

73nd Session
of the General Assembly
Sixth Committee

Agenda Item 82
Report of the International Law Commission
on the Work of its 70th Session

**Cluster III - Chapters: IX (Protection of the environment in relation to armed conflicts),
X (Succession of States in respect of State responsibility) and XI (Immunity of State
officials from foreign criminal jurisdiction)**

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New York, 30 October 2018

Chairperson,

As to the topic “**Protection of the environment in relation to armed conflicts**” Austria commends Special Rapporteur Lehto for offering a very substantive first report which addresses a core issue, namely the relation between IHL and the law of the protection of the environment. Austria concurs with the view reflected in the report that the approach concerning the relationship between IHL and human rights, which has already been addressed by several decisions of international courts and tribunals, including the ICJ, should be followed in this regard.

Permit me to turn to the new Draft Principles provisionally adopted by the Drafting Committee this year. Draft Principle 19 (1) on the general obligations of an occupying power raises the question which additional obligations beyond the respect of relevant applicable international law can be derived from the duty to “take environmental considerations into account”. It is our understanding that in any case the occupying power is obliged to apply international environmental law binding upon it to the occupied territory as well, unless this effect is excluded by the rule in question.

As to Draft Principle 20, we concur with the view that the exercise of the right to administer and use natural resources in an occupied territory should not only aim at minimising, but also at preventing environmental harm. However, Austria questions the wording of this Draft Principle. It is our opinion that if the occupying power is permitted to use the resources in question, this permission must be understood to be granted under international law, hence the qualifier regarding the benefit of the population and other lawful purposes is redundant. Accordingly, we would propose to delete this qualifier and to introduce a reference to the applicable rules of international law.

Regarding Draft Principle 21 on due diligence, it is our view that this principle should be brought in line with Principle 21 of the Stockholm Declaration on Human Environment and Principle 2 of the 1992 Rio Declaration on Environment and Development, which are already well established in international law. While Draft Principle 21 reduces the obligation of an occupying power to due diligence, the two declarations contain an unrestricted responsibility of states “to ensure that activities within their jurisdiction *or control* do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction”. The present wording of Draft Principle 21 appears to diminish the responsibility of an occupying power.

Chairperson,

Permit me now to turn to the topic “**Succession of states in respect of state responsibility**”. We are grateful to Special Rapporteur Šturma for his second report dealing with essential problems of the topic, namely general rules on succession of

states in respect of state responsibility and individual cases of state succession. In this context, the Special Rapporteur discusses examples of state succession which, however, are open to different interpretations.

Draft Article 1 (2) regarding the scope constitutes a general clause on the subsidiary nature of the Draft Articles. This is redundant, since according to the *lex specialis* principle any special agreement takes precedence over the Draft Articles, even if they were converted into a convention. Instead, the Draft Articles could call upon states concerned to conclude special agreements aiming at solving responsibility issues resulting from state succession.

Draft Article 5, which restricts the applicability of the Draft Articles to successions of states occurring in conformity with international law, corresponds to the relevant articles of the Vienna Convention on Succession of States in respect of Treaties and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts as well as of the Draft Articles on Nationality in case of Succession of States. We accept this approach, as it would be difficult, if not impossible, to establish rules for cases of state succession not in conformity with international law. In such cases, like the purported annexation of a territory in violation of peremptory norms of international law, one even has to question whether this constitutes a case of succession of states at all. What is clear, however, is that states are under an obligation not to recognise such a situation in line with Article 41 (2) of the State Responsibility Articles.

As to the Draft Articles proposed by the Special Rapporteur, in particular those regarding specific cases of state succession, my delegation would also like to offer a few comments.

Draft Article 6 does not indicate who exactly is to be understood by the term "subject" in paragraphs 2 and 4. Further explanation whether this includes individuals and corporations would be appreciated.

As to Draft Article 8 on newly independent states my delegation doubts that the particular reference to such a group of states is still needed. The Draft Articles on Nationality of Natural Persons in relation to the Succession of States already abstained from a reference to this category of states. *Likewise, the present topic does not need to deal with this category since the matter is one of history and the present Draft Articles would not have any retroactive effect.*

Draft Article 10 (2) on incorporation and Draft Article 11 on dissolution are obviously prompted by the claim for justice according to which no unlawful act should remain without responsibility. However, state practice does not warrant the solution contained in these provisions. The practice as characterised by the report of the Special Rapporteur is not very convincing, since most of the cases concern succession

into treaties or debts, or explicit acknowledgements of the responsibility by the successor state.

In view of this practice, it is doubtful whether the proposed Draft Articles would be acceptable to states. The legal consequences of succession can be best described by the words of Judge Crawford in the latest edition of Brownlie's Principles of Public International Law concluding that "[t]he preponderance of authority is in favour of a rule that responsibility for an international delict is extinguished when the responsible state ceases to exist". In our view, only in cases where a successor state acknowledges and adopts the unlawful acts of a predecessor state as its own, in line with Article 11 of the State Responsibility Articles, or is unjustly enriched as a consequence of such an act, the obligations arising from the internationally wrongful act of the predecessor state would be transferred to the successor state. However, it is doubtful whether this transfer of obligations is the consequence of a succession of states at all. Rather, it seems to be based on other rules of international law.

Chairperson,

Turning to the topic "**Immunity of State officials from foreign criminal jurisdiction**", the Austrian delegation appreciates the 6th report of Special Rapporteur Escobar Hernández, which addresses central issues such as the definition of criminal jurisdiction, the acts of the forum state affected by immunity and procedural issues in relation to immunity. Nevertheless, my delegation regrets that it was not possible to present new Draft Articles despite the great importance of this topic.

The Commission discussed in particular three issues: the timing of the consideration of immunity, the acts affected by immunity and the determination of immunity.

With regard to timing, the first of these issues, Austria has always maintained the view that immunity does not hamper investigations short of measures of constraint. In its 2008 judgment in the case *Djibouti v. France*, the ICJ stated that "the determining factor in assessing whether or not there has been an attack on the immunity of the Head of State lies in the subjection of the latter to a constraining act of authority" (para. 170). Accordingly, as long as investigations are not connected with coercive measures against a person enjoying immunity, they are not violating that person's immunity and are thus not prohibited by international law. However, as soon as coercive measures are under consideration, the forum state and its courts are under an *ex officio* obligation to take the potential immunity of state officials into account. This applies during all stages of the criminal proceedings. At the same time, it is in the interest of defendants and their home states to assist the forum state in the early clarification of potential immunities and to invoke such immunities as early as possible.

During the discussions in the Commission of the second issue, the acts of the forum state affected by immunity, it was suggested that the role of INTERPOL and its practice of red notices should be further scrutinised (*see para. 312 of the report*). According to Article 82 of INTERPOL's rules on the processing of data, "red notices are published at the request of a National Central Bureau ... in order to seek the location of a wanted person and his or her detention, arrest or restriction of movement for the purpose of extradition, surrender, or similar lawful action." In accordance with Article 80 of INTERPOL's rules the final decision on the measures to be taken in pursuing red notices lies with the national authorities, and it is their duty to respect the immunity in case of measures of constraint. Hence, INTERPOL's red notices do not seem to warrant special consideration in this context.

The Special Rapporteur also proposed to analyse matters relating to cooperation between states and international criminal courts and the possible impact of such cooperation on immunity from foreign criminal jurisdiction. Our delegation does not see a necessity for the Commission to embark on this question, as it would *concern the interpretation of specific legal instruments and therefore* go beyond the general issues discussed under this item.