Republic of Cyprus

73rd Session of the United Nations General Assembly

Report of the International Law Commission on the work of its seventieth session (Agenda item 82)

Cluster I: Chapter V (Identification of Customary International Law)

and

Cluster I: Chapter XIII, Annex B (Other decisions and conclusions of the Commission)

Concerning **Chapter V** on the **Identification of Customary International Law**, allow me to commend the Special Rapporteur, Sir Michael Wood, for his continued efforts to advance the ILC's work on this topic. We take note of the adoption by the Committee of the 16 draft conclusions.

On the notion of the so-called "persistent objector" we would like to affirm our previous comments and reiterate our concerns regarding the proposed draft conclusion 15. Our concern is twofold: 1) we are of the view that the concept of the persistent objector does not fall within the scope of the Special Rapporteur's mandate to identify customary international law, and 2) we consider that the unconditional acceptance of the persistent objector doctrine opens the door to an *à la carte* approach to rules from which no State can be exempt. While we welcome part 3 of draft conclusion 15, which recognizes that "The present draft conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*)", we do not agree with the report's assertion on the "wide acceptance" of the concept, or that it could have legal effects after the establishment of a customary norm.

The ILC's mandate is to determine the methodology for identifying customary international law. The purpose is not to identify any possible *exception to the application* of customary international law. As Rapporteur Murase rightly commented and I quote: "The reason for my objection [to the inclusion of the concept] was that 'persistent objector' is not a question of 'identification' of customary international law, but it is a question of its 'application'."

A State or group of States may oppose or diverge from a norm while the latter is in the realm of *lege ferenda* or *statu nascendi.* In such situations, it may be said that a norm has not yet attained status as customary international law. However, we firmly hold the view that when it comes to the application of *lege lata,* no exception may be extended to a persistent objector. Once a norm has been established, there is no room for a subsequent objector, as this would be a vehicle for the dilution of the norm [and is, in any case, beyond the scope of the Report at hand].

As Rapporteur Arguello rightfully stated, “It is true that there are *obiter dicta* individual opinions of some judges who refer to this issue, but no court has decided that an allegation of a State as alleged persistent objector prevents the application of a norm of customary international law to that State. On the other hand, the concept does not have broad support in State practice and few States invoke it. Finally, its invocation and presumed existence undermines its own institution of customary international law. It is a virus that has been injected into the institution of international customary law. Therefore, I do not believe that the Commission should present the persistent objector concept as something defined and generally accepted.”

More recently, in the pending proceedings before the International Court of Justice in *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, States expressed serious doubt as to the existence of the concept. The African Union, representing 55 States, stated that “It is a trite doctrine that once a rule of customary international law is established that a State cannot unilaterally exempt itself from its obligations under that rule”.

We therefore disagree with the Special Rapporteur’s comments on draft conclusion 15 that the concept “was once again widely welcomed by States.” This is not an accurate reflection of the expressed views of States. The lack of support for this conclusion was rightly raised by Rapporteur Murase who noted the absence of citations or support for the concept.

We are of the view that the positions adopted by other members of the Commission more closely align with the reality. As Mr. Grossman explained, “In carefully consider[ing] the Special Rapporteur’s amendment to draft conclusion 15 and Belarus argument including that the persistent objector exception should not apply to the detriment of the international community or the integrity of the international legal system as a whole. . . . persistent objectors undermine the significance of States’ practice of third-world States.”

Mr. Park reiterated his objection to including the controversial ‘persistent objector’ rule/doctrine in the draft conclusion, adding that, and I quote: “during the last quinquennium, Professors Caflisch, Forteau and myself, we were ‘persistent objectors’ to this draft conclusion 15.” He elaborated, “First, the persistent objector rule is based on a position that emphasizes voluntarism, rather than objectivism or the spontaneous formation of customary international law. Secondly, this inclusion presupposes this to be an uncontroversial rule established by general international law. However, the topical summary of the discussion held in the 6th Committee in 2016 clearly recorded States’ divergent views: several delegations welcomed the affirmation of the persistent objector rule, while some other delegations affirmed that it was a contentious issue which was not supported by State practice and international case-law.’

While the Special Rapporteur mentions in his 5th report that, and I quote, “persistent objector … has indeed been recognized in international practice, by doctrine, and by the Commission itself…”, the relevant practice of States is not sufficient and we can find different views among scholars as well.

We concur with these views and hold that it would be premature to develop a conclusion on a highly controversial topic which has no bearing on the identification of customary international law.

At any rate, a State invoking any such persistent objector concept shall be under a duty to present solid and continuous evidence of its long-standing and constant opposition to the rule under concern in any given case prior to its crystallization. Abstentions are not sufficient for demonstrating objection. Notwithstanding the above, once a norm has been established as customary, then no objection can be invoked by a State to claim exclusion from its applicability, irrespective of when the objection was first raised and how persistently.

We request that the Special Rapporteur and the Commission address these matters, including the points raised in the previous debate, and not to attach to the concept any significance other than the one it can play during the *lege ferenda* phase of the formation of norms of customary international law.

Cluster I: Chapter XIII (Other decisions and conclusions of the Commission)

Annex B - Sea Level Rise in relation to international law

Mr. Chairman,

I now turn to the issue of **Sea Level Rise in relation to international law**, included in **Chapter XIII, Annex B** of the ILC report.

Cyprus recognizes the gravity of this issue not only for small-island developing States, but for the international community as a whole. Combatting climate change and dealing with its already visible effects, including rising sea levels, is of critical importance to Cyprus. Cyprus' coastline is expected to experience serious degradation and seawater intrusion because of rising sea levels.

Because of these increasing concerns, Cyprus has adopted a comprehensive national plan in order to implement the commitments undertaken in the 2015 Paris Accord.

While Cyprus notes that many of the topics worked on by the ILC have been initiated by the Commission itself we are concerned with the methodology used in this instance concerning the subject of sea-level rise as well as the lack of prior consultation between the ILC and the Sixth Committee.

We note that despite the limited resources at the disposal of the ILC, the specific proposal for the creation of the Study Group to revisit an issue that is the subject of the report on "Sea-Level Rise in relation to International Law", is broad in scope and overlaps with the preexisting work of the International Law Association (ILA), as recognized by the ILC. The ILA undertook the highly complex study on the effect of rising sea levels on baselines, a process that required extensive research over the course of ten years and resulted in a completed report in 2018. Moreover, the ILA has since turned its attention to study the effects of rising sea levels on Statehood and migration, as noted at paragraph 11 of the Commission's proposal. Query should be made on the allocation of limited resources for work in progress or already completed by another aptly capable body.

Cyprus recognizes that the rise in sea levels is already a fact whose negative impact will only grow and whose legal effects will have to be clarified. At the same time, it is our view that the best methodology to follow, is for States to examine the effects of sea-level rise in an inclusive setting and elaborated through State practice.

Cyprus would like to note that the ILC has stated in its proposal that any such topic "will not propose modifications to existing international law, such as the 1982 U.N. Convention on the Law of the Sea (UNCLOS)." In this regard, to the extent that further study is desired despite the existing work of the ILA, my delegation cannot overstate the indispensability of fully respecting the letter and spirit of the UNCLOS in conducting such work and of ensuring that the content of said study will fully comply with the Convention. Any attempts to modify or in any way undermine the UNCLOS will have detrimental consequences.

Another important element that must be noted, is that in 1973, the International Law Commission faced significant political difficulties arising from any definition of Statehood, which ultimately impeded the Commission from ever proposing one. On at least four occasions between 1949 and 1974, the ILC debated the possibility of defining statehood. This occurred during the preparation sessions of three different instruments: the Declaration of the Rights and Duties of States in 1949, the Vienna Convention on the Law of the Treaties in 1956 and 1966, and for the Articles on Succession of States in Respect of Treaties in 1974). Given that the ILC has been unable to agree on a definition of Statehood, we are mindful of the risk of assigning it with the task of determining any possible loss of that status because of rising sea levels.

In conclusion, let me reiterate that should the legal effects of the sea-level rise be examined, it must be done by fully respecting the letter and the spirit of the UNCLOS and in this context, Cyprus would be ready to participate in a dialogue between the ILC and the 6th Committee.

I thank you for your attention.