

(Check against delivery)

STATEMENT OF THE CHAIR OF THE INTERNATIONAL LAW COMMISSION,

MR. EDUARDO VALENCIA-OSPINA

Cluster Three

Chapters IX, X and XI: Protection of the environment in relation to armed conflicts; Succession of States in respect of State responsibility; and Immunity of State officials from foreign criminal jurisdiction

Mr. Chair,

The third cluster is constituted of three chapters of the report of the ILC: “Protection of the environment in relation to armed conflicts” (chapter IX), “Succession of States in respect of State responsibility” (chapter X) and “Immunity of State officials from foreign criminal jurisdiction” (chapter XI).

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

Mr. Chair,

At this session, the Commission considered the first report of Ms Marja Lehto, the Special Rapporteur on the topic “**Protection of the environment in relation to armed conflicts**”. The Commission also provisionally adopted a number of draft principles, which had been provisionally adopted by the Drafting Committee in 2016, as well as commentaries thereto.

In her first report, the Special Rapporteur addressed the protection of the environment in situations of occupation. The report offered a general introduction to the protection of the environment under the law of occupation and addressed the complementarity between the law of occupation, international human rights law and international environmental law. It also proposed three draft principles to be included in a separate Part Four dealing specifically with protection of the environment in situations of occupation.

Draft principle 19 embedded the obligation of the occupying State to protect the environment in the general obligation to take care of the welfare of the occupied territories. Members supported the position of the Special Rapporteur that an occupying State had a general obligation to respect the legislation of the occupied territory with regard to environmental protection. It was suggested that there was greater latitude to alter environmental legislation than the wording of this draft principle permitted, particularly to enhance

the protection of the population. It was also suggested that, apart from domestic legislation, occupying States should respect the international obligations pertaining to the protection of the environment that were incumbent on the occupied territory.

Draft principle 20 was based on the principle of usufruct as found in article 55 of the 1907 Hague Regulations while it also drew on the principle of sustainable use as its modern equivalent. It provided that the occupying State should exercise caution in the exploitation of non-renewable resources and exploit renewable resources in a way that ensured their long-term use and capacity for regeneration. A discussion ensued from the use of the term “sustainable use”, which was supported by some members, while other members expressed the view that the principle of sustainable use constituted a policy objective, rather than a legal obligation. It was emphasized that the Occupying Power should act for the benefit of the people under occupation, not for its own benefit.

Draft principle 21 incorporated the principle not to cause harm to the environment of another State. Members generally expressed support for the inclusion of the no-harm or due diligence principle in draft principle 21.

These draft principles were referred to the Drafting Committee, which provisionally adopted draft principles 19, 20 and 21. The Chair of the Drafting Committee presented an interim report of the Committee, which can be found on the website of the Commission. The Commission took note of the three draft principles provisionally adopted by the Drafting Committee.

Mr. Chair,

As I mentioned earlier, at this year’s session, the Commission also provisionally adopted nine draft principles, namely draft principles 4, 6 to 8, and 14 to 18, as well as commentaries thereto. A Working Group, chaired by Mr. Vázquez-Bermúdez, was established to assist the Special Rapporteur in the preparation of the draft commentaries to those draft principles.

Draft principle 4 recognizes that States are required to take effective measures to enhance the protection of the environment in relation to armed conflict. Paragraph 1 reflects that States have obligations under international law to enhance the protection of the environment in relation to armed conflict and addresses the measures that States are obliged to take to this end. Paragraph 2 addresses voluntary measures States may take that would further enhance the protection of the environment in relation to armed conflict.

Draft principle 6 recognizes that States should, due to the special relationship between indigenous peoples and their environment, take appropriate measures to protect such an environment in relation to an

armed conflict. It further recognizes that where armed conflict has adversely affected the environment of indigenous peoples' territories, States should attempt to undertake remedial measures.

Draft principle 7 addresses agreements concluded by States among themselves and between States and international organizations, concerning the presence of military forces in relation to armed conflict. Draft principle 8 concerns the impact of peace operations on the environment. According to this draft principle: "States and international organizations involved in peace operations in relation to armed conflict shall consider the impact of such operations on the environment and take appropriate measures to prevent, mitigate and remediate the negative environmental consequences thereof."

Draft principle 14 aims to reflect that environmental considerations are, to a greater extent than before, being taken into consideration in the context of contemporary peace processes, including through the regulation of environmental matters in peace agreements. Draft principle 15 covers post-armed conflict environmental assessments and remedial measures. Its purpose is to encourage relevant actors to cooperate in order to ensure that environmental assessments and remedial measures can be carried out in post-conflict situations.

Draft principle 16 concerns remnants of war. This draft principle aims at strengthening the protection of the environment in a post-conflict situation and seeks to ensure that toxic and hazardous remnants of war that are causing or that may cause damage to the environment are removed or rendered harmless after an armed conflict. While draft principle 16 deals with remnants of war more generally, draft principle 17 deals with the specific situation of remnants of war at sea including the long-lasting effects on the marine environment. This draft principle expressly encourages international cooperation to ensure that remnants of war at sea do not constitute a danger to the environment.

Draft principle 18 addresses sharing and granting access to information. It consists of two paragraphs. Paragraph 1 refers to the obligations States and international organizations may have under international law to share and grant access to information with a view to facilitating remedial measures after an armed conflict. Paragraph 2 refers to security considerations to which such access may be subject.

Before I conclude, I would like to note that the Commission would appreciate being provided by States, by 31 December 2018, with information on whether, in their practice, international or domestic environmental law has been interpreted as applicable in relation to international or non-international armed conflict. The Commission would particularly appreciate receiving examples of:

- (a) treaties, including relevant regional or bilateral treaties;

- (b) national legislation relevant to the topic, including legislation implementing regional or bilateral treaties;
- (c) case-law in which international or domestic environmental law was applied to disputes in relation to armed conflict.

The Commission would also appreciate receiving any information States may be in the position to provide concerning responsibility, liability or reparation for harm caused to the environment in relation to armed conflict, inter alia case law or agreements or arrangements between the parties.

This concludes my introduction of chapter IX of the report.

Chapter X: Succession of States in respect of State responsibility

Mr. Chair,

Let me now turn to the topic “**Succession of States in respect of State responsibility**”, which is addressed in chapter X of the report of the Commission.

The Commission had before it the second report of the Special Rapporteur, Mr. Pavel Šturma, which addressed, *inter alia*, certain introductory issues, including the legality of succession, the general rules on succession of States in respect of State responsibility, as well as certain special categories of State succession to the obligations arising from responsibility. The Special Rapporteur proposed seven draft articles in his second report.

During the debate, it was noted that the scarcity of State practice on succession of States in respect of State responsibility presented significant challenges to the work of the Commission on the topic and that the available State practice was diverse, context-specific and often politically sensitive. It was also observed that not many relevant decisions by domestic and international courts and tribunals were available.

A discussion took place as to the possibility of identifying an underlying general rule applicable to the succession of States in respect of State responsibility, according to which State responsibility did not automatically transfer to the successor State, except in certain circumstances. In that regard, the scope of possible exceptions to such an underlying general rule of non-succession was the object of considerable debate.

Draft article 5 dealt with the issue of legality of succession, providing that the draft articles applied only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations. This draft article was generally supported by members of the Commission.

The second general provision was draft article 6, which set out the general rule applicable to the succession of States in respect of State responsibility, namely the principle of non-succession when it comes to the establishment of an internationally wrongful act. A discussion took place regarding the legal basis of the general rule of non-succession. While some members considered that such a rule derived from the rules on attribution of conduct enshrined in the articles on responsibility of States for internationally wrongful acts, some other members considered that the question of attribution of conduct was distinct from the question of succession to responsibility.

The five draft articles that followed draft article 6 considered individual categories of succession and specified the circumstances where the obligations arising from an internationally wrongful act rested with the predecessor State and those where they passed to the successor State. Draft articles 7, 8 and 9 dealt with cases of succession where the predecessor State continued to exist, while draft articles 10 and 11 dealt with situations where the predecessor State had ceased to exist.

Draft articles 7, 8 and 9 addressed respectively the separation of parts of a State, the establishment of a newly independent State, and the transfer of part of the territory of a State. In relation to draft article 7, dealing with separation of parts of a State, and draft article 9 on transfer of part of the territory of a State, a discussion took place as to whether existing State practice supported the exceptions to the non-succession rule included in those draft articles. Draft article 8 addressing newly independent States was supported, although some views were expressed questioning the necessity of such a provision.

Draft article 10 dealt with the two situations of merger of States and incorporation of a State into another existing State, while draft article 11 addressed the dissolution of State. Those draft articles encompass situations where the obligations arising from an internationally wrongful act of the predecessor State may pass to the successor State or States. In particular, draft article 11 underlines the role of agreements that should be negotiated in good faith by successor States. It was stressed that draft articles 10 and 11 established the certainty of legal consequences for all internationally wrongful acts, and thus preserved the rights of injured parties. Several members of the Commission remarked, however, that those draft articles espoused a general presumption of succession to responsibility that was inconsistent with the general rule of

non-succession in respect to State responsibility and that there was not sufficient State practice in support of such a presumption of succession.

Mr. Chair,

The Commission would appreciate being provided by States, by 31 December 2018, with information on their practice relevant to the succession of States in respect of State responsibility. The Commission would particularly appreciate receiving examples of:

- (a) treaties, including relevant multilateral and bilateral agreements;
- (b) domestic law relevant to the topic, including legislation implementing multilateral or bilateral agreements;
- (c) decisions of domestic, regional and subregional courts and tribunals addressing issues involving the succession of States in respect of State responsibility.

This concludes my introduction of chapter X of the report.

Chapter XI - Immunity of State officials from foreign criminal jurisdiction

Mr. Chair,

The last substantive chapter of the report is **Chapter XI** and it relates to topic “**Immunity of State officials from foreign criminal jurisdiction**”.

This year the Commission had before it the sixth report of the Special Rapporteur, which apart from summarizing the debates in the Commission and the Sixth Committee on draft article 7 (on crimes under international law in respect of which immunity *ratione materiae* should not apply), provisionally adopted by the Commission last year, commences a discussion of the procedural aspects of immunity from foreign criminal jurisdiction. In particular, it focuses, with respect to procedure, on the timing of the consideration of immunity; the acts of the authorities of the forum State that may be affected by immunity; and the identification of the organ competent to decide whether immunity applies. The report did not contain new draft articles. It is anticipated that the analysis of the procedural aspects will be completed in the seventh report to be submitted next year. Among the issues to be considered in that report would be: (a) the invocation of immunity, (b) waiver of immunity; and (c) procedural safeguards related to both the State of the official and the foreign official concerned, including safeguards and rights that must be recognized in relation to such an official. Once the Commission concludes the consideration of these issues and the draft

articles related thereto, it would complete the first reading of the draft articles of the topic. It is anticipated that this will be done next year.

The debate on the sixth report only commenced late in the Commission's busy schedule at the current session. As can be imagined, given the circumstances, the debate on the sixth report will be continued and completed next year. Aside the general comments which confirm the continuing importance of the topic for States, three essential areas dominated the debate.

The first set of comments concerned draft article 7, which as will be recalled was adopted last year, according to which immunity *ratione materiae* would not apply with respect to certain international crimes. Both the circumstances surrounding the adoption of draft article 7, which was adopted by a vote, and the impact that would have on the working methods of the Commission, as well as its future work were the object of comment. It was considered by some members that the discussion of procedural aspects of immunity provided pathways for considering further any lingering concerns that remain with respect to the draft article, even though some doubted the feasibility of addressing these matters through procedural safeguards.

The second set of comments related to the procedural aspects as dealt with in the sixth report. Here, the members who spoke generally welcomed the analysis of the Special Rapporteur on procedural issues and looked forward to the draft articles that would be presented by the Special Rapporteur in the seventh report. Regarding the question of timing, it was generally considered that this was an area that could be considered by the Commission and on which it could offer valuable guidance on the basis of existing case law and practice. Concerning the acts of the forum States to which immunity applied, members generally agreed with the three categories referred to by the Special Rapporteur in her sixth report — namely, detention, appearance as a witness and precautionary measures — as requiring examination. Concerning the determination of immunity, some members, without discounting the role to be played by the executive, agreed with the Special Rapporteur that it was for the courts of the forum State to determine whether immunity existed and, if so, whether there were exceptions to such immunity. Nevertheless, it was suggested that the Commission consider the procedural requirement that any exercise of jurisdiction over an official should be subject to a decision of a higher court and not the lowest court.

The third set of comments addressed procedural safeguards and guarantees. This aspect was viewed by members who spoke to be crucial to the successful completion of work on the topic. It was noted that a distinction had to be drawn between safeguards ensuring individual due process and other guarantees under international human rights law, and safeguards that aimed at protecting the stability of international

relations and avoiding political and abusive prosecutions. Both aspects required treatment and it was suggested that, for safeguards to be meaningful, they should not only address the consequences of the denial of immunity of the State official in the forum State generally, but also in the specific context of draft article 7.

The Commission would welcome any information that States could provide by 31 December 2018 on their national legislation and practice (of a judicial, administrative or any other nature) concerning procedures for dealing with immunity, in particular the invocation and waiver of immunity, as well as on mechanisms for communication, consultation, cooperation and international judicial assistance that they may use in relation to situations in which the immunity of State officials from foreign criminal jurisdiction is being or may be examined by their national authorities. Similarly, it would be useful to have any information that international organizations could provide on international cooperation mechanisms which, within their area of competence, may affect immunity of State officials from foreign criminal jurisdiction.

This concludes my introduction of chapter XI of the report and of the entire report on the work of the Commission at its seventieth session.

Before concluding my statement, I would like to remind you that this year the topic “Crimes against humanity” was not debated by the Commission. As you will recall, a full set of draft articles and a preamble on this topic was adopted on first reading during last year’s session. As is the established practice, the Commission suspends the consideration of topics after the first reading to give States an opportunity to carefully review the outcome and to give in-depth comments for the second reading. Written comments are requested by 1 December 2018, so that the second reading of this topic may take place in the summer of 2019. I encourage all Member States to submit written comments in time.

The Commission greatly values comments from States on all topics. I can assure you that we examine all comments most carefully; they are a very important part of our work.

I appreciate your kind attention and I thank you all.
