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Draft report of the International Law Commission on the work of its sixty-third session

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Chapter III

Specific issues on which comments would be of particular interest to the Commission

A. Immunity of State officials from foreign criminal jurisdiction

1. What approach would States wish the Commission to take on this topic? Should the Commission seek to set out existing rules of international law (*lex lata*), or should the Commission embark on an exercise of progressive development (*lex ferenda*)?
2. Which holders of high office in the States (Heads of State, Heads of Government, Ministers of Foreign Affairs, others) enjoy *de lege lata*, or should enjoy *de lege ferenda*, immunity *ratione personae*?
3. What crimes are, or should be, excluded from immunity *ratione personae* or immunity *ratione materiae*?
4. It would greatly assist the Commission if States could provide information on their law and practice in the field covered by the Special Rapporteur's three reports. Such information could include recent developments in the case law and legislation. Information on the procedural issue covered by the Special Rapporteur's third report would be particularly helpful.
5. Which category of persons are entitled, *de lege lata*, to personal immunity from foreign criminal jurisdiction? Should this be the same category of persons, *de lege ferenda*?

B. Expulsion of aliens

6. With regard to the topic "Expulsion of aliens", the Commission would like to know whether, in your national practice, suspensive effect is given to appeals against an expulsion decision:

- Relating to an alien lawfully in the territory?
- Relating to an alien unlawfully in the territory?
- Relating to either, irrespective of category?

7. Does a State that has such a practice consider it to be required by international law?
8. In the event there is no such practice, the Commission would welcome the views of States on whether an appeal against an expulsion decision should have suspensive effect on the implementation of the decision.

C. Protection of persons in the event of disasters

9. The Commission reiterates that it would welcome any information concerning the practice of States under this topic, including examples of domestic legislation. It would welcome in particular information and comments on specific legal and institutional problems encountered in dealing with or responding to disasters.
10. The International Law Commission has affirmed that States have a duty to cooperate with the affected State in disaster relief matters. Should this duty include a duty on third States to provide assistance when requested by the affected State?

D. The obligation to extradite or prosecute (*aut dedere aut judicare*)

11. The Commission, on the basis of the Reports of the Special Rapporteur, has at length discussed the question of the legal source of the obligation to extradite or prosecute.
12. It has thus considered whether the source of the obligation is exclusively based on treaties and whether it originates, in certain cases, also in international customary law.
13. One aspect that has further been considered is whether the obligation would exist, on the basis of customary law, with respect to the most serious crimes which affect the international community as a whole, like grave breaches of international humanitarian law, genocide and crimes against humanity.
14. In order to orient its future work on the topic, the Commission would appreciate receiving indications from Governments as to their views on these matters:
 - Is there a basis in customary international law for an obligation to extradite or prosecute persons accused of the most serious international crimes?
 - If not, should the Commission formulate a proposal stating such an obligation *de lege ferenda*, as a step in the direction of progressive development of international law? In this case, to which crimes, or categories of crimes, would such formulation of the obligation to extradite and prosecute apply?

E. Treaties over time

15. The Commission, in its consideration of the topic “Treaties over time”, attempts to clarify the practical and legal significance of “subsequent agreements” and the “subsequent practice” of the parties as a means of the interpretation and application of treaties (article 31 (3) (a) and (b) of the Vienna Convention on the Law of Treaties).

16. In this context, the Commission reminds States of its request, contained in its 2010 report,¹ to provide it with one or more examples of “subsequent agreements” or “subsequent practice” which are or have been relevant to the interpretation and application of one or more of their treaties. The Commission would also be interested, in particular, in instances of interpretation by way of subsequent agreements or subsequent practice which have not been subject to judicial or quasi-judicial proceedings.

F. Most-favoured-nation clause

17. In order to complete its work on the Most-favoured-nation clause in relation to the field of investment law, the Study Group on the Most-favoured-nation clause plans to consider whether any use of Most-favoured-nation clauses in areas outside of those of trade and investment law could provide it with guidance for its work. Accordingly, the Commission would appreciate being provided with examples of any recent practice or case law in relation to Most-favoured-nation clauses in fields other than trade and investment law.

G. New topics

18. The Commission decided to include in its long-term programme of work five new topics referred to paragraphs ... of the current report. In the selection of these topics, the Commission was guided by the following criteria that it had agreed upon in 1998,² namely that the topic (a) should reflect the needs of the States in respect of the progressive development and codification of international law, (b) should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification and (c) is concrete and feasible for progressive development and codification, and (d) that account should also be taken of those topics that reflect new developments in international law and pressing concerns of the international community as a whole. The Commission would welcome the views of States on these new topics.

19. In addition, the Commission would welcome any proposals that States may wish to make concerning possible topics for inclusion in its long-term programme of work. It would be helpful if such proposals were accompanied by a statement of reasons in their support, also taking into account the criteria for the selection of topics referred to above.

¹ Report of the sixty-second session (2010), *Official records of the General Assembly, Sixty-fifth session* (Supplement No. 10), A/65/10, Chapter III, paras. 26–28.

² A/53/10, Report of the Commission on the work of its fiftieth session (1998), para. 553, *Yearbook...*, 1998, vol. II (Part Two), p. 110.