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STATEMENT
by the representative of the Russian Federation
in the Sixth Committee of the 73rd Session of the UNGA
on agenda item "Report of the International Law Commission"
(Topics: "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")

31 October 2018

Mr. Chairman,

First of all, let me congratulate Ms. Marja Lehto with her appointment as the Special Rapporteur on the topic of "Protection of the environment in relation to armed conflicts" and thank her for the preparation of the first report.

We expressed several doubts on the appropriateness of further work on this project. This issue has been for more than 5 years under consideration of the Commission. We believe that this issue on the whole has been sufficiently settled by the international humanitarian law and does not require elaboration of a new international convention, for example.

The norms of the international law applied in a situation of an armed conflict must be absolutely clear given the priority, first of all, to the safety of civilian population.

Initially the idea to study this area was not to generalize the norms of international law on the protection of environment but their application exclusively during an armed conflict. Later the scope of draft principles included the "preventive measures" and "principles applicable after an armed conflict" i.e. the provisions regarding the time before and after the conflict.

Since the abovementioned periods are considered to be a peacetime, the general norms applicable to the protection of environment should be fully applied. Therefore, we deem as counterproductive the attempts to develop a code of comprehensive rules of environment protection at all stages – preparation to an armed conflict during and after the armed conflict.

The draft contains the language of general nature – for example, declaration "areas of major environmental and cultural importance" and the "protected zones". We believe that the establishment of such areas in the absence of war should not be subject for consideration. Speaking properly about the context of a armed conflict, it is well-known that the IHL regards as protected areas the demilitarized zones, hospitals and security zones as well as unprotected towns and settlements. During the preparation of Additional Protocol I to the Geneva Conventions the idea of extending such a status to other facilities did not receive the necessary support. I believe that we must bear in mind those circumstances. Otherwise, this draft would contradict the existing international humanitarian law.

Moreover, the report contains the analysis of interdependence of norms pertaining to the human rights and international humanitarian law. We think that this approach should not lead to modification of interpretation of the existing IHL norms.

Let me share some ideas regarding separate principles of the draft.

We believe that it is inappropriate to refer to application by analogy to principles I and II-5 of the draft international legal regime of protection of cultural heritage in respect of the issues related to the protection of the environment in armed conflict. Moreover, these principles mention the term of "protected zone". Nevertheless, the current IHL does not contain such a concept. For instance, the 1949 Forth Geneva Convention and Additional Protocol I does envisage three "zones of security" – sanitary zones, neutral zones and demilitarized zones. The introduction of the concept of "protected zone" extends too much the notion of "the security zone".

As to the principle of the protection of the environment on the territory of indigenous peoples, we believe that this aspect is not directly related to the topic under discussion.

It is not quite clear what is meant by further measures undertaken by the States to improve the environment in connection with an armed conflict referred to in paragraph 2 of the draft principle 4.

It would be necessary to specify in paragraph 3 of draft principle II-1 the components of the environment and also how the military use of such a component affects the status of the environment on the whole.

It does not clearly follow from the draft principle II-3 what is understood by the term of "environmental considerations". As we understand, the existing treaty-based IHL system does not contain such a notion. It would be necessary to specify the meaning and the extent of such "considerations".

On the whole, the draft principles contain certain provisions that continue to require further consideration and elaboration, especially those provisions that excessively extend the scope of this topic. We also believe that the draft should avoid the language which is not used in the current IHL.

The issues of complementarity with other branches of international law including international environmental law, protection of environment under occupation, issues of legal and material responsibility, responsibility of non-State actors and general application of principles to non-international armed conflicts require a thorough analysis.

Mr. Chairman,

We reviewed with interest the second report of Prof. Pavel Šturma on the succession of States in respect of State responsibility and the outcomes of the work of the Commission on this issue.

As compared to the last year, the opinion of the Russian delegation regarding the prospects of further work on this topic has not changed. The Commission was not able to significantly move forward on this topic. Draft articles 5 on cases of succession of States covered by the draft articles and 6 on the absence of impact on the attribution approved by the Commission do not raise questions as such. However, we believe that they simply auxiliary to this draft. We believe, however, that the problem that was not addressed in a satisfactory manner is the overall approach to the topic.

During the last session the Special Rapporteur decided to cardinally change his approach to the topic by changing the recognition as the general rule of a norm regarding automatic succession with regard to the responsibility for the norm of the absence of succession with potential exclusions.

It is indicative, however, that such a cardinal review of approaches by all means is based on the same few examples of the practice of States and court decisions.

We believe that those examples are arguable from the viewpoint of the consideration as a proof of a certain established rule of succession of State with regard to their responsibility. It seems to us that it is quite complicated to form a conclusion on the existence of a certain general norm on their basis. This, in our view, demonstrates the lack of foundations for formulating such draft articles.

We also doubt that the departure from the 1978 and 1983 Vienna Conventions is methodologically correct.

We also note that instead of relying on the achievements of the Commission relating to the succession of States, the report of the Institute of the International Law and a resolution adopted on its basis as well as the works of Mr. Patrick Dumberry were used as the main basis for this research.

We are not quite certain either that the selected method of drafting the articles depending on the existence of preceding State or its disappearance is methodologically correct. We believe that it would be more successful to use the structure of draft articles using the type (category) of succession similar to the 1983 Vienna Convention.

We believe that taking into account the examples of practice of States examined by the Special Rapporteur[1] and in light of the section on the State debts stipulated by the Convention it seems to us that it would be more justified to use the approach under which the agreements are the main method of settlement of the issues of responsibility in connection with legal succession.

In this connection a correct step would be draft article 1 (2), which was only presented by the Chairman of the drafting committee but did not become a part of the report of the Commission. This draft proposes to record the residual nature of the rules formulated by the Commission that would be effective only in case if a different agreement was reached.

The Russian delegation has certain doubts also regarding the approach of the Special Rapporteur to the attribution of responsibility in case of succession.

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[1] "Gabcikovo-Nagymaros Project" (basis: special agreement); Lighthouses arbitration (basis: 1923 Lausanne Peace Treaty with protocols in part concerning the succession of Greece in respect of rights and obligations under the concessionary contracts concluded with the Ottoman Government or local authorities); the Bijelic v. Montenegro and Serbia case (basis: an expressed consent of Montenegro regarding its right and obligations under a number of international treaties that had been in effect for it prior to its declaration of independence on 3 June 2006); Mwandinghi case (basis: Constitution of Namibia (Namibia assumed responsibility for the acts of the South African Government).

As we understand, the Special Rapporteur proposes the following: if the preceding State continues to exist, the successors should not bear the responsibility with the exception of separate cases; if the preceding State disappears then according to the Special Rapporteur, the successor State should bear certain obligations deriving from succession with regard to responsibility (for example, payment of monetary compensation). To justify the latter provision the Special Rapporteur indicates that in case of disappearance of the preceding State, the keeping of the rule of non-succession would be unjust with regard to the victim State. However, we believe that it would be unjust to use the approach when the successor States do not bear any responsibility for the violations by the preceding State because they receive a part of its property, assets and territory. It seems that such an approach could be applied to the newly independent States (in the colonial context).

Moreover, we tend to believe that the issues of direct responsibility of the preceding State which continues to exist should not be subject to research since it derives from the norms of general responsibility of States rather than succession. Such incidents are not covered either by the Vienna Conventions. Therefore, we believe that there is no need to include draft article 6.

Let me note that the Russian delegation has already expressed its opinion that the concept of continuation should not be examined within this topic.

In light of the above we propose to the Commission to examine the issue of changing the form of the final product of its work on this topic, perhaps in the form of an analytical report.

Mr. Chairman,

We studied with great interest the new report of Ms. Escobar Hernández on the **"Immunity of State officials from foreign criminal jurisdiction"** and reviewed the summary of the preliminary discussion at the Commission during its 70th session. We thank the Special Rapporteur for her substantive work to prepare the sixth report.

Nevertheless, we note that the procedural aspects were not examined in a broad sense and comprehensively. We are looking forward to continued discussions of the sixth report during the 71st session of the Commission and presentation by the Special Rapporteur of the seventh report which must complete the examination of procedural aspects. We will also await the proposals on draft articles that reflect the issues examined in the sixth report.

In light of the above we would like to formulate a preliminary comments on the sixth report reserving the right to express additional ideas next year.

We share the desire of the Special Rapporteur to find answers to a number of fundamental procedural issues including the question when the immunity from foreign jurisdiction begins to be applied; what action of the country of the court is affected by immunity from foreign criminal jurisdiction; who determines the applicability of immunity and what are the consequences of such determination for immunity; is the application of immunity necessary; who may apply it; how and by whom the revocation of immunity is exercised; what are the consequences of revocation of immunity for exercise of jurisdiction, etc.

Since the immunity has procedural nature, the procedural aspects of its application have principled importance. This is the area which may be examined by the Commission and on which it could formulate valuable guidelines on the basis of the existing case law and practice.

We believe that the formulation of procedural rules of application of immunity could remove some concerns of States on the issue of rule inconsistent with the international practice on the existence of exceptions from immunity of State officials formulated in draft article 7. Unfortunately, the report did not cover all procedural aspects. We did not find there either the analysis of interrelationship between the procedural and material legal aspects of this topic. On the whole, the potential prospect of finding full balance on the basis of procedural guarantees of the

formulation of conceptual and principled character contained in draft article 7 raises certain doubts.

We do not believe that the Commission needs to hurry with the completion of the first reading of draft articles on this topic during the next session. First of all, we expect to obtain in the seventh report the full compendium of draft articles on procedural aspects. After the discussion of procedural issues the Commission could examine and review the content of draft article 7 under a different angle to level out the differences not only within the Commission but also among the members of the Sixth Committee.

Let us recall once again our firm position that the exceptions listed in draft article 7 adopted by vote instead of consensus in the Commission is not supported by the practice of national or international courts nor the legislation of States.

The desire to eradicate impunity for serious international crimes is a noble goal but it should not serve as an instrument for manipulation of the norms of customary international law. The introduction of exceptions from immunity of State officials from foreign criminal jurisdiction can become an instrument of political pressure of one State on another under the motto of fighting immunity, which will only increase tensions in the interstate relations.

Mr. Chairman,

We do not support consideration of issues related to the issues of international criminal jurisdiction within the topic of "Immunity of State officials from foreign criminal jurisdiction".

First, under draft article 1 preliminary approved by the Commission "these draft articles are applied to immunity of State officials from foreign criminal jurisdiction of another State". This language excludes the examination of international criminal jurisdiction.

Second, the international criminal institutions operate on the basis of special legal regimes whether it is a special treaty (for example the Rome Statute of the ICC) or the UN Security Council resolutions. The application of immunity in this context is exercised on the basis of special international legal instruments. Therefore, we do not see any grounds for codification or progressive development of international law in this area.

Thank you, Mr. Chairman.