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Sixth Committee

Agenda Item 83

Report of the International Law Commission on the work of its seventieth session

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Chapter V: Protection of the atmosphere

Mr. Chairman,

I will first address the topic ''Protection of the atmosphere''. The atmosphere is a natural resource essential for sustaining human life and ecosystems. Nonetheless, a "pressing concern" on behalf of the international community exists on the grounds of its deteriorating state, which makes its protection, comprising both its conservation and preservation, necessary. At the outset, allow me to take this opportunity to commend the Special Rapporteur, Mr. Shinya Murase, for the high quality of his second Report. The latter, which contains preambular paragraphs and draft principles 1 to 5, provides a sound basis for the future adoption of a complete set of principles addressing the matter, which is a pressing concern for the international community.

We fully share the ILC's option to focus on an approach based on State's rights and obligations, and not on an approach based on the atmosphere *per se*. The atmosphere is a natural resource that is limited; therefore, a State-oriented approach, based on States' obligations would secure an effective protection of the atmosphere as well as human life and health. As a result, the term "human activities" in the second guideline is to be understood as connoting activities under the jurisdiction or control of States.[1]

At this point, we fully support the inclusion in the second guideline of a clause that "[n]othing in the present draft guidelines is intended to affect the legal status of airspace under applicable international law". Although the atmosphere cannot be divided, and although some activities conducted in airspace might be covered by the principles enshrined in the guidelines, the concept of airspace and that of the atmosphere are to be clearly distinguished.

Regarding the fourth guideline proposed by the Special Rapporteur and not yet adopted by the Commission, the basic obligation of States to protect the atmosphere is, of course, well established in international law. However, it should be reflected in the guideline itself or in the relevant commentary, that this obligation of prevention comprises the duty to assess the risk before actual damage occurs, to adopt any other appropriate measures for the purpose of preventing it, or at any event to mitigate harm and limit its consequences.[2] Therefore, the elements of such an obligation should be formulated in a comprehensive way, so as to comprise the duties of States to assess and prevent the risk, as well as to control potentially harmful activities and mitigate air pollution and atmospheric degradation.

In addition, we welcome the adoption of draft guideline 5, given that, together with the codification of primary principles of international law establishing States' obligation to protect the atmosphere, we support the development of international

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[1] The 1974 Stockholm and the 1992 Rio Declarations refer to "States" which "have [...]the responsibility to ensure that *activities* within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

[2] See article 2 of the 1992 UNECE Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes, as well as article 3 of the ILC's draft articles on Prevention of Transboundary Harm from Hazardous Activities, *Report of the International Law Commission on the work of its fifty-third session*, A/56/10, page 153.

cooperation in this field. Cooperation must be achieved in good faith, as already provided in article 4 of the ILC's 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities.

In this respect, it could be useful to reconsider the more vague and indefinite term "as appropriate" in the wording of draft guideline 5. In addition, we are of the view that the commentary of draft guideline 5 should refer to the exchange of information as an important component of cooperation, following the example of the relevant provisions included in the UN Convention on the Law of the Non-navigational Uses of International Watercourses (1997) and the UNECE Convention on Long-range Transboundary Air Pollution (1979).

In conclusion, there has been considerable evolution in the rules concerning the protection of the environment, and the atmosphere in particular. The treatment of the topic by the ILC under the *spectrum* of both transboundary air pollution and global atmospheric degradation is encouraging, fostering the aim of codification and progressive development of international law in this crucial field.

Chapter VI: Identification of customary international law

Identification of customary international law

Mr. Chairman,

I will now address the topic of the identification of customary international law and, at the outset, let me take this opportunity to commend the Special Rapporteur, sir Michael Wood, for the high quality of his third Report.

First of all, we would like to praise the clarity of the Report on rather complex issues such as the circumstances under which a treaty or resolutions of international organizations and conferences may generate customary international law. The precisions and nuances of the report provide useful and clear guidance on the complex relationship between custom and written texts, drawing clear conclusions from a mass of relevant case-law and scholarly writings. In addition, we welcome the formulation by the Special Rapporteur of paragraph 3 of draft conclusion 10 [11], which differentiates between inaction and inaction in case of circumstances calling for some reaction, the latter only qualifying as a possible evidence of *opinio juris*.

On draft conclusion 3[4] as currently supplemented by the addition of a second paragraph, we are of the view that the commentary thereto should distinguish between two distinct, albeit interrelated types of variance in the assessment of evidence for the two elements: at first, as already suggested in par. 17 of the Special Rapporteur's third report, in some cases a particular form of practice or particular evidence of acceptance as law may be more relevant than in others. For instance, the identification of customary international law in the field of diplomatic privileges and immunities heavily relies on international agreements and diplomatic correspondence, while in other fields such as the law of naval warfare, relevant State practice may take the form both of written texts and of physical action.

Secondly, it would be advisable to highlight in the commentary that in some cases the weighing between the two elements of custom and/or their time sequence may follow a differentiated path. Those two phenomena often interact, given that in cases, already contemplated in par. 16 of the Special Rapporteur's third report, where *opinio juris in statu nascendi* precedes the development of relevant State practice and the latter consists merely of State acquiescence to the new rule or of absence of conflicting practice, it can be argued that *opinio juris* has played a prominent role in the process of generation of the new customary rule.

Paragraph 3 of draft conclusion 4 [5] which provided that conduct by non-State actors other than international organizations is not practice for the purposes of formation or identification of customary international law, has, in our view, been adequately supplemented by the Drafting Committee, which considered that such practice "may be relevant when assessing the practice referred to in paragraphs 1 and 2". In fact, in cases of international law rules whose addressees are also non-State actors, such as armed groups in case of internal armed conflict, or in cases of novel fields of international regulation mixing up customary international law rules and policy guidelines, both applicable to private entities, such as the one on the activities of private military security companies, one cannot easily argue that the behavior of the addressees of those norms is irrelevant for the formation of customary international law.

We believe that, in the above scenario, the non-State actor's abidance by some rules and principles, if accepted by the community of States as reflecting the law, may constitute practice which may be taken into account for the formation of a customary international law rule, even if it cannot be equated with State practice. Non-State actor's practice could consolidate already established general international law or facilitate the emergence of a customary international law rule, in particular when it is in conformity with relevant treaty provisions. In fact, this practice may serve as a catalyst and prompt positive or negative reactions by States which may count as State practice and evidence of their legal opinion.

On draft conclusions 13 [14] and 14, we support the option of the Drafting Committee to deal with judicial decisions and writings as subsidiary means for the identification of customary international law in separate conclusions, given their differentiated authoritative value. Scholarly writings should be approached with more caution than case-law, given that in some of them the distinction between what the law is or what the law should be, is sometimes blurred. In addition, the new wording of par. 1 of draft conclusion 13[14] highlights not only the evidentiary value of judicial decisions for the identification of customary law, but also to their contribution to the formulation of the exact content of a customary law rule.

On the persistent objector rule, we consider that its applicability is questionable not only in relation to the rules of *jus cogens*, a matter already reserved in fn. 204 of the Special Rapporteur's third report, but also in relation to the broader

category of the general principles of international law which seem to apply to all the members of the community of States irrespective of their consent to be bound by them[3]. One could hardly imagine how a State could qualify as a persistent objector to uncontested general principles of international law such as the right of innocent passage, the objective legal personality of international organizations, the principle of sustainable development, fundamental human rights norms, even if some of those rules do not qualify as *jus cogens*.

In addition, it would be advisable to consider in the commentary whether a persistent objection may stand up to the test of time. In fact, as time passes and the customary rule gains universal approval among the community of States, it will be more and more difficult for an isolated State to uphold its objection ad infinitum[4].

With respect to the particular custom, we concur with the wording of draft conclusion 16 [15] proposed by the Special Rapporteur and slightly amended by the Drafting Committee. In this spirit, we would like to stress, given the exceptional character of particular custom, the necessity for clear and uncontested evidence of a State's participation in the formation of the corresponding practice and its acceptance as law. In this context, we might also distinguish between novel particular customs, whose scope of application refers to State behavior not already regulated by specific rules of international law, from derogatory particular customs, when the latter derogates from a general rule of customary international law or from a multilateral treaty rule. The above mentioned standard of proof should, in our view, be even stricter in the latter case, given that such derogations could not be easily presumed.

Chapter VII: Crimes against humanity

Crimes against humanity

Mr. Chairman,

Concerning the item "Crimes against humanity" I would like to commend the Special Rapporteur, Mr. Sean Murphy, for his detailed first report on the topic. Greece attaches great importance to the fight against impunity for the most heinous crimes of international concern, including the crimes against humanity.

We are not, however, entirely convinced about the desirability and the necessity of a Convention addressing exclusively that category of crimes.

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[3] See G. Buzzini, "La théorie des sources face au droit international général. Réflexions sur l'émergence du droit objectif dans l'ordre juridique international", 106 RGDIP 2002, p. 581, 582 ; G. Buzzini, "La généralité du droit international général : réflexions sur la polysémie d'un concept", 108 RGDIP 2004, p. 381, 396.

[4] "...cette objection persistante s'avère le plus souvent très difficile à tenir sur le long terme et conserve encore un régime juridique par trop imprécis" (P.M. Dupuy, Droit international public, fourth edition, Paris, 1998, par. 319, p. 298) ; see also P.M. Dupuy, "A propos de l'opposabilité de la coutume générale : enquête brève sur l'objecteur persistant" in Mélanges M. Virally, Paris, 1991, p. 257.

In this respect, we share the views expressed by some States in previous sessions of this Committee that the Rome Statute of the International Criminal Court provides a sufficient legal basis for the domestic criminalization and prosecution of crimes against humanity, through both the definition of these crimes contained in its Article 7 which, as the Rapporteur notes, has broad support among States, and, more importantly, the principle of complementarity which underpins it.

Indeed, as a State Party to the Rome Statute of the International Criminal Court and a staunch supporter thereof, Greece has enacted implementing legislation penalizing, inter alia, crimes against humanity as defined in Article 7 of the Rome Statute, providing for their imprescriptibility as well as for a limited extra-territorial jurisdiction of its domestic courts.

We, therefore, are of the view that the entry into force of the Rome Statute and the establishment of the International Criminal Court has rendered to a large extent unnecessary the elaboration of a Convention on the crimes against humanity.

We also believe that, despite the cautious approach and declared intention of both the Special Rapporteur and the Commission not to affect existing conventional regimes and the Rome Statute of the International Criminal Court, the risk of reopening during the future negotiation of a Convention the consensus reached on the definition of the crimes against humanity, as contained in Article 7 of the Rome Statute, cannot be excluded. Moreover, we share the concerns expressed by some States and members of the Commission that such a convention may hamper efforts to achieve the universality of the Rome Statute, since some States may deem it sufficient to ratify the former without adhering to the latter.

Mr. Chairman,

We concur with the Special Rapporteur and the Commission that the Rome Statute does not regulate inter-State cooperation on crimes falling within its jurisdiction. However, it is also a fact that the absence of a robust inter-State cooperation system does not affect only crimes against humanity but also crimes of genocide and war crimes despite the fact that they make the object of specific conventions.

We, therefore, believe that, at this stage, efforts of the international community should rather focus, on the one hand, on the promotion of universality and effective implementation of the Rome Statute and, on the other, on the establishment of necessary mechanisms of inter-State cooperation for the domestic investigation and prosecution of the most serious crimes of concern to the international community. In this respect, Greece has already expressed its support for the international initiative towards the establishment of a multilateral treaty for mutual legal assistance and extradition in domestic prosecution of atrocity crimes.

Notwithstanding the above, we will follow closely and with great interest the work of the Commission on this topic.

Turning now to the Draft Articles provisionally adopted by the Commission, we would like to note that, in general, we favor the restructuring of the two Draft Articles initially proposed by the Special Rapporteur, and their reformulation into four Draft Articles as well as most of the additions and refinements made on their wording. In particular, we agree with the addition in Draft Article 3 of paragraph 4, which, along the lines of existing conventions and the Rome Statute, stipulates that the definition of the crimes against humanity contained in this Article is without prejudice to any broader definition provided for in any international instrument or national law. We also agree with the addition of the phrase "in conformity with international law" in paragraph 1 of Draft Article 4 dealing with the obligation to prevent crimes against humanity as well as with the addition of the phrase "or control" in paragraph 1(a) of the same Draft Article, which seeks to cover situations where a State is exercising de facto jurisdiction over a certain territory.

As to the placement of current paragraph 2 of Draft Article 4, which, as noted in the Report, will be addressed at a later stage, we are of the view that it should be removed from that Article dealing with the obligation of prevention of crimes against humanity.

Finally, regarding Draft Article 4, paragraph 1 (b) on the obligation of States to cooperate, inter alia, with "other organizations", as appropriate, in the prevention of crimes against humanity, we would appreciate more clarifications and examples on its content in the Commentary of this Article.

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

Mr. Chairman,

Let me first express our appreciation to the Special Rapporteur, Mr. Georg Nolte, for his third report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, which specifically addresses treaties which are constituent instruments of international organizations. I would also like to extend our appreciation to the Drafting Committee, as well to the Commission, for streamlining draft conclusion 11 and for providing a thorough analysis in the commentary thereto.

Greece welcomes the reaffirmation by the Commission of the applicability of articles 31 and 32 of the Vienna Convention to treaties which are constituent instruments of international organizations. Moreover, in view of the variety of international organizations as well as of the fact that constituent instruments of international organizations are treaties of a particular type, Greece considers that the

inclusion, in paragraph 4 of draft conclusion 11, of a safeguard clause ensuring that paragraphs 1 to 3 apply without prejudice to any relevant rules of the organization concerned, guarantees the flexibility required for the interpretation of those treaties.

However, for the sake of clarity, we consider that it would be appropriate to reintroduce, in paragraph 3 of draft conclusion 11, that it is the practice of an international organization in the application of its constituent instrument *itself*, as distinguished from the practice of the Member States, which may, *in its own right*, contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32, as it was proposed by the Special Rapporteur in the original version of draft conclusion 11.. Moreover, given that such practice does not necessarily reflect the agreement of the member states regarding the interpretation of the constituent instrument of the organization concerned – especially, in the event of acts adopted despite the opposition of certain member states –, it would, in our view, be useful to state in clear terms that such practice, when applying the general rule of treaty interpretation enshrined in Article 31 of the Vienna Convention, has less weight than the practice of the organization which is generally accepted by its member states. As stated in the commentary, the practice of an organization itself may contribute to the determination of the object and purpose of the treaty under article 31, paragraph 1, but its relevance for the purpose of interpretation should in our view be merely of a confirmatory nature.

Furthermore, we would be interested in receiving more clarification (information) regarding the difference, if any, between the general practice of an international organization and the established practice of an international organization, in particular to the extent that the latter is described by the Commission as "a specific form of practice ... which has generally been accepted by the members of the organization, albeit sometimes tacitly". In view of the confusion that this term seems to generate as to its exact meaning and effects, we welcome the deletion from the final version of draft conclusion 11 of the reference to the established practice of an international organization for the purpose of the interpretation of its constituent instrument.

As a concluding remark, we would like to reiterate our support for the work of the Special Rapporteur on this important issue and to express our hope that the Commission will continue to carry out its consideration of the topic in an expeditious manner with the view to providing a complete set of draft conclusions which will be of a great value for all states in the interpretation and application of international treaties but also, ultimately, for the consolidation of the rule of law.

Thank you Mr. Chairman.