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Report of the International Law Commission on the work of its sixty-sixth sessions

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

Chapter IX: Immunity of State officials from foreign criminal jurisdiction

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

Mr. Chairman,

Greece wishes to express its gratitude to the Special Rapporteur for his thorough analysis in the second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties. Greece would also like to extend its gratitude to the Drafting Committee for having streamlined the draft conclusions proposed by the Special Rapporteur. In the view of this delegation, the final result of the work of the International Law Commission at its 66th session, in particular the commentaries to the draft conclusions which are supported by a considerable amount of judicial and state practice, provide a well-balanced and insightful approach to some main features of the topic under consideration, such as the essential elements, the form and the legal effects of subsequent agreements and subsequent practice.

Greece welcomes draft conclusion 6 and, in particular, paragraph 1 thereof, which is a clear statement of the process of identification of subsequent agreements and subsequent practice under Article 31, paragraph 3 of the 1969 Vienna Convention on the Law of Treaties. This process is an indispensable prerequisite in order for subsequent agreements to be taken into account under the general rule of interpretation embodied in the above Article 31 of the Vienna Convention. Thus, the formulation of paragraph 1 and the accompanying commentaries are of great practical value.

Regarding, however, the second sentence of paragraph 1, which stresses that a common subsequent practice does not necessarily indicate an agreement between the parties regarding the interpretation of a treaty, but may instead signify their agreement temporarily not to apply the treaty, or an agreement on a practical arrangement, this delegation has some doubts as to whether this sentence should be included in draft conclusion 6;the reason being that it may give the wrong impression about the frequency of the situations in which the parties may have recourse to such practical arrangements, given especially that this practice is supported in the commentary by only one example dating back to 1906 (see paragraph 21). In addition, recourse to such arrangements is only one possibility among others that may come into play when evaluating whether the parties, by a subsequent agreement or practice, have assumed a position regarding the interpretation of a treaty or whether they are motivated by other considerations (political considerations, comity etc.). Greece, therefore, considers that the above considerations would better fit within the commentary rather than in draft conclusion 6 itself.

With regard to draft conclusion 7, Greece welcomes the recognition in paragraph 3 of the presumption that the parties, by a subsequent agreement or practice in the application of a treaty, intend to interpret it, not to amend or modify it. The presumption in favour of interpretation – supported, in the commentary, by a significant amount of relevant case law on how subsequent agreements and subsequent practice have actually contributed to treaty interpretation – is crucial for the stability of treaty relations.

In the same vein, Greece welcomes the inclusion of the disclaimer clause in the third sentence of paragraph 3 regarding the rules on amendment or modification under both the 1969 Vienna Convention and customary international law and considers that this sentence could form a separate paragraph 4 under article 3.

Furthermore, with regard to draft conclusion 8, Greece considers that the frequency of subsequent practice, is an essential element to be taken into account in Article 31, paragraph 3 (b) and, therefore, considers that a one-off practice of the parties could hardly meet the criteria for establishing their agreement regarding the interpretation of a treaty under this provision. Having said this and given that international law is not formalistic, one could not exclude the possibility of the conclusion of a subsequent tacit agreement regarding the interpretation of a treaty, evidenced by a one-off practice of the parties. However, and irrespective of the likelihood of such an agreement, the latter would rather fall within the scope of Article 31, paragraph 3 (a), instead of paragraph 3 (b), as indicated in paragraph 12 of the commentary. The use of the word "any" in the former provision (e.g. "any subsequent agreement...") seems to support this point of view.

Likewise, we are of the view that the statement in paragraph 1 of draft conclusion 9, that an agreement regarding the interpretation of a treaty need not be legally binding, if left without further clarification, could be a source of misunderstanding.

As indicated in paragraph 2 of draft conclusion 6, subsequent agreements and subsequent practice can take a variety of forms, including the form of a decision of a Conference of States Parties, covered by draft conclusion 10, which is usually not legally binding per se. In substance, however, an agreement regarding the interpretation of a treaty produces legal effects and needs to be taken into account for the purposes of treaty interpretation because it is the authentic expression of the intentions of the parties, although it may be incorporated in a non binding legal instrument. In the view of this delegation, the distinction between the substance and the form of such an agreement should be more clearly reflected in the text of draft conclusion 9.

Finally, with respect to draft conclusion 10, Greece would like to express its concern regarding the need and the desirability for addressing, in the context of the topic under consideration, the decisions adopted within the framework of a Conference of States Parties, separately, in a draft conclusion specifically dedicated to them.

Indeed, to consider that such decisions may embody a subsequent agreement regarding the interpretation of a treaty under Article 31,para 3, would imply as the Special Rapporteur rightly points out, acceptance that such decisions have legal effect despite the fact that they are not legally binding as such. This statement although agreeable to my delegation, is already covered in paragraph 2 of draft conclusion 6, which states that subsequent agreement and subsequent practice can take a variety of forms. The decision of States Parties of the Conference is indeed one of those forms. There seems, therefore, to be no reason to highlight this particular form of subsequent agreements or subsequent practice in relation to other possible forms that the latter may take. Accordingly, it would be more appropriate in our view to incorporate the considerations contained in draft conclusion 10 and its commentary in the

commentary to draft conclusion 6, rather than formulating a distinct draft conclusion in this respect.

As a concluding remark and given the great practical relevance of the topic under consideration, Greece would like to reiterate its support for the approach taken by the Commission to produce draft conclusions followed by commentaries, which, as stated above, contain a considerable amount of practice on this topic and will, therefore, be very useful to practitioners, in particular State representatives and judges, when interpreting and applying international treaties.

I thank you Mr. Chairman.

Chapter IX: Immunity of State officials from foreign criminal jurisdiction.

Mr. Chairman,

Greece attaches great importance to the consideration of the issue of the immunity of State officials from foreign criminal jurisdiction by the International Law Commission, in particular, given the significance of this issue to national and international courts when dealing with matters related to universal jurisdiction.

We would like to thank the Special Rapporteur, Ms. Conception Escobar-Hernandez, for her Third Report on «Immunity of State officials from foreign criminal jurisdiction». The Report analyzes, among others, the normative elements of immunity *ratione materiae*, and focuses on identifying substantive criteria, to determine whether a given person is an ''official'' for the purpose of the Draft articles, as those criteria derive from national and international judicial practice, various international agreements, including the Statute of the ICC and other documents adopted by the ILC (such as Draft Articles on State Responsibility). Finally, the Special Rapporteur proposed the adoption of two articles: Article 2, para. e related to the definition of «State official» and article 5, regarding the subjective scope of immunity ratione materiae.

My delegation wishes to make some comments on the above draft articles provisionally adopted by the ILC after making considerable changes thereto.

We agree with the majority of the members of the ILC that for the purpose of the present Draft Articles a definition of «State officials» is useful, given that immunity from criminal jurisdiction, regardless of whether it is recognized for the benefit of the State concerns, after all, individuals. We also agree with the definition suggested by the ILC in this respect, which is, in our view, general in nature and encompasses all categories of officials who enjoy immunity, be it *ratione personae* or *materiae,* thus defining the term «official» with reference to his duties, and in particular to his relationship with the State. This definition has the advantage that it does not confuse the subjective element of «who» should be granted immunity with the objective element of «what» acts should enjoy such immunity.

Likewise, we agree with the decision of the Commission not to make a distinction between the troika and other officials, as such a distinction is in our view not necessary for the purpose of defining the term «official».

Finally, with respect to the proposal of the Special Rapporteur to replace the word «official» with the word «organ», we agree with the decision of the Commission to continue using the term «State official» as this term encompasses all categories of state officials, in particular in view of the fact that the main reason given by the Special Rapporteur for reviewing this term relates to the lack of an exact translation of the word «official», in particular in the French and Spanish languages.

With respect to draft article 5: As the commentary to draft article 5 underlines, this article is intended to define the subjective scope of immunity *ratione materiae*, has the same structure and uses, mutatis mutandis, the same wording as draft article 3, on immunity *ratione personae*, provisionally adopted last year by the Commission. In contrast however to draft article 3, where the persons enjoying immunity *ratione personae* are determined *eo nomine,* in draft article 5 persons enjoying immunity *ratione materiae* are defined as «State officials acting as such». The phrase «acting as such» refers to the official character of acts performed by state officials, thus giving emphasis to the functional nature of immunity *ratione materiae*, whereas at the same time it distinguishes it from immunity *ratione personae.*

We agree with the decision of the Commission to adopt a separate article on the subjective scope of the immunity *ratione materiae*, despite the doubts raised by some members of the Commission as to the need to have a separate article in this respect, as in their view the essence of such immunity lies with the act itself and not with the person in respect of which immunity was enjoyed. Although it is true that in contrast to immunity *ratione personae*, in the case of immunity *ratione materiae*, it is rather the act than the person that is paramount, we agree with the comments made by the Special Rapporteur during the discussion of this issue in the Commission that this does not imply that the act substitutes itself for or replaces the person that performs it, and this is all the more so as immunity from foreign criminal jurisdiction concerns, after all, persons. In addition, we are of the view that for reasons of consistency and uniformity of the Draft articles there is a need to have a separate article on the subjective scope of immunity *ratione materiae* as exists on the immunity *ratione personae* (Draft article 3).

I thank you Mr. Chairman.