



**GOVERNMENT OF JAMAICA**

**INTERVENTION BY**

**MS. CLAUDINE BAILEY,  
LEGAL ADVISOR,  
MINISTRY OF FOREIGN AFFAIRS AND FOREIGN TRADE OF JAMAICA**

**ON THE REPORT OF THE INTERNATIONAL LAW COMMISSION (ILC) TO  
THE UNITED NATIONS GENERAL ASSEMBLY**

**CHAPTER VII: SUCCESSION OF STATES IN RESPECT OF STATE  
RESPONSIBILITY JAMAICA'S STATEMENT**

**6<sup>th</sup> November 2019**

Mr. Chairman,

My delegation wishes to commend the International Law Commission and the Special Rapporteur on their continuing contribution to the codification and progressive development of international law specifically in relation to the topic, *Succession of States In Respect of State Responsibility*.

Mr. Chair,

It is worth noting that *Article 5 of the 1978 Vienna Convention on Succession of States in respect of Treaties* had limited questions relating to the effects of a succession of States to matters provided for in that Convention, while *Article 39 of the 1983 Vienna Convention on Succession of States in respect of State Property Archives and Debts* expressly excluded issues *regarding the effects of a succession of States in respect of a treaty from the international responsibility of a State or from the outbreak of hostilities between States*. Further, the *2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts* addressed the subject in respect of matters relating to insurrectional movement, which later resulted in the creation of a new state, wrongful acts which comprised a continued character evident before and after the date of the succession, and acts permitting the exercise of diplomatic protection committed against the predecessor State.

Needless to say, the aforementioned work of the ILC and the decision taken to substantively address the matter at a future date, reflects the common view that the area of law being contemplated is a very complex and sensitive one. It therefore requires careful attention particularly in light of the fact that the current practice is limited, diverse and case-specific.

It is in light of these, my delegation shares the views of other Member states that the work being undertaken in relation to this topic must be consistent with its prior works. This is particularly vital as it pertains to the solutions of the substantive issues to be addressed and the usage of applicable terminologies for example, terms such as "injury" and "injured state", which the Special Rapporteur indicated was intended to be consistent with Parts Two and Three of the 2001 Draft Articles. It was also indicated by the Special

Rapporteur that the notion of “responsibility of States” reflected a similar usage to that of the 2001 Draft Articles, wherein, Article 1 of the relevant articles, had clarified that “international responsibility” in article 1 covered the relations which arose under international law from the internationally wrongful act of a State, whether such relations were limited to *inter alia* the wrongdoing State.—In light thereof, it is understood that references to the term, “responsible state” means “the state which caused, or is believed to have caused, the injury” as articulated in the 2001 Draft Articles.

It is also suggested that there should not be any automatic extinction of responsibility or automatic transfer of responsibility in cases of succession of States, which is also referred to as the general rule of non-succession. The rationale for this is that this principle has the potential to lead to unfair and inequitable results as in the former case, states would avoid consequences of internationally wrongful acts and in the latter case, nationals or states which have legitimately suffered an injury would be left without a legal remedy/reparation. My delegation suggests that the determination as to whether there would be a succession to responsibility should turn on the facts of the case as indicated in the case of *Lighthouses Arbitration between France and Greece*,<sup>1</sup> which further held that the responsibility of a State might be transferred to a successor if the facts were such as to make it appropriate to hold the latter responsible for the former’s wrongdoing.

We also believe our stance is supported by the dissenting opinion of Judge Van Eysinga who reasoned in the *Panevezys Saldutiskis Railway Case* that the crystallization of such unwritten rules of law that is, the non-succession or clean-slate principle, in which a territory would not be able to bring a claim on behalf of a national which had suffered an injury, against a successor state, would lead to inequitable results.

In conclusion, Mr. Chairman, my delegation awaits the fourth report of the Special Rapporteur and looks forward to the continued development of this area of law.

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<sup>1</sup> *Claims No. 11 and 4*, 24 July 1956 (United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XII, p. 155)



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**ON THE REPORT OF THE INTERNATIONAL LAW COMMISSION (ILC) TO  
THE UNITED NATIONS GENERAL ASSEMBLY**

**CHAPTER VI: ENVIRONMENTAL PROTECTION IN RELATION TO ARMED  
CONFLICTS**

**6<sup>th</sup> November 2019**

Mr. Chair,

My delegation wishes to commend the International Law Commission on its continued contribution to the progressive development of international law and its codification as evinced by the comprehensive report on its seventy-first session, which addresses several significant topics, among which is the *Protection of the Environment in Times of Armed Conflict*.

We also wish to thank the Special Rapporteurs for their contribution on the development of the draft principles, which are presently before the Sixth Committee for deliberation.

Mr. Chair,

Studies have shown that the damage sustained to the environment as a result of armed conflict extends far beyond the period of conflict, the boundaries of national territories and the current generation. The deleterious effects caused by armed conflicts include significant harm to human health, pollution, loss of biodiversity, loss or scarcity of natural resources including access to clean water, and the degradation of ecosystems, which result in human displacement.

This type of devastation has also attracted the acknowledgment and intervention of the global community as exhibited by the United Nations Environmental Assembly of the United Nations Environment Programme's 2017 Resolution on *Pollution Mitigation and Control in Areas Affected by Armed Conflict or Terrorism (UNEP/EA.3/L.5)*, the over twenty-post conflict assessments, conducted by the United Nations Environment Programme, and its 2009 Report on *"Protecting the Environment During Times of Armed Conflict: An Inventory and Analysis of International Laws"*, which sought to identify the lacunas and deficiencies in the relevant international legal regime.

Accordingly, the delegation of Jamaica notes that the International Law Commission indicated at paragraph 2 of its commentary on Principle 1 (Scope) that it had divided the

draft principles into temporal phases, and had decided to address the topic from a temporal perspective rather than various areas of international law namely, the international environmental law, international humanitarian law and international human rights law perspectives. While my delegation does not seek to dispute the approach of the ILC, it is recommending that the ILC considers the content of the UNEP's report in its further elaboration of the draft principles, particularly in relation to some of the gaps identified in the Report.

Mr. Chair,

Other noticeable acknowledgment of this subject matter was evidenced by the United Nations General Assembly's Resolution A/RES/56/4, titled, "Observance of the International Day for Preventing and the Exploitation of the Environment in War and Armed Conflict". This Resolution not only established November 6, as its day of observance but also underscored a key principle, which the delegation of Jamaica believes is critical for the ILC's contemplation, that is, "*the necessity of safeguarding the environment for future generations.*" This reflects the intergenerational equity principle, a widely recognized tenet by many legal traditions and legal systems notably, common law, civil law, Islamic law, and African customary law. The intergenerational equity principle calls for the preservation of natural resources and the environment for the benefit of future generations. At the core of this tenet is the notion that each generation holds the Earth in common with members of the past, present and future generations. Accordingly, the principle articulates the necessity of fairness in relation to the use and conservation of the environment and its natural resources among generations.

The delegation of Jamaica therefore submits that this principle should be specifically highlighted in *Principle 21 (Sustainable use of natural resources)*. Jamaica notes that pursuant to international humanitarian law, occupying powers shall use natural resources for the benefit of the population, which is referred to as usufruct. The rules in relation to usufruct were enunciated prior to the principle of sustainable use/development. We have observed that the current draft principle seeks to bring the rules relating to usufruct in line with modern realities and international environmental law developments. In light thereof,

the Jamaican delegation believes that the intergenerational equity principle should be included in Principle 21 by the introduction of language which mandates the Occupying Power to use the natural resources not only in a sustainable manner, which minimizes harm but also with a view to ensure that the use of the natural resources is not prejudicial to the interests of future generations of the population of the occupied territory. Alternatively, it is proposed that population in this context should be read to include both present and future generations, and that this should be made plain in the commentary. This recommendation is reminiscent of the following dicta taken from the ICJ's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*,<sup>1</sup> which states that: "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn."

The delegation of Jamaica also submits that this view aligns with that of paragraph 1 of draft Principle 20, which stipulates that the Occupying Power must respect and protect the environment of the occupied territory, and Principle 3 of the Rio de Janeiro Declaration on Environment and Development ('Rio Declaration'), which has also stipulated that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations as well as Principle 24, which calls on States to respect international law, provide protection for the environment in times of armed conflict and co-operate in its further development, as necessary.

Mr. Chair,

The aforementioned 2017 Resolution on *Pollution Mitigation and Control in Areas Affected by Armed Conflict or Terrorism (UNEP/EA.3/L.5)*, *inter alia*: stresses the importance of preventing the pollution of rivers and water reserves with harmful substances as a result of armed conflict or terrorism. In view of cases of water pollution owing to armed conflict and the implications for human displacement as displaced populations seek fresh water resources to provide for their basic needs, it is recommended that a duty to prevent the pollution of rivers and water reserves with harmful substances as a result of armed conflict be included in the draft principles as a separate principle.

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<sup>1</sup> Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996,226 et seq., (241, para. 29).

Alternatively, the prevention of the pollution of rivers and water reserves with harmful substances in cases of armed conflict may be highlighted as a 'preventative measure' under Principle 2 (Measures to enhance the protection of the environment), which ought to be undertaken throughout each temporal phase. To this end, my delegation wishes to indicate that while it was evident from the Commentary that an explanation and a scope was given for the word "remedial measures" no scope was given for "preventative measures". We therefore recommend that a similar indication of the scope of "preventative measures" be included rather than a mere indication of the phases in which, such measures may be employed. We are not requesting an exhaustive list as this may not be possible or practical. However, some guidance in this regard would undoubtedly prove useful. Further, and in relation to paragraph (2) of Principle 2, my delegation observed that "preventive measures for minimizing damage" relates primarily to the situation before and during armed conflict. However, Principle 1 (Scope) only addresses, "during" armed conflict. It is therefore our recommendation that the word "before" be added in the Principle, for the purposes of clarity and consistency.

The delegation now turns its attention to an apparent contradiction between the scope and the purpose of the draft principles. During our assessment of the principles, we observed that the title of the draft principles refers to "environmental protection". However, it was observed that Principle 2, entitled Purpose, addresses "enhancing environmental protection." We are therefore querying the rationale for inclusion of the word "enhancing" in this provision as it was not elaborated on in the commentary, though it was mentioned. Is it intended to demonstrate a recognition of existing principles, which currently provide for the protection of the environment in armed conflict and expand thereon as indicated in Principle 1 (Scope), which explains that the principles are in respect of protection of the environment before, during and after the armed conflict? If this is the case, it is the belief of my delegation that this should be apparent in the relevant commentary.

In relation to Principle 15 (Environmental Considerations), my delegation notes the ICJ's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, which stipulates that:



"States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality".

In the discussion surrounding this paragraph, it was noted that the ICJ contemplated the issue of *whether obligations stemming from treaties relating to the protection of the environment were intended to be obligations of total restraint during military conflict*. In its response, the Court found that it did not consider that "the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment." However, there was an obligation on the part of States to take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives.

We noted that the ILC quoted this dictum in the commentary. However, considering the discussion of the ICJ and paragraph (5) of the relevant commentary of the ILC, the constitution of 'environmental considerations' are not clear. We are therefore seeking clarity in respect of the parameters or the understanding that formed the decision to include the term in the draft principles.

Finally, my delegation agrees with the views expressed by previous delegations that the phrase, 'significant harm' in Principle 22 (Due Diligence) and paragraph (2) of Principle 20, should be revised or deleted. We recommend that the phrase be replaced with positive language, which provides little to no room for abuse in their application. Such words were found in paragraph 5 of the UNEP Resolution, which refers to "minimize, mitigates and prevents."

In conclusion, Mr. Chair, my delegation looks forward to the further elaboration of the draft principles on environmental protection in relation to armed conflict by the ILC.