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STATEMENT OF THE CHAIRMAN OF THE INTERNATIONAL LAW COMMISSION, MR. PEDRO COMISSÁRIO AFONSO

Part Three

***Chapters X-XII:* 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 statement, I will address the remaining chapters of the Commission's report, beginning with Chapter X.

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

Mr. Chairman,

Chapter X concerns the topic "**Protection of the environment in relation to armed conflicts**". This year, the Commission had before it the third report by the Special Rapporteur, Ms. Marie Jacobsson. The third report focused on identifying rules of particular relevance to post-conflict situations, while also addressing some issues relating to preventive measures to be undertaken in the pre-conflict phase, as well as the particular situation of indigenous peoples. It proposed nine draft principles, three on preventive measures, five concerning the post-conflict phase and one draft principle on the rights of indigenous peoples. The draft principles addressed matters concerning implementation and enforcement, status of forces and status of mission agreements, peace operations, peace agreements, post conflict assessments and reviews, remnants of war at land and at sea, access to and sharing of information, and rights of indigenous peoples.

The report was discussed by the Commission in the plenary and the nine draft principles proposed therein were referred to the Drafting Committee. A summary of the plenary debate is contained in **paragraphs 147 to 187** of the report. The Drafting Committee provisionally adopted the nine draft principles, taking into account the debate on the third report. The Chairman of the Drafting Committee, Mr. Pavel Šturma, delivered a statement to the Plenary of the Commission on the work of the Drafting Committee on those nine draft principles. That statement, dated 9 August 2016, is available on the website of the Commission. To facilitate reading, the draft principles provisionally adopted by the Drafting Committee are also reproduced in a footnote in chapter X. I would like to emphasize, however, that those provisions have not yet been considered or adopted by the Commission in full. The Commission will consider those draft principles, along with accompanying draft commentaries at a future session.

In addition to the referral of the nine draft principles proposed in the third report, the Commission also decided to refer back to the Drafting Committee the draft introductory provisions and draft principles that were taken note of in 2015, to address some technical issues in the text, including numbering of the draft principles as a whole. Upon consideration of the report of the Drafting Committee on those draft principles, the Commission provisionally adopted draft principles 1, 2, 5 and 9 to 13, together with commentaries. The text of the provisionally adopted draft principles and commentaries can be found at **paragraphs 188 and 189** of the report.

Structurally, the entire set of draft principles are divided into three parts following the initial part entitled "Introduction" which contains draft principles on the scope and purpose of the draft principles. **Part One** concerns guidance on the protection of the environment before the outbreak of an armed conflict but also contains draft principles of a more general nature that are of relevance for all three temporal phases: before, during and after an armed conflict. Part One is therefore entitled "General principles". It is envisaged that additional draft principles may be added to this part at a later stage. **Part Two** pertains to the protection of the environment during armed conflict, and **Part Three** relates to the protection of the environment after an armed conflict.

I will now address the eight draft principles that were provisionally adopted by the Commission during this year's session in turn.

Draft principle 1 defines the **scope** of the draft principles and provides that the draft principles apply to the protection of the environment during three temporal phases – before, during or after an armed conflict. It is important to underline that not all draft principles would be applicable during all phases, and also that there is a certain degree of overlap between the three phases. Regarding the *ratione materiae* of the draft principles, reference is made to the term "protection of the environment" as it relates to the term "armed conflicts". No distinction is made between international armed conflicts and non-international armed conflicts.

It should also be noted that the Commission has not yet decided whether a definition of the term environment should be included in the text of the draft principles and, if so, whether the term "environment" or "natural environment" is preferable for all or some of these draft principles. As indicated in the text the Commission will revisit this matter.

Draft principle 2 concerns the **Purpose** of the draft principles, which is to enhance the protection of the environment in relation to armed conflict, including through preventive and remedial measures. Similar to the provision on scope, the present provision covers all three temporal phases.

Let me now turn to draft principle 5, **"Designation of protected zones"**. Draft principle 5 provides that States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones. While draft principle 5 is situated in Part One of the draft principles, which generally concerns guidance on the protection of the environment before the outbreak of an armed conflict, it is recalled that this Part also contains draft principles that are relevant to the other temporal phases. Draft principle 5 therefore does not exclude instances in which the designation of protected zones could take place also either during or soon after an armed conflict. In addition,

draft principle 5 has a corresponding draft principle, draft principle 13, placed in Part Two of the draft principles concerning the protection of the environment during armed conflict.

Let me now turn to draft principles 9 to 13 that are all placed in Part Two of the draft principles.

Draft principle 9 is entitled **"General protection of the natural environment during armed conflict"** and provides broadly for the protection of the natural environment during armed conflict. It reflects the obligation to respect and protect the natural environment, the duty of care and the prohibition of attacks against any part of the environment, unless it has become a military objective.

Paragraph 1 sets out that the natural environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict. This paragraph highlights the fact that the draft principles are intended to build on existing references to the protection of the environment in the law of armed conflict together with other rules of international law in order to enhance the protection of the environment in relation to armed conflict overall. Paragraph 2 provides that care shall be taken to protect the natural environment against widespread, long-term and severe damage and is inspired by article 55 of Additional Protocol I of the 1949 Geneva Conventions. It indicates that there is a duty on the parties to an armed conflict to be vigilant as to the potential impact that military activities can have on the natural environment. Paragraph 3 provides that no part of the natural environment may be attacked, unless it has become a military objective. This paragraph is based on the fundamental rule that a distinction must be made between military objectives and civilian objects and seeks to treat the natural environment in the same way as a civilian object during armed conflict.

Let me now turn to **draft principle 10, "Application of the law of armed conflict to the natural environment"**. This draft principle provides that the law of

armed conflict, including the principles and rules on distinction, proportionality, military necessity and precaution in attack, shall be applied to the natural environment, with a view to its protection. The overall aim of the draft principle is to strengthen the protection of the environment in relation to armed conflict, and not to simply reaffirm the law of armed conflict. While certain principles and rules under the law of armed conflict are explicitly identified in the draft principle, as being of particular relevance, this should not be understood to be an exhaustive list.

Draft principle 11, which is entitled "**Environmental considerations"**, sets forth that environmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity. Draft principle 11 is closely linked with draft principle 10, but adds specificity with regard to the application of the principle of proportionally and the rules of military necessity. It is therefore of operational importance; it aims to address military conduct and does not deal with the process of determining what constitutes a military objective as such.

Draft principle 12 is entitled **"Prohibition of reprisals"**. It provides that attacks against the natural environment by way of reprisals are prohibited and mirrors paragraph 2 of article 55 of Additional Protocol I. The content of draft principle 12 generated much debate in the Commission and some members maintained their concerns over its current formulation. The divergent views centred around three main points: (a) the link between draft principle 12 and article 51 of Additional Protocol I; (b) whether or not the prohibition of reprisals against the environment reflected customary law; and (c) if so, whether both international and non-international armed conflicts were covered by such a customary law rule. In this respect, I draw your attention to the commentary to draft principle 12.

Finally, I will turn to **draft principle 13**, entitled **"Protected Zones".** Draft principle 13 provides that an area of major environmental and cultural importance designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective. As I indicated earlier, this draft principle

corresponds to draft principle 5. The conditional protection provided for in the draft principle is an attempt to strike a balance between military, humanitarian, and environmental concerns. This balance mirrors the mechanism for demilitarized zones as established in article 60 of Additional Protocol I to the Geneva Conventions.

Mr. Chairman,

This concludes my introduction of Chapter X of the report.

<u>Chapter XI</u>: Immunity of State officials from foreign criminal jurisdiction

Mr. Chairman,

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

The report this year reflects two stages of consideration of the topic. The first aspect deals with the work of the Commission this year, while the second aspect is a continuation of work on this topic done last year.

This year, the Commission had before it the fifth report of the Special Rapporteur, Ms. Concepción Escobar Hernández. The fifth report analysed the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction. It addressed some methodological and conceptual questions relating to limitations and exceptions, and considered instances in which the immunity of State officials from foreign criminal jurisdiction would not apply. It drew the conclusion that it had not been possible to determine, on the basis of practice, the existence of a customary rule that allowed for the application of limitations or exceptions in respect of immunity *ratione personae*, or to identify a trend in favour of such a rule. On the other hand, the report reached the conclusion that limitations and exceptions to the immunity of State officials

from foreign criminal jurisdiction did apply to State officials in the context of immunity *ratione materiae*. As a consequence of the analysis, the report contained a proposal for draft article 7 concerning "Crimes in respect of which immunity does not apply". The introduction of the Special Rapporteur on the various aspects canvassed in the fifth report is reflected in paragraphs **197 to 208** of the Commission's report.

Since at the time of its consideration, the report was only available to the Commission in two of the six official languages of the United Nations, the debate in the Commission was commenced, involving members wishing to comment on the fifth report at the sixty-eighth session. The debate at the present session was only the beginning of the discussion of this aspect of the topic. It will be continued at the sixty-ninth session of the Commission. The summary of the debate should be appreciated bearing these factual considerations in mind.

Those members who spoke welcomed the Special Rapporteur's fifth report. It contained rich, systematic and well-documented examples of State practice as reflected in treaties and domestic legislation, as well as in international and national case law. It was readily recognized that the subject matter, in particular the question of limitations and exceptions, was legally complex and raised issues that were politically highly sensitive and important for States. It was also recalled that disagreements within the Commission, and in the views among States, exist. Thus, some members pointed out that the topic needed to be proceeded with prudently and cautiously.

In their comments, the members who spoke addressed the various aspects of the report. They referred to the work concerning the prior consideration by the Commission of the question of limitations and exceptions. They also offered comments on the treatment of relevant practice. Moreover, they addressed some methodological and conceptual questions relating to limitations and exceptions, as well as questions concerning the legal nature of the immunity regime, and examined instances in which the immunity of State officials from foreign criminal jurisdiction did not apply, in particular in the context of the proposed draft article 7. While some members expressed support for

the approaches taken, some other members were opposed to them. In the view of some members the Commission should focus on codification rather than progressive development of new norms of international law in dealing with the issue of limitations and exceptions. Others members stated that this issue should be dealt with taking account both the codification and the progressive development of international law. The summary of the debate is contained in **paragraphs 209** to **248** of the report. A summary of the full debate, including the summing up by the Special Rapporteur, will be available after the debate is concluded in 2017.

Next year, the Special Rapporteur is also expected to address the procedural aspects of immunity of State officials from foreign criminal jurisdiction. Accordingly, it would appreciate being provided by States with information, by 31 January 2017, on their national legislation and practice, including judicial and executive practice, with reference to the following issues:

(a) the invocation of immunity;

(b) waivers of immunity;

(c) the stage at which the national authorities take immunity into consideration (investigation, indictment, prosecution);

(d) the instruments available to the executive for referring information, legal documents and opinions to the national courts in relation to a case in which immunity is or may be considered;

(e) the mechanisms for international legal assistance, cooperation and consultation that State authorities may resort to in relation to a case in which immunity is or may be considered.

The second aspect of this chapter concerns, as noted earlier, the work done last year. It will be recalled that, at the previous session, the Commission considered the fourth report of the Special Rapporteur which addressed the material scope of immunity *ratione materiae*, concerning "what" constituted an "act performed in an official capacity", as well as matters concerning its temporal scope. The Commission subsequently took note of the report of the Drafting Committee containing draft article 2,

subparagraph (f) defining an "act performed in an official capacity" and draft article 6 on the scope of immunity *ratione materiae*, provisionally adopted by the Drafting Committee. This year, the Commission proceeded to provisionally adopt these articles and commentaries thereto. These aspects are dealt with in **section C** of the chapter. Allow me to address these draft articles briefly.

Draft article 2 (f) defines the concept of an "act performed in an official capacity" for the purposes of the present draft articles as any act performed by a State official in the exercise of State authority. The term "act" refers to both actions and omissions. Moreover, the expression "in the exercise of State authority" is intended to reflect a link between the act and the State. There has to be a direct connection between the act in question and the exercise of State functions and powers, since it is this connection that justifies the invocation of immunity, consistent with the principle of sovereign equality of States. The formulation "State authority" is sufficiently broad to refer generally to acts performed by State officials in the exercise of their functions and in the interests of the State. It also covers the functions set out in draft article 2 (e), which refers to any individual who "represents the State or who exercises State functions". While the attribution of an act to the State is a prerequisite for an act to be characterized as having been performed in an official capacity, this does not prevent the act from also being attributed to the individual, as, a single act can engage both the responsibility of the State and the individual responsibility of the author, especially in criminal matters.

The definition of an "act performed in an official capacity", as set out draft article 2 (f), is without prejudice to the question of limits and exceptions to immunity, which the Commission is currently considering.

Draft article 6 addresses the material and temporal scope of immunity *ratione materiae*. It complements draft article 5, which refers to the persons enjoying immunity *ratione materiae*. The two draft articles together are intended to address the general regime applicable to immunity *ratione materiae*. Immunity *ratione materiae* applies exclusively to acts performed in an official capacity. This means that acts performed in a

private capacity are excluded. Unlike immunity *ratione personae*, immunity *ratione materiae* applies to both official and private acts.

The material scope of immunity *ratione materiae* does not prejudge the question of limitations and exceptions to immunity.

For the purposes of immunity *ratione materiae* it is irrelevant that the official on whose behalf the immunity is invoked still holds such a position when immunity is claimed, or has ceased to be a State official. Such immunity "continues to subsist after the individuals concerned have ceased to be State officials". The term "individuals" reflects the definition of "State official" as previously adopted in draft article 2 (e). Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.

This concludes my introduction of Chapter XI of the report.

***Chapter XII*: Provisional application of treaties**

Mr. Chairman,

I will now turn to chapter XII on the topic "provisional application of treaties". This year, the Commission had before it the fourth report of the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, which included a proposal for one draft guideline, guideline 10, on internal law and the observation of provisional application of all or part of a treaty.

Following the plenary debate, the Commission decided to refer the draft guideline, as proposed by the Special Rapporteur, to the Drafting Committee. The primary focus of the Drafting Committee, however, was on completing the consideration of the draft guidelines referred to it last year that it had not been able to address due to a lack of time. The Drafting Committee was unable to conclude its work at this year's

session on all the draft guidelines referred to it. It is anticipated that the Drafting Committee will continue and conclude its consideration of the remaining draft guidelines at next year's session.

The Commission received on 9 August 2016 a report from the Chairman of the Drafting Committee containing draft guidelines 1 to 3 and draft guidelines 4 and 6 to 9, as provisionally adopted by the Drafting Committee at the sixty-seventh and sixty-eighth sessions, respectively. The report has been made available on the Commission's website. To facilitate reading, the draft guidelines provisionally adopted by the Drafting Committee are also reproduced in a footnote in chapter XII. I would like to emphasize, however, that those provisions have not yet been considered or adopted by the Commission in full. The Commission took note of the draft guidelines as presented by the Drafting Committee. It is anticipated that the Commission will take action on the draft guidelines and commentaries thereto at next year's session.

For the purposes of present statement, the focus is only on the plenary debate in the Commission on the fourth report of the Special Rapporteur. The fourth report continued the analysis of the relationship of provisional application to other provisions of the 1969 Vienna Convention on the Law of Treaties and of the practice of international organizations with regard to provisional application. An addendum to the report contained examples of recent European Union practice on provisional application of agreements with third States. The Commission's debate on the report is summarized at **paragraphs 259 to 300** of the report.

As regards the **relationship with other provisions of the 1969 Vienna Convention**, the Special Rapporteur focused on analyzing the relationship between provisional application and the provisions on reservations, invalidity of treaties, termination or suspension of the operation of a treaty as a consequence of its breach under article 60, State succession, State responsibility, and an outbreak of hostilities under article 73.

The debate in the Commission **focused on questions of methodology**, which, to a large extent, reflected the underlying question whether the legal effects of provisional application were the same as those after the entry into force of the treaty. For example, while some members welcomed the analysis of the relationship with other provisions of the 1969 Vienna Convention and generally supported the conclusions reached, they nonetheless called upon the Special Rapporteur to further substantiate them. Other members were of the view that the direction of the topic depended on whether or not the 1969 Vienna Convention applied to provisional application. In their view, to the extent that the provisions of the 1969 Vienna Convention applied to a treaty in force, they were also applicable to a treaty being applied provisionally, with one qualification — the rights and obligations of a State provisionally applying the treaty depended on the terms of the agreement providing for provisional application. However, the view was also expressed that it could not be simply presumed that the legal effects of the provisional application of a treaty were exactly the same as those deriving from a treaty in force. Several members observed that a comparative analysis of conventional practice regarding provisional application would be required to fully understand the intricacies of the topic and facilitate the Commission's work.

Members generally welcomed the Special Rapporteur's decision to examine the question of the relevance of internal law for provisional application. They observed, however, that further clarifications concerning the different situations involved or the legal consequences that resulted therefrom were necessary. In that regard, the importance of differentiating between three different scenarios was stressed. The first was where an agreement on provisional application itself qualified provisional application by reference to internal law. The second situation was analogous to article 46 of the 1969 Vienna Convention, i.e., concerning the competence to conclude treaties under internal law. The third was equivalent to article 27 of the 1969 Vienna Convention and concerned the situation where a State sought to invoke its internal law as a justification for its failure to perform its international obligation. Whereas some members considered that it was the first scenario that was often the most important aspect of provisional application, several members also stressed the need to reflect in the draft guidelines the scenarios envisaged

under articles 27 and 46 in the 1969 Vienna Convention. The Special Rapporteur was encouraged to further analyze the interplay between international law and internal law, in the context of provisional application, in order to provide a more in-depth understanding on the various scenarios for the purpose of the topic.

Concerning the practice of international organizations in relation to application of treaties, it was noted that the report contained information on two different forms of practice, namely, practice related to the registration, depository and publication of treaties by the United Nations and the practice of an organization with regard to treaties to which it was a party. Some members considered that it was this latter category of practice that was most relevant for the consideration of the topic and that it should be further elaborated. The Special Rapporteur was therefore encouraged to undertake a more in-depth comparative study on the provisional application of treaties involving States, on the one hand, and those involving international organizations, on the other hand, as well as to expand the section on regional organizations to ensure a more inclusive approach.

As regards **possible future work**, suggestions included undertaking an exhaustive treatment of treaty provisions providing for provisional application to gain a more in-depth understanding of the topic. It was suggested that a comparative analysis of relevant treaty provisions could assist in understanding provisional application and its relationship with the full application of a treaty. Likewise, it was suggested that a comparison of provisions in agreements providing for provisional application that condition such application on internal law would be particularly useful. While several members welcomed the Special Rapporteur's intention to prepare model clauses on provisional application, caution was nevertheless advised against attempting to analyse the meaning of each clause, which could affect the meaning already ascribed by States to such clauses in existing treaties.

Members continued to support the approach taken by the Special Rapporteur of preparing draft guidelines for the purpose of providing States and international organizations with a practical tool. I draw the attention of the Sixth Committee to the

various suggestions and substantive comments on the proposed draft guideline, made during the debate on the report, which are summarized at **paragraphs 283 to 285.**

Let me also refer 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.

As a final point, let me draw attention once more to the request by the Commission addressed to the Secretariat for a memorandum analysing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General, which provide for provisional application, including treaty actions related thereto.

Mr. Chairman,

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

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