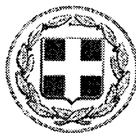

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69TH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY

Sixth Committee

Agenda Item 78

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

Chapter X: Identification of customary international law

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

Chapter XII: Provisional application of treaties

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Chapter X: Identification of customary international law

Mr. Chairman,

At the outset, allow me to take this opportunity to commend the Special Rapporteur, Sir Michael Wood, for the high quality of his second report which provides clear guidance to the Commission, as well as to States, despite the complex theoretical issues and scholarly debates associated with international custom and, in particular, its subjective element, often referred to under the term *opinion juris*.

The following comments by my delegation are related to the draft conclusions proposed by the Special Rapporteur, taking also into account the renumbering of the draft conclusions and reformulations thereof proposed by the Drafting Committee. The comments are therefore of a preliminary nature, given that, at this stage, the report of the Committee has been presented to the ILC for information purposes only.

At first, and while concurring with the unified view regarding the general applicability of the two-element approach in identifying the rules of customary international law, we are of the view that, in the context of the future examination of the interplay among those elements, the variation of their respective weight in some specific fields of international law, (such as human rights law), should be further analyzed and explored.

Reference to inaction as a form of practice for the purpose of identification of customary international law, while acceptable in principle, should, in our view, be qualified, given that not any form of inaction may be taken into account in this respect. It is rather the conscious inaction of an interested State with regard to the practice in question, often considered in relation to an act, proposal or assertion of another State calling for a reaction, which may be relevant for our purpose. For this reason, we consider that the addition by the Drafting Committee, in draft conclusion 7 [6], of the term 'under certain circumstances' next to the term of 'inaction' is most welcome and should be retained.

Mr. Chairman,

States may follow a general practice on the assumption that a right is being exercised or an obligation is being complied with in accordance with international law. In this respect, the term 'by a sense of legal obligation' in draft conclusion 10 [9] is rather restrictive, as it does not seem to encompass the case of a practice being considered as the exercise of a legal right. In our view, it might be better to replace it by a broader term, such as 'by a sense of the implementation of a legally binding norm under international law' or, following the wording of the ICJ in its *North Sea Continental Shelf* judgment (*Reports* 1969, par. 77, p. 44), 'by a sense that this practice is rendered obligatory by the existence of a rule of law requiring it'.

Furthermore, as already pointed out by some members of the Drafting Committee, it would be of use to States if the Commission provided some guidance on the

interrelationship between treaties and custom, as well as general principles of law and custom, namely on the issue of how such a general principle might evolve into a customary rule of international law. The Commission might also, when dealing with the 'persistent objector' subject, shed some light on the so-called 'general principles of international law', considered by some authors as rules valid for all States, irrespective of their attitude during the process of their formation.

Another point we wish to make is that even if international courts and tribunals do not generate 'general practice' for the purpose of identification of customary international law, any acceptance on their part of the existence of a customary international law rule meets with respectful consideration by States, which also consider such findings as an authoritative formulation of the content of such a rule. We consider that this indirect but decisive normative influence of international case law should be further considered in the upcoming work of the International Law Commission and somehow reflected in the commentary, preferably under draft conclusion 4 [3], as it pertains to the identification of both elements of international custom.

Finally, we look forward to the future consideration by the Special Rapporteur of the normative practice of international organizations in the field of customary law and we fully subscribe to the remarks of the European Union regarding the important role, in this respect, of regional integration organizations. Moreover, we are of the view that the issue of the law-creating effects of resolutions adopted by the organs of international organizations deserves particular attention as the latter, despite being acts attributable to the organization, may nevertheless reflect, under certain circumstances, the collective *opinio juris* of the States concurring with their adoption.

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

Mr. Chairman,

On the topic of the protection of the environment in relation to armed conflicts, allow me first to express our appreciation to the Special Rapporteur, Ms. Marie Jacobsson, for her preliminary report. The report paves the way for a pragmatic analysis of the subject in the coming sessions of the International Law Commission. We would, in particular, like to express our support for the temporal, three-phased approach of the subject proposed by the Special Rapporteur, which allows for a unified consideration of the relevant applicable norms, irrespective of whether they stem from the law of armed conflict, international environmental law or human rights law.

On the scope of the topic, we would like to stress that, notwithstanding any decision of the Commission to include in its study some aspects of cultural heritage or to refrain from doing so, one cannot disregard the issue of the protection of natural heritage, the latter being a prominent part of the environment. Needless to mention, natural heritage is afforded special protection under all circumstances by the 1972 UNESCO Convention and the reference by the Special Rapporteur, in par. 81 of her preliminary report, to the definition of natural

heritage provided in article 2 of that Convention suggests that the matter will be further considered in her subsequent reports. We therefore welcome this approach.

The preliminary report presents a series of basic principles of international environmental law which are candidates for continued application during armed conflict. In this context, the relevance of some of these can hardly be questioned. This is the case, among others, with the precautionary principle, given that provisions of international humanitarian law, such as article 53, par.3 of the Additional Protocol I, incorporate a precautionary approach. In contrast, the applicability of the sustainability principle is less obvious and deserves careful examination.

Regarding the analysis of the obligation of prevention, it should be kept in mind that it is a due diligence obligation stemming from the much broader no-harm rule, encompassing also obligations of control and reduction of environmental damage. In our view, it is the no-harm rule in its entirety which should be scrutinized with regard to its application in case of armed conflict.

On the reference by the Special Rapporteur (par. 161 of the preliminary report) to the obligation to disclose environmental information to the public, we would like to stress that the latter has gained momentum since the adoption and entry into force of the 1998 Aarhus Convention on access to information, public participation in decision-making and access to justice on environmental matters. For this reason, we are of the view that the scope of application of the safeguard clause (article 4 par. 4(b)) of that Convention, regarding national defense, merits throughout examination.

On the issue of human rights, we consider that future reports should take into account, in addition to the already mentioned right to health, food and acceptable living conditions, the debate about an emerging right to water.

Mr. Chairman, we look forward to the next reports of the Special Rapporteur, which shall assist us in identifying the principles of international environmental law which continue to apply during armed conflict, in association with the relevant rules of international humanitarian law.

ChapterXII: Provisional application of treaties

Mr. Chairman,

Greece wishes to thank the Special Rapporteur, Mr. Juan Manuel Gomez-Robledo, for his second report on this topic and his endeavour to provide therein a substantive analysis of the legal effects of the provisional application of treaties. This is, in our view, a fundamental question that needs to be further explored, in particular, in the light of relevant State practice. In this respect, Greece would like to reiterate that given the disparity of the practice, the Special Rapporteur should engage in a more thorough analysis of the circumstances under which States have recourse to the provisional application of treaties before determining its legal effects. In the same vein, despite the merit of not embarking on a comparative

study of relevant domestic and, in particular, constitutional provisions, it should be recalled that the decision to provisionally apply a treaty also depends on the national legal requirements of the State concerned. For this reason, one can find in treaty practice provisions stating that the Contracting States shall apply provisionally an international agreement only to the extent permitted by their respective national legislation.

In the view of this delegation, reliance on relevant State and judicial practice is also crucial when examining the consequences arising from a breach of an obligation in a treaty being provisionally applied. The assumption that the rules on responsibility for internationally wrongful acts should apply in this respect requires further consideration and, in our view, it would be premature to draw a conclusion thereon to the extent that this is not supported by a sufficient body of practice.

Furthermore, with respect to the applicability of the rules on the unilateral acts of States, Greece shares the concerns expressed by some members of the Commission in the light of the clarity of the terms used in Article 25 of the 1969 Vienna Convention on the Law of Treaties, which expressly provides for an agreement of the negotiating States. We, therefore, welcome the clarification provided by the Special Rapporteur that his reference to the unilateral declaration of a State to provisionally apply a treaty was not meant to be the "source" of the legal obligation but rather its "origin" in a temporal sense, i.e. the act which triggered the provisional application, although this concept needs to be further explored.

Taking into account that the consideration of this topic by the Commission is still at an early stage, Greece would like to conclude its preliminary remarks by reiterating that it looks forward to the future work on this issue, in particular in the form of draft guidelines or conclusions to be proposed by the Special Rapporteur, if possible, at the next session of the ILC.

I thank you Mr. Chairman.