PERMANENT MISSION OF GREECE TO THE UNITED NATIONS
866 2nd Avenue, 13th Floor· New York, NY 10017-2905
Tel: 212-888-6900 Fax: 212-888-4440
e-mail: grdel.un@mfa.gr

www.mfa.gr/un

70TH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY

Sixth Committee

Agenda Item 83

Report of the International Law Commission on the work of its sixty-seventh session

Cluster Three:

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

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

Chapter XI: Provisional application of treaties.

Statement by
Maria Telalian
Legal Adviser, Head of the Legal Department,
Ministry of Foreign Affairs

NEW YORK
Monday, November 9, 2015

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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 at the outset to express my government's appreciation for the second report of the Special Rapporteur, Ms. Marie Jacobsson. The report contains preambular paragraphs and draft principles 1 to 5, thus paving the way for the identification of a complete set of principles addressing the matter, to be proposed in the subsequent reports.[1] The latter should, in our view, focus more on the interrelation between the information provided by the Special Rapporteur and the content of the proposed draft principles, in particular with regard to the general principles of international environmental law.

Those principles have already been identified in the preliminary report of the Special Rapporteur and, we think, it's high time to reflect about their applicability during armed conflict, in particular how they operate in wartime, as well as how they interact with the principles of international humanitarian law referred to in draft principle II-2. In this context, rule 44 of the ICRC 2005 study on customary international humanitarian law deserves, in our view, respectful consideration, given that it proposes a coordinated application of the obligation to take precautions in attack so as to avoid or minimize incidental damage (article 57 of Additional Protocol I) as well as of the precautionary principle of general environmental law.

In the same vein, one should consider whether there might be common points between the duty of care enunciated in article 55 of Additional Protocol I and the no-harm rule of environmental law which contains a due diligence standard, and whether the precautionary principle may provide guidance to a State in determining the required level of diligent "care".

Lastly, we believe that one of the subsequent reports of the Special Rapporteur should consider to which extent the IHL threshold of "widespread long-term and severe damage to the environment" (draft principle II-1 par. 2 and Additional Protocol I, article 35 par. 3 and 55 par. 1) differs from the one of "significant harm" , embedded in the no-harm rule.[2]

The second preambular paragraph of the draft principles refers both to "preventive measures" and to ''remedial measures" rather roughly and, we hope, the relevant commentary shall provide a comprehensive definition for each of them. In

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[1] It should be stressed that the present statement refers to the draft principles as amended and renumbered by the Drafting Committee.

[2] See, for instance, article 3 of the ILC's 2001 draft articles on Prevention of transboundary harm from hazardous activities : "The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof" (*YILC 2001, vol. II, part II,* p. 146). On the assessment of "significant harm" see commentary to article 2, par. 4, *ibid.*, p. 152.

addition, we are of the view that the meaning of the term "damage to the environment" should also be clearly defined.

On the term of "preventive measures", it should be clarified whether it encompasses also anticipatory measures (such as the designation of protected zones) to be adopted in peacetime, or just preventive measures to be adopted during wartime. In addition, the objective of preventive measures should not be limited to the minimization of damage, as implied from the current wording of the second preambular pargraph, but extend also to the avoidance of damage. In this spirit, it might be better to refer to "preventive measures for adopting and in any event minimizing potential damage to the environment".

On remedial measures, which, as the opposite of preventive measures, are adopted after the occurrence of environmental damage, it should be made clear whether the term refers only to measures of reinstatement or also to immediate response or mitigation measures adopted during warfare and immediately after the occurrence of damage with a view to minimize and, to the extent possible, eliminate its adverse impact.[3]

In view of the above, the Commission might consider the added value of introducing in the draft principles a separate provision with definitions of various terms, as has been the case with article 2 of the ILC's 2001 draft articles on Prevention of transboundary harm from hazardous activities[4].

On the second paragraph of draft principle II-1, we are of the view that the commentary should elaborate on the degree of the required "care", which should be proportionate to the circumstances and the level of risk of serious damage to the environment. In this context, the commentary might refer to a series of factors guiding States in assessing whether an attack might have significant adverse environmental effects.[5]

In addition, we are of the view that next to the general principle of care to protect the general environment against widespread, long-term and severe damage, a more focused but at the same time more general obligation, in the sense that it refers not just to the prohibition of serious damage, would be of use. The relevant wording might be inspired by rule 44 of the ICRC 2005 Study on customary international law,

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[3] On response measures see, inter alia, Principle 5 of the ILC's 2006 draft principles on the Allocation of loss in the case of transboundary harm arising out of hazardous activities (*YILC 2006, vol. II, part II*, p. 109).

[4] See *YILC 2001, vol. II, part II*, p. 146.

[5] For a similar approach, see article 6 of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses.

which provides that "methods and means of warfare must be employed with due regard to the protection and preservation of the environment".[6]

Finally, we are of the view that while the Commission's draft principles should focus on general rules and standards, the commentary should also explore, in an indicative manner, some strictly regulated methods of warfare, more likely than others to adversely affect the environment, such as the use of incendiary weapons (Rule 84 of the 2005 ICRC Study) or attacks against works or installations containing dangerous forces in cases where the latter are military objectives (Additional Protocol I, article 56, Additional Protocol II, article 15).

Immunity of State officials from foreign criminal jurisdiction

Mr. Chairman,

I will now address the topic "Immunity of State officials from foreign criminal jurisdiction", and, let me, at the outset commend the Special Rapporteur Ms. Concepción Escobar Hernández, for her fourth report dealing with the material and temporal scope of immunity *rationae materiae*.

Regarding the former and, in particular, the notion of "acts performed in an official capacity", we agree with the conclusion reached by the Special Rapporteur and shared by the Commission that the distinction between "acts performed in an official capacity" and "acts performed in a private capacity" does not correspond nor is equivalent to the distinction between *"acta iure imperii"* and *"acta iure gestionis"* or to the distinction between lawful and unlawful acts.

Furthermore, while we acknowledge that, for the purposes of immunity, the identification of an act as "performed in an official capacity" can ultimately take place on a case by case basis, after taking into account all relevant parameters, we believe that the inclusion in the Draft Articles of a definition of this notion encapsulating the main characteristics of such acts, is not only desirable but, if combined with well crafted commentaries, would largely assist practitioners, including national courts.

In this respect, we tend to agree with the reformulation of Draft Article 2 paragraph (f) by the Drafting Committee and we look forward to the commentary on this paragraph which is anticipated to be considered at the next session of the Commission.

Regarding the complex and politically sensitive issue of crimes under international law, we concur with the position taken by the Special Rapporteur in paragraph 124 of her Report that the argument that crimes such as torture, enforced disappearances, genocide, war crimes and crimes against humanity are devoid of any

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[6] See also article 44 of the 1994 San Remo Manual on international law applicable to Armed Conflicts at Sea : "Methods and means of warfare should be employed with due regard for the natural environment taking into account the relevant rules of international law. Damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited".

official or functional dimension in relation to the State is at odds with the facts. Whether or not acts of state officials are regarded as "performed in an official capacity" does not depend on their legality in international or domestic law, but, rather, on the purposes for which such acts were performed and the means through which the official carried them out. Such acts are very often carried out by individuals vested with state authority and, as it was successfully pointed out by scholars, "to deny the official character of such offences is to fly in the face of reality". We believe, therefore, that from a conceptual point of view, the effects of crimes under international law in respect of immunity *rationae materiae* should be better explored in the context of possible exceptions to immunity, rather than in the context of the definition of acts performed in an official capacity. Conversely, any definition of such acts adopted by the Commission should not prejudge the future consideration of this matter.

Concerning Draft Article 6, we welcome the changes made by the Drafting Committee to the text initially proposed by the Special Rapporteur, namely the reversal of the order of paragraphs 1 and 2 in order to put the emphasis on the functional nature of immunity *rationae materiae.* We think, however, that, as it was already noted by the Chair of the Drafting Committee, there might be a need to better articulate Draft Article 5 which refers to State officials "acting as such" with paragraph 1 of Draft Article 6 referring to acts performed in an official capacity.

As to the temporal scope of immunity *rationae materiae*, we agree with the Special Rapporteur that it is uncontroversial. In this respect, we believe that the wording of the new paragraph 2 of Draft Article 6 encapsulates better the idea that immunity rationae materiae is not characterized by a strict temporal scope.

Provisional application of treaties

Mr Chairman,

I wish to reiterate Greece's support to the work of the Commission on this topic which touches upon some very sensitive questions of both doctrinal and practical interest. Greece welcomes the third report of the Special Rapporteur on the provisional application of treaties, focusing on the relationship of provisional application to other provisions of the 1969 Vienna Convention on the Law of Treaties and on provisional application with regard to the practice of international organisations, as well as the preliminary proposals for guidelines presented therein.

Given that the Drafting Committee has not been able to conclude its consideration of the six draft guidelines proposed by the Special Rapporteur and has only presented an interim report on the progress made thus far, including, solely for information purposes, a first set of three draft guidelines, the comments provided herein by my Delegation are of a preliminary nature.

We note with appreciation the presentation by the Drafting Committee of the two introductory draft guidelines dealing respectively with the scope and the purpose of the draft guidelines on provisional application, as well as the reaffirmation in draft guideline 3 of the general rule, based upon the language of Article 25 of the 1969 Vienna Convention which should, in our view, be the point of departure for the consideration by the Commission of this important topic.

Regarding in particular draft guideline 1, it would be advisable to reconsider, at a later stage, the possibility of adding the qualifying phrase "by States and international organisations", in order to avoid stating the obvious and to emphasize that the scope is broad enough to take account of the significant amount of practice developed by international organisations in relation to the provisional application of treaties.

As to draft guideline 2, we are of the view that it accurately reflects the purpose of the draft guidelines, which is to provide guidance to States on provisional application of treaties, without however seeking to encourage resort thereto. We could also accept the reference to other rules of international law, in addition to Article 25 of the 1969 Vienna Convention, provided that it is clearly indicated in the commentary which rules are meant herewith.

Moreover, with regard to draft guideline 3, and given that the decision of the Drafting Committee not to specify which States may provisionally apply a treaty marks a departure from the language used in Article 25 of the 1969 Vienna Convention, we would welcome a more thorough analysis of the cases in which States other than the negotiating States have provisionally applied a treaty.

Turning now to the key issue of the legal effects of provisional application, and given the silence of the 1969 Vienna Convention in this respect, we are of the view that the assessment that the legal effects of a provisionally applied treaty are the same as those stemming from a treaty in force should be further substantiated, taking into account various considerations. Thus, on the one hand, it would be undesirable to allow States to hide behind the fact that the treaty was being provisionally applied by denying the obligations resulting from the provisional application. On the other hand, one should not ignore that the provisional application allows for a simplified means of termination according to article 25, paragraph 2, of the 1969 Vienna Convention and that it is a way to circumvent national constitutional requirements regarding the expression of the consent to be bound by a treaty, which may give rise to serious concerns, especially in situations where the provisional application continues for a prolonged period of time.

Regarding the future work of the Commission, Greece shares the view that the Special Rapporteur should focus on the legal regime and the modalities for termination and suspension of the provisional application, including on the relevance in this respect of Article 60 of the 1969 Vienna Convention dealing with termination

or suspension of the operation of a treaty as a consequence of its breach. In the view of this delegation, another question which deserves to be further explored is that of the limitation clauses used to modulate the obligations assumed in order to comply with internal law, given that compliance with this body of law could be an essential element of the State's consent to the agreement on provisional application.

In conclusion, Greece acknowledges the merit of a concise set of draft guidelines on provisional application of treaties for the purpose of providing states and international organizations with a practical tool and looks forward to the future work of the Commission on this topic. Finally, Greece expresses its openness and readiness to discuss the possibility of drafting model clauses which could further assist States in the process of the negotiation and conclusion of treaties.

I thank you Mr. Chairman.