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68TH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY

Sixth Committee

Agenda Item 81

Report of the International Law Commission on the work of its sixty-third and sixty-fifth sessions

Chapter VI: Protection of Persons in the event of disasters

Chapter VII: Formation and evidence of customary international law

Chapter VIII: Provisional application of treaties

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

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Mr. Chairman,

My delegation will address today the following Chapters of the International Law Commission's Report: Chapter VI: Protection of Persons in the event of disasters, Chapter VII: Formation and evidence of customary international law and Chapter VIII: Provisional application of treaties and Chapter IX: Protection of the environment in relation to armed conflicts.

A. Chapter VI: Protection of Persons in the event of disasters

Mr Chairman,

I wish first of all to thank the Special Rapporteur, Mr Eduardo Valencia Ospina, for his sixth report dealing with a number of issues in the context of this topic and, in particular, with prevention, including disaster risk reduction, prevention as a principle of international law, and international cooperation on prevention. The report also makes proposals for draft articles 5 *ter* (Cooperation for disaster risk reduction) and16 (Duty to prevent). Greece also thanks the Commission for having adopted the report of the Drafting Committee on draft articles 5 *bis* and 12 to 15, and on draft articles 5 *ter* and 16 as well as the commentaries to draft articles 5 *bis*, 5 *ter* and 12 to 16.

Mr. Chairman,

Greece, a country often hit by various natural or environmental disasters (such as earthquakes or wildfires) has been following actively and with great interest the work of the Commission on this topic since 2008 when the Special Rapporteur presented his first Report and has commented on all the subsequent Reports of the Special Rapporteur and of the ILC in 2009, 2010 and 2012.[1]

Regarding the present Report, we would like first to make some comments on draft articles 5*ter* and 16 on the reduction of the risk of disasters. The Special Rapporteur and the Commission rightly identified the need for a provision providing for international cooperation in article 5*ter*. They also followed a pragmatic approach as to the specifics of the duty to reduce the risk of disasters through domestic legislation (article 16 par. 1) and/or through other specific measures and actions (article 16 par. 2) such as risk assessment, collection of relevant information or early warning systems.

However, the duty of cooperation which is enshrined in article 5*ter* is not set on an entirely clear basis in the draft articles. Greece would prefer a straightforward reference to article 5*ter* to be included in article 16. In our view the linkage between these two provisions is not clear but derives rather indirectly since the wording of article 16 does not specify any 'right to ask for cooperation' from the part of the State which has the duty to reduce the risk. In our view the importance of the measures that 'each State' has to take (in order to reduce the risk of

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[1] (see for instance docs A/C./63/SR.24 (2008), A/C.6/64/SR.21 (2009), A/C.6/65/SR.22 (2010), A/C.6/67/SR.19 (2012)

disasters), but also the technically advanced and scientifically specific character of such measures call for the cooperation between all stakeholders, namely the State upon which the duty of risk reduction is incumbent and the relevant 'assisting actors' (international organizations and/or non international organisations such as universities with expertise on the specific issue), in order for the object and purpose of article 16 be fulfilled.

We therefore would welcome any consideration by the Commission to include in the wording of article 16 an explicit reference to article 5 *ter* which would read that each State in the performance of its duty to reduce the risk of disasters may 'ask and seek the cooperation provided for in article 5 *ter* where appropriate'.

Finally, with respect to articles 5*bis*, and 12 to 15 adopted by the Commission this in its May 2013 session, we take this opportunity to commend the Commission for its pragmatic approach as regards the content of these provisions, in particular that of articles 14 (facilitation of the assistance) and 15 (termination of external assistance), which in our view may prove instrumental in removing administrative or other obstacles for the timely provision or termination of assistance.

B. Chapter VII: Formation and evidence of customary international law.

Mr. Chairman,

Allow me first of all to commend the Special Rapporteur, sir Michael Wood, for the high quality of his first Report.

We would also like to express our agreement as regards the International Law Commission's decision to change the title of the topic which now reads: "identification of customary international law". In our view, the identification process is crucial for judges and practitioners who are called to apply or to rely on customary international law rules, both at the domestic as well as at the international level. While not underestimating the importance of the process of formation of international customary rules, the identification of customary law, is in our view of crucial importance for judges and international law practitioners that are in search or the eventual existence of a customary rule of international law, and thus they should be provided with the tools allowing them to assess that a certain law-creation process has been concluded and has led to the creation of an international customary law rule.

The open-ended approach of the Special Rapporteur, Mr. Michael Wood, as regards the materials to be taken into consideration that range from views of States to scholarly writings, goes hand in hand with the inherent flexibility of the topic, which is one of the most theoretical topics ever put on the agenda of the International law Commission. In this context, the views already expressed in the past by the International Law Commission are extremely valuable in assessing the latter's overall approach on the issue of customary international law, and we consequently thank the Secretariat for having produced a relevant and systematic compilation of this approach in its document A/CN.4/659 (2013).

Since this is a novel matter, normative guidance is mostly needed, and it would be extremely useful for States and lawyers if the Special Rapporteur and the International Law Commission placed more emphasis on less traditional and thus less obvious means of custom formation, such as the practice of international organizations, or the formation of customary

law in fields, such as the international human rights law, where one can witness a differentiation as regards the weight attributed to the two constitutive elements of customary law, that is State practice and *opinio juris*.

On the relationship between customary international law and treaty law, two issues should, in our view, be clearly distinguished, the first one being the influence of treaty law on the formation or crystallization of customary law and the second the interplay between the application of a treaty provision and of a parallel, already established, customary rule.

The relationship between customary law and the general principles of international law, a matter already addressed in the Special Rapporteur's Report, merits thorough examination, which should also include some definitional work, given that the term of "general principles of international law" is given various meanings in legal literature. The Commission should describe the specific features of the latter, without, however, pursuing the investigation beyond the needs of the present topic.

We also agree with the Special Rapporteur's view that *jus cogens* should not be covered, as particular difficulties arise in connection with the process of its formation and the production of evidence that a certain rule has acquired this status.

While it is premature to refer to the outcome of the Commission's work, *prima facie* the option suggested by the Special Rapporteur and accepted by the members of the Commission, i.e. to produce a set of conclusions with commentaries seems appropriate, as it would allow for flexibility and leave the door open for future developments. In addition, the future work of the International Law Commission on the topic will not only clarify matters in relation to international custom, but also revitalize the debate over its importance within the international normative process.

C. Chapter VIII: Provisional application of treaties

Mr. Chairman,

Greece wishes to express it appreciation to the Special Rapporteur, Mr. Manuel Gómez-Robledo, for his first Report on the provisional application of treaties, which constitutes a good starting point for setting up the principal legal questions that may arise with regard to this topic.

Greece is also thankful to the Commission for having opted for a neutral approach on the above topic, seeking neither to encourage nor to discourage States from having recourse to provisional application. To this regard, it should be pointed out that some States may be reluctant to provisionally apply international treaties both for policy reasons and because of constitutional constrains related to procedural requirements for participation in treaties. Thus, the Commission's task should be to clarify the legal issues surrounding the institution of provisional application, without taking position on policy matters.

As it was stated by my delegation when commenting on the work of the Commission on subsequent agreements and subsequent practice in relation to the interpretation of treaties, the study undertaken by the ILC on provisional application should similarly be based on its previous work on the law of treaties, and in particular on Article 25 of the 1969 Vienna

Convention. However, given the disparity of State practice and the divergence of views expressed with regard to the provisional application as an autonomous institution of public international law, there seems to be no sufficient ground to believe that the rules embodied in Article 25 reflect customary international law.

Moreover, the variety of the situations occurring in practice inevitably give precedence to the treaty itself and the relevant provisions contained therein and may, therefore, call for a more in-depth consideration of the feasibility and the opportunity of the study undertaken by the Commission. As already mentioned by the Special Rapporteur, flexibility is one of the key features of the concept of provisional application and, in that context, it could be preferable to let States to decide whether and to what extent recourse should be had to provisional application, as well as to determine the legal consequences of such recourse in each particular case.

For this reason, we share the view already expressed by some members of the Commission that it is too early to take a position on the final outcome of the work of the Commission, including on the its final form. Whether the final project takes the form of guidelines or model clauses, it should, in our view, focus on assisting States in the negotiation and drafting of international agreements and providing them guidance on how to interpret and give those agreements full effect. Within this framework, it would be useful to highlight some questions which have not been sufficiently addressed by the Vienna Convention and could be further explored in the framework of the present work of the Commission.

Of all these questions, the most important is, in our view, the question of the legal effects of provisional application. Taking into account that Article 25 of the Vienna Convention uses the term "provisional application", instead of "provisional entry into force" as initially suggested by the Commission, it seems reasonable to assume that the former is a question of fact rather than an issue of law. Accordingly, the view expressed by the Special Rapporteur that such effects "could depend on the content of the substantive rule of international law being provisionally applied" needs, in our view, to be further clarified. Nor it is clear whether, in terms of the rules of State responsibility for international wrongful acts, it is accurate to claim that a State may be found responsible for "breach of an obligation" arising out of a rule being provisionally applied. Having said this, one should also take into account the situation of individuals, which may be affected by the rule provisionally applied.

Another important issue is the termination of provisional application, including in connection with its temporal scope. The text of Article 25 of the Vienna Convention, which provides that a treaty may be provisionally applied "pending its entry into force" seems to suggest that provisional application of treaties is a rather transitional institution of limited duration which should not be indefinitely extended.

Finally, we consider that a distinction between multilateral and bilateral treaties could be of relevance in the context of the current work of the Commission on this topic. On the basis of existing State practice, some of the parties to a multilateral treaty may agree *inter se* to apply it provisionally. It would, therefore, be interesting to determine the relations between the

above parties and those which do not apply it provisionally, especially if the treaty itself does not provide for this possibility and such provisional application is agreed by means of a separate agreement, which may be tacit. Moreover, regarding the position of non-signatory or acceding States wishing to provisionally apply a multilateral treaty, we would like to underline that it flows from the text of Article 25 that it belongs to "negotiating States", e.g. States "which took part in the drawing up and adoption of the text of a treaty" (see Article 2 (1) (e) of the Vienna Convention) to decide to provisionally apply it or not.

D. Chapter IX: Protection of the environment in relation to armed conflicts

Mr. Chairman,

While topics such as the protection of cultural property in times of war or the applicability of human rights norms in case of armed conflict have been given particular attention in the case law, both international and domestic, as well as in legal theory, this has not been the case with the protection of the environment in relation to armed conflict, despite the increasing density of normative instruments aiming to protect the environment in peacetime. Therefore, the ILC's decision to consider this topic responds to a real need, in times when international as well as non-international armed conflicts, often raise questions in public opinion about their adverse impact on the environment and the natural resources.

We are of the view that the proposal of the Special Rapporteur, Ms. Marie Jacobsson, to avoid an approach of the subject consisting in a successive consideration of the various fields of international law, such as environmental law, law of armed conflict or human rights law, is an appropriate one, as any other course of action would result in a fragmented and most probably an incomplete picture of the applicable norms. Instead, the temporal perspective suggested in her oral report to the Commission, which favors the pragmatic identification of the issues raised before considering the legal responses to them, allows for a unified approach of the relevant principles, taking also into consideration the possible interactions among them.

I thank you Mr. Chairman.