CHECK AGAINST DELIVERY

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Chapters X, XI and XII

Chapter X

(The Protection of the Environment in Relation to Armed Conflict)

Mr. Chairman,

1. Concerning the topic of the protection of the environment in relation to armed conflicts, my Government would like to express its appreciation for the work of the Special Rapporteur, Ms Marie Jacobsson. We congratulate her on her very comprehensive report. I will focus on principles provisionally adopted by the Drafting Committee on the basis of the third report.
2. We consider that the temporal division between the periods of before, during and after armed conflict in the application of the principles is useful. Thus, generally, the present placement of draft principles in the different sections relating to the different phases is logical.
3. We note that within the Commission, there was debate whether the link between all of the draft principles and the general topic is close enough to justify their inclusion. We share this concern. In particular, the link between the protection of the environment in relation to armed conflict and peace operations and indigenous peoples respectively is perhaps too tenuous. Peace operations may operate in a situation of armed conflict but this is not necessarily the case. Moreover, they are normally not a party to an armed conflict. With regard to

indigenous peoples, the fact that they have a special relationship with their land and the living environment in itself seems insufficient reason to include this matter in draft principles on protection of the environment in armed conflicts.

4. Regarding the outcome of the work on this topic, we prefer this to be in the form of draft principles rather than draft Articles. With respect to the terminology employed, we would concur with several members of the Commission and are of the view that it is important to ensure that the terminology employed in the draft principles corresponds to the normative status intended for the topic. For this reason, we suggest that the use of "shall" and "should" be more carefully considered. In particular, we question whether the use of "shall" as it is now used in several draft principles is appropriate. This is the case for draft principles 8, 16 and 18. If the use of "shall" in these draft principles is intended to suggest that they reflect existing obligations under international law, we have serious doubts whether this is the case.
5. For example, draft principle 16, using 'shall', obliges parties to the conflict to remove or render harmless toxic and hazardous remnants of war under their jurisdiction or control that are causing or risk causing damage to the environment. We recognize that the Drafting Committee softened the language proposed by the Special Rapporteur by replacing the words "without delay after cessation of active hostilities" with "after an armed conflict." Nevertheless, we

question whether this principle reflects an existing legal obligation of universal application. The principle appears to have been inspired by provisions in the amended Protocol II and Protocol V to the Convention on Certain Conventional Weapons. The scope of the proposed principle is however considerably broader. Moreover, it is questionable whether the provisions in the two Protocols have achieved the status of customary international law yet.

6. As regards draft principle 18, the insertion by the Drafting Committee of a second paragraph acknowledging that a State or international organization may not share or grant access to information that is vital to its national defence or security is an important improvement. However, the formulation of that paragraph read together with paragraph 1 suggests that in all other cases, there is an absolute obligation to share and grant access to information. In our view, such an absolute statement is not warranted based on the information in the Special Rapporteur's third report.

Chapter XI

(Immunity of State Officials from Foreign Criminal Jurisdiction)

7. Mr Chairman, 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, Professor Concepción Escobar Hernandez. As her lengthy Fifth Report and the ensuing discussions in the

Commission demonstrate, the issue of whether – and if so which – exceptions or limitations exist to immunity for State officials from foreign criminal jurisdiction remains highly controversial. Considering the length of the Report and the many issues that it raises, I will limit my comments today to the most important aspects.

8. First, my Government acknowledges the importance of the fight against impunity and the necessity to hold accountable the perpetrators of the most serious crimes. However, we are not convinced by the way in which the necessity to fight impunity is used as justifying an exception to immunity. The topic concerns the question of whether a state official enjoys immunity from foreign domestic jurisdiction. The question is thus one of forum, of procedure.
9. Many factors determine whether or not immunity will be granted before a domestic court, but a risk of resulting impunity is not one of them. After all, under normal circumstances, in the State for which a State official performs his or her functions ample remedies ought to be available. Also, the bar to the exercise of jurisdiction through the granting of immunity does not become substantive – as opposed to procedural – by the mere fact that no criminal prosecution will take place. A decision to grant immunity expressly does not contain a pronouncement on whether a State official is guilty. It is only about

the availability of a particular forum and as such a point of procedure that should not enter into the merits of the case.

10. Secondly, my Government very much welcomes the trend in international criminal courts and tribunals with respect to the prosecution of persons suspected of international crimes and the non-availability of the plea of immunity. There is, however, an important difference between the jurisdiction of international courts and tribunals and the jurisdiction of national courts. International courts and tribunals, including hybrid courts, derive their jurisdiction from the consent of the participating States. The exercise of this jurisdiction is therefore not an infringement on the sovereign equality of States or the principle of *par in parem non habet imperium*.

11. The same cannot be said of national courts: consent to jurisdiction of an international court or tribunal cannot be taken to imply consent to the jurisdiction of a foreign domestic court. These are not the same thing. It is quite the opposite: the fact that international courts and tribunals increasingly exercise jurisdiction is perhaps rather an answer to the lack thereof of domestic courts than a precursor for a widening of the jurisdiction of the latter.

12. Thirdly, I would like to make two comments on the way in which this Report addresses the relation between immunity and *jus cogens*. First, we would disagree with distinction made by the Special Rapporteur between immunity of

State officials and the immunity of the State itself in relation to international crimes and *jus cogens*. The former is directly derived from the latter. The approach should thus be the same, and my Government would follow the approach of the International Court of Justice in this. The Netherlands considers that the plea of immunity *ratione materiae* is unavailable for international crimes, including violations of *jus cogens*, since they are not and cannot be official acts. For State officials enjoying immunity *ratione personae*, however, the plea of immunity is available regardless of whether he or she is accused of an international crime.

13. Secondly, my Government is not convinced by the analogy between the way in which the Commission dealt with *jus cogens* in its work on State Responsibility and the work on immunity of State officials. The Articles on State Responsibility establish secondary norms applicable to establishing and invoking State Responsibility for breaches of *jus cogens*. They are not about the question of to which forum to turn to for invoking such responsibility. The law on immunities, however, exactly is about that. These are methodologically two different things and the way in which *jus cogens* affects the former does not necessarily prescribe the way in which it should affect the latter.

Chapter XII
(Provisional Application of Treaties)

14. With respect to the topic of provisional application of treaties, we express our appreciation to the Special Rapporteur, Mr Juan Manuel Gómez-Robledo for his fourth report.

15. We have taken note of the debate in the Commission on the methodology of the current work, particularly concerning the question whether not or not to draw conclusions based (exclusively) on analogy. While we acknowledge that drawing conclusions by way of analogy may be useful since Article 25 of the Vienna Convention remains silent on the relationship with other provisions of the Convention, we share the words of caution expressed by members of the Commission that the conclusions arrived at should be supported by underlying State practice.

16. With respect to the question of reservations and provisional application, the question is whether reservations made at the time of signature, ratification etcetera would also apply when the treaty or any of its provisions are applied provisionally. The Special Rapporteur points out that no treaties provide for the formulation of reservations specifically in relation to provisional application. We would suggest that this is due to the fact that many treaties, including the examples mentioned by the Special Rapporteur, already limit the scope of provisional application to specific provisions.

17. Similarly, the law of treaties specifies the moment at which States may make reservations: i.e. when signing, ratifying, accepting, approving or acceding, in accordance with Article 19 of the Vienna Convention. My Government would consider that further analysis is required whether a reservation made at this stage is also applicable when the treaty or any of its provisions is applied provisionally. We would therefore welcome further analysis on this, including an analysis of the practice of States.

18. I thank you for your attention!