ESPAÑA

INTERVENCIÓN
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DEL MINISTERIO DE ASUNTOS EXTERIORES Y DE COOPERACIÓN
DE ESPAÑA

EN LA SEXTA COMISIÓN
DEL 72º PERIODO DE SESIONES DE LA ASAMBLEA GENERAL
DE LAS NACIONES UNIDAS

Tema 81. Informe de la Comisión de Derecho Internacional sobre la labor realizada en su 69º período de sesiones (PARTE I)

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(Cotejar con intervención definitiva)

STATEMENT
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AT THE SIXTH COMMITTEE
OF THE 72ND SESSION OF THE UN GENERAL ASSEMBLY

Agenda item 81. Report of the International Law Commission on the work of its sixty-ninth session (CLUSTER I)

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Mr Chairman,

I would like to start my address by expressing what a great honour it is for me to once again take the floor at this Sixth Commission. I would also like to take this opportunity to congratulate 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 69th session on addressing the items included on the agenda.

Chapters I to III and XI

Mr Chairman,

The Spanish Delegation welcomes the continuance of plans to celebrate, in 2018, the 70th anniversary of the Commission. This is an essential recognition of the Commission's efforts. Undoubtedly, it will be a red-letter day for everyone here.

Regarding the Commission's work in general terms,, we must reiterate, as in previous years, our concern that the number of issues included on the Commission's programme may be excessive. It is interesting to note that the work time of the Commission has decreased, yet the number of issues on the agenda has nevertheless doubled in barely twelve years. In our opinion, the ILC needs time to develop its work in an effective and adequate manner. And this VI Committee itself needs to concentrate on the issues at hand for the dialogue with the ILC to be real and practical. In this regard, we have no doubt regarding the importance of topics such as the "Succession of States in respect of State responsibility", of the "General principles of law", or even (yet this raises more doubts) of the "Evidence before international Courts and Tribunals"; we simply doubt the timeliness of the Commission's addressing them right now.

Furthermore, also on a general level, we would like to manifest the deep concern of our delegation regarding the fact that the adoption of certain draft articles has been carried out through voting. We are not unaware that the Commission has adopted decisions through voting in the past. But we believe this entails a risk of dividing the Commission, with a possible future impact on its work. The Commission's authority is consolidated if it acts on consensus. And, if consensus were not possible, perhaps the discussion should continue until such consensus is reached. If the Commission intends to present a draft *lex ferenda*, the very least to be demanded is for there to be an internal agreement about the question.

In this same order of things, we also consider that, in the ILC's work, it is important to distinguish clearly when it acts as *lex lata* and when as *lex ferenda*. States need to have certainty as to whether a Commission proposal represents a codification or a development of International Law. This is particularly necessary when we face sensitive topics. We deem this is always important. This also applies to the case of draft articles, even though States can obviously later accept or not to include them in a treaty.

On the other hand, we fully support the Commission's call to favour the equality of treatment of the six official languages of the United Nations in this body.

Lastly, we wish to underline that we also agree with the Commission's view that it is not possible to limit, *a priori,* the length of the documents produced therein. Having said that, while guaranteeing quality, we must make an effort to be concise. As the Spaniard Baltasar Gracián said: "*lo bueno, si breve, dos veces bueno*" [brevity is the source of wit]. And it is indeed true that some of the reports presented this year, for instance within the framework of the first topic we are going to mention at once, are unusually long.

Chapter IV: Crimes against humanity

In respect of Chapter IV, on crimes against humanity, the Delegation of Spain wishes, firstly, to congratulate Mr Sean D. Murphy on his third report, and the Commission on having successfully carried out the first reading of the draft articles. It is praiseworthy that this was done so quickly, especially considering that this is a complicated issue which raise many controversial questions.

In general terms, the draft articles strike us as appropriate and balanced. Clearly, they are the result of deep reflection, and we find it deserves our positive appraisal. Thus, wishing not to expand too much in my spoken presentation, I will only comment on a few of their most notable and general aspects. For all other issues, some of which are also of relevance, please refer to the written annex to this presentation, in which there are some clarifications and suggestions regarding draft articles 4, 6, 11, and 13.

In this spoken presentation, therefore, I will address seven very specific issues. First, as I said last year, my Delegation regrets that topics of enormous significance have been set aside. I will mention as examples the military tribunals and States' margin of appreciation.

Secondly, as regards *draft Article 5 ("Non-refoulement"),* we are not sure that it correctly reflects the systematic nature of a crime against humanity. It is not merely a matter that an individual who was expelled, handed over or extradited to another country could be the victim therein of a murder, a rape, or an act of torture, for instance. In accordance with the very definition of "crime of against humanity" offered in the draft articles, it is essential for these actions to be committed within the context of a systematic attack against a civilian population or a part thereof.

Moreover, we tend to believe that the reference, in paragraphs 1 and 2, to a "territory under the jurisdiction of another State" could, in practice, be more problematic than simply mentioning the "territory of another State".

Third, as to *draft Article 12 ("Victims, witnesses and others")*, it seems to us that paragraph 3, concerning reparation for victims of a crime against humanity, does not take the right approach, technically speaking. Firstly, because it refers to cessation and guarantees of non-repetition which, strictly speaking, do not form part of reparation. And secondly, because it mentions "rehabilitation" as if it were something different from restitution or satisfaction, which are also cited as forms of reparation.

Fourth, moving on to *draft Article 14 ("Mutual legal assistance"),* we believe that paragraph 5, which refers to the conclusion of future legal assistance agreements between States, is

disconcerting and adds nothing new. It adds nothing new because the idea that States could conclude future legal cooperation agreements already appears in paragraph 7. And it is disconcerting because it seems to indicate the non-self-executing nature of these draft articles, which is not the case.

Although it is unusual in conventional practice, we like this systematization of provisions regarding legal assistance, which distinguishes between those which would apply in any case, and those which would apply in a subsidiary fashion, that is to say, in the absence of a specific treaty between the parties. The first type of provisions would be included in the draft articles, whereas the latter (the subsidiary type) would go in an annex.

Fifth, we deem it adequate that the Drafting Committee finally eliminated original draft article 16 regarding federal States obligations. The issue is indeed covered by Article 29 of the Vienna Convention on the Law of Treaties.

We are less certain, however, about the decision to keep the disposition regarding the settlement of disputes (article 15). Usually, the Commission leaves this type of clauses, when appropriate, for the States to draft. We do not see why it should be otherwise in this case. The same would apply regarding the issue of reservations, which has also been intensely discussed within the Commission.

Finally, as regards the very sensitive issue of amnesty, the solution that is brought forth to us seems reasonable. Whether with or without the Secretary's examination of the issue, it does not seem easy for the Commission to be able to predict all the possible complex situations that may arise in the future in the framework of processes aimed to ensure adequate transitions.

Chapter V: Provisional application of treaties

Mr Chairman,

As regards Chapter V, on the provisional application of treaties, the Spanish Delegation wishes to express its acknowledgement to the Commission for its work on this issue, which has led to the provisional approval of draft Guidelines 1 to 11 and their respective Commentaries.

Generally speaking, the draft Guidelines that have been presented to us strike us as correct, both in terms of the matters addressed and of the contents presented. However, as we have already stated at this same forum on other occasions, Spain wishes to reaffirm its confidence that other issues will be addressed in connection with provisional applications which, in our opinion, raise doubts, not to mention problems, and to which the provisions of the 1969 and 1986 Vienna Conventions do not respond: Are all the treaties subject to being applied provisionally or, rather, are there treaties which, given their subject-matter or the implications that provisional application would have, cannot be applied provisionally? Is the period of provisional application of a treaty calculated for purposes of establishing the term of those treaties that have a pre-established duration? Does the termination of provisional application without the entry into force of the treaty

produce *ex tunc* or *ex nunc* effects? Neither can we overlook the question of provisional application and the reservations, which was discussed at the Commission during the 68th session.

We also believe that there are guidelines – as is clearly the case with number 7, but also partly with numbers 9 or 10 – which demand a study of the international practice and jurisprudence. The Memorandum prepared by the Secretary, by the way, offers very useful ground rules to the Commision.Going into the details of certain draft Guidelines, in the same manner as for the previous chapter, we provide our specific observations to Guidelines 2, 3, 4, and 8 in the written annex to our spoken presentation. My Delegation will now address only Guidelines 6 and 9. In the former case, to formulate a criticism; in the latter, to give praise.

As regards *draft Guideline 6 ("Legal effects of provisional application")*, we must express our disagreement with the statement contained in paragraph 5 of the Commentary, according to which the rules of the 1969 Vienna Convention on termination or suspension of treaties would not operate during or in relation to provisional application. The truth is we do not quite understand why this should be so. On the one hand, the *suspension* of provisional application (for which there are no *ad hoc* rules) may be necessary in a particular case, and we do not see why the Vienna rules would not be able to operate. As regards *termination*, the 1969 Convention envisages this only in general terms; i.e., with regard to the relations of a State or international organization with all the other parties to which a treaty is applied on a provisional basis; however, a State may want to put an end to provisional application only in its relations with another party which, for example, committed a serious violation of the obligations undertaken. Why would that State have to choose between ignoring this circumstance or relinquishing the possibility of concluding the treaty in order to generally terminate its provisional application?

As to the inclusion in *draft Guideline 9 ("Internal law of States or rules of international organizations and observance of provisionally applied treaties")* we must applaud the inclusion of a reference to the rules of international organizations. Last year we criticized that this draft Guideline only envisaged States and their internal legal systems.

Having said that, the wording of paragraph 2 would be improved (in addition to highlighting the parallel with paragraph 1) if, instead of saying that an international organization "may not invoke the rules of the organization", it said "may not invoke *its* rules".

Thank you very much, Mr Chairman.

ANNEX

Other comments to Chapter IV: Crimes against humanity

As a written addendum to its spoken presentation, the Spanish Delegation wishes to point out several issues regarding draft articles 4, 6, 11 and, 13.

Regarding *draft Article 4 ("Obligation of prevention"),* which was examined by the Commission in a previous session, Spain would like to draw attention to the fact that, even though the text of the draft (specifically, paragraph 1, letter *a)*) only alludes to the "territory under [the] jurisdiction" of the State, the Commentary still mentions the territory subject to the jurisdiction "or control" of the State (p. 54). This must have been a slip of the pen.

Regarding *draft Article 6 ("Criminalization under national law")*, the Delegation of Spain considers it an excellent idea to include, in the new paragraph 5, a provision to ensure that persons holding an official position are not excluded from criminal responsibility. As pointed out in the Commentary to this provision, this is in line with different international treaties, beginning with the Statute of the International Criminal Court. The existence of said responsibility does not affect the immunity that a person holding an official position could enjoy, where appropriate. As we all know, responsibility and immunity operate on different planes with different scopes.

The wording of the translation into Spanish of *draft Article 11 ("Fair treatment of the alleged offender")* is also worth discussing briefly. The reference in paragraph 3 to the "laws and regulations" of the State in the territory under whose jurisdiction the person is present appeared in the version approved by the Commission in 2016, and remains the same in the 2017 version; however, the translation into Spanish was *"leyes y reglamentos*" in 2016 and is "*leyes y normativas*" in 2017. We are afraid that this must be an error in the translation, and we believe that it is advisable for the Spanish to say "*leyes y reglamentos*" in 2017 as well, because this expression is technically more exact. What is more, it would be advisable to review all the draft articles, because in the Spanish version the internal legal system is sometimes called "*legislación*" ["legislation"], others "*Derecho*" ["law"], and others "*leyes y reglamentos*" [laws and regulations]. It would be advisable to use uniform terminology throughout.

As regards *draft Article 13 ("Extradition")*, this Delegation is of the opinion that the reference to future extradition treaties to be concluded between States Parties to the Convention should not be limited to providing that these treaties will have to include crimes against humanity as extraditable offences (as set forth in paragraph 1), but that there should also be a call for these future treaties to include several of the provisions from these draft articles. We are thinking here, for instance, of paragraphs 7 to 10 of draft Article 13.

Continuing with this same draft Article on extradition, but now focusing on paragraph 7, regarding offences being treated as if they had been committed in the requesting State, this should be made much clearer from the start. The wording "If necessary", which begins

this paragraph, is difficult to understand. It would be advisable to be more explicit and to point out, as the Commentary does, that the provision set forth here will operate in the cases when the requested State, pursuant to its internal law, is only able to extradite a person to the State on whose territory the offence was committed.

Taking into account that the draft articles tend to favour the recognition of States' jurisdiction to decide on crimes against humanity, it can be assumed that there will be frequent cases of a concurrence of extradition requests. In this regard, it would have been advisable to have included in this draft article a reference to the manner in which said cases should be resolved.

We also advocate the inclusion of a reference to a possible refusal of extradition when the person whose extradition is being requested could be condemned to death in the requesting State.

Other comments to Chapter V: Provisional application

First, in order to complete the content of our spoken presentation, we would like to draw attention in this annex to a minor issue with regard to *draft Guideline 2 ("Purpose").* This Guideline states that "Article 25 of the Vienna Convention on the Law of Treaties" is taken as the basis, in a clear allusion to the 1969 Vienna Convention; however, paragraph 4 of the Commentary mentions the central importance of Article 25 of both Vienna Conventions, that of 1969 and that of 1986. Here, the text of the draft Guideline and the text of the Commentary should be aligned, to mention the same instrument (or instruments) in both cases.

As regards *draft Guideline 3 ("General rule")*, this Delegation deems the explanation given in the Commentary to be convincing, specifically the explanation in paragraph 3), regarding the elimination of the adjective "negotiating" used in the 1969 and 1986 Vienna Conventions in paragraph 1 b) of their Articles 25. Another reason could be added to those stated: Technically speaking, the expression "negotiating State" or "negotiating international organization" would not include the "contracting" States and international organizations; however, it is undeniable that States or international organizations that did not negotiate the treaty in question but that did accept being bound thereby could decide upon its provisional application.

Continuing with the Commentary to this same draft Guideline 3, it could possibly be pointed out in paragraph 4, which alludes to the possibility of provisionally applying only part of a treaty, that this possibility makes it possible to address mixed agreements signed by the European Union and its Member States with a third country or with several third countries. Such agreements often envisage provisional application by the European Union of only those provisions falling within its scope of authority.

With regard to *draft Guideline 4 ("Form of agreement")*, we must welcome the fact that in letter a) the term "treaty" has replaced the word "agreement", which had been used in previous versions.

Even though it is possible for a State to unilaterally decide to provisionally apply a treaty that does not contain a provision to this effect, it is also true that such a declaration will fall under the sphere of unilateral acts and not that of treaties, as is correctly explained in the Commentary to this draft Guideline.

As for *draft Guideline 8 ("Termination upon notification of intention not to become a party")*, we consider that its heading should be completed with the words "provisional application", so it would read: "Termination *of provisional application* upon notification of intention not to become a party". Thus, it would be fully parallel to the heading of draft Guideline 5, "Commencement *of provisional application*".

Last year we stated that if this draft Guideline focuses on termination of provisional application as a consequence of notification of intention not to become a party to the treaty in question, there should be another draft Guideline envisaging the second reason for termination set forth explicitly in Article 25 of the 1969 and 1986 Vienna Conventions, namely: entry into force of the treaty. To be sincere, the explanations given in paragraphs 2 and 3 of the Commentary to draft Guideline 8 do not convince us—basically, because what is said there could be perfectly well extended to Article 25 of the Vienna Conventions, and that did not prevent said provision from explicitly setting forth entry into force as a cause for termination of provisional application.

Moreover, and still within the Commentary to draft Guideline 8, this time with regard to paragraph 6, we reiterate the considerations we made before about the elimination of the adjective "negotiating".