Statement
on behalf of the
Republic of South Africa

by

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(International Law)

at the

Department of International Relations and
Cooperation of South Africa

before the Sixth Committee of the General Assembly

on the following Cluster 3 topics:

"Protection of the environment in relations to armed conflicts" and "Immunity of State officials from foreign criminal jurisdiction"

26 - 31 October 2018

Mr Chairman

My delegation would like to thank the Chairman of the Commission, Professor Eduardo Valencia-Ospina, for introducing Cluster 3 topics to this Committee and wishes to provide its reflections on the topic entitled "**Protection of the environment in relations to armed conflicts**". At the outset, my delegation wishes to congratulate the Special Rapporteur, Professor Marja Lehto, for her first report on this important topic. We welcome the fact that her report focused on the specific issue of the protection of the environment in situations of occupation.

Mr Chairman

The international community committed itself in the Johannesburg Plan of Implementation of the 2002 World Summit on Sustainable Development; the 2005 World Summit Outcome; the 2010 High-level Plenary Meeting of the General Assembly on the Millennium Development Goals; the Rio+20 outcome "The Future We Want"; and in the 2030 Agenda for Sustainable Development to take further effective measures and actions to remove the obstacles to the full realisation of the right of self-determination of peoples living under colonial and foreign occupation.

One of the essential conditions of such full realisation is the protection of the environment for the benefit of peoples living under occupation. South Africa appreciates the work of the Commission thus far in clarifying the rules and principles of the law of armed conflict that relate to the protection of the environment. As many others have emphasised in the debates on this topic, we do expect the Commission or this Committee to amend existing norms in this area of law, but we recognise the value in the Commission's codification mandate, as well as the contribution that the Commission can make to the progressive development of the law where gaps exist. The ultimate aim of the work of the Commission on this topic – the protection of the environment and of the rights of peoples living under occupation – should however not be undertaken exclusively in terms of the law of armed conflict, or the law of occupation. Rather, the interface between the law of armed occupation, on the one hand, and international human rights law and international environmental law, on the other hand, should be examined carefully in order to reflect the full gamut of legal norms that affords protection to the environment during occupation. In undertaking this analysis, conflicts between international environmental law and the law of occupation should not be over-emphasised. Notwithstanding the assertion that the law of occupation is the applicable *lex specialis* during occupation, there is much complementarity between the law of occupation, on the one hand, and international environmental law and human rights law, on the other. One can find examples of such complementarity between international environmental law and the law

of occupation in the obligation of the occupying power to respect the laws in force in the occupied territory; the obligation to restore and ensure public safety; the obligation to ensure sufficient hygiene and public health standards; and the prohibition against the destruction of property. We encourage the Commission to highlight such complementarities in their work. Furthermore, we also encourage the Commission to recognise the growing appreciation that other bodies of law are not wholly displaced by the applicability of international humanitarian law or the law of occupation as the *lex specialis*.

Mr Chairman

We also studied carefully the draft principles (19, 20 and 21) provisionally adopted by the Drafting Committee of the Commission during its session this year and we wish to make the following comments:

- We note that the Drafting Committee omitted the reference to "adjacent maritime areas" which appeared in the Special Rapporteur's proposed draft principles. While we appreciate the rationale put forward by the Drafting Committee in this regard, we wish to emphasise the critical importance of protecting the oceans as part of the natural environment. In so far as the omission is necessary for clear, concise and precise legal drafting, we would support a clarification in the commentary to this principle that the protection of the relevant areas of the oceans are included within the ambit of the draft principles.
- It further appears that the scope of the draft principles is qualified and limited by the condition that the relevant harm must be "likely to prejudice the health and well-being of the population of the occupied territory". We take note of the discussion that the Commission had on whether to enumerate specific human rights relevant to environmental protection and we welcome the inclusion of the broader term "well-being". At the same time, we encourage the Commission to consider extending the category of persons entitled to the benefit of environmental protection from "the population of the occupied territory" to include also "future generations".
- Regarding the principle that an occupying power should respect the law and institutions of the occupied territory, we submit that this should also include respect and continued implementation of the international environmental law commitments of the occupied territory.
- We further support the principle of the right to self-determination and sovereignty over natural resources of peoples' living under colonialism and foreign occupation, and we believe that it should also find expression in the outcome of the Commission's work.

Mr Chairman

Looking ahead, when considering the principles governing non-international armed conflicts specifically, the Commission should bear in mind the increasing convergence of norms applicable to international and non-international armed conflicts; and to appreciate the fact that the potential impact on the environment can be equally severe in either of these two kinds of conflicts. We also support proposals made for the Commission to address issues of responsibility, liability, compensation and reparations for harm done to the environment during armed conflict and occupation, particularly in terms of the "polluter-pays" principle, as well as possible enforcement measures. Similarly, we would also welcome the Commission considering the applicability of the precautionary principle in situations of armed conflict and occupation. Finally, we wish to thank the Commission again for its excellent work on this important topic and we look forward to receiving the Commission's next report.

Mr Chairman

We now turn to the topic entitled "**immunity of state officials from foreign criminal jurisdiction**". My delegation congratulates the Special Rapporteur, Professor Concepción Escobar Hernández, on her well-researched and comprehensive sixth report and commends her for the noteworthy progress that has been made on this topic. We note that this report focused primarily on procedural aspects of immunity from foreign criminal jurisdiction. We will therefore focus our comments on this issue.

Mr Chairman

The question of immunities is a heavily debated topic and has become even more so in recent years. It carries with it particular political sensitivity as it has a bearing on the very essence of sovereignty. A careful balance must thus be struck between the protection of the well-established norm of immunity of representatives of States from the jurisdiction of foreign States and the avoidance of impunity for serious crimes.

In this regard, the elaboration of procedural aspects is a positive development as it brings an element of objectivity that seeks to reduce politicisation and abuse of criminal jurisdiction, even though, the possibility of abuse can never be eliminated in its entirety.

Moreover, providing clarity on procedural aspects is paramount. Procedural aspects are often overlooked, yet it is regularly the question of procedural compliance that forms the basis of legal challenges.

Mr Chairman

My delegation supports the view that the procedural aspects of immunity from criminal jurisdiction should not be restricted to the exceptions in draft Article 7, but ought to apply to all draft Articles. However, we wish to echo the view of the Special Rapporteur that a distinction should be drawn between the procedural aspects related to immunity *ratione materiae* and immunity *ratione personae*.

The Special Rapporteur focused her report broadly on three procedural aspects: a) the timing of the consideration of immunity; b) the acts of the authorities of a forum state that may be affected by immunity; and c) the identification of the organ competent to decide whether immunity applies.

In relation to timing, South Africa agrees that the consideration of immunity should occur at an early stage and we acknowledge that the application of immunities could be determined at the investigation phase.

However, South Africa notes that there are certain practical implications that arise during the investigation phase.

In this regard, the International Court of Justice's separate opinion in the *Case Concerning the Arrest Warrant 11 April 2000 (DRC v Belgium)* has been cited. In this case, it was expressed that the commencement of investigations upon which an arrest warrant may ultimately be issued is not in itself a violation of immunity or inviolability.

If it is true that the investigation does not violate immunity, practical challenges still arise in that no acts may be taken to prevent a person from leaving the jurisdiction of the state pending investigations into the applicability of immunity. A state is thus faced with the predicament that it may not prevent a person from leaving who may indeed be subject to its jurisdiction.

Mr Chairman

The categories of acts that are affected by immunity as elaborated by the Special Rapporteur are instructive. My delegation agrees with the view expressed by members of the International Law Commission that a guiding factor in whether acts are affected by immunity should be whether the forum state's act would hinder the person in the performance of its duties.

The Special Rapporteur contends that the court of the forum state is competent in deciding on the applicability of immunities. However she

acknowledged that the possibility for other organs or State authorities to express their views depended on national law. In this regard, the prosecuting authorities of a forum state may play an integral role and may have wide discretionary powers. South Africa is concerned that such wide powers could result in the selective application of immunity and abuse.

South Africa, therefore, does have concerns that certain practical challenges which may arise have not been comprehensively considered and would urge the Special Rapporteur to reflect upon these when crafting the draft Articles.

In conclusion, the Special Rapporteur has carried out an extensive study and provided a valuable and insightful report, and we look forward to seeing the draft Articles.

I thank you for your attention.