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Report of the International Law Commission

on the work of its 71st Session

Cluster II: Chapters: VI (Protection of the environment in relation to armed conflicts), VIII (Immunity of State officials from foreign criminal jurisdiction) and X (Sea-level rise in relation to international law)

Statement by

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New York, 31 October 2019

Chairperson,

Austria expresses its appreciation for the work of Special Rapporteur Marja Lehto and for her second report on the “**Protection of the environment in relation to armed conflicts**”. We also congratulate the Commission on the conclusion of the first reading of the draft principles, which present a full picture of the regime relating to this important area of international law.

As to draft principle 9 on state responsibility, we are not convinced by the current wording. Contrary to the text proposed by the Special Rapporteur, the current text adopted by the Commission reiterates the general rule that the draft principles are without prejudice to the rules on state responsibility. Therefore, draft principle 9 para. 1 is only of a subsidiary nature, and its only addition to legal discourse is that it specifies that reparation for damage must include “damage to the environment in and of itself”. In our view, it would have been clearer to retain the drafting of the third paragraph proposed by the Special Rapporteur, namely that the notion of “damage” includes damage to ecosystem services, “irrespective of whether the damaged goods and services were traded in the market or placed in economic use”. We also wonder to what extent existing regimes of state liability, *i.e.* regimes not relating to wrongful acts, regarding the protection of the environment would be applicable in situations of armed conflict.

Draft principle 10 on “corporate due diligence” and draft principle 11 on “corporate liability” both use the expression “corporations and other business enterprises”. This wording raises the question whether the draft principles cover also private military and security companies. The commentary does not offer guidance on this issue. Although we understand that these two draft principles are not imposing strict obligations on states, we would like to be reassured that they also apply to private military and security companies.

Regarding draft principles 13, 14 and 15, applicable during armed conflict, we believe that the relationship between the law of armed conflict and environmental law is not made sufficiently clear, neither by the structure of these draft principles nor by the commentary. As my delegation has already stated in 2015, these draft principles could be merged and shortened in order to add clarity and to put more emphasis on the objective of the protection of the environment. For example, it is not necessary to reiterate the principles and rules of the law of armed conflict in principle 14, as they are already well established as parts of the law of armed conflict.

However, the draft principles should expressly confirm that international environmental law continues to apply during armed conflicts. In this context, reference can be made to the “Draft articles on the effects of armed conflicts on treaties”, submitted by the Commission to the General Assembly in 2011. These draft articles explicitly stipulate that treaties relating to the international protection of the environment belong to those treaties the subject-matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict.

Furthermore, we would like to state that Austria understands the reference to the principles of proportionality and military necessity in draft principle 15 as only addressing the *ius in*

bello. However, these principles are also important for the *ius ad bellum* where the consequences of military actions for the environment have to be considered as well.

Austria welcomes that those draft principles applicable in situations of occupation, i.e. draft principles 20 to 22, are to apply to all forms of "occupation" in the sense of international humanitarian law. According to Article 2 of the Fourth Geneva Convention of 1949, an occupation exists, "even if the said occupation meets with no armed resistance". This understanding is in line with the advisory opinion of the International Court of Justice on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory and is duly reflected in the commentary to the present draft principles introducing Part Four on occupation.

Chairperson,

Turning now to the topic "**Immunity of State officials from foreign criminal jurisdiction**", the Austrian delegation commends Special Rapporteur Concepción Escobar Hernández for her seventh report which contains a rich analysis of the relevant state practice, the jurisprudence of domestic and international courts as well as the pertinent legal writing in this field. However, my delegation notes with regret that the Commission was not in a position to discuss the draft articles as proposed by the Special Rapporteur in more detail. We will thus focus in this intervention on the draft articles as proposed by the Special Rapporteur in her seventh report and the preliminary debate on them as reflected in the Commission's report.

As to the definitions, the Special Rapporteur obviously intends – as a way of providing safeguards - to propose rules determining the level of the national organs that should be competent to deal with matters of immunity. However, since the determination of the competent organs is a matter of national law, we do not support a determination of the level of the competent organs in the draft articles.

As to draft article 8 on "Consideration of immunity by the forum State" Austria wishes to point out that issues of immunity must be examined as soon as possible, not only in the context of judicial proceedings, but also in the context of administrative acts and proceedings of the forum state. Accordingly, immunity must be examined by all competent authorities at the earliest stage, prior to an indictment. This, however, does not preclude the possibility to conduct the necessary investigations in order to verify the identity and status of the person invoking immunity.

Regarding draft article 9 on "Determination of immunity", we wish to underline that it is not only judicial organs that determine whether or not a person enjoys immunity. In particular in a situation where immunity is invoked against executive acts of constraint, it is usually the foreign ministry of the forum state that is consulted by the other executive authorities. According to Article 9 of the Austrian Introductory Law to the Jurisdiction Law, judicial organs have to seek the opinion of the ministry of justice if there are doubts as to whether a person enjoys immunity. In practice, the ministry of justice will consult in these matters with the foreign ministry.

Concerning draft articles 10 on invocation and 11 on waiver of immunity, the Special Rapporteur mentioned that the organ competent to invoke or waive immunity should be part of the judicial system of the state of the official. However, in many legal systems these matters belong to the competences of the executive branch of government, and therefore it is often the foreign ministry that is competent to make such decisions.

Draft article 10 (2) as proposed by the Special Rapporteur creates the impression of an obligation to invoke immunity, whereas the invocation of immunity is a matter of discretion for the state of the official, as reflected in draft article 10 (1).

In the light of the discussion on draft article 11, we consider it useful to provide for the possibility that the forum state may request the state of an official enjoying immunity *ratione materiae* to waive immunity if the official allegedly has committed a grave crime other than one listed in draft article 7. In the case of officials enjoying immunity *ratione personae*, this possibility should be provided for all grave crimes, including those listed in draft article 7.

As to the various communications among the states concerned addressed in draft articles 11, 12 and 13, the Commission should take into account that the appropriate way for such communications is the diplomatic channel.

During the discussions in the Commission, reference was made to the crucial link between the procedural aspects of the topic and the exceptions to immunity in respect of the crimes under international law set out in draft article 7. Without questioning these exceptions as such, my delegation considers that a way to solve this issue could be to submit any dispute relating to the application and interpretation of these exceptions to the review by the International Court of Justice. Such a procedure would undoubtedly strengthen the judicial control of the invocation of such exceptions and prevent possible abuses.

Draft article 14 on the possible transfer of criminal proceedings should provide for assurances to the forum state to guarantee genuine criminal proceedings in the state of the official. It should equally impose a duty on the forum state to cooperate with the authorities of the state of the official after the transfer of the proceedings to ensure that they are in possession of the necessary evidence.

As to the future work on this subject, Austria is of the view that the draft articles should be converted into a convention. This would avoid any further discussion as to the *de lege lata* or *de lege ferenda* nature of some provisions and would lay the basis for a mandatory dispute settlement regime.

Chairperson,

I will conclude this statement with a few remarks on the topic of **"Sea-level rise in relation to international law"**. Although Austria is only indirectly affected by sea-level rise, its consequences are felt worldwide, affecting also landlocked countries. The recent reports of the Intergovernmental Panel on Climate Change (IPCC) are alarming. It is timely that the ILC addresses the legal challenges resulting from sea-level rise. Austria appreciates the work already undertaken by the Commission and is looking forward with great interest to the first

results of the study group established this year. In any case, we wish to underline that the provisions of the UN Convention on the Law of the Sea should remain unaffected.