Statement by Chile

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Report of the International Law Commission (second part)

Sixth Committee, New York, 27 October 2016

Mr. Chair,

In this, our second and final statement, in view of the limited time available, I will refer only to the following topics: "Subsequent agreements and subsequent practice in relation to the interpretation of treaties"; "Crimes against humanity"; "*Jus cogens*"; "Immunity of State officials from foreign criminal jurisdiction"; and "Provisional application of treaties."

I shall start with the issue of subsequent agreements and subsequent practice concerning the interpretation of treaties, covered in chapter VI of the Commission's report, which is based on article 31, paragraphs 3 (a) and (b), of the Vienna Convention on the Law of Treaties.

This is an issue that the Commission has been considering since 2008, first by the study group on treaties over time, which was chaired by Professor Georg Nolte, and later, from 2013, under its current name with Professor Nolte as Special Rapporteur, who over the years since that date has regularly submitted reports.

The debate in which we have engaged over these years has demonstrated that, under the leadership of Professor Nolte, it has been possible to reach a measure of consensus on this important matter.

At its last session, on the basis of the report of the Drafting Committee, the Commission adopted on first reading a set of 13 draft conclusions and corresponding commentaries, and decided, in accordance with its Statute, to circulate the said draft conclusions to Governments, through the Secretary-General, so that these could submit their comments and observations before 1 January 2018.

Even though my delegation made its comments and observations on that occasion, allow me on this opportunity to take up an issue that had initially given rise to divergent opinions, as set out in draft conclusion 7, paragraph 3, before us today, which states that it is presumed that the parties to a treaty, pursuant to a practice followed in the implementation of the treaty, intend to interpret the treaty and not to amend it or modify it. The possibility of amending or modifying a treaty through the subsequent practice of

the parties has not been generally recognized. We believe that this is an acceptable approach to this issue.

In view of the quality of the work already accomplished and the serious purpose with which the issue has been tackled, we are convinced that the end result will represent a major contribution to international law and, for that reason, we offer our congratulations to Professor Nolte.

Second, I wish to refer to the topic of "Crimes against humanity", covered in chapter VII of the report. At this session, the Special Rapporteur, Mr. Sean Murphy, submitted his second report to the Commission. In addition, the Commission had before it the required memorandum to the Secretariat with information on conventional existing monitoring mechanisms that may be of relevance to the future work of the International Law Commission.

In this second report, the Special Rapporteur discussed various topics, including: criminalization under national law; establishment of national jurisdiction; general investigation and cooperation for identifying alleged offenders; exercise of national jurisdiction when an alleged offender is present; *aut dedere aut judicare*; and fair treatment of an alleged offender. The Special Rapporteur proposed six draft articles corresponding to the issues discussed under these topics.

During the session in question, the Commission provisionally adopted the said six draft articles, in addition to the commentaries on each of them.

Draft article 5 on criminalization under international law takes up a number of different issues in an appropriate and systematic manner in its seven paragraphs. In them, it sets out the various measures that all States must take to ensure that crimes against humanity constitute offences under their criminal law, to preclude any superior orders defence or any statute of limitation, and to provide for appropriate penalties commensurate with the grave nature of such offences. In addition, the last paragraph provides a special section on the criminal liability of legal persons.

We support unreservedly the wording of paragraph 3 of draft article 5 on command or other superior responsibility. This paragraph not only complements article 28 of the Rome Statute, it gives more substance to its provisions, which prescribe in detail the imputation of criminal liability to military commanders or persons effectively acting in this position for the acts of others. National legal systems generally recognize the responsibility of those who commit offences directly or as participants, but we consider it extremely important that, in view of the gravity pertaining to the commission of crimes against humanity, that the responsibility of military commanders should remain an intrinsic part of national

legislation. The codification of this responsibility in law is a direct response to the obligation of States to prevent and punish such crimes effectively.

We also welcome the wording of paragraph 4 of draft article 5, providing that "[e]ach State shall take the necessary measures to ensure that the fact that an offence referred to in the article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding the criminal responsibility of a subordinate". In this respect, the Special Rapporteur has also followed the guidelines set forth in the Rome Statute on this issue, although article 33 of that instrument establishes a limited scope, in the sense that it does only apply respect of war crimes, and not for those who commit acts of genocide or crimes against humanity.

We support and welcome the wording and content of paragraph 5 of draft article 5, which urges States to take necessary measures to ensure that crimes against humanity are not subject to any statute of limitations. Although article 29 of the Rome Statute states that crimes within the jurisdiction of the Court shall not be subject to any statute of limitations, it is essential that this is also written into national legislation.

We are giving close attention to the debate that will emerge around the inclusion of the criminal liability of legal persons for crimes against humanity in the final paragraph of draft article 5. We know that this is a developing issue which is still at an early stage in international law and we hope to have a fruitful discussion about it.

We support draft articles 6, 7, 8 and 9, which we believe are appropriate in wording and content.

Draft article 10 is of interest to us, in that it sets out guidelines for the fair treatment of alleged offenders and enshrines the internationally recognized standards of due process in this regard.

In this section, we believe there should be mention of an issue which relates to matters under discussion here. This is the international initiative led by the Netherlands, together with Argentina, Belgium and Slovenia, to negotiate a multilateral treaty on mutual legal assistance and extradition for the domestic prosecution of crimes of genocide, crimes against humanity and war crimes. This initiative has garnered a great deal of support, including from my country, because it would be conducive to the formation of a universal legal framework that would positively influence the campaign against impunity for these serious international crimes. Accordingly, we believe that it would be useful to encourage dialogue on this issue between the Special Rapporteur, the International Law Commission and the coordinators of this initiative.

We commend the work of the Special Rapporteur, Mr. Sean Murphy, and look forward to his third report.

Third, I would like to refer to the topic of *jus cogens* in chapter IX of the report. At the present session, the Special Rapporteur, Mr. Dire Tladi, submitted his first report to the Commission, with the aim of setting forward his overall approach to the topic and, on that basis, seeking the views of the Commission on the matter and providing an overview of the conceptual issues relating to *jus cogens*.

Once it had considered this first report, the Commission referred draft conclusions 1 and 3 contained therein to the Drafting Committee. After that, the chair of the Drafting Committee presented the Committee's interim report on *jus cogens*, which included the draft conclusions provisionally approved at the Commission's sixty-eighth session.

While there are no discrepancies regarding the acceptance and recognition of *jus cogens* rules at the international level, the complexity of this issue is evidenced by the debate that has taken place in the Commission on how the draft on these rules should be worded.

It would be useful at this stage to revisit draft articles 1-3, since there is still no consensus among Member States on their wording.

With regard to the possibility of developing an illustrative list of rules that have acquired the status of *jus cogens*, we believe that further discussion of this issue is essential, but the development of such a list may present more disadvantages than advantages, not only because of the resulting difficulty in reaching agreement on what to include in or exclude from that list, but also because, once it is developed, it could easily be argued that the other rules that have not been included – and which are probably equally important – are to be considered rules of a lesser status.

We believe that the stipulation of article 53 of the Vienna Convention on the Law of Treaties must remain the cornerstone of any work in this regard and that we must not deviate from that stipulation, while taking into account the considerations put forward during the preparatory work for the Convention.

My delegation is aware of the importance of the draft that needs to be prepared. Topics such as how a *jus cogens* rule is to be identified; where or not there are regional *jus cogens* rules; or the relationship between *jus cogens* rules and *erga omnes* obligations are just some of the topics that need to be considered in this draft. The debate has just begun.

We wish Mr. Tladi every success in his mission and pledge our full cooperation. We look forward to his second report next year.

I would like to turn now to the issue of immunity of State officials from foreign criminal jurisdiction, which is considered in chapter XI of the Commission's report. This is an important issue that fully justifies the Commission's decision to take it up in 2007 and to keep it under consideration thereafter through successive reports submitted by its Special Rapporteurs.

Ms. Concepción Escobar Hernández took over as Special Rapporteur in 2012, at the beginning of the present five-year period, and has been discharging her duties in this regard with great responsibility and competence, demonstrating her great skills as a lawyer in tackling this complex and sometimes controversial issue and putting forward appropriate solutions to the problems that it raises.

Last year, the Commission considered the Special Rapporteur's fourth report and decided to forward two draft articles – article 2, paragraph (f), on the definition of an act performed in a private capacity, and article 6, on the scope of immunity *ratione materiae* – to the Drafting Committee.

At its current session, the Commission provisionally approved the two draft articles and the commentaries on them. My delegation welcomes this decision. Those two provisions, expressed in simple language and yet with great precision, are crucial to the fate of the draft articles on the immunity of State officials from foreign criminal jurisdiction.

In this last session, the Commission also received the Special Rapporteur's fifth report, which analyses the question of limitations and exceptions to the above mentioned immunity.

In this context, I would like to volunteer some considerations on this important issue. This is not a simple matter, since it involves such fundamental principles as the sovereign equality of States, on the one hand, and, on the other, the campaign which current international law intends to wage against impunity for serious international crimes.

In that regard, we support the proposal to accept the provisions of article 7, paragraph 1 (a), pursuant to which immunity shall not apply in respect of the crimes of "genocide, crimes against humanity, war crimes, torture and enforced disappearances".

In the same vein, my delegation strongly supports the view that there can be no impunity for certain crimes, as defined by international treaties, which undermine the values and principles recognized by the international community as a whole.

We hope that, at the next session, we will have before us a new report by the Special Rapporteur or, at least, guidelines issued by the Commission that would enable us to rule on this fundamental issue of limitations and exceptions to immunity from foreign criminal jurisdiction.

Lastly, I would like to refer to chapter XII of the report, on the provisional application of treaties, which pertains to the fourth report of the Special Rapporteur, Mr. Juan Manuel Gómez Robledo.

This report sets out an analysis of the relationship of the provisional application of a treaty with other provisions of the 1969 Vienna Convention on the Law of Treaties.

Regarding this matter, we are largely in accordance with the criteria supported by the Special Rapporteur. For example, with regard to reservations, we agree with him that nothing prevents a State from formulating reservations from the moment that it decided to apply a treaty provisionally.

Similarly, with regard to the invalidity of treaties in the light of articles 27 and 46 of the aforementioned Vienna Convention, we agree that the principle that a State cannot invoke its internal law as a justification for its failure to perform a treaty also applies in respect of treaties which have been provisionally applied.

With regard to the termination or suspension of a treaty or of a treaty provisionally applied as a result of a material breach, we agree with the Special Rapporteur that provisionally applied treaties produce the same legal effects as if the treaties were in force, so long as they remain in that situation, since the rules relating to the termination and suspension of treaties also apply to provisionally applied treaties.

In his report the Special Rapporteur also notes that the Commission took note of the draft guidelines 1-4 and 6-9, provisionally adopted by the Drafting Committee. My delegation has studied these draft guidelines and shares the views supported by the Special Rapporteur. Guideline 4 (b), however, requires further analysis: the guideline states that (I quote): "In addition to the case where the treaty so provides, the provisional application of a treaty or part of a treaty may be agreed through:

...

(b) any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference."

Our observation is concerned with the latter part of the clause set out in paragraph (b). In our delegation's view, it is essential to maintain the principle that provisional application

must always be subject to the consent of each of the States parties to the treaty, so that it cannot be imposed on them by a resolution adopted by an international organization or an international conference.

Another important issue broached in the report before us relates to draft guideline 10 on internal law and the observation of provisional application of all or part of a treaty.

Draft guideline 10 proposed by the Special Rapporteur in his fourth report, which the International Law Commission decided to submit for the consideration of the Drafting Committee, reads (I quote): "A State that has consented to contract obligations by means of the provisional application of all or part of a treaty may not invoke the provisions of its internal law as justification for non-compliance with such obligations. This rule is without prejudice to article 46 of the 1969 Vienna Convention" (end of quotation).

The possibility of provisionally applying a treaty is contingent not only on the provisions of the treaty itself or the agreement of the negotiating States, as stipulated in article 25 of the Vienna Convention of 1969, but also on whether it is permitted under the constitutional law of the State parties.

We certainly agree with the proposed guideline 10, as indicated earlier; we believe it important, however, to place this discussion on record, and that it would be desirable in the future also to give consideration, in a guideline, to the situation of those States which, under their internal law, are obliged to limit the provisional application of treaties. This is a quite different matter from that addressed by draft guideline 10.

Furthermore, my delegation shares the position taken by the Special Rapporteur in his conclusions set out in the report on the advisability of preparing a general draft guideline that would provide that the 1969 Vienna Convention applied *mutatis mutandis* to provisionally applied treaties, thereby making it clear that there could be other grounds for annulment and termination provided for in the Convention, besides those of articles 46 and 60.

We hope that this issue will remain on the Commission's agenda under the wise leadership of its Special Rapporteur, Mr. Gómez Robledo. In this regard, we are convinced that a thorough analysis of the treaty provisions establishing the provisional application of a treaty will facilitate a better understanding of the subject. Accordingly, we believe that it will be very useful to prepare the memorandum which the Commission requested from the Secretariat in August 2015 on the practice of States on treaties, bilateral and multilateral, deposited or registered with the Secretary-General over the last 20 years, which make provision for provisional application.

In conclusion, allow me congratulate the Special Rapporteur, Mr. Juan Manuel Gómez Robledo, and all the Special Rapporteurs whose reports have helped ensure that this session has been one of the Commission's most fruitful sessions ever.

Thank you, Mr. Chair.