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Report on ILC's 69th Session

Chapter IV – Crimes against humanity
Chapter V – Provisional application of treaties
Chapter XI – Other decisions and conclusions of the Commission

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La ROUMANIE pays candidat au Conseil de sécurité des Nations Unies 2020-2021

General considerations

I would like to begin my statement by thanking the Chair of the International Law Commission for the comprehensive presentation of the report on this year's ILC session.

I would equally like to take this opportunity to express the deep consideration of the Romanian delegation to all members of the International Law Commission for the work carried out during this 69th session.

We assess this report of the ILC as a very good report, reflecting a good progress of work on important topics that are on the agenda of the Commission.

We can assume that the session was somewhat dramatic resulting even in applying a seldom if ever used (at least lately) voting procedure for adopting certain draft texts by the Commission. While we very much appreciate the need for progress on the topics under the consideration by the ILC, it is this delegation's point of view that the Commission should generally work on the basis of consensus. However, we acknowledge the complexity of some of the issues, reflecting even a more complex inter-state debate on those vary matters and important differences in approaching them by States, which, in some cases, might require recourse to less used practices in order to move forward. Nevertheless, we do find it essential that, when adopting the final outcome of the work on a topic, consensus must be achieved.

We take note of the request of reaction for some of the topics within the agenda of the ILC and we commit to submit our views in that respect in order to contribute to the streamline of the analysis on those topics.

With regard to the items that make up the first cluster of our debate, my delegation underlines the following:

Chapter IV – Crimes against humanity

We would like to express our gratitude for the impressive work done by the Special Rapporteur, Mr. Sean D. Murphy, which has enabled the Commission to swiftly conclude its first reading on the draft articles on crimes against humanity.

We are also thankful for the very rich material provided as a basis for a possible global convention on prevention and punishment of crimes against humanity.

Strengthening inter-State cooperation is key to combating impunity, especially for international crimes. Therefore, we appreciate the focus of the current draft articles on improving national

measures, as well as on fostering more effective inter-State cooperation on the prevention, investigation and prosecution of such crimes.

However, we highlight the fact that any new instrument in this field should not conflict with or undermine existing international law.

Along these lines, the Romanian delegation has supported the approach of the Commission of not departing from the relevant provisions of the Rome Statute of the International Criminal Court and shares the view that the result of this exercise should be seen as a contribution to the implementation of the principle of complementarity under the ICC Statute.

We reiterate our support for the inclusion of provisions which draw attention to the gravity of these crimes, such as the requirement to provide appropriate penalties in the criminal legislation and the obligation of prevention. On this second matter, we note the commentary of the Commission clarifying the fact that a State must pursue effective preventive measures in any territory under its jurisdiction, including in situations of *de facto* jurisdiction.

As the definition of crimes against humanity is built on article 7 of the 1998 Rome Statute, we welcome the confirmation by the Commission of the possibility of prosecuting non-State actors for such offenses. At the same time, we take note of the recommendation to include a provision on liability of legal persons in draft article 6, which moves away from the approach followed by the drafters of the ICC Statute. Whilst we recognize the dissenting views on the latter topic, we emphasize the flexibility for States in implementing this obligation, given that such liability is subject to the provisions of the respective national law.

Taking into account the egregious nature of this international crime, we consider that the current draft articles on establishing jurisdiction meet the desired objective of leaving no safe haven for persons responsible for such offenses. In this regard, we have supported placing the principle *aut dedere aut judicare* at the heart of framing the issue of jurisdiction, following the model of other international treaties.

In the context of applying the passive personality principle when assuming the jurisdiction, we would find merits in better clarifying the conditions under which the jurisdiction might be established in this case given that, as defined, crimes against humanity means acts committed as part of systemic attack directed against any civilian population, that is there is not only one single victim of this type of crimes. The formula used in art. 7 para 1c) might not be reflective accurately of the definition of the crimes and might raise questions as to a possible threshold (one victim, the majority of the victims) that could be envisaged to trigger the jurisdiction of a State. At the same time, we wonder whether the same letter c) could not be formulated in the same manner as letter b) by including the *stateless persons who are habitually resident in that State's territory* as a legitimate basis for the establishment of the jurisdiction under the passive personality principle, just not to leave any kind of room for impunity.

We appreciate that the commentaries also deal with the possible conflict between the obligation of a State to submit the case to the competent authorities and its ability to implement an amnesty,

by highlighting, on the one hand, the open door for another State with concurrent jurisdiction and, on the other hand, the need to evaluate the permissibility of the amnesty in light of that State's obligations to criminalize crimes against humanity.

We consider that the articles on extradition and mutual legal assistance provisionally adopted this year set a comprehensive normative framework to ensure the implementation of the *aut dedere aut judicare* principle, using the model of recent UN conventions. Barring the "political offense" exception to extradition concurs with the overall approach on such heinous crimes that harm the entire international community.

Chapter V – Provisional application of treaties

My delegation is appreciative of the work done by the ILC and by the appointed Special Rapporteur, Juan Manuel Gomez Robledo, on this important topic and we welcome the draft set guidelines and commentaries as provisionally adopted. Treaty law, which inevitably includes provisional application of treaties, represents *the* subject matter that keeps legal advisers busy most of their time, and this makes the assessment of the ILC even more desirable and worthy of our attention.

We fully align with the comments already provided on this topic in the statement made by the European Union. In our national capacity we would like to put forward some additional remarks.

The provisional application of treaties is one of the fields of treaty law that has two special qualities - it is both old and new. On one hand, it was already addressed in the early period of treaty law codification. On the other, emerging practice which existed at the time continued to expand and deepen significantly, providing today a broad material for analysis.

We fully support the approach taken to include both states and international organizations in the scope of the guidelines. Given current practice, any other approach would not have brought the required level of guidance.

Notwithstanding the substantial progress achieved through the draft guidelines and commentaries, the delegation of Romania would like to draw attention to several aspects which in our view required additional clarification.

We shall address three issues which are closely related, as it is also clear from the commentaries: the legal basis for provisional application (guidelines 3 and 4), the material scope (guideline 6) and termination (guideline 8).

As regards guidelines 3 and 4, we consider that the commentaries do not provide enough clarity regarding the source of the obligation for provisional application for states or organizations not taking part in treaty negotiations or, respectively, in the decision making procedure within an international organization or conference.

In our view, while a treaty is not yet in force, the source of the obligation could be either:

- Participation in the treaty making procedure, formalized through signature;
- A separate valid international agreement, in whatever form it is concluded, including through a unilateral declaration followed by its acceptance.

The situation of *non-signatories* joining a provisional application regime of a treaty not yet in force through accession, currently dealt with under guideline 3, could also be considered under the heading on alternative basis within guideline 4. The determination of the source of their obligation is important for practical considerations, in order to determine when provisional application and responsibility for material breach begin.

Equally, the situation of States that do not take part in the adoption of a resolution adopted by an international organization or intergovernmental conference or voting against should be further clarified, namely under what circumstances they are bound by the adopted decision.

As regards the differences between provisional application and entry into force for the purposes of suspension and termination, detailed in the commentary on guideline 6, we reiterate the position expressed by the European Union and add our concerns based on the drafting history of article 25.

The Memorandum by the Secretariat examined at the 65th session of the Commission regarding the negotiating history [1] shows that other possibilities for the termination of provisional application were considered but finally not codified. Yet, they continue to exist. Considering that guideline 2 expressly states that guidance is based on art. 25 of the Vienna Convention as well as *other rules of international law*, these other possibilities should be taken into account.

In our view, the current form of the commentaries to guidelines 6 and 8 do not sufficiently reflect the temporary nature of this type of treaty action. We take the view that, in the absence of a specific agreement, there are instances when termination of provisional application could be unilaterally decided with respect to a State or organization, other than the situation when the latter notifies its intention not to become a party. Such instances may also include unreasonable delay or reduced probability of ratification. Whereas drafting history shows us the difficulties in

[1] Document A/CN.4/658 available at http://legal.un.org/docs/?symbol=A/CN.4/658

establishing a temporal limit on provisional application, we consider that further attention should be given to the temporary nature of this legal institution.

This delegation looks forward to the next reports and expresses the conviction that they will bring even more clarity on this topic.

Chapter XI – Future work of the ILC

Next year it will be a solemn year for the International Law Commission and for the entire international legal community – the marking of the 70 years of ILC. It is this delegation's commitment to join the ILC in drawing a balance for the future by standing by the international law. We welcome the prospective initiatives we find in the report for marking this venerable age and we already declare our readiness to support and participate in these events.

We are as well very pleased to see in the report a more thorough organization of the work of the Commission for the next years with a specific calendar for each of the topics on the agenda of the ILC. In this way, not only the work of the Commission can be better anticipated and followed, but also our work with regard to various contributions that are needed in respect of the topics on the agenda.

As far as the new topics included on the ILC long-term programme of work we express the following views:

With respect to the *general principles of law* topic, we favour in principle that this topic is followed up by the ILC, being an important source of international law as underscored in art. 38 of the Statute of the International Court of Justice. In our view it is important that the work of the ILC on this topic be focused on its practical relevance, thus avoiding to end up with a too theoretical product of the Commission.

Evidence before international courts and tribunals is, in our view, a rather technical and very specific topic, having a limited relevance to international law in general. Therefore, we are rather reluctant of it being included within the agenda of the ILC.

Romania would, as well, be interested in ILC embarking on the consideration of one of the topics that was proposed last year for its future work, namely settlement of international disputes to which international organisations are parties. Such disputes are very frequent nowadays and merit special attention in view of clarifying the legal implications of such situations and the limitations of such private law disputes from the jurisdictional point of view.

Following on the reminder of the Commission in para. 33 of its Report, this delegation considers that one topic that could be address by the ILC, since it poses important legal questions for the

present, but even more so for the future, is the implications from the international legal standpoint of the sea-level rise.

This phenomenon is increasingly impacting our societies and its legal implications become more and more relevant, having a practical legal perspective..

A myriad of issues arise from the factual effects of the sea-level rise, in particular upon islands and other maritime formations. Territorial changes, effects on existing or prospective maritime boundaries, consequences of the resulting migration of peoples – all need to be addressed including, if not especially, by international law.

It is our view that this is one of the vitally important emerging issues in international law, and we do consider that it deserves the attention of the Commission.

This concludes my remarks on the first cluster of topics.

Thank you.