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73RD SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY

Sixth Committee

Agenda Item 82

Report of the International Law Commission on the work of its sixty-ninth sessions
Cluster III

Chapter IX: Protection of the environment in relation to armed conflicts

Chapter X: Succession of States in respect of State responsibility

Chapter XI: Immunity of State officials from foreign criminal jurisdiction

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NEW YORK
Friday, October 26, 2018

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Chapter IX: Protection of the environment in relation to armed conflicts

Mr. Chairman,

On the topic of the protection of the environment in relation to armed conflicts, allow me to commend the Special Rapporteur, Ms Marja Lehto, for her first Report which addresses the complex issue of the protection of the environment in situations of occupation. The Report contains an in-depth analysis of some rules of the law of occupation pertaining to the protection of the environment, often based on an evolutionary approach, given that, at the time of their inception, environmental concerns were not at the forefront of international law.

The Report highlights also the multiple links between the law of occupation and applicable rules of international human rights law, such as the right to health, or general principles of international environmental law. The above rules and principles seem to have informed the rule expressed in draft principle 19[1], i.e. that the occupying power has the obligation to respect and protect the environment and prevent significant environmental harm. This obligation is closely related to the well-established duty of the occupying power to preserve civil life and maintain the orderly government of the occupied territory, as nowadays environmental protection is one of the key functions assumed by public authorities.

We also welcome the deletion by the Drafting Committee, in the first paragraph of draft principle 19, of the reference to maritime areas adjacent to the occupied territory, where the duties of the occupying power in relation to the environment would also be applicable. Such an assumption took for granted that the authority of the occupying Power extends to those areas. This, however, has to be assessed on a case-by case basis, depending on whether or not the occupying power has assumed effective control over those areas or whether such control has remained within the territorial State.

Turning to draft principle 20, on the sustainable use of natural resources of the occupied territory, there is no doubt that the requirement of sustainable use applies to the use of any natural resources, whether located in an occupied territory or not. This being said, the question whether and to what extent the use of the latter may be effectuated by the occupying power is a complicated one, extending far beyond the question of sustainability, thus it is not easy to formulate a single provision capturing all different situations.

To start from the law of armed conflict already referred to in the text of draft principle 20, we are of the view that the relevant legal analysis should not focus only on article 55 of the Hague Regulations of 1907 laying down the so-called "usufructuary rule", but should also encapsulate article 47 thereof, as well as article 33 of the fourth Geneva Convention of 1949, both of them prohibiting pillage. It is on the basis of these provisions that the International Court

[1] This statement refers to draft conclusions 19-21 as provisionally adopted by the Drafting Committee.

of Justice held, in the case of the *Armed Activities on the territory of the Congo*, that the looting, plundering and exploitation of the natural resources in the territory of the Democratic Republic of the Congo by members of the military forces of a neighboring country was illegal from the point of view of the *ius in bello*. We are therefore of the view that if the draft principle 20 is maintained, the relevant commentary should also provide an analysis indicating under which circumstances the prohibition of pillage may render illegal the exploitation of natural resources located in an occupied territory. In addition, the commentary should also identify cases (such as extraction of mineral resources that goes beyond the pre-occupation levels or is directed to the domestic market of the occupying power) where such exploitation, even if not amounting to pillage, goes beyond the "usufructuary rule" and is, hence, not allowed under the law of armed conflict.

In addition, it should be noted that the text of draft principle 20 seems to imply that the permissibility of the administration and use of natural resources in the occupied territory is solely dependent upon the law of armed conflict. However, other principles of international law should also be taken into consideration, such as the sovereignty of the territorial State over its natural resources or the principle of self-determination in cases the latter has been recognized by the United Nations as applicable for the benefit of the local population. Moreover, in cases of illegal occupation where the natural resources are not allocated to the local population but intended for export, the duty of third States not to recognize such a situation, which implies that they should not engage into economic or other forms of relationship which may entrench the illegal occupation[2], should also be taken into consideration. It is for these reasons that the wording of draft principle 20 should in our view be reformulated, through the inclusion of a reference, or even a non-prejudice clause, to applicable principles of general international law, which may qualify as permissible or not in a given case the use and administration by the occupying power of the natural resources in an occupied territory.

Chapter X : Succession of States in respect of State responsibility

Mr. Chairman,

On the topic of the succession of States with respect to State responsibility, I wish to commend the Special Rapporteur, Mr. Pavel Šturma, for the high quality of his Second Report which, which despite the scarcity of State practice on some of the issues addressed in the report, proposes carefully considered draft articles based on the general principles of the law of state responsibility.

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[2] See the Advisory Opinion of the International Court of Justice in the *Namibia* case, *Reports* 1971, par. 124, p. 55-56.

The general rule in draft article 6, i.e. that responsibility in principle does not transfer to the successor State in case the predecessor State continues to exist, is in agreement with the cardinal rule underlying the law of State responsibility, that the wrongdoing State should be held responsible for its internationally wrongful act. We also agree with the distinction between the attribution of the wrongful act to the predecessor State, addressed in paragraph 1 of draft article 6, and the legal consequences of such attribution, addressed in paragraph 2.

That being said, the term "attribution [to a State] of an internationally wrongful act" proposed by the Special Rapporteur and retained by the Drafting Committee, might create confusion with the attribution of conduct to a State, which is one of the conditions for a State to incur responsibility, according to article 3(a) of the ILC's Draft Articles on State Responsibility of 2001. For this reason it might be useful to redraft the first paragraph of draft article 6, either by using the term "designation" of a State as responsible for an international wrongful act[3], or by clarifying that an international wrongful act *remains* the act of the predecessor State if committed by that State before the date of succession.

Regarding paragraph 3 of article 6 relating to a continuing act perpetrated successively by the predecessor State and the successor State, it should be clarified whether each of the two States has sole responsibility for its own conduct or whether shared responsibility arises out of such a breach.

Paragraph 2 of draft article 7 as well as paragraph 3 of draft article 9, provide for the liability of both the predecessor and the successor State. We are of the view that either the text of these provisions or the commentary thereof should provide guidance regarding the apportionment of such liability.

Although the concept of "newly independent States" referred to in draft article 8 is well known by international lawyers, a definition of the latter should be inserted in draft article 2, as it is already the case with article 2 par. 1(f) of the 1978 Vienna Convention on Succession of States in respect of Treaties, as well as with article 2 par. 1(e) of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

Draft articles 10-11 dealing with cases of succession (merger, incorporation or dissolution) where the predecessor State has ceased to exist, provide a justified exception to the rule of non-succession to responsibility. In our view, it would be inequitable to deprive the injured State or person of any chance to receive reparation by applying that rule, because if that was the case no State would incur the relevant obligation.

Regarding in particular paragraph 2 of draft article 11, on the obligations of the successor States arising out of an internationally wrongful act of a dissolved State, we are of the view that one of the elements to be added to that provision is whether the wrongful act has been

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[3] This term is already contained in paragraph 44 of the Special Rapporteur's Second Report.

committed by an organ of a territorial unit of the predecessor State that has later become an organ of one of the successor States, a factor already taken into account in paragraph 2 of draft article 7, as well as in paragraph 2 of draft article 9.

Chapter XI: Immunity of State officials from foreign criminal jurisdiction

Mr. Chairman,

I would like, first of all, to thank the Special Rapporteur for her sixth Report containing, on the one hand, a thoughtful and helpful summary of last year's heated debate on Draft Article 7, both within the Commission and the Sixth Committee, and, on the other, the initiation of the analysis of the procedural aspects of immunity of State officials from foreign criminal jurisdiction.

Given the fact that the sixth report is an interim one, in the sense that it does not propose new Draft Articles and, consequently, the relevant debate within the Commission is expected to be finalized next year, our comments would be necessarily preliminary at this stage and focus mainly on methodological issues:

Mr. Chairman,

As the Special Rapporteur has eloquently shown in her report, the proper examination of procedural aspects of immunity is of crucial relevance to the whole set of Draft Articles, especially in view of the scarcity of international and national case law and doctrine on the topic. More importantly, their clarification could provide an element of neutrality and certainty in the treatment of immunity (or the absence thereof) and contribute to reducing the risk of politically motivated and abusive prosecutions of foreign State officials.

In this context, we concur with the Special Rapporteur that a broad and comprehensive approach of those issues is required and we are confident that, along the lines suggested by some Commission members, a proper distinction would be made between procedural rules that apply to all cases where immunity of a State official comes into play and procedural safeguards which should apply in cases where exceptions to such immunity are at issue.

Turning to the procedural aspects of immunity related to the concept of jurisdiction, i.e. the "when", "what" and "who" examined in Chapter II of the sixth report of the Special Rapporteur, we would like to note the following:

Given the diversity and variety of national laws and procedures, we believe that there is no need to define the term "criminal jurisdiction" for the purposes of the present Draft Articles. A functional approach of that notion based on appropriate criteria would suffice, in our view, for the proper examination of relevant issues.

We also believe that the distinction between immunity rationae personae and immunity rationae materiae should be maintained in the relevant analysis to the extent required by the difference in their substance and normative elements.

Regarding the acts of the authorities of the forum State which are affected by immunity, we would like to echo the views of some Commission members that issues relating to the consideration of immunity at the investigative stage as well as issues relating to the appearance of a foreign official as a witness and to precautionary measures need to be further analyzed and clarified.

With regard to the effect that an obligation to cooperate with an international criminal tribunal may have on the immunity of State officials from foreign criminal jurisdiction and the related procedure, we share the doubts expressed by some Commission members as to the advisability of examining this issue, not only because such an exercise might be considered as going beyond the scope of the present Draft Articles as defined in Draft Article 1, but also in view of the diversity of existing international criminal tribunals and the fact that the relevant obligations of States as well as the procedural treatment of these cases are mainly governed by the statutes of those tribunals.

Finally, Mr. Chairman, with regard to the future work of the Commission on this topic, we invite the Commission to proceed with the examination of procedural aspects of immunity and to conclude the first reading of Draft Articles in a way that would allow it to overcome the division on Draft Article 7 and propose consensual and balanced solutions which would take into account all the relevant interests of the international community, in line with the moto *"Drawing a balance for the future"* adopted this year on the occasion of its 70th anniversary.

I thank you, Mr. Chairman.