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Report of the International Law Commission

***Chapter IX – Protection of the environment in relation to armed conflicts
Chapter X – Succession of States in respect of State responsibility
Chapter XI – Immunity of State officials from foreign criminal jurisdiction***

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Chapter IX – Succession of States in respect of State responsibility

The discussions within the seventieth session of the ILC on the second report of the Special Rapporteur, Mr. Pavel Šturma, concerning *the succession of States in respect of State responsibility* have tried to streamline the analysis on the topic, with limited progress however. We are thankful to the Special Rapporteur for his dedication and for the comprehensive doctrinal analysis of the subject matter.

However, it is this paucity and diversity of State practice that is not conducive to the codification or progressive development on the matter. We also maintain our reluctance on developing new law due to the limited practical relevance of the topic.

This delegation would find a certain relevance for the topic should it resulted in a set of model clauses to be used by States in agreements on succession.

Chapter X - Protection of the Environment in relation to Armed Conflicts

Romania joins the delegations which commend the work of the Commission and of the Special Rapporteur, Maria Letho, on the issue of the protection of the environment in relation to armed conflicts. The examination of this topic increase States' awareness on its growing significance.

Romania favors the general opinion that international humanitarian law is *lex specialis* in this matter. Nevertheless, the angle of analysis is international environment law and this perspective would allow States to more easily identify the existing legal gaps in protecting the environment in situations of armed conflicts. We remind in this respect the International Court of Justice's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons from 1996, where the Court recognized that IHL does not operate to the exclusion of all other rules and principles of law during armed conflict.

Regarding future work, the Romanian delegation commends the intention of the Special Rapporteur to address in her next report questions relating to the protection of the environment in non-international armed conflicts and also encourage the expansion of the consideration of the topic to the responsibilities of non-state actors as well.

The question of responsibility and liability is also a key issue in environment protection. In this regard, Romania deems useful to elaborate on the relevance of the precautionary and "polluter pays" principles and how they could apply in armed conflict situations. The relevance is increased by the potential transboundary impact that activities harming the environment may

have. As a result, not only the occupied State, but also other affected States and the community at large shares an interest in clarifying responsibilities.

We will continue to follow with great interest the future work of the ILC on this topic in view of its completion.

Chapter XI - Immunity of State officials from foreign criminal jurisdiction

We are thankful to the Special Rapporteur (SR), Ms. Conception Escobar Hernandez, for her latest detailed report on this sensitive topic.

Given last year's vivid debates on limitations and exceptions to immunity and the related draft Article 7, the inclusion of a summary of those discussions was a good way of framing the examination of the procedural aspects of immunity. As previously stated by this delegation, we are of the view that clarifying the procedural implications of immunity and establishing procedural safeguards for the State of the official could help alleviate the concerns regarding the politicization and abuse in the exercise of jurisdiction, including with reference to a fair and effective implementation of Article 7.

Whereas the immunity of State officials is anchored in the principle of sovereign equality of States, the application of this legal regime must also take into account the development of substantive norms of international criminal law and international human rights, in particular the ongoing efforts to prevent impunity for serious crimes under international law.

In our opinion, rules concerning immunity of State officials should not be seen in conflict with norms of *jus cogens*. The former merely embody a procedural mechanism meant to ensure stability in international relations. Neither should they remove responsibility for such violations, nor should they affect the objective to combat impunity for the most grave crimes. From this perspective, we would be interested in examining the feasibility 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.

On the report under discussion, we salute the attention given to maintaining the methodological distinction between *immunity ratione personae* and *immunity ratione materiae* in addressing the procedural provisions. As demonstrated by the SR, there are different answers depending on situations involving status-related or functional immunity.

Concerning the *timing* of considering immunity, we subscribe to the approach followed by the SR and the ICJ on the matter, stating the need to resolve it without delay, at the initiation of procedures and before binding measures were taken against the State official. Insofar as the investigation phase is concerned, we support the intention of the Commission to further study the applicability of these rules in light of relevant national laws and practices.

As regards the *acts affected by immunity*, we deem very useful the analysis of the three categories of measures identified by the SR as debatable. The coercive nature of these acts and the consequent impediment on the exercise of functions by an official are, indeed, adequate indicators in identifying the balanced course of action. We encourage the Commission to further look into this subject and further consider the question of the inviolability in this context.

Moreover, we concur with the SR that it is up to the courts of the forum state to determine the existence of immunity, while we also acknowledge the important role played by the executive and, in particular, the ministries for foreign affairs, including in relation with the law enforcement agencies.

As the current report does not address all the procedural aspects, we take note of the plan for future work suggested by the Special Rapporteur and look forward to the draft articles reflecting the discussions at this year's session of the ILC.

To conclude, it is true that emerging practice has brought into the light the impact of the obligation to cooperate with an international criminal court on the immunity of State officials. This issue should be seen in a broader context, together with international judicial cooperation and assistance mechanisms and international arrest warrants registered with INTERPOL. However, it would be advisable to keep such an analysis within the agreed scope of our exercise, which is limited to immunity from criminal jurisdiction of a State, whilst keeping in mind that the current draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law.

Faced with insufficient state practice on the matter, we trust the SR and the Commission to carefully proceed with identifying the adequate balance between the right of the forum State to exercise jurisdiction and the right of the State of the official to ensure that the immunity of its officials is respected.