COURTESY TRANSLATION

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INTERNATIONAL LAW COMMISSION REPORT

PART III: CHAPTERS IX (Protection of the environment in relation to armed conflict), X (Immunity of State officials from foreign criminal jurisdiction) and XI (Provisional application 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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(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, in this occasion, regarding chapters IX to XI of its Report.

We will go superficially over chapter IX, to focus in detail on chapters X and XI.

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

Mr. President,

Concerning chapter IX, which deals with the protection of the environment in relation to armed conflicts, the Spanish delegation would like to start by congratulating the Special Rapporteur, Mrs. Marie G. Jacobsson, for the second report submitted to the Commission, which is at the origin of the draft introductory provisions and draft principles I-(x) to II-5, provisionally adopted by the Drafting Committee.

The many debates arisen within the Commission around the second report of the Rapporteur show the difficulty of the topic (where humanitarian law and environmental law coexist and where humanitarian law must adapt to environmental law). But the number of debates might show as well the lack of maturity to tackle this topic.

This delegation will not delve into the details of all the issues addressed, pending its provisional adoption by the Commission. We will simply reiterate what was said in 2013 and 2014, in the sense that the treatment initially proposed by the Special Rapporteur, distinguishing between preventive measures, those applicable during armed conflict and the subsequent ones arise numerous doubts, since many principles do not confine their applicability to each of these phases, but are rather present in all three.

Chapter X: Immunity of State officials from foreign criminal jurisdiction

Mr. President,

On the topic of immunity of State officials from foreign criminal jurisdiction, the Spanish delegation would like to begin by congratulating most sincerely the Special Rapporteur, my

compatriot and predecessor, Mrs. Concepción Escobar Hernández, for her work in the fourth report.

The works on this matter progress slowly but steadily, knowing that it is a complex topic from the legal point of view and highly sensible politically. The extensive research carried out by the Special Rapporteur is a guarantee, in this regard.

In general terms, the texts adopted provisionally by the Drafting Committee seem more satisfactory than those initially presented by the Special Rapporteur. This shows the value of the debates within the Commission.

Starting with the definition of an 'act performed in an official capacity' (draft article 2 f)), this delegation considers its inclusion in the project necessary. On the other hand, we welcome the deletion of the initial reference to its condition of "crime against which the State of the forum could exercise its jurisdiction to prosecute". This was not only non-intuitive, but also unnecessary. Immunity from jurisdiction, whoever it might be applicable to, and regardless of the jurisdiction (civil, criminal or administrative), necessarily implies the existence of jurisdiction of the State of the forum. Only when its courts have jurisdiction do the questions of existence of immunity arise. It is therefore unnecessary to state it, especially when other international texts of reference on immunity of jurisdiction of certain individuals (such as the 1961 and 1963 Vienna Conventions on Diplomatic and Consular Relations) proclaim this immunity without explicating that it concerns conducts against which the receiving State could exercise its jurisdiction. *Cela va de soi.*

Concerning *draft article 6*, on the 'Scope of immunity *rationae materiae*', we prefer the *systematization* it now presents; with paragraph 1 stating its material scope, paragraph 2 stating its temporal scope and paragraph 3 addressing the situation of Heads of State, Heads of Government and Foreign Affairs Ministers whose term of office has come to an end, which fits well with draft article 4.

In terms of the *wording* of draft article 6, we welcome some deletions, such as the statement that State officials enjoy immunity *ratione materiae* "only with respect to acts performed in an official capacity" (paragraph 1) and which restates draft article 5, which declares already that State officials enjoy immunity of prosecution only with respect to acts performed in official capacity.

Regarding the *substance*, the Spanish delegation welcomes the perspectives of the draft articles considered by the Commission during the 67th session. That is of course, waiting for the study of limits and exceptions to immunity in 2016; the crucial issue of its relation with international crimes and with the International Penal Court will then arise.

Chapter XI: Provisional application of treaties.

Mr. President,

Moving on to chapter XI, on the provisional application of treaties, the Spanish delegation would like to thank the Special Rapporteur on the topic, Mr. Juan Manuel Gómez Robledo, for the third Report submitted to the International law Commission.

This delegation wants to make several comments about the different draft guidelines of that Report.

Firstly, in relation to draft guideline 1, it can be pointed out that the final reference to internal law of the States or to the rules of international organizations is contrary to the approach of the international Law of the treaties and to customary international Law. Accepting that States and international organizations "could provisionally apply a treaty, or parts thereof (...) provided that the internal law of the states or the rules of the international organizations do not prohibit such provisional application" imply a breach of the principle by means of which internal Law in, in theory, is "indifferent" in the international field. This principle can be found in article 27 of 1969 and 1986 Vienna Conventions, on the Law of the treaties, when it says that a State cannot invoke its internal Law to justify the fact of not having accomplished a treaty. The same happens with international organizations and their rules. If a State or an international organization have accepted to provisionally apply a treaty, they cannot invoke afterwards their internal laws to go back on a provision or to free themselves from complying with a treaty.

In what makes reference to draft guideline 2, its only aim is to give examples of other types of ways (different to the inclusion in the treaty) by means of which the parties can convey the provisional application. It is, for certain, a *numerus apertus* and, at the end, the specific examples are limited, in fact, to two cases: a separate agreement and a resolution of an international conference. Taking into account the limitations of such approach, we have to confess that we consider it pointless; moreover, we do not even think that it is necessary to give examples of a subject which, in practice and, as far as we know, does not generate problems.

Draft guideline 3 deals with the *dies a quo* of the provisional application. It makes reference to the moment of the signature of the treaty, its ratification, accession or acceptance or to any other moment agreed by the parties. The reference to "any other time agreed" by the States or the international organizations ends up by implying that any comment which intends to introduce any other moment would have no sense. Nevertheless, it is surprising that in a text which intends to be in line with the 1969 and 1986 Vienna Conventions on the law of the treaties, there is not a total coincidence between the means of expressing consent to be bound by a treaty included in such Conventions (they mention ratification, acceptance, approval and accession in their articles 11), and those included in the draft guideline which we are now analysing (which omits the approval).

Draft guideline 4, according to which "the provisional application of a treaty has legal effects", has caused us certain perplexity. There is nothing similar about the entry into force in the Vienna Conventions on the law of the treaties. There is no provision in such Conventions which says that treaties "have legal effects" or a similar provision in internal systems (or, at least, in the Spanish one) in relation to regulations or acts in force. Only from a pedagogic point of view, it could be said something about the fact that the provisional application implies bringing forward the effectiveness of the provisions of a treaty or of a part thereof in a moment which is prior to its entry into force.

In relation to draft guideline 5 that contemplates two cases of possible termination of the provisional application of treaties (when the treaty enters into force or when one party announces her intention not to ratify it) it would be convenient to introduce the "opening formulation" commonly used within the Law of Treaties. This formulation of a dispositive nature safeguards any other procedure agreed upon by States or the international organisations. In this way those provisions that establish the termination of the provisional application after a certain delay if the entry into force of the treaty has not taken place, could be reflected.

This delegation is of the opinion that the inclusion of model clauses in the Commision Draft could prove complicated, taking into account the great diversity that they could present and the existing differences amongst internal laws.

Concerning the provisional application of treaties celebrated by international organisations, it could be useful to collect the practice commonly used within the EU regarding "mixed treaties" (agreements celebrated by the EU together with the Member States on one side and one or several third States on the other). This practice is restricts the provisional application to the clauses which fall within the area of the EU competences, that is where the decision concerning the provisional application is adopted by the EU. The intervention of member states is not required (beyond their presence as members of the Council of the EU, the competent institution to take decisions on the provisional application of the EU international treaties according to article 218.5 of the TFUE.

The Spanish Delegation wishes to conclude her intervention at his point, expressing her confidence that all doubtful and problematic issues will be dealt with. We could add some questions to the ones already identified by the Commission; as an example: Are all the treaties susceptible of provisional application? Is there any limitation regarding the content or the implications of the provisional application? Is the provisional application "inter partes" admissible, and only for one State? Is it possible to take into account the timeframe of the provisional application of a treaty in order to establish the duration of the treaties with a predefined one?

Thank you very much, Mr. President.