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**Report of the International Law Commission
(71st Session, A/74/10)**

Chapter VI – Protection of the environment in relation to armed conflicts
Chapter VIII – Immunity of State officials from foreign criminal jurisdiction
Chapter X – Sea-level rise in relation to international law

**Speech delivered by Mrs. Alina Orosan
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Chairperson,

In relation to the second cluster of topics, Romania would like to share with the 6 Committee and the ILC the following considerations and views:

Chapter VI – Protection of the environment in relation to armed conflicts

Romania expresses its deep appreciation for the outstanding contribution of the Special Rapporteur, Ms. Marja Lehto, which had enabled the Commission to bring to a successful conclusion its first reading of the draft principles on protection of the environment in relation to armed conflicts. We also appreciate the valuable contribution of the previous Special Rapporteur, Ms. Marie G. Jacobsson, to this topic.

Regarding the organization of the principles, while we agree with the general, time-based structure (before, during and after conflict), we believe that a better systematization of the principles is still necessary. For example, there are certain principles that have a more general applicability (i.e. principle 19 and 24), than just during or just after conflict.

We underline the progressive character of the principles in what regards the necessity of increased regulation of various non-state actors' environmental conduct in conflict and post-conflict areas and we commend the research of Dr. Lehto in her second report. These are innovative provisions that hold great potential in securing, if consistently applied, environmental justice in times of conflicts.

The Draft Principles reflect and consolidate a growing set of norms, which can be used to tackle environment-related corporate wrongs in the context of armed conflict. It reflects existing conceptual tools rather than creating new ones, which is also due to the complexity when seeking to hold companies accountable for harm occurring in armed conflict. They also represent a chance to support discussions of protection of the environment in armed conflict when negotiating binding instruments, such as the draft business and human rights treaty and help shifting the global debate towards a voluntary corporate orientation.

While we agree that the complexity of the non-state actors can raise many hurdles, especially regarding liability, we also believe that it is important to make progress in establishing systematic rules in this regard. Developments in technology and connectivity could allow in future better opportunities to develop, establish and apply such rules. This area of law is still at its beginnings, and depending on its evolution, ILC's work could in time return to it. The current legal regime for the protection of the environment in relation to armed conflict was elaborated when little was known on the environmental impact of armed conflict.

That being said, despite the existing gaps, we believe that these principles will greatly contribute to improving the international environmental legal regime.

Romania has supported and continues to support this work.

Chapter VIII - Immunity of State officials from foreign criminal jurisdiction

We thank the Special Rapporteur (SR), Ms. Conception Escobar Hernandez, for her extensive work on the seventh report, which, together with the sixth report, has generated a rich debate on the procedural aspects of immunity during this year's ILC session.

We share the belief that clarifying the procedural implications of immunity is essential to alleviate the concerns regarding the politicization and abuse in the exercise of jurisdiction, thereby building trust between the forum State and the State of the official.

We note and echo the broad support offered by the members of the Commission with respect to **draft articles 8 to 16**. In our view, these proposals reflect an adequate balance between the interests of the forum State and the State of the official, with due respect to the various norms and principles at play.

The link between the procedural aspects of the topic and the exceptions to immunity in respect of serious crimes under international law set out in draft article 7 was again at the heart of the debate. As previously stated by this delegation, rules concerning immunity of State officials merely embody a procedural mechanism meant to ensure stability in international relations and should not be seen in conflict with norms of *jus cogens*. Neither should they remove responsibility for such violations, nor should they affect the objective to combat impunity for the gravest crimes. However, given the different views on limitations and exceptions to immunity *rationae materiae* of State officials, we would like to recall our understanding that draft article 7 was adopted by the Commission on the premises that procedural provisions and safeguards would be elaborated.

Against this backdrop, Romania supports the SR's view that the procedural provisions and safeguards in Part IV should be applied to the draft articles taken as a whole, including draft article 7. We also acknowledge **draft article 8 ante provisionally adopted by the Drafting Committee** that backs up this interpretation. At the same time, we further note that the adoption of this latter article is without prejudice to the adoption of any additional procedural guarantees and safeguards, including specific safeguards applicable to draft article 7. Here again, we concur with the SR's view that any supplementary safeguards should rather apply to all cases in which it was necessary to determine the immunity *rationae materiae* from foreign criminal jurisdiction and not only to instances involving the possible commission of a crime under international law.

Along these lines, we would encourage a careful consideration of proposals aimed at preventing the potential abuse of the transfer of proceedings to the State of the official (**article 14**), such as placing conditions that the State of the official is genuinely able and willing to exercise jurisdiction. The transfer of proceedings must not become an instrument for exempting the official from prosecution and hence for facilitating impunity, whilst we should also ensure that the decision of the forum State on whether not to transfer proceedings has a solid foundation and thereby fully respects the principle of the sovereign equality of States. Moreover, we would still be interested in exploring the option of a mechanism of communication between the forum State and the State of the official that would foster investigation and prosecution by the foreign State.

Regarding **draft articles 8 and 9 (consideration and determination of immunity)**, we agree with a broader wording that would cover all possible situations that might arise under national law. However, we think that while the courts of the forum state are to determine the admissibility of the case in view of all elements and information pertaining to the immunity of the official person, this should be better reflected against the principle of equal sovereignty of States in order not to imply that the court might still find that it has jurisdiction in cases where the state of the official has expressly not waived it.

On **draft article 10 (invocation of immunity)**, we agree that there is no obligation to immediately invoke immunity. However, it would be useful to clarify the consequences of failing to invoke it within a reasonable time.

At the same time, we are not very convinced of the distinction within this draft article between *immunity ratione materiae* and *immunity ratione personae* when it comes to the former being invoked vs. the latter being *proprio motu* considered. More reasoning is needed for such a distinctive invoking mechanism and a coherent approach is required in between art. 8 para. 1 and art. 10 para. 6 if such a distinction is eventually retained.

In relation to para. 4, we would prefer that the way the immunity is invoked does not place a preference for the mutual legal assistance procedures to the detriment of the diplomatic channel, the channel mostly used in practice for invoking immunity. Therefore a language should be found to acknowledge that the claim could be made equally through those mutual legal assistance procedures and the diplomatic channels.

In relation to **draft article 11 (waiver of immunity)**, we also deem useful to clarify the effect of a treaty provision which could be interpreted as an implied or express waiver.

As to the general form of communication between the forum State and the State of the official, echoing the elements mentioned in relation to para. 4 of draft art. 10, we support the central role (not secondary role) of the diplomatic channel, while also allowing these States to decide on other modalities as appropriate.

In relation to para. 4 of this draft article, we do wonder if there are no other situations from which the waiver of the immunity can be deduced, but for a "clear and unequivocal" provision in an international treaty. For instance, could *extradition* to the forum State by the State of the official qualify as a deduced waiver? At the same time we found the formulation of this paragraph ambiguous as it speaks of "deduced waiver" which is qualified in the end as "express waiver". It is either deduced or express.

We further welcome the importance given to **consultations between the States concerned** on matters pertaining to the determination of immunity, as set out in **article 15**.

Regarding **Article 16 on procedural rights and safeguards pertaining to the foreign State official**, we support its inclusion which is meant to ensure his/her protection from politically motivated

proceedings both in the process of considering and determining immunity and also subsequently, during proceedings.

As regards **the future programme of work**, we acknowledge the SR's wish to provide a brief analysis on the relationship of this topic with international criminal jurisdiction, including the possibility of transferring the proceedings to an international tribunal. We deem that such an analysis is needed given the ongoing discussions regarding the impact of the obligation to cooperate with an international criminal court on the immunity of State officials. We reiterate our view that this issue should be seen in a broader context, together with international judicial cooperation and assistance mechanisms and international arrest warrants registered with INTERPOL, whilst keeping in mind the agreed scope of our exercise, which is limited to immunity from criminal jurisdiction of a State official.

Chapter X – Sea-level rise in relation to international law

It is already scientifically proven that we will witness in the near future a significant rise in sea levels. Indeed, the *Special Report on the Ocean and Cryosphere in a Changing Climate* of the UN's Intergovernmental Panel on Climate Change, issued in September 2019, highlights that the global mean sea level is rising at accelerated speed.

These very rapid and tangible natural changes pose major challenges for the development of international law. „*Land dominates the sea*” has long been an established principle of international law, but the land/sea interaction is not so straightforward, and we are finding now that the sea calls into question this domination.

The implications for international law of sea level rise are manifold, but a few areas stand out. In particular, as the extent of States' maritime areas is influenced by the position of their baselines, it is crucial to assess the effects that a shift landward of the coastline caused by increasing sea level might have on these maritime zones. This issue is even more complicated in the cases where States have not yet delimited their maritime spaces; with many maritime boundaries all over the world still not settled, the potential for conflict is unfortunately high. Also, submergence of land features poses obvious risks for the territorial integrity of States and might force us to rethink some of the fundamental assumptions regarding statehood and international law personality. Furthermore, how to better protect persons at risk because of the hazards occurring in the context of sea level is a major area of concern.

Scientific assessments of the natural processes are of course crucial to address sea level rise, but we believe that international law has also a role to play in enabling adaptation to these changes and in mitigating the worst impacts. In order for international law to play such a role we need to understand whether the existing framework is adequate, or there is a need for developing new rules in order to fill in a lacuna. We need not only to get the science right, but also to get the law right.

Patterns of State practice are emerging in this field and there is already a sizeable body of scholarly commentary on the subject of sea level rise, some of these studies including proposals *de lege ferenda*.

We note in particular the work of International Law Association, especially the latest report on the matter, issued in 2018.

Given these considerations we think that the subject is ripe enough for attention by the International Law Commission. Romania welcomed thus decisions of the Commission to include the topic in its current programme of work and to establish an open-ended Study Group to address this matter.

We have noted the information provided in the Report about the composition of the Study Group, its programme of work, as well as its methods of work.

Given the key concerns raised by sea level rise, we believe that the division in the three subtopics identified in the syllabus prepared in 2018 (issues related to the law of the sea, issues related to statehood and respectively issues related to the protection of persons affected by sea-level rise) is justified. We are confident that the way the study group has structured its activity will prove efficiency and thoroughness in approaching the various relevant items. It is also our understanding that the Study Group will approach the subject matter without questioning the applicable legal regimes as codified by UNCLOS and at the same time that it will pay due consideration to preserving legal stability in international law in relation to this topic and to its outcome.

Romania has also duly taken note of the request made by the Commission to receive, by 31 December 2019, examples from States of their practice that may be relevant (even if indirectly) to sea-level rise in relation to the law of the sea. We are currently reviewing our national practice and we will provide any relevant information within the indicated deadline.

We have further noted the request of the Commission to receive, in due course, any information related to statehood and the protection of persons affected by sea-level rise, topics which will be considered by the Study Group during the seventy-third session (2021) of the Commission, and we'll evaluate our practice with a view to provide an input in a timely manner.

We will follow closely the activity of the Study Group and we wish its members every success in fulfilling their very challenging task.

Thank you.