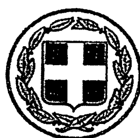

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71ST SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY

Sixth Committee

Agenda Item 78

**Report of the International Law Commission
on the work of its sixty-eighth sessions
Cluster II**

Chapter VII : Crimes against humanity
Chapter VIII : Protection of the atmosphere
Chapter IX : Jus cogens

**Statement by
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**NEW YORK
Thursday, October 27, 2016**

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Chapter VII : Crimes against humanity

Mr. Chairman,

Concerning the item "Crimes against humanity" Greece would like to express our appreciation the Special Rapporteur for his detailed and exhaustive second report on the topic. Given however the length of this report and the number of articles proposed therein more time is required to make an in-depth examination of all its implications.

As we understand the intention of both the Rapporteur and the Commission is to elaborate and propose a draft Convention on the crimes against humanity and to do so in an expedited way.

From that point of view, we agree with the Rapporteur that the best approach is to take guidance from and to draw on standard provisions repeatedly used in widely ratified treaties dealing with other crimes. Indeed, the second report of the Rapporteur contains an exhaustive presentation of relevant clauses adopted in the context of other treaties.

Turning to the Draft Articles provisionally adopted, we would like to state that, in general, we agree with the refinements made to their wording following the debate within the Commission.

With regard to Article 5, the restructuring of its paragraphs by the Commission is in our view an improvement. We would favour, however, the split of its provisions, as suggested by some Commission Members, so that paragraphs referring to quite distinct issues, such as the responsibility of superiors or the imprescriptibility of crimes against humanity, become the object of separate articles. On the issue of corporate criminal responsibility which seems to have generated a heated debate within the Commission, we would like to state that criminal responsibility of legal persons is not recognized in many legal systems, including my country's. However, a wide array of administrative sanctions against legal entities is provided in our legislation.

Given the diversity and heterogeneity of State practice in this respect as well as the divergence of views among Commission Members, we think that the decision of the Commission to follow the *via media* suggested by the Rapporteur and to propose, in paragraph 7, a wording repeating Article 3 par. 4 of the widely ratified Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, is an acceptable way to deal with the issue in the context of the present Draft Articles. We understand that the proposed paragraph, acknowledging the diversity of approaches adopted in national legal systems, would only oblige States to take measures where they deem it appropriate to do so and allows them the maximum decree of flexibility in addressing the issue of liability of legal persons.

In Draft Article 6 par. 1 (a), but also in Articles 7, 8 and 9, we note the deletion of the phrase "or control", so as to align its wording with that of Article 5 of the Convention against Torture. In this respect we welcome the explanation provided for in the Commentary that the phrase "territory under the [State's] jurisdiction" *"is intended to encapsulate the territory de iure of the State, as well as territory under its jurisdiction or de facto control"*. We also note the intention of the Commission to revisit the wording of Draft Article 4 provisionally adopted last year.

In par. 1 (b) of Draft Article 6 we could accept the addition concerning the establishment by a State of its jurisdiction over acts committed by stateless persons habitually resident in its territory, as long as such addition remains optional. At the same time, we wonder whether it is still appropriate to maintain optional, in paragraph 1 (c), the establishment of the so-called "passive personality" jurisdiction.

In Draft Article 7, we can only but concur with the deletion of paragraphs 2 and 3 initially proposed by the Rapporteur as "useful innovations" but for which little -if none at all- information was provided in the second Report. Moreover, as it was pointed out by several Commission Members, provisions relating to State cooperation should find their place in other Draft Articles.

Regarding Article 8, we welcome its remodeling after Article 6 of the Convention against Torture and the reference to surrender proceedings.

As far as Article 9 is concerned, we would like to invite the Commission to align further its wording with the wording of the so-called "Hague formula", as the latter was incorporated in numerous conventions aiming at the repression of specific offences, including terrorism, and, in particular, in the Convention against Torture (Article 7) and, more recently, in the International Convention for the Protection of all Persons from Enforced Disappearances (Article 11). More specifically, we invite the Commission to rephrase this Article so as to read "The State in the territory under whose jurisdiction the alleged offender is present shall, if it does not extradite or surrender him/her to another State or competent international criminal tribunal, submit the case to its competent authorities for the purpose of prosecution".

Given the fact that Draft Articles 7 and 8 are based on the relevant provisions of the Convention against Torture, we see no reason why Draft Article 9 which is closely connected with the abovementioned Articles should be an exception in this respect.

Finally, regarding Draft Article 10, we agree with the Commission that for the purposes of this Article it is not necessary to reproduce Article 36 of the Vienna Convention on Consular Relations.

Chapter VIII : Protection of the atmosphere

Mr. Chairman,

I will now address the topic of the protection of the atmosphere and allow me to use this opportunity to commend the Special Rapporteur, Mr. Shinya Murase, for the high quality of his third Report. The draft guidelines adopted so far by the Commission on the basis of the Special Rapporteur's proposals provide a solid basis for the future work of the Commission on the topic.

We highly appreciate the overall structure of the draft guidelines adopted so far, in particular the link established in the Commission's report between the due diligence obligation of States to protect the atmosphere as expressed in draft guideline 3 and the ensuing obligations to conduct Environmental Impact Assessments (EIAs) and use the atmosphere in a sustainable, equitable and reasonable manner as enunciated in draft guidelines 4, 5 and 6 respectively[1]. In fact, draft guideline 3 provides for the overarching duty of care for the protection of the atmosphere, while the obligations contained in the three following guidelines flow from and concretize aspects of this general duty.

Regarding the formulation of draft guideline 3, we are happy to notice that the latter covers all the three elements of the duty to protect, namely the prevention, control and reduction of atmospheric pollution and degradation. In this respect, one might consider referring first to the control and then to the reduction element, given that, from a chronological point of view, the second usually precedes the first[2].

In addition, we consider that the above mentioned components of the duty to protect are not interchangeable. Accordingly, a State which has fallen short of its due diligence initial obligation of prevention may not argue that its wrongfulness is set off by the fact that it has later complied with the two other components of the obligation. For this reason, we believe that the term "reduce or control" should be replaced by the term "reduce and control", while this point might also be highlighted in the commentary to the draft guideline.

We also welcome the reference, in paragraph 5 of the commentary on draft guideline 3, to the evolutive character of the due diligence obligation to protect the atmosphere, which is conditioned upon the evolution of scientific and technological standards. In this respect we believe that the term "technology" should be replaced by

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[1] See paragraph 1 of the commentary to draft guideline 3, *Report of the International Law Commission, sixty-eighth session* (2016), doc. A/71/10, p. 286.

[2] See article 2 par. 1 of the UNECE 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, which reads as follows : 'The Parties shall take all appropriate measures to prevent, *control and reduce* any transboundary impact' (emphasis added).

the term "science and technology" given that both of them have greatly contributed to the humanity's efforts to better protect the atmosphere and assess the related risks.

On EIA, there is no doubt that the EIA study may be conducted, and this is the usual case, by private entities according to the parameters and requirements of applicable legislation, and not by the State itself. However, it should be reminded that any decision with respect to the authorization of the proposed activity based on the findings of the EIA process has to be taken by the competent public authorities. Given the above, we are of the view that the wording of paragraph 2 of the commentary to draft guideline 4 should be fine-tuned accordingly, so as to make clear that even if itis not up to the State to perform the assessment, it is up to the latter to issue or not the environmental permit based on the outcomes of the relevant EIA.

In addition, it should be stressed in the same paragraph that in case of risk of atmospheric pollution as the latter is defined in point (b) of draft guideline 1, the notification and consultations procedures should include the potentially affected State, as already provided in principle 19 of the 1992 Rio Declaration on Environment and Development.

Greece supports draft guideline 5 on the sustainable utilization of the atmosphere, given that the sustainability principle applies to both renewable and non-renewable natural resources. However and for reasons of clarity, we are of the view that the notion of "utilization" of the atmosphere should be better defined in paragraph 3 of the commentary or, in the alternative, some examples of such a utilization should be provided. Such a clarification of the notion of "utilization" would also inform the reader's understanding of the equitable and reasonable utilization principle enunciated in draft guideline 6. In addition, we are of the view that the commentary on this guideline is rather short for such an important provision.

Finally, it should be made explicit in paragraph 6 of the commentary on draft guideline 4 referring to the UNECE Strategic Environmental Assessment Protocol, that the latter, unlike the Espoo Convention, applies also in cases where there is no risk of transboundary effect from the plans and programs whose environmental effects are subject to evaluation under the Protocol.

Chapter IX : ***Jus cogens***

Mr. Chairman,

I will now address the topic of *jus cogens* and let me use this opportunity to commend the Special Rapporteur, Mr. Dire Tladi, for the high quality of his first report. Greece has been, since the elaboration of the Vienna Convention on the Law of Treaties, steadily supportive of the *jus cogens* as an established element of contemporary international law, considering peremptory norms as an expression of the fundamental values of international community.

Given the evolution of international law since the time of the adoption of the Vienna Convention and, in particular, the growing number of decisions of both international and national courts referring to the *jus cogens*, the expertise of the International Law Commission will be of invaluable help to States for a better understanding of the legal nature and implications of this cardinal concept. We thus welcome its inclusion in the Commission's agenda and look forward to the future adoption, on the basis of the future reports of the Special Rapporteur, of a complete set of conclusions addressing this highly theoretical matter.

The sensitivity of the topic, regarding in particular the criteria for the identification of the norms having reached the level of *jus cogens*, requires that the Commission approaches it with due care. Greece welcomes the methodology proposed by the Special Rapporteur, namely to successively address the nature, the identification and the consequences of the *jus cogens*, while keeping in mind the interplay between the three clusters. In this context, the input of the International Law Commission is mostly needed in unchartered areas such as the implications of *jus cogens* beyond the law of treaties or the process of mutability of a peremptory norm, i.e., its modification or abrogation by a subsequent norm of the same nature.

On the issue of the persistent objector doctrine and its application in the field of *jus cogens* norms, we shall consider with the utmost interest the Commission's future views on the topic, however allow us to caution against theories attempting to undermine the well-established universal applicability of *jus cogens* norms.

Regarding the draft conclusions proposed by the Special Rapporteur, we share the view expressed by many members of the Commission that a definition of *jus dispositivum*, as the one contained in paragraph 1 of draft conclusion 2, does not have its place within a set of conclusions devoted to the *jus cogens*. In addition, the Commission might consider merging paragraph 2 of draft conclusion 2 with paragraph 1 of draft conclusion 3, as both provide elements for a comprehensive definition of the *jus cogens* norms.

I thank you Mr. Chairman .