71ST SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY

SIXTH COMMITTEE

REPORT OF THE INTERNATIONAL LAW COMMISSION

PART I: CHAPTERS I-III, IV (Protection of persons in the event of disasters), V (Identification of customary international law), VI (Subsequent agreements and subsequent practice in relation to the interpretation of treaties) and XIII (Other decisions and conclusions of the Commission)

ADDRESS DELIVERED BY

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Mr Chairman,

I would like to start my address by expressing how great an honour it is for me to once again take the floor at this Sixth Committee. I would also like to take this opportunity to applaud you, Mr Chairman, and the other members of the Bureau, for your efforts to ensure that the work of this session is productive. Furthermore, I congratulate the International Law Commission on its outstanding work during the 68th session on addressing the items included on the agenda.

Chapters I to III and XIII

Mr Chairman,

The Spanish Delegation wishes to express its support for the Commission with regard to the opportunity—I would even go so far as to say the need—to hold a commemorative event for its 70th anniversary in 2018. The plan that has been drafted sounds truly excellent.

We also congratulate the United Nations and Commission bodies responsible for updating the Yearbook and the Commission's website, which is particularly useful.

Although all of the matters on the Commission's programme are important, they are still numerous. The Spanish Delegation has previously expressed its concern in this regard on several occasions.

On this note, we cannot fail to recognise that the two matters included in the Commission's long-term agenda definitely meet the criteria for selection.

Regrettably, we must again insist that all those involved in the Commission's work ensure that the six official languages of the United Nations are given equal treatment.

Chapter IV: Protection of persons in the event of disasters

Mr Chairman,

Concerning Chapter IV, on the protection of persons in the event of disasters, the Spanish Delegation firstly wishes to commend all of the members of the Commission for the excellent draft articles submitted to the General Assembly. In particular, we applaud the work of Mr Eduardo Valencia-Ospina, Special Rapporteur throughout.

The draft articles rightfully focus on protection of persons. They also strike the necessary balance between respect for the sovereignty of the affected State and the required cooperation of third countries.

Spain is naturally gratified that several of its observations have been reflected in the final document.

Chapter V: Identification of customary international law

Mr Chairman,

With respect to Chapter V, on identification of customary international law, the Spanish Delegation wishes to begin by congratulating the Special Rapporteur, Mr Michael Wood, on his excellent work, and applauding the Commission for completing the first reading of the draft conclusions.

To contribute to consideration of this matter, we shall make several comments on these draft conclusions and the accompanying commentaries.

First and foremost, the commentary to *draft conclusion 5 ("Conduct of the State as State practice")* indicates that practice "must be publicly available or at least known to other States". It would be advisable to add the following to the reasons given for this: it is necessary for practice to be made publicly available to give other States the opportunity to object to the customary provision in question.

The most problematic part for us is Part Five, on the "Significance of certain materials for the identification of customary international law".

In *draft conclusion 11 ("Treaties")* we do not consider the Spanish expression *"norma enunciada en un tratado"* ("rule set forth in a treaty") to be correct. We understand the reasons for not using the Spanish word *"disposición"*. However, why can the Spanish word *"previsión"* ("provision") not be used, which does not refer to a specific article of a treaty? If *"previsión"* is not used, another noun should be considered, because *"norma"* is unsuitable. The term *"norma"* (as opposed to "obligation") should only be used to indicate rules of customary origin, whose enforceability does not require specific consent from the subject in question. It is tautological to state that a "A rule set forth in a treaty may reflect a rule of customary international law" (paragraph 1). It is also a tautology to affirm that "The fact that a rule is set forth in a number of treaties may [...]indicate that the treaty rule reflects a rule of customary international law" (paragraph 3).

Concerning *draft conclusion 12 ("Resolutions of international organizations and intergovernmental conferences")*, we do not understand why it cannot be expressed in the same terms as the conclusion concerning treaties. While it is true that, as such resolutions are not usually binding, States may pay less attention to them than they do to treaties. However, the importance of certain resolutions is apparent to all; the best example of this is a UN General Assembly resolution. The wording used in draft conclusion 11 on treaties

(whereby they "*may* reflect a rule of customary international law") is sufficiently flexible to adapt to the circumstances of each resolution and each international organisation.

The lack of parallels between draft conclusions 11 and 12 is a problem. I will give just one example. In paragraph 1, draft conclusion 12 states that "A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law". However, nor can treaties, of themselves, create rules of customary international law. Nonetheless, this idea is not reflected in draft conclusion 11.

Draft conclusions 13 ("Decisions of courts and tribunals") and 14 ("Teachings") stipulate that judicial decisions and teachings represent or may represent a "subsidiary means" to determine the rules of customary international law. This subsidiary nature is based on the subsidiary function that Article 38 of the ICJ Statute establishes with regard to "determination of rules of law". However, the fact that judicial decisions and teachings are not independent sources of international law—and are instead subsidiary to independent sources—does not mean that in relation to this determination of law, they play a secondary role to treaties and resolutions of international organisations. In order to take into account the observations in the commentaries on the two draft conclusions regarding the variable value of judicial decisions and teachings, it would be sufficient to say that they "*may* be a means for the determination of rules of customary international law". Nevertheless, the adjective "subsidiary" (in the expression "subsidiary means") would have to be eliminated.

Moving on from Part Five, in *draft conclusion 15 ("Persistent objector")* it would be advisable to include a proviso concerning peremptory norms. A *jus cogens* norm would be binding on a State, no matter how many times said State has continuously and unequivocally objected to the norm since its inception. In view of its importance, this clarification, which appears in the commentary, should be reflected in the wording of the conclusion.

Finally, a conclusion should be included regarding the burden of proof of the existence and the content of customary norms. This fundamental issue is currently omitted.

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

Mr Chairman,

Turning to Chapter VI, concerning subsequent agreements and subsequent practice in relation to the interpretation of treaties, the Spanish Delegation would like to express its gratitude to the Special Rapporteur on this matter, Mr Georg Nolte, for his fourth report to the Commission. Thirteen draft conclusions have already been approved at the first reading.

We will focus on the most significant new item this year: *draft conclusion 13*, on *"Pronouncements of expert treaty bodies"*.

Given that such expert bodies exist (often established in human rights treaties), it seems appropriate to include a specific draft conclusion on them.

We also consider the use of the expression "pronouncements" to be correct. It is a generic term that encompasses the instruments through which such expert bodies express their opinions, whatever their specific names.

However, the phrase "experts serving in their personal capacity" in the definition in paragraph 1 might not be as suitable. Why not merely refer to "independent experts"?

Concerning paragraph 3, it is our understanding that the draft conclusion covers the situations in which a pronouncement by such experts gives rise to a subsequent agreement or subsequent practice by the parties to the treaty. Nonetheless, we do not understand why it also provides for the situations in which pronouncements by experts relate to a subsequent agreement or subsequent practice by the parties. What would an expert body contribute in such circumstances? It would be the subsequent agreement already reached by the parties or their subsequent practice that would carry weight. Nor are any examples of such a case provided in the commentary on this conclusion.

Finally, the Spanish Delegation wishes to reiterate a comment made at last year's Committee. A great number of the draft conclusions (at least in their Spanish version) refer to "la práctica ulterior *en el sentido* del artículo 32" meaning, in English, "subsequent practice *in the sense* of article 32". As article 32 of the Vienna Convention does not expressly refer to practice of any kind, this wording is not appropriate. Instead, reference could be made to the relevance of subsequent practice as means of interpretation "en virtud del artículo 32", meaning in English "pursuant to Article 32".

Thank you very much Mr Chairman.