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72ST SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY

Sixth Committee

Agenda Item 81

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

**Chapter IV: Crimes against humanity
Chapter V : Provisional application of treaties
Chapter XI: Other decisions**

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Chapter IV: Crimes against humanity

Mr. Chairman,

At the outset I wish to commend on behalf of my delegation the Special Rapporteur, Mr. Sean Murphy, for his detailed and exhaustive Third report on this topic as well as the Commission for the adoption, on first reading, of a full set of Draft Articles on Crimes against Humanity. The expedient way with which both the Special Rapporteur and the Commission proceeded clearly demonstrates their dedication and commitment to completing this important work.

Mr. Chairman,

Given the length of the Draft Articles and the accompanying Commentaries, the importance and complexity of the questions raised therein, as well as the fact that the Draft Articles have already been forwarded to States by the UN Secretary General for comments and observations by 1 December 2018, our remarks at this stage will be preliminary and limited only to the Draft Articles proposed this year by the Special Rapporteur, as they were adopted by the Commission. We reserve however at this moment our comments on the remaining Draft Articles, including the new paragraph that was added to Draft Article 6 on the irrelevance in this context of the official capacity.

Mr. Chairman,

We note with interest that the Commission decided to include a Draft Article on the principle of non-refoulement, following in this respect the example of the International Convention for the Protection of all Persons from Enforced Disappearances. This inclusion, however, has to be studied also in the light of the already well-established and comprehensive obligations of States regarding the principle of non-refoulement deriving either from major international conventions or the case-law of regional and international judicial or quasi-judicial bodies. The possible overlap with other treaty regimes was also pointed out by several members of the Commission during the relevant discussions.

With regard to the issues of extradition and mutual legal assistance, we note that, after an extensive and interesting debate within the Commission on the advantages and disadvantages of the so called “long-form” provisions versus the “short-form” provisions, the Commission has finally opted for the “long-form” model proposed by the Special Rapporteur, drawing mainly on the relevant provisions of the UN Conventions against Corruption and Transnational Organized Crime respectively.

While we understand that the Commission was motivated in its choice by the wish to include in the Draft Articles the most advanced and detailed clauses on the matter, we would

like, at this stage, to echo the concerns expressed by some Commission members regarding the extensiveness of those provisions which risks overshadowing the main topic of the Draft Articles and undermining their balance.

The fact that the initial 5-page Draft Article on mutual legal assistance proposed by the Special Rapporteur was divided in two parts, with the second part forming the current Annex in the Draft Articles is not, in our view, a sufficient remedy.

We also consider it appropriate to recall in this respect the current initiative aiming at negotiating an international instrument dealing exclusively with issues of extradition and mutual legal assistance in relation not only to crimes against humanity but also to other core crimes under international law.

An additional point that we wish to make with regard to the Draft Articles is that, while the Commentaries indicate the precise articles of the international instruments, after which each particular paragraph of these Draft Articles is modelled, departures from the wording of those international instruments is not always sufficiently explained and justified. The most illustrative example is, in our view, Draft Article 13 par. 9 on the non-obligation of a State to extradite a person accused of having committed crimes against humanity when there are substantial grounds to believe that the extradition request has been made for the purpose of prosecuting or punishing that person on account of a number of grounds. We note that the Commission has decided to alter the list of the grounds initially proposed by the Rapporteur, by, inter alia, adding the term “culture” to that list. In the relevant Commentary we simply read that the term “culture” was added in line with the language used in Draft Article 3 par. 1 (h). In the absence of any further explanation, we fail to see the link between Draft Article 3 dealing with the definition of crimes against humanity and Draft Article 13 par. 9. dealing with the extradition or not of a person accused of having committed crimes against humanity.

We also note that the Commission, while refraining -rightly so in our view-, to propose final clauses, has decided to retain Draft Article 15 on inter-State dispute settlement. However, the reasoning of that choice is not explained in the relevant Commentary. On our part, we agree with the view expressed within the Commission -and also reflected in the relevant Commentary- that the drafting of dispute settlement clauses should be left, together with the other final clauses, to States. In any case, regarding the content of that Draft Article, we would like to express our preference for the initial proposal made by the Special Rapporteur reflecting the tried and tested three-tier process of negotiation, arbitration and judicial settlement.

Finally, Mr. Chairman, as we stated above, we intend to come back with further comments on the Draft Articles as a whole, after having thoroughly examined them and consulted thereon with our competent national authorities.

Chapter V: Provisional Application of Treaties

Mr. Chairman,

Let me now turn to the topic ‘Provisional application of treaties’. We express our appreciation to the International Law Commission, which under the guidance of the Special Rapporteur, Mr. Juan Gomez-Robledo, has provisionally adopted, at its current session, a consolidated set of draft guidelines on the provisional application of treaties with commentaries thereto.

In particular, we welcome the adoption by the Commission of the commentaries, which are in our view a useful complement to draft guidelines 1 to 11 as well as to Article 25 of the Vienna Convention on the Law of Treaties, and provide States and international organizations additional guidance and clarification on the scope and operation of existing rules of international law governing the provisional application of treaties.

We also take this opportunity to thank the Secretariat for the preparation of an updated memorandum, reviewing State practice in respect of treaties that provide for provisional application, including treaty actions related thereto.

As we have previously stated in the Sixth Committee, Greece fully supports the work of the Commission on this topic which is of great practical and doctrinal interest.

We are also in agreement with the Commission that the legal basis for provisional application should be found either in the treaty itself or in a separate agreement, which may take one of the forms specified in draft guideline 4.

This being said, it is still not clear to us how “a declaration made by a State or an international organization that is accepted by the other States or international organizations concerned”, as subparagraph (b) of draft guideline 4 suggests, can provide the basis for an agreement on provisional application. According to paragraph (5) of the commentary to this draft guideline, such a declaration must be clearly accepted, and furthermore, this acceptance has to be explicit and not merely acquiescence based on non-objection. Given, however, the voluntary nature of provisional application and the fact that state practice in this respect is still quite exceptional, we believe that, should this reference be retained, the said commentary needs to be further elaborated and enriched with concrete examples of state practice and explanations regarding the above legal concepts (such as acceptance, acquiescence, non-objection) so as to avoid confusion with the regime of unilateral acts of States.

Regarding draft guideline 6, a key provision of the present set of draft guidelines, as it deals with the legal effects of provisional application, we consider that, in view of the far-reaching statement contained therein, both the text of the said guideline and the commentary thereto should be further elaborated in order to better reflect the position taken by the Commission according to which the provisional application of treaties (albeit a different concept from that of entry into force) “produces the same legal effects as if the treaty were in force”, unless otherwise agreed.

Similarly, with respect to draft guideline 8, we think that it would be useful to further address the question of how long provisional application can (or should) last, particularly in those cases where a long period of time has already elapsed since the commencement of provisional application, and there is no indication as to the intention of the States concerned to become a party to the treaty provisionally applied, nor an express treaty provision regulating the termination of provisional application.

We further note with satisfaction the inclusion of a new draft guideline 11, in the form of ‘without prejudice’ clause, addressing a different situation from that envisaged in draft guideline 10 and which is, in our view, necessary in order to capture a possibility already supported by an abundant State practice.

Finally, with regard to the final outcome of the work undertaken by the Commission on this topic, we would like to reiterate our support for the development of model clauses, which should be tailored to fit the flexible nature of provisional application, that could assist States and international organizations in the negotiation and application of treaties.

Chapter XI: Other decisions of the Commission.

Mr Chairman,

We have taken note of the decision of the Commission to include in its long-term programme of work two new topics relating: (a) to general principles of law and (b) to evidence before international courts and tribunals, and we welcome the preparation of syllabuses, which appear as an annex to the present Report and provide States an outline of the scope of these topics, their relevance and their possible outcome.

At the same time, we have noticed with some concern the extension of the list of new topics that are included in the long-term programme of work of the Commission. In this regard, we wish to stress that in our view the Commission should, first, complete in a timely manner its work on the topics which are currently under consideration, and, then,

give priority to the study of those new issues which are more topical in the light of current developments in international relations and needs of the international community.

In that context, we believe that the Commission should undertake a thorough examination of the topic of "general principles of law", which is closely related to the question of sources of international law. Taking into account that article 38, paragraph 1, of the Statute of the International Court of Justice includes general principles of law recognized by civilized nations among the sources of international law, we consider that this topic deserves to be further studied by the Commission, in line with its previous and current work on treaties and customary international law, with the aim to clarify the nature, scope and functions of general principles of law and find ways to identify them.

I also take this opportunity to reiterate the interest of my delegation in the examination by the Commission of the topic "Settlement of disputes to which international organizations are parties", which was included in its last year's long-term programme of work. This issue is in our view both timely and important, especially in the light of recent developments and the relevant case-law of international and national tribunals and fits also well with the Commission's mandate.

I thank you Mr. Chairman
