

Provisional

For participants only

8 August 2023

Original: English

International Law Commission
Seventy-fourth session (second part)

Provisional summary record of the 3638th meeting

Held at the Palais des Nations, Geneva, on Thursday, 13 July 2023, at 5 p.m.

Contents

Cooperation with other bodies (*continued*)

Council of Europe

Organization of the work of the session (*continued*)

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).



Present:

Chair: Ms. Galvão Teles

Members: Mr. Akande
Mr. Asada
Mr. Cissé
Mr. Fathalla
Mr. Fife
Mr. Forteau
Mr. Galindo
Mr. Grossman Guiloff
Mr. Huang
Mr. Jalloh
Mr. Laraba
Mr. Lee
Mr. Mavroyiannis
Mr. Mingashang
Mr. Nesi
Mr. Nguyen
Ms. Okowa
Ms. Oral
Mr. Ouazzani Chahdi
Mr. Oyarzábal
Mr. Paparinskis
Mr. Patel
Mr. Reinisch
Ms. Ridings
Mr. Ruda Santolaria
Mr. Sall
Mr. Savadogo
Mr. Tsend
Mr. Vázquez-Bermúdez

Secretariat:

Mr. Pronto Principal Assistant Secretary to the Commission

The meeting was called to order at 5.05 p.m.

Cooperation with other bodies (agenda item 10) (*continued*)

Council of Europe

Mr. Tichy (Chair of the Council of Europe Committee of Legal Advisers on Public International Law), welcoming the opportunity to engage in dialogue with the Commission in person once more, said that cooperation between the Committee and the Commission was more necessary than ever in the face of challenges to the international legal order, in particular those arising from the war of aggression of the Russian Federation against Ukraine. Established in 1991, the Committee comprised the legal advisers of the ministries of foreign affairs of the 46 States members of the Council of Europe and its five observer States, together with those of four States with observer status specifically for the Committee and 11 participating international organizations, including, as from September 2022, the International Development Law Organization. In total, representatives of 66 States and international organizations were admitted to the Committee's meetings, which were usually well attended, allowing for personal contacts to be established among legal advisers within Europe and beyond.

The Committee functioned as a forum for coordination on matters of public international law and for discussion, reflection and advice; it also facilitated cooperation between the Council of Europe and the United Nations, including through its strong ties with the International Law Commission. The Commission's annual report to the General Assembly was discussed at the Committee's meetings in September every year, usually with the participation of the Chair of the Commission. Dialogue with international courts also took place; in September 2023, an exchange of views on the Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and Other International Crimes would be held with Ms. Silvia Fernández de Gurmendi, President of the diplomatic conference at which the Convention had been adopted and President of the Assembly of States Parties to the Rome Statute of the International Criminal Court.

An issue of high priority regularly discussed by the Committee was the aggression of the Russian Federation against Ukraine. Following the exclusion of the Russian Federation from the Council of Europe, the Committee had issued an opinion on the legal consequences of the cessation of its membership for its participation in treaty bodies. Another opinion of the Committee referred to recommendation 2231 (2022) of the Parliamentary Assembly of the Council of Europe, entitled "The Russian Federation's aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes". At its meeting in March 2023, the Committee had continued to focus on the public international law aspects of the Russian aggression, including all aspects of international criminal accountability before the International Criminal Court and other international legal bodies; it had also discussed the possibility of establishing a register of damage.

Acting as the European Observatory of Reservations to International Treaties, the Committee monitored compliance by States with rules of public international law in the field of treaty law, examining reservations and declarations made in respect of Council of Europe and United Nations conventions. In March 2023, it had decided likewise to examine reservations and declarations in respect of treaties concluded under the auspices of the Hague Conference on Private International Law. In September 2022, the Committee had added an item on the use of new technologies and international law to its agenda with a view to initiating dialogue on the application of international law to cyberspace, including in the field of humanitarian law, by organizing panel discussions and taking stock both of formal discussions within the United Nations and of relevant academic initiatives.

At each of its meetings, the Committee held an exchange of views on immunities of States and international organizations and diplomatic and consular immunity. Such exchanges covered topical issues, State practice and relevant case law, and might be of particular interest to the Commission, given its work on the topic "Immunity of State officials from foreign criminal jurisdiction". A September 2022 expert seminar on States' obligations

under public international law in relation to immunity of State officials had been intended to offer an academic and expert perspective on that complex topic, in view of current and emerging practices. Subjects discussed had included the determination of officials entitled to immunity *ratione personae* (possibly going beyond the “troika”); limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction; the relationship between immunity *ratione materiae* and individual criminal responsibility; the exercise of universal and extraterritorial jurisdiction in relation to international crimes; the consequences of the jurisprudence of the International Criminal Court for States if the Court issued an arrest warrant for officials of third States benefiting from immunity under customary international law, if such officials found themselves in the territory of a State party to the Rome Statute; and the removal of immunity before the Court as a consequence of the participation of a State party to the Rome Statute and of the third State, being the State of such an official, in an international treaty related to crimes under the Court’s jurisdiction.

Another topic of particular relevance to the work of the Commission related to non-legally binding agreements in international law, which the Committee had placed on its agenda in 2021, when an expert workshop on the matter had been organized at the initiative of the German delegation, and which the Commission had placed on its long-term programme of work in 2022. At its meeting in September 2021, the Committee had decided to prepare a questionnaire to elicit an overview of State practice, including substantive and procedural aspects of non-legally binding agreements and applicable rules. A year later, Professor Andreas Zimmermann of the University of Potsdam had been selected as a consultant to analyse the responses received. His report, submitted in December 2022, addressed the practice of States members of the Council of Europe, other States participating in the Committee and two international organizations that had replied to the questionnaire. A revised version of the report, taking into account additional responses received in 2023, was in preparation and could be shared with the Commission in due course. In March 2023, the Committee had decided to keep the item on its agenda under the revised title “Non-legally binding instruments in international law”, considering that the word “instruments” better reflected the non-legally binding nature of the objects of its study than “agreements”. The Committee’s secretariat had been asked to prepare a working document setting out best practices and, where relevant, guidelines.

Exchanges of views had been organized on two other subjects related to the Committee’s work on non-legally binding instruments. The first concerned treaties not requiring parliamentary approval, which had been taken up at the suggestion of the delegation of Slovenia. A draft questionnaire had been prepared; 19 States had so far responded to it. The Committee had encouraged more States to submit replies and would consider how to proceed on the topic at its next meeting in September 2023. Second, the Italian Ministry of Foreign Affairs had organized a panel discussion on the margins of the Committee’s meeting in March 2022 to focus on the increasing role of “soft” multilateral law-making and its implications for international governance. In September 2022, the Committee had agreed to include the issue of soft-law instruments on its agenda for future meetings. In March 2023, it had taken note of a non-paper presented by the delegation of Italy and agreed to a proposal to prepare and circulate a draft questionnaire on soft-law instruments for comment by delegations; the questionnaire would provide information for use in analysing the impact of soft law on the activities of ministries of foreign affairs and legal departments. It was intended to complement, rather than overlap with, the Committee’s other initiatives in the field of non-legally binding instruments.

The Committee and the Commission shared the common goal of promoting the rule of law and the role of public international law in international relations. As it pursued its work on issues related to treaty law, immunities, non-legally binding instruments, international criminal justice and other relevant subjects, the Committee would continue to welcome the Commission’s input and value the interaction between the two bodies.

Mr. Polakiewicz (Legal Adviser of the Council of Europe) said that the issue of the war of aggression waged by the Russian Federation against Ukraine had been at the heart of the Fourth Summit of Heads of State and Government of the Council of Europe, held in Reykjavik in May 2023, which had been organized after an 18-year break with a view to recommitting to common values and standards and considering the role that the Council

should play in the new geopolitical reality. The Russian aggression against Ukraine had challenged the very foundations of the international order, and the Council had been among the first international organizations to take action. On 25 February 2022, a day after the full-scale invasion of Ukraine had begun, the Council had taken the unprecedented step of suspending the representation rights of the Russian Federation. On 15 March 2022, the Russian Federation had announced its withdrawal from the Council and its intention to denounce the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights); on 16 March, however, the Council's Committee of Ministers had decided to expel the aggressor country from the Council with immediate effect, after 26 years of membership. The decision had been taken in the context of the suspension procedure already launched under article 8 of the Council's statute.

As a result of the expulsion of the Russian Federation, the Council had faced a series of questions of public international law that had not been examined in detail before. First, given that the European Convention on Human Rights was open only to States members of the Council of Europe, the Russian Federation could no longer remain a party to the Convention after its expulsion. Both the Committee of Ministers and the European Court of Human Rights had interpreted the relevant provision of the Convention, article 58, to mean that the status of the Russian Federation as a party to the Convention would not end immediately on 16 March but only six months later, as in the case of denunciation. Accordingly, the Court remained competent to adjudicate on applications directed against the Russian Federation in relation to acts or omissions occurring during the first six months of the large-scale invasion of Ukraine, which was likely to generate a significant influx of new applications involving complex questions at the intersection of human rights law and international humanitarian law. Overall, the Court was processing more than 15,000 individual applications lodged against the Russian Federation. Leading judgments had been issued in cases such as *Fedotova and Others v. Russia*, on recognition of same-sex couples; *Navalnyy v. Russia*, concerning the applicant's poisoning; and *Glukhin v. Russia*, on the use of facial recognition technology in Moscow.

An unprecedented number of inter-State cases against the Russian Federation were also pending, 10 of which derived from applications lodged by Ukraine. On 25 January 2023, the Grand Chamber of the Court had declared the first of them, in the case of *Ukraine and the Netherlands v. Russia*, partly admissible. The case concerned complaints relating to the conflict in eastern Ukraine involving pro-Russian separatists, which had begun in 2014. The Government of Ukraine principally complained of alleged continuing patterns of violations of several articles of the European Convention on Human Rights by separatists in the "Donetsk People's Republic" and "Lugansk People's Republic" and by members of the Russian military forces. The case raised complex questions of attribution and responsibility. The Committee of Ministers continued to supervise the execution of judgments and friendly settlements concerning the Russian Federation. However, as the latter refused to participate in meetings of the Committee of Ministers on the subject, despite invitations to do so, that was no easy task. The Committee of Ministers would need to develop the means to execute judgments against a non-cooperating respondent State that was no longer a party to the Convention.

Unlike the European Convention on Human Rights, most of the more than 200 conventions concluded under the auspices of the Council of Europe were open to non-member States. To date, the Russian Federation had denounced only one – the Criminal Law Convention on Corruption – and thus remained a party to 41 others, some of which established elaborate follow-up or treaty body mechanisms. Some States members of the Council of Europe considered it problematic to continue treaty relations with a State that had so blatantly violated the values on which the Council's convention regime was based. The Council had consulted its Committee of Legal Advisers on Public International Law regarding the applicability of articles 60 and 62, in particular, of the Vienna Convention on the Law of Treaties. While the substance of those provisions was largely considered to embody customary international law, the procedural aspects had received far less attention and, to his knowledge, had never been tested in practice. It had been concluded that article 60 was of limited usefulness in that context, as human rights treaties were excluded from its scope, and that article 62 was ill-suited to a situation in which the parties to a treaty sought

to force a defaulting State to withdraw from the treaty against its will while maintaining the treaty in force as between themselves.

In the end, innovative solutions had been found. The Committee of Ministers, as the Council's governing body, had no direct authority over treaties despite their creation under the auspices of the Council. The Committee had therefore invited the various bodies representing all the parties to the relevant treaties to decide, on the basis of their rules of procedure, the modalities of participation by the Russian Federation and to consider how such participation might be restricted in the light of the Russian aggression. Similar decisions had been taken with regard to Belarus, which was a party to 12 "open" conventions of the Council. The approach taken by most of the treaty bodies in question had been to amend their rules of procedure to allow them to restrict the participation rights of the States concerned, such as by prohibiting the election of their representatives to serve as Chair or Vice-Chair or limiting their participation in meetings to online participation only; however, the right of the Russian Federation to vote on treaty-related issues, such as interpretation or amendments, had remained unaffected.

In the wake of the United Nations General Assembly's adoption of resolution ES-11/5, a key deliverable from the Fourth Summit of Heads of State and Government of the Council of Europe had been the establishment of the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine in the form of an enlarged partial agreement of the Council. The concept of enlarged partial agreements was well established in the Council's practice but had required adaptation to the new and challenging circumstances at hand. Such agreements were not considered treaties but were, rather, a form of cooperation that was more flexible and could be implemented more quickly and easily. Thus far, 44 countries and the European Union had joined or indicated that they would join the Register as a platform for intergovernmental cooperation within the institutional framework of the Council. In addition to the United States of America, Canada and Japan, other States beyond Europe were expected to participate. The Register would be kept not in Strasbourg but in The Hague, in proximity to the International Criminal Court and the European Union Agency for Criminal Justice Cooperation. The primary purpose of the Register was to ensure that victims of human rights violations had a platform to document their experiences and to seek justice, and it was expected that a victim-centred approach would be followed. It was the first time such a register had been established during an ongoing armed conflict. The United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory had served as a source of inspiration for the Register's statute. The Register was only the first step in ensuring a comprehensive compensation mechanism for Ukraine. Once such a mechanism was established, all information held in the Register would be transferred. A host State agreement between the Committee of Ministers and the Netherlands had been adopted the previous day, and operations were beginning under the Executive Director, who had already been appointed by the Conference of Participants in the Register.

The Council of Europe was involved in deliberations on the creation of a special tribunal for the crime of aggression. At the Fourth Summit of Heads of State and Government, support had been expressed for efforts to hold the political and military leadership of the Russian Federation to account for its war of aggression against Ukraine. The participants had welcomed the progress made towards the establishment of a special tribunal, noting that the Council should participate in relevant consultations and negotiations and provide expert and technical support.

In the face of unprecedented events, it was the duty of lawyers to find innovative solutions to respond to barbarity. Impunity anywhere sent the wrong signal everywhere. At the same time, lawyers must be aware that their actions would create precedent. In arguing for an international legal order based on the rule of law, they must themselves be irrepensible. The work of the Commission provided important elements for the work of the Council of Europe and its Committee of Legal Advisers as part of the community of international lawyers.

Mr. Fife, welcoming the continuity of the Committee's work, even in the face of dire events, said that its collection, analysis and transmission of State practice contributed immensely to the codification and progressive development of international law. The

Committee brought together States both within and outside Europe, together with international organizations, and was open to exchanges on issues such as developments pertaining to the core functions of the Council of Europe and technological change. The European Observatory of Reservations to International Treaties had originally served to help States members of the Council stay abreast of relevant developments, but it had also contributed to the work of the Commission on reservations to treaties and provided guidance to States on how to respond.

Mr. Patel expressed the strong view that the interaction with the Legal Adviser of the Council of Europe left much to be desired. It had the air of a political briefing on a dispute between two States, using terminology – “Russian aggression”, “war”, “barbarity” – that could be contested. The issue of a dispute between two States should not have been raised before the Commission. He failed to understand the purpose of explaining the political reasoning, processes and plans of the Council of Europe or referring to the competence of the European Court of Human Rights. In the Commission’s constructive dialogues with other similar bodies at its current session, such matters had not been raised. If the Commission were to discuss the migration crisis, for example, it would not expect that mention would be made of the breach of the Protocol on Ireland/Northern Ireland in relation to the withdrawal of the United Kingdom from the European Union; similarly, in discussions with the Asian-African Legal Consultative Organization, references to bilateral disputes between States in Asia or Africa would not be appropriate. The Chair should have exercised due diligence with respect to statements made by representatives of cooperating bodies in their individual capacities. It was important for the Bureau to decide whom to invite and what topics they should cover in their statements. The secretariat should also exercise due diligence. He was sure that several members of the Commission shared his concerns, even if, for various reasons, they remained silent.

Mr. Asada, noting the particular status of enlarged partial agreements in the Council’s practice, asked whether the agreement with the Kingdom of the Netherlands on hosting the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine was considered a treaty, given that the agreement establishing the Register was not, and, if so, whether it would be deposited as a treaty with the United Nations.

Mr. Grossman Guiloff said that the presentations made had covered a number of matters of great interest and importance for the Commission’s work. As Special Rapporteur for the topic of immunity of State officials from foreign criminal jurisdiction, he was particularly interested in the issue of exceptions to immunity. The draft articles on immunity of State officials from foreign criminal jurisdiction, adopted by the Commission on first reading at its seventy-third session, established exceptions to immunity *ratione personae* for the troika but left the determination of who else might be covered by such exceptions to be decided as a matter of customary international law. The Commission would benefit from receiving the Committee’s legal analysis in that regard. He would also be interested to hear the Committee’s views on the list of crimes triggering exceptions to immunity from jurisdiction that had been included in draft article 7 of those draft articles. The Commission had yet to receive responses from States on the matter. Having heard some criticism of the safeguards included in the draft articles, particularly from the standpoint of comparative criminal law, he would likewise welcome the Committee’s views on that issue.

Mr. Jalloh, recalling the Commission’s decision to exclude the crime of aggression from the list of exceptions to immunity *ratione materiae* contained in draft article 7 of its draft articles on immunity of State officials from foreign criminal jurisdiction, requested further information on how the issue of immunity would be handled by the proposed special tribunal for the crime of aggression.

Mr. Tichy (Chair of the Council of Europe Committee of Legal Advisers on Public International Law), expressing full solidarity with the Legal Adviser of the Council of Europe, said that their statements had merely been intended to report on recent developments and discussions within the Council and its Committee of Legal Advisers, which were inevitably a product of political events and considerations. Members of the Commission did not need to sympathize with those considerations in order to take an interest in the relevant legal discussions.

Speaking as Legal Adviser in the Federal Ministry for European and International Affairs of Austria, he said that it would have been desirable for the crime of aggression to have been included among the exceptions to immunity set out in draft article 7 of the Commission's draft articles on immunity of State officials from foreign criminal jurisdiction; he hoped that further work to refine the list would result in its inclusion. In general, the international legal order appeared to be experiencing a move away from too restrictive a view of functional immunity. That would need to be taken into account in establishing new tribunals or extending the competence of existing ones.

Mr. Polakiewicz (Legal Adviser of the Council of Europe) said that the legal effect of an enlarged partial agreement for States members of the Council of Europe was simply to add a new activity, with a separate budget, to the Council's work; for non-member States, however, entering into such a cooperation framework created new obligations, including to contribute to that budget, and must be viewed as entry into an international agreement. The status of the host State agreement for the new Register of Damage was unambiguously that of an international treaty.

In reporting on the work of the Council of Europe, he hoped he had not offended anyone; unfortunately, its recent activities had been dominated by the aggression of the Russian Federation against Ukraine, which had changed Europe and the wider world. The Council had been compelled to take important and unprecedented decisions very swiftly; nonetheless, it continued to base its work on the Commission's output. The political context was undeniable, but the Council always acted within the bounds of international law, as one of the principal values enshrined in its statute.

The Chair, expressing appreciation to the representatives of the Council of Europe and its Committee of Legal Advisers on Public International Law for their participation, said that she looked forward to briefing the Committee on the Commission's work at the Committee's next meeting in September 2023.

Organization of the work of the session (agenda item 1) (*continued*)

The Chair said that consultations with the Special Rapporteur for the topic "Prevention and repression of piracy and armed robbery at sea" had suggested that it would be useful to establish an open-ended Working Group to examine the commentaries that would be submitted to accompany the draft articles on the topic. Discussions within the Bureau had resulted in a specific proposal to that end. She therefore took it that the Commission wished to create such an open-ended Working Group and to appoint Ms. Oral as its Chair.

It was so decided.

The meeting rose at 6.05 p.m.