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Agenda Item 81

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

Chapter VI : Protection of the atmosphere
Chapter VII: Immunity of State officials from foreign criminal jurisdiction
Chapter VIII: Peremptory Norms of General International Law
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Chapter VI : Protection of the atmosphere

Mr. Chairman,

On the topic ''Protection of the atmosphere" I would like to use this opportunity to commend the Special Rapporteur, Mr. Shinya Murase, for the high quality of his fourth Report. His work, based upon an exhaustive study of relevant practice, case-law and scholarly writings, enables the Commission to provide international lawyers with mostly needed normative guidance in this rapidly evolving field of international law.

While fully aligning with the statement of the European Union on this matter, we would like to make the following additional observations:

Draft Guideline 9 (as adopted by the Commission) which addresses the issue of interlinkages and synergies between rules of international law on the protection of the atmosphere and other relevant rules of international law, provides, in our view, thoughtful guidance on the matter. Drawing on the conclusions reached in 2006 by the Commission's Study Group on fragmentation in international law, it aims to ensure compatibility and complementarity among rules on the protection of the atmosphere and rules stemming from other branches of international law such as trade and investment law, the law of the sea and human rights law, so that States can abide by both without the fear of conflicting obligations, notwithstanding any difference in respect of their provenance and regulatory subject matter.

As indicated in the Special Rapporteur's report, environmental considerations have progressively made their way into the above mentioned branches of international law, either through the proclamation of new principles or through an evolutionary interpretation of existing rules by judicial and quasi-judicial bodies, thus facilitating the trend, conveyed also through Draft Guideline 9, towards harmonization and mutual supportiveness.

It is to be expected that this growing interaction will speed up in the future and Draft Guideline 9, through its framework nature and open-ended wording, provides enough normative guidance for this process to flourish. This being said, we are of the view that the additional formulation of similar sectoral guidelines, specific for each of the above mentioned branches of international law, as it is the case with Guidelines 10-12 proposed by the Special Rapporteur (and which were not retained by the Commission), should be avoided. The latter could quickly become outdated through the continuing evolution of relevant state practice and case law, which might incorporate environmental considerations into the above mentioned branches of international law through novel approaches and legal reasoning not contemplated in draft Guidelines 10-12.

Regarding in particular, the second paragraph of draft Guideline 11 proposed by the Special Rapporteur, we are of the view that law of the sea issues have no place in a set of Guidelines on the protection of the atmosphere. This is even more true when it comes to the core matters of the law of the sea, such as the delimitation of maritime zones. In addition, all law of the sea matters are adequately regulated by the UNCLOS whose universal and unified character as well as the need for maintaining its integrity are stressed in a series of

annual UN General Assembly resolutions on oceans and the law of the sea, the last one being GA Resolution 71/257. It should be recalled that when the Commission decided to include this topic in its programme of work, reached an understanding, which among others, underlines that '' ...(d) The outcome of the work on the topic will be draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein. The Special Rapporteur's reports would be based on such understanding."[1]

This being so we are of the view that the Commission should be very cautious to include in its future programme of work topics that are related to the Law of the Sea issues.

Chapter VII: Immunity of State officials from foreign criminal jurisdiction

Mr. Chairman,

With regard to the topic "Immunities of State officials from foreign criminal jurisdiction" and, in particular, the highly sensitive issue of exceptions to immunity ratione materiae, we would like to make the following observations:

In our intervention last year, while acknowledging the inherent difficulties of the issue and the dilemmas which might arise, we called on the Commission not to miss the opportunity to remove the lingering uncertainty which had caused tensions between States and to provide them with appropriate guidance. We also invited the Commission to do so in the context of its dual mandate, that is codification and progressive development of international law, and in the light of the purposive character of the institution of immunity.

In this respect, we note with concern that this year the apparently irreconciliable divergence of views on this issue did not allow the Commission to come up with a consensual proposal regarding Draft Article 7, and rendered inevitable the -rather unusual- recourse to a recorded vote.

Having said that, we note that, despite the heated debate within the Commission, the majority of its members endorsed the systemic approach to the institution of immunity proposed by the Special Rapporteur, Ms. Conception Escobar Hernandez, in her fifth report and, as it is mentioned in the Commentary to Draft Article 7, and recognized the need for the rules on immunity not to overlook other existing standards or principles enshrined in other important sectors of contemporary international law such as international humanitarian law, international human rights law and international criminal law.

It is in this spirit that the Commission ultimately decided to bolster the discernible trend towards limiting the applicability of immunity *ratione materiae* in respect of certain

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[1] Footnote 677, at the 3197th meeting of the ILC, on 9 August 2013 (Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10 (A/68/10)), para. 168.

types of behaviour, by including in Draft Article 7 certain crimes under international law in relation to which immunity *ratione materiae* shall not apply.

Mr. Chairman,

As we stated last year, we firmly believe that in contemporary international law, the rules on immunity should strike a balance between on the one hand the respect for the sovereign equality of States and the stability of international relations and, on the other hand, the need to preserve the essential interests of the international community as a whole, one of which is undoubtedly to combat impunity for the most serious crimes under international law. From that point of view, we consider the Commission's decision a step in the right direction.

We are fully aware and we understand the concerns expressed by some members of the Commission regarding, in particular the potential abuse of exceptions to immunity *ratione materiae* and the fear for politically motivated trials. In this respect, we welcome the fact that the Commission highlighted -both through the footnote inserted in Parts Two and Three of the Draft Articles and in the Commentary to Draft Article 7- the importance of procedural provisions and safeguards to prevent possible abuse in the exercise of foreign criminal jurisdiction over State officials. We would also like to commend the Special Rapporteur for her initiative to hold already this year informal consultations on this issue and we hope that the discussion next year of the procedural aspects of immunity, including guarantees and safeguards, will help to allay the above mentioned concerns.

Turning now to the proposed wording of Draft Article 7, we welcome the deletion of corruption-related crimes from the list of crimes included therein. As we noted last year and as is also recognized in the Commentary of Draft Article 7, these crimes, despite their gravity, cannot be considered as "acts performed in an official capacity" and, therefore, one of the essential normative elements of immunity *ratione materiae* is not met in the case of these crimes.

We can also accept the reasoning on which the Commission based its decision not to include in Draft Article 7 the so called "territorial tort exception", a concept which up to now has been mainly invoked in the context of civil proceedings.

Regarding the list of crimes under international law contained in paragraph 1 of Draft Article 7, we understand that, given the circumstances, the Commission opted for a pragmatic approach based on what could ultimately be acceptable to States. We also understand that the inclusion of the crime of apartheid was deemed appropriate mainly for historical reasons.

Finally, we welcome the refinements made by the Drafting Committee to the wording of this Draft Article, aiming mainly at highlighting the fact that it concerns immunity *ratione materiae* as well as the removal of the two "without prejudice" clauses

initially proposed by the Special Rapporteur which, as rightly pointed out by the Drafting Committee, if they were to be included, ought to apply to the Draft Articles as a whole.

Chapter VIII: Peremptory Norms of General International Law

Mr. Chairman,

On the topic of peremptory norms of general international law (*jus cogens*), allow me first of all to express our gratitude to the Special Rapporteur, Mr. Dire Tladic, for the two reports produced by him on this subject. These reports, together with the draft conclusions provisionally adopted so far by the Drafting Committee, have paved the way for a pragmatic approach to the subject, based on the elements of *jus cogens* set out in article 53 of the 1969 Vienna Convention, which is widely accepted as providing an adequate definition of the latter, applying also beyond the law of treaties.

Greece also welcomes the pivotal importance recognized by the Special Rapporteur and the Commission to the acceptance and recognition by States of the peremptory character of a norm as a prerequisite for it to qualify as a *jus cogens* norm. The latter, as it is also the case with any norm within the international legal system, has to be accepted as such by the international community of States and cannot simply derive from any natural law principle or doctrine.

According to article 53 of the Vienna Convention, peremptory norms are part of general international law, a position stated also in conclusions 3 and 4 of the present draft (as these draft conclusions were provisionally adopted by the Drafting Committee). For this reason, we are of the view that the draft conclusions should contain a definition of the notion of general international law, as its exact meaning and scope are far from being settled. In particular, its relationship to customary international law and normative multilateral treaties deserves further elaboration. While paragraph 1 of draft conclusion 6, referring to the acceptance and recognition of a norm as a norm of general international law, brings the latter close or even assimilates it with customary international law, paragraph 2 of draft conclusion 5, providing, *inter alia*, that treaty provisions may serve as bases for *jus cogens* norms, seems to imply that treaty provisions as such may also be part of general international law.

In this context, another matter that needs to be clarified is the meaning of the qualifier "general". In our view this term does not relate to the subject matter of the norm in question, as even rules stemming from specialized fields of international law, such as international environmental law, may be part of general international law, but rather to the extent of its acceptance by the international community of States.

For the above reasons, the Commission should provide guidance on the meaning of general international law. The definition contained in paragraph 1 of draft principle 5 proposed by the Special Rapporteur, which was not retained by the Drafting Committee, could, if further elaborated and fine-tuned, provide a useful starting point in this regard.

With respect to the criteria for the identification of peremptory norms of international law provided in draft conclusion 4, we are of the view that the Commission should consider adding another one, that is for a norm to qualify as part of *jus cogens* it should be accepted and recognized by the international community of States as reflecting and protecting fundamental values of it.

This characteristic of *jus cogens* norms, already referred to in draft conclusion 2, should qualify also as a key criterion for their identification, together with the formal one of their acceptance and recognition as non-derogable norms. In fact, the reason why states recognize such a quality to a norm is because they consider it as reflecting fundamental values of the international community. This is also in line with the positions taken by Sates as well as the judicial pronouncements which usually refer to the latter when advocating that a norm is part of *jus cogens*.

Regarding draft conclusion 5 and treaties, it is well known that there is a long lasting doctrinal debate whether the latter may only serve as evidence of *jus cogens* rules or whether they may also be a direct source for it. Although the issue is far from being settled in legal theory, there is no doubt that multilateral treaties of universal participation, such as the Genocide Convention or the Slavery Conventions, may be vehicles for general international law norms to be established as part of *jus cogens*. In this context, we are also of the view that the relevant commentary should also refer to treaties of universal participation containing provisions prohibiting reservations. Such rules may, in certain cases and taken together with other conclusive elements, provide evidence of the acceptance and recognition of the substantive norms of the relevant treaty as peremptory norms of general international law.

Turning to draft conclusion 7, we concur with the Special Rapporteur's view, also shared by the Drafting Committee, that acceptance and recognition by all States is not required for a norm to qualify as a peremptory norm of international law. In fact no State has the right of veto with respect to such a qualification. In addition, once a peremptory norm is established no State may opt out from its application, as *jus cogens* norms operate uniformly, even in relation to States which may have objected to their acceptance and recognition.

Chapter IX : Succession of States in respect of State responsibility

Mr. Chairman,

I will last address the topic of the succession of States with respect to State responsibility. Allow me to use this opportunity to commend the Special Rapporteur, Mr. Pavel Šturma, for his first Report. As relevant State practice is not abundant in this area, the Commission may encounter difficulties in identifying applicable rules and will have to fill relevant gaps and engage, to a considerable extent, in progressive development of international law. We are confident that the Commission's work will provide international lawyers with normative guidance in dealing with this thorny issue. Greece is looking forward to the future work of the Special Rapporteur and of the Commission and will provide its comments accordingly.

Turning to draft articles 3 and 4 proposed by the Special Rapporteur in his first report, allow me to stress, that there is, in our view, a major difference between those two provisions and the corresponding provisions of articles 8 and 9 of the 1979 Vienna Convention on State succession with respect to treaties. In the case of State succession to a treaty, the *viniculum juris* between the third State and the predecessor State remains in parallel with the new one between the third State and the successor State, with the exception of cases where the predecessor State ceases to exist or of treaties whose scope of application *rationae loci* is connected solely with the territory of the successor State (such as a treaty on the maintenance of border signs). On the opposite, succession with respect to State responsibility by means of a devolution agreement or of a relevant unilateral declaration, if admitted, usually entails the extinction of the obligations of the predecessor State towards the third State.

In view of the above, in case the predecessor State continues to exist, third States affected by the internationally wrongful act of the predecessor State might not be always in favor of the devolution of the relevant obligations to the successor State by means either of a devolution agreement or of a unilateral declaration. For this reason, we consider that the relevant assent of third States should not be taken for granted as implied, in relation to devolution agreements, in paragraph 99 of the Special Rapporteur's report. Likewise, the assumption in draft article 4 that, in case of a unilateral declaration of succession to responsibility made in clear and specific terms that the relevant obligations devolve to the successor State, should be tested against the scenario that the third State who has suffered the damage does not concede to such a transfer of obligations.

Another matter deserving consideration is whether there should be a link between succession to a treaty and succession to the obligations arising from the breach of such a treaty. In this regard, the principal question seems to be whether a successor State which does not concede to succession to a treaty of the predecessor State could be held liable, by way of a default rule, to any breaches of such a treaty committed by the predecessor State.

We concur with the Special Rapporteur's distinction between State succession with respect to State responsibility and State succession with respect to debts, based on the notion of unliquidated damages, i.e. damages that have not yet created an interest in assets

of a fixed or determinable value[2]. It should however be clarified whether the notion of unliquidated damages may be of help in cases where an international court has issued against the predecessor State, before the date of succession, an award providing not for compensation but for more complicated forms of reparation, such as the annulment of an illegal act in the context of an order of *restitutio in integrum*[3].

I thank you mr. Chairman

[2] See pars. 76-80 of the Special Rapporteur's report.

[3] See ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), commentary to article 35, paragraph 5.