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Sixth Committee

Agenda Item 78

**Report of the International Law Commission
on the work of its sixty-eighth sessions
Cluster III**

Chapter V : Protection of the environment in relation to armed conflicts
Chapter XI : Immunities of State Officials from foreign criminal jurisdiction
Chapter XII : Provisional application of treaties

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Chapter V: Protection of the environment in relation to armed conflicts

Protection of the environment in relation to armed conflicts

Mr. Chairman,

I will first address the topic of the protection of the environment in relation to armed conflicts and please allow me to express my appreciation for the three reports produced so far by the Special Rapporteur Ms. Marie Jacobsson. Those reports, together with the draft principles and commentaries thereon provisionally adopted so far by the Commission, have paved the way for a pragmatic analysis of the subject by the next Special Rapporteur and provide a solid basis for the future work of the Commission on this issue.

On the scope of the topic, we support the suggestion of the Special Rapporteur Ms. Jacobsson, as well as of other members of the Commission, to consider also the issue of environmental protection during military occupation. One has just to recall that military forces retreating from an occupied territory have had occasionally recourse to the highly detrimental policy of scorched earth, as it has been the case with oil wells set on fire by Iraqi troops during their retreat from Kuwait.

In addition, and although, according to the Commission, “the draft principles are aimed at applying to all armed conflicts”¹, it is not clear to what extent some of them which refer only to States, as it is the case of principle 5, apply to non-international armed conflicts.

Draft principle 2 should, in our view, be slightly rephrased, given that preventive measures should not be limited to the minimization of damage, as implied by the current wording of the principle, but should also extend to the avoidance of damage.

The articulation between the law of armed conflict and the general principles of environmental law is, in our view, inherent to the topic and should be addressed accordingly. The remark in par. 5 of the commentary on draft principle 9 that “the law of armed conflict is *lex specialis* during times of armed conflict, but that other rules of international law providing environmental protection remain relevant”², is but a starting point for the consideration of this issue. The Commission should, in our view, examine to what extent the general principles of environmental law remain applicable in times of armed conflict and how they interact with the *jus in bello* rules.

Allow us to raise some particular questions in this respect, such as the applicability of the prevention principle, already reflected in Rule 44 of the ICRC’s study on customary international humanitarian law, relating to the use of means and methods of warfare with due regard to the protection of the environment, and whether the precautionary principle may provide guidance to a belligerent State in this context.

¹ Paragraph 7 of the commentary to draft principle 9, *Report of the International Law Commission, sixty-eighth session* (2016), doc. A/71/10, p. 349.

² *Report of the International Law Commission, sixty-eighth session* (2016), doc. A/71/10, p. 348.

We also believe that the Commission should provide guidance on the meaning of the threshold of “widespread, long-term and severe damage” embedded in draft principle 9 paragraph 2 as well as in articles 35 paragraph 3 and 55 paragraph 1 of the 1977 Additional Protocol I.

The non-indicative part of draft principle 10 (“the law of armed conflict...shall be applied to the natural environment, with a view to its protection”) partially overlaps with paragraph 1 of draft principle 9 (“The natural environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict”). In addition, the principle of distinction is enunciated twice, in draft principle 10 as well as in paragraph 3 of draft principle 9. In view of the above, the sequence between draft principles 9 and 10 should be reconsidered so as to avoid any duplication.

Draft principle 17 refers to remnants of war at sea. The latter may also include leaking wrecks of warships, jurisdiction upon and removal of which is regulated by general international law as well as the UNCLOS. For this reason, it is advisable to replace the term “...should cooperate to ensure...” by the term “...should cooperate in accordance with applicable rules of international law, including the UNCLOS, to ensure...”.

Chapter XI: Immunities of State Officials from foreign criminal jurisdiction

Mr. Chairman,

On the topic “Immunities of State Officials from foreign Jurisdiction”, I wish first of all thank the Special Rapporteur, Ms. Concepción Escobar Hernández for her detailed and well-documented fifth report, on the exceptions (or limitations) to immunity of State officials, a politically sensitive and legally complex issue, which currently lies at the heart of international debate. We also thank her for her courage to propose a Draft Article on crimes in respect of which immunity would not apply.

Mr Chairman,

We understand that this year’s debate on this issue within the Commission was only preliminary in nature and would be continued at its sixty-ninth session. We also understand that the issue had elicited divergent and -quite often- opposing views among the Members Commission. Already last year the Commission has noted in its report that “[It] *was not only confronting theoretical and doctrinal questions concerning the topic in relation with other fields of law in the overall international legal system, but also the difficulty of making choices in the codification and progressive development that would help to advance international law*”.

We are fully aware of the difficulties encountered by the Commission as well as of the dilemmas that might arise. However, we cannot overemphasize the importance of the matter for States and can only but agree with the Special Rapporteur that the issue of exceptions to immunity of State officials is the main not to say the sole purpose of consideration of the topic by the Commission. We invite, therefore, the Commission not to miss this opportunity to clarify this issue and remove the current state of uncertainty, which, although not unusual in cases where a change of paradigm

is ongoing, has already caused and might cause further tensions between States, thus threatening the stability of inter-State relations. We, also, invite the Commission to proceed so in the context of its dual mandate consisting not only in codification but also in the progressive development of international law.

Mr. Chairman,

We fully concur with the conclusion reached by the Special Rapporteur that it is not possible to determine, on the basis of established State practice and international case-law, the existence of a customary rule allowing for exceptions or limitations to immunity *ratione personae*, or even to identify a trend in favour of such a rule.

With respect however the Rapporteur's conclusions on exceptions to immunity *ratione materiae*, our position would necessarily have to be more nuanced. Indeed, we think that some methodological concerns raised by some Commission Members, mainly those relating to the process followed to identify customary international law or the assessment of existing national legislative and judicial practice, are to a certain extent justified. We also note that, while the Rapporteur has rightfully described the conceptual difference between exceptions and limitations to immunity, she ultimately decided not to draw the implications of such a difference for the issue at stake, considering it as being mainly theoretical and unnecessary in the context of the present Draft Articles.

That being said, we think that the fifth report contains [in Parts III and IV] a number of valuable elements which can help the Commission to rightfully set the parameters of the issue in the overall context of contemporary international legal system and propose balanced and workable solutions, in particular as far as international crimes are concerned.

Thus, we believe that the systemic approach of immunity suggested by the Rapporteur should be endorsed and followed by the Commission in the relevant debate next year. In particular, the relationship between immunity and responsibility, immunity and impunity, the gravity of crimes of concern to the international community as a whole, the legal dimension that has acquired the fight against impunity for these crimes, the conventional obligation of States to establish broad jurisdiction for some of them, as well as the right of access to justice and reparation for the victims having endured such crimes are factors that should be taken into consideration by the Commission in its examination of the issue. In the same vein, the progress over the last 25 years in the institutionalization of international criminal justice, the interconnection between national and international courts and the established division of competences in the fight against impunity, in particular through the principle of complementarity, as well as the need for an effective two-way cooperation and judicial assistance between them cannot be ignored by the Commission.

All the above developments in contemporary international law constitute in our view an ongoing change of paradigm concerning the issue of exceptions to the immunity *ratione materiae* of State officials from foreign criminal jurisdiction, as far as international crimes such as genocide, war crimes, crimes against humanity, torture and possibly other crimes are concerned.

We therefore urge the Commission, as we did in the past, to take into account the above developments and not to hesitate, if needed, to examine the issue also from the angle of progressive development of international law and in the light of the purposive character of the institution of immunity.

With respect to the other categories of crimes included in draft Article 7 proposed by the Special Rapporteur we would like to note the following:

We believe that the so-called “territorial tort exception”, which has been invoked also by our own courts, albeit in the context of civil proceedings, and which was retained also by the previous Rapporteur, is an interesting avenue that deserves to be further explored by the Commission, in particular as far as its transposition and functioning in the context of criminal proceedings are concerned.

Regarding the corruption-related crimes, we believe that it is mainly in this case where the conceptual difference between exceptions and limitations to immunity comes into play and should be taken into account. Indeed, the limited, scarce and diverse national judicial practice invoked by the Rapporteur shows, in our view, that the issue was examined by national courts mostly from the angle of limitations to immunity *ratione materiae* and the lack of normative elements thereof, since the acts at issue ultimately were not considered as “acts performed in an official capacity”. In this respect, paragraph 13 of the Commentary of Article 2 (f) on the definition of “act performed in an official capacity” seem to confirm the above understanding. In view of this, as well as of the limited and inconsistent national practice invoked, we would not favour the inclusion of corruption-related crimes in Draft Article 7.

Finally, Mr. Chairman, we reserve further comments on the wording of Draft Article 7 until the relevant debate within the Commission has been concluded.

Chapter XII: Provisional application of treaties

Mr Chairman,

Turning to the last topic currently on the agenda of the International Law Commission, we would like to express our appreciation to the Special, Juan Manuel Gómez-Robledo, for his fourth report on provisional application of treaties, which continues 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.

We also wish to extend our appreciation to the Drafting Committee for its consideration of the draft guidelines proposed by the Special Rapporteur.

Taking into account that the Commission is expected to take action on the draft guidelines provisionally adopted by the Drafting Committee at its next session, we will restrict at this point our comments to draft guideline 10 on internal law and the observation of provisional application of all or part of a treaty, which is proposed by the Special Rapporteur in his fourth report.

While we agree, in principle, that provisional application should not be invoked by a State as justification for its failure to comply with its treaty obligations, we nevertheless consider that draft conclusion 10 is narrowly formulated, insofar as it does not take due regard of what actually may occur in practice. Indeed, there are situations where recourse to provisional application relies on a treaty provision, which provides that the treaty will be provisionally applied to the extent permitted by domestic law. We, therefore, concur with other members of the Commission having expressed the view that draft guideline 10 needed to be broadened in order to also address such situations, which, as has been rightly pointed out, are different from the impermissible invocation of internal law, as foreseen in Article 27 of the 1969 Vienna Convention.

In a broader context, Greece welcomes the analysis by the Special Rapporteur of other 1969 Vienna Convention provisions of direct relevance to provisional application, based on the suggestions previously made by various delegations. This analysis sets, in our view, the theoretical background against which relevant practice can be properly understood and evaluated.

Having said that, we believe that it is now time for the Commission to undertake a comprehensive study of the practice in relation to provisional application of treaties in order to provide us with more concrete results.

In this respect, we welcome the decision taken by the Commission to request from the Secretariat a memorandum analyzing State practice in respect of treaties deposited or registered with the Secretary General, which provide for provisional application, including treaty action related thereto.

As to the final outcome of the work undertaken by the Commission in this field, we believe that the adoption of concise and practice-oriented draft guidelines, followed by commentaries, as well as model clauses for inclusion in treaties would be of great assistance to States and other international actors engaged in the process of provisional application of treaties.

Finally, Mr. Chairman, I wish to reiterate my country's support for the continuation and the early conclusion of the work on this topic, taking into account that its overall purpose is to provide useful guidance in the course of provisionally applying a treaty and, thus, to promote the stability of treaty relations and the respect for the rule of law.

I thank you Mr. Chairman.