAPTERS VI (Identification of customary international law), VII (Crimes against humanity) and VIII (Subsequent agreements and subsequent practice in relation to interpretation of treaties).

**STATEMENT BY THE LEGAL EXPERT OF THE PERMANENT MISSION OF
SPAIN ON BEHALF OF PROFESSOR JOSÉ MARTÍN Y PÉREZ DE
NANCLARES**

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New York, 4th November 2015

(Provisional version, subject to modifications during the presentation)

Mr. President,

On behalf of the Spanish delegation, I would like to congratulate most warmly the International Law Commission on the outstanding quality of its work during the 67th session, particularly regarding chapters VI to VIII of the Report.

Chapter VI: Identification of customary international law.

Mr. President,

Concerning chapter VI's object, on the identification of customary international law, the Spanish delegation would like to start by congratulating Mr. Michael Wood for his excellent work on the third Report submitted to the International Law Commission and containing 8 draft conclusions.

In order to contribute to the reflection on the subject, allow us to comment on those draft conclusions and/or on the debate arisen within the Commission.

In the *draft conclusion 4[5]*, on the 'Requirement of practice', the exclusion of the conduct by other non-state actors, other than international organizations, from the consideration of practice for the purpose of identifying customary law, is to our eyes too strict. There are fields in International Law where those actors do play an important role and should be taken into account in the process of determining the existing International Law. Thus, we would be in favour of a much more nuanced approach.

In the *draft conclusion 11*, on 'Evidence of acceptance as law', it could be interesting to consider inaction not only as evidence of *opinio iuris*, but also as evidence of the dissolution of a previous *opinio iuris*. When a conduct in principle against customary law does not prompt reaction from those who could invoke the violated rule, one could infer that its acceptance as law has diminished. Even more, should the inaction continue or extend itself, one could argue that *opinio iuris* has ceased to exist. On the other hand, as we stated last year in this same forum, we would rather use the expression "*opinio iuris*", fully consolidated, than "acceptance as law".

Lastly, concerning judicial decisions and writings, mentioned in *draft conclusion 14*, as subsidiary means to identify customary international law rules, my delegation shares the opinion of those members of the International Law Commission who considered that resolutions from national courts should be included within the "judicial decisions" category. In subjects such as foreign State immunities, which concern the exercise of their jurisdiction by such courts, considering judicial decisions, for instance, is unavoidable. On the other hand, regarding writings, the role of the resolutions of the International Law

Institute (an institution that congregates academics from different regions of the world) could be taken into consideration (not in the draft conclusion, but rather in the corresponding commentary).

Chapter VII: Crimes against humanity.

Mr. President,

Concerning chapter VII, on crimes against humanity, the Spanish delegation wishes to congratulate Mr. Sean D. Murphy, for his first report on the matter, starting point of the four draft articles provisionally adopted by the International Law Commission in 2015, with commentaries. The quality of the texts adopted up until now foretells a good final result.

Clearly the Commission's work has been eased by the existence of previous conventional instruments. In particular, the Statute of the ICC, which provides the definition of crimes against humanity, found in draft article 3. But also the treaties applicable to other international crimes, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

To this regard, the Spanish delegation considers that, following the steps of the aforementioned Convention on the Prevention and Punishment of the Crime of Genocide, the content of *draft article 1* ("The present draft articles apply to the prevention and punishment of crimes against humanity") could be the title of the Draft Articles to be adopted by the Commission and later submitted to the United Nations General Assembly ('International Law Commission Draft articles on the prevention and punishment of crimes against humanity'). Draft article 1 could therefore be suppressed. Furthermore, its wording is not entirely satisfactory. It does not seem technically correct to state that the draft articles "apply" to the prevention and punishment of crimes against humanity, but it would rather be more suitable to say the draft articles "concern" the prevention and punishment of crimes against humanity.

Regarding *draft article 4*, the content of paragraph 2 must be moved somewhere else, since stating that "No exceptional circumstances whatsoever (...) may be invoked as a justification of crimes against humanity" has no relation with the heading of the draft article ('Obligation of prevention'), nor with paragraph's 1 object.

Chapter VIII: Subsequent agreements and subsequent practice in relation to the interpretation of treaties.

Mr. President,

Turning to chapter VIII, referring to subsequent agreements and subsequent practice in relation to the interpretation of treaties, the Spanish delegation would like to thank the Special Rapporteur, Mr. Georg Nolte, for the third report submitted to the International Law Commission. There are currently eleven draft conclusions provisionally adopted by the Commission: five were adopted in 2013, another five in 2014, and one in 2015.

We will focus on draft conclusion 11, on ‘Constituent instruments of international organizations’. It is certainly a thought through text. Nonetheless, we hold three comments.

Firstly, the draft conclusion would be clearer if it specifically stated that subsequent agreements, subsequent practice and other subsequent practice, mentioned in paragraphs 1 and 2, refer to the agreements and practice of States parties to the constitutive treaty of the international organization, either that of all of them (they would fall within article 31.3 of the 1969 Vienna Convention), or that of one or more of them (they would be included in article 32 of the Vienna Convention). We are aware that draft conclusion 4 already defines ‘subsequent agreement’, ‘subsequent practice’ and ‘other subsequent practice, pointing at the parties to the treaty in question, but profiting of the circumstance that, in the case of international organizations’ constitutive treaties, States are Member States of the organization, a mention to the subsequent agreement and practice of “Member states” or one or more of them could be included. This would therefore further stress the difference with paragraph 3, whose object is the subsequent practice of the international organization *qua talis*.

Secondly, considering that article 32 of the Vienna Convention does not refer to any kind of practice, it does not seem suitable to speak, at least in the Spanish version, of “subsequent practice *under* article 32”. Instead, its interpretative value could be mentioned “*by virtue* of article 32”. This observation is applicable to other draft conclusions adopting the said expression.

Lastly, we believe that the object of paragraph 2 should be clearer stated, in order to, amongst other things, distinguish it immediately from that of paragraph 3. In our view, the content of paragraph 2 is not sufficiently clear when stating that subsequent agreements and practice “may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument”; maybe is a problem the Spanish version only. Furthermore, the commentary to this paragraph faces two different directions: on the one hand, the examples given in the commentary refer to the subsequent agreements and practice of Member States or States Parties which show in the practice of the international organization; on the other, paragraph 15 of the commentary explains that agreements and practice may ‘arise from’ or ‘be expressed in’ the practice of an international organization, stating that, (and I read): “Subsequent agreements and subsequent practice of States parties

may 'arise from' their reactions to the practice of an international organization in the application of a constituent instrument. Alternatively, subsequent agreements and subsequent practice of States parties to a constituent agreement may be 'expressed in' the practice of an international organization in the application of a constituent instrument". From this, we infer that the practice of an international organization may trigger an agreement or a practice of States, either to react against it, or to acknowledge it. But the remainder of the commentary does not follow that path. As we have already said, it rather refers to the fact that the agreement or practice of States may be contained or be reflected, however it might be, in the practice of an international organization. It would be, then, advisable to clarify what this paragraph refers to, to ensure that its wording and the commentary in question fully meet their purpose.

Thank you very much, Mr. President.