

Provisional

For participants only

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Sixty-sixth session (second part)

Provisional summary record of the 3231st meeting

Held at the Palais des Nations, Geneva, on Friday, 25 July 2014, at 10 a.m.

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Present:

Chairman: Mr. Gevorgian
Members: Mr. Caflisch
Mr. Candiotti
Mr. Comissário Afonso
Mr. El-Murtadi
Ms. Escobar Hernández
Mr. Forteau
Mr. Gómez-Robledo
Mr. Hassouna
Ms. Jacobsson
Mr. Kamto
Mr. Kittichaisaree
Mr. Laraba
Mr. Murase
Mr. Murphy
Mr. Niehaus
Mr. Nolte
Mr. Park
Mr. Peter
Mr. Petrič
Mr. Saboia
Mr. Singh
Mr. Šturma
Mr. Tladi
Mr. Valencia-Ospina
Mr. Vázquez-Bermúdez
Mr. Wako
Mr. Wisnumurti
Sir Michael Wood

Secretariat:

Mr. Korontzis Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Protection of the environment in relation to armed conflicts (agenda item 10)
(continued) (A/CN.4/674)

The Chairman invited the Special Rapporteur to summarize the debate on her preliminary report on the protection of the environment in relation to armed conflicts (A/CN.4/674).

Ms. Jacobsson (Special Rapporteur) said that she would address only some of the specific issues raised during the debate but that all the comments made by the members of the Commission would be duly reflected in her second report. The objective of the preliminary report had been to seek the views of colleagues on the matters to be dealt with as part of future work on the topic; that approach should not be interpreted as surrender or indecision on her part. Many members of the Commission had offered their views on Additional Protocol I to the Geneva Conventions and the principles of proportionality and military necessity, which belonged purely to the sphere of *jus in bello* and thus fell outside the scope of the preliminary report. She would return to those aspects in her next report, as well as to post-conflict issues such as peacekeeping operations, reparation and responsibility.

Although the majority of members had welcomed the adoption of a three-phase approach, several had expressed a preference for a thematic approach. That solution, adopted in the relevant 2009 United Nations Environment Programme report, had proven unsuitable, however, as instead of allowing a holistic approach to the subject, it separated the various branches of law: the methodology thus made the elaboration of guidelines or operational recommendations difficult. Although many members had also been of the view that greater emphasis should have been placed on phase two in the preliminary report, wished to make it clear that she had no intention of neglecting that phase in her second report. On the other hand, she disputed the argument that the 2011 syllabus for the topic supported the proposition that phase two was at the heart of the legal issues. The Commission's composition had changed since 2011 and it was the opinion of the current members that should guide its work on the topic. Nonetheless, it was probably necessary to clarify what was understood by phase two. The starting point for an analysis of that phase was the law of armed conflict, as set out in treaties such as the 1949 Geneva Conventions and their additional protocols. There was no doubt that that was an important body of law for the purpose of protecting the environment: the Commission could obviously not modify the provisions of such treaties. At the same time, other rules of international law were applicable *before* or *after* an armed conflict, applying either exclusively to those phases or also to the protection of the environment *during* armed conflict (phase II). It was that body of law that needed to be identified, and she intended to do so in her second report, which would take account of the provisions of international humanitarian law on measures that needed to be addressed before an armed conflict commenced, such as article 36 of Additional Protocol I to the Geneva Conventions.

With regard to the scope of the topic, she recalled that her intention was not to exclude weapons, but that the issue should not be the focus of the Commission's work. As had been proposed, the solution might be to include a "without prejudice" clause. The exclusion of cultural heritage had been supported by most members who had spoken on the issue. The relationship between the environment and cultural heritage was complex, particularly with regard to aesthetic and characteristic aspects of the landscape and indigenous peoples' rights to their environment as a cultural and natural resource. The Commission should perhaps also consider the distinction between the protection of cultural property and of cultural heritage in relation to armed conflict. A gap arose there because of a divergence in the definition of "cultural property" in the 1954 Convention for the

Protection of Cultural Property in the Event of Armed Conflict and the definition of “cultural heritage” in the 1972 Convention for the Protection of the World Cultural and Natural Heritage, which was broader, covering also the works of man or the combined works of nature and man, such as aesthetic aspects of landscapes. She would again consult experts at the United Nations Educational, Scientific and Cultural Organization and go into more detail on the various issues in her second report, taking into account the possible impact of certain aspects of law on the definition of the terms “environment” and “natural environment”, as well as humanitarian law terms such as “civilian object” and “military objectives”, so that the Commission could take a decision on whether cultural heritage should be included in the definition of environment or addressed in another way. The issue of refugees and displaced persons remained within the scope of the topic, but would be addressed with caution, as had been proposed in the report. Lastly, there seemed to be a general understanding that there was no urgent need to address the question of the use of terms.

With regard to sources and the practice of States, she noted that the legislation and regulations mentioned in the preliminary report were those that contained “provisions *in relation to* an armed conflict” and not “provisions applicable *during* an armed conflict”: hence, there was no assumption that such provisions had replaced what was needed and required with regard to a situation of armed conflict. It would be valuable if the Commission could repeat its request to States for information but reformulate it to ensure that examples were provided of cases in which the rules of international environmental law, including regional and bilateral treaties, had continued to be applied during an armed conflict. The Commission’s ongoing work on other topics, especially the protection of persons in the event of disasters, had been and would continue to be taken into consideration in her work on the topic at hand.

Chapters XI and XII of the preliminary report had generated two categories of comments. Some members had been of the view that the manner in which environmental principles and concepts functioned in the context of armed conflict and the relationship between the two areas had not been explained with sufficient clarity. That view was justified, as it had not been her intention to establish that relationship but rather to seek the views of the members of the Commission on the relevance of the principles and concepts as such in order to formulate guidelines, recommendations or conclusions. Other members had considered that the issue of sustainable development was of little relevance to the topic; although she shared that opinion in principle, she noted that there had long been a political connection between war and sustainable development, outlined in Principle 24 of the Rio Declaration on Environment and Development.

With regard to the polluter-pays principle, she had not intended to suggest that it had been first formally identified in the *Trail Smelter* and *Chorzów Factory* cases, but rather that addressing issues associated with the regulation of pollution had been a consistent endeavour in international law and, more specifically, that international regulatory trends emphasizing the prohibition of pollution and State responsibility upon proof of damage had been evidenced in both of those cases and had contributed greatly to the formal recognition of the polluter-pays principle. With respect to the procedural aspects of human rights, that topic was being addressed by the Independent Expert on Human Rights and the Environment, Mr. Knox, who had written a report on the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).

With regard to the outcome of the work on the topic, members of the Commission had drawn attention to two main issues, namely the scope of protection and the target audience. The response to the second question was likely to differ depending on the phase, and would involve first defining the audience: the States that were the recipients of the

outcome or the natural and legal subjects that were supposed to apply the rules or recommendations on the ground. She would return to that question in her second report, which would include proposals for guidelines, conclusions or recommendations on, *inter alia*, general principles, preventive measures, cooperation, examples of rules of international law that were candidates for continued application during armed conflict and protection of the marine environment. The third report would contain proposals concerning post-conflict measures, including cooperation, sharing of information and best practice and reparation measures.

Provisional application of treaties (agenda item 8) (A/CN.4/675)

The Chairman invited the Special Rapporteur on the provisional application of treaties to introduce his second report (A/CN.4/675).

Mr. Gómez-Robledo (Special Rapporteur) reviewed the history of the Commission's work on the topic and gave an outline of the report, noting that the main objective had been to consider the legal consequences of the provisional application of treaties in greater depth. Although in practice there was indisputably a link between the provisional application of treaties and domestic law, especially constitutional law, it was not necessary for the Commission to do a comparative analysis. The second part of the report presented an analysis of the views expressed by States on the topic in the Sixth Committee. The majority had shown a clear interest in the topic, particularly the issue of the legal consequences of provisional application. He had duly taken into consideration their views, although further information on State practice would need to be collected before any conclusions could be drawn in that regard. The third part of the report dealt with the legal effects of the provisional application of treaties, which was the most important aspect of the work. That section addressed the issues of the source and nature of obligations arising from provisional application, which were the rights that arose from provisional application and on whom they were enforceable, what type of obligations arose from provisional application and on whom they were imposed and the termination of obligations. Any study that overlooked the legal consequences of provisional application for other States or third parties concerned would be of little interest in terms of the progressive development of international law or practice. The study at hand demonstrated that provisional application did indeed give rise to legal consequences, both at the national and international level. Cases concerning the scope of legal consequences of the breach of a treaty applied provisionally had been brought before international courts. The fourth part of the report was an examination of the legal consequences of the breach of a treaty applied provisionally. In that respect, it was noted that the regime of responsibility of States for internationally wrongful acts also applied in the case of breach of an obligation arising from provisional application. In the last part of the report, he stated his intention of collecting further information on State practice so as to present a more comprehensive analysis of the subject. He would also deal with the issue of provisional application of treaties by international organizations and would start to prepare draft guidelines or conclusions.

The Chairperson invited the members of the Commission to examine the Special Rapporteur's second report on the provisional application of treaties (A/CN.4/675).

Mr. Murase noted that the Special Rapporteur had rightly referred to international arbitral awards, and in particular to the *Yukos* case (*Yukos Universal Limited (Isle of Man) v. the Russian Federation*), which offered a good deal of insight into the issues discussed in the second report and highlighted both the usefulness and dangers associated with the provisional application of treaties. However, he had a number of comments to make in relation to the Special Rapporteur's analysis of the decision of the Permanent Court of Arbitration. First, one of the main issues involved in that case was whether the provisional application of the Energy Charter Treaty, provided for in article 45, paragraph 1, of that

instrument, was consistent with the Constitution and legislation of the Russian Federation. Given that a number of treaties contained similar provisional application clauses, a comparative analysis of the domestic law of a range of States was indispensable – contrary to the Special Rapporteur’s view. In paragraph 32 of the report, the Special Rapporteur indicated that the intention to apply a treaty provisionally could be “communicated either expressly or tacitly”. At the time of signing the Energy Charter Treaty, the Russian Federation had not made the declaration, provided for in article 45, paragraph 2, that it did not accept provisional application as set out in paragraph 1 of the same article. The Court of Arbitration had found that an express declaration was not required and that the clause could be considered to be directly applicable; however, having examined the relationship between the two paragraphs in the light of the Vienna Convention on the Law of Treaties, it had reached the conclusion that the provisional application of the Treaty was not inconsistent with the Constitution and domestic law of the Russian Federation. Another issue raised in that case was whether the obligation of provisional application extended to the whole treaty or only to selected provisions. The Court had rejected the theory of partial application put forward by the Russian Federation, arguing that a piecemeal approach under which it would be decided whether or not to provisionally apply each individual provision of a treaty depending on whether it was consistent with domestic law, within the meaning of article 45, paragraph 1, would come into conflict with the principle of *pacta sunt servanda*. It was important that the Commission should consider the question carefully. The Special Rapporteur had rightly recalled, in paragraph 83 of the report, that the termination of the provisional application of a treaty did not necessarily entail the termination of obligations created by such provisional application, as also illustrated in the *Yukos* case. Indeed, while the Russian Federation had terminated the provisional application of the Energy Charter Treaty on 19 October 2009 in accordance with article 45, paragraph 3 (a), the property of investors would remain protected until 19 October 2029 under paragraph 3 (b) of the same article. Again, the Commission should discuss the issue in greater detail.

The Special Rapporteur seemed to be treating a unilateral declaration of acceptance of treaty obligations and provisional application of a treaty on the same level, although the two should be differentiated. The concepts of “enforceability” and “opposability” should also be clarified, as the latter could be employed not only *vis-à-vis* third States but also *vis-à-vis* the other parties to the treaty. The Commission should not wait for States to have responded to the request for information on their practice before starting on its substantive discussions on the topic, as experience had shown that few States tended to respond to such requests.

Mr. Kittichaisaree said that he agreed with that remark: the Commission might well have to rely on other sources to avoid delaying work on the topic.

Immunity of State officials from foreign criminal jurisdiction (agenda item 5)
(*continued*) (A/CN.4/673)

Report of the Drafting Committee (A/CN.4/L.850)

Mr. Saboia (Chairman of the Drafting Committee) introduced the texts and titles of draft articles 2 (e) and 5, provisionally adopted by the Drafting Committee, as contained in document A/CN.4/L.850.

Draft article 2 (e) read:

“Definitions

For the purposes of the present draft articles:

...

(e) ‘State official’ means any individual who represents the State or who exercises State functions.”

Draft article 2 (e), as provisionally adopted by the Drafting Committee, was a more concise version of the draft text proposed by the Special Rapporteur in the annex to her third report (A/CN.4/673), which covered representation of the State and the exercise of elements of governmental authority. Some members considered that it was unnecessary to define “State official”, given that it was not defined in international law, but the Drafting Committee, taking into consideration the comments made in plenary, had considered that it was advisable and feasible to do so. It had also elected not to refer to the Head of State, the Head of Government and the Minister for Foreign Affairs, as it went without saying that they represented the State. That also averted confusion and ensured greater coherence within the draft articles as a whole, particularly with regard to the relationship between immunity *ratione materiae* and immunity *ratione personae*. The new definition was sufficiently broad to cover the members of the troika and individuals who, in various capacities, exercised a range of public functions on behalf of the State.

Bearing in mind the comments made during the plenary debate, particularly the reservations expressed by certain members in relation to the use of the term “organ” as proposed by the Special Rapporteur in her third report, the Drafting Committee had decided to retain the terms “official” in English, “*représentant*” in French and “*funcionario*” in Spanish. The new definition covered only individuals and not legal persons; the Drafting Committee had opted for the word “individuals” rather than “persons”, which could be used to describe the two, in order to underscore that aspect.

Although “State functions” was not a legal term, it had the advantage of being more specific than the term “functions”, which had been proposed during the debate in the Drafting Committee. Although international law did not, generally speaking, govern the structure and functions of the State, which were the responsibility of each State, it came into play in the case of activities that were essentially public functions or were linked to the exercise of elements of governmental authority. The concept of “State functions” should thus be understood in the broad sense; what was covered by the concept would depend on the specific circumstances of each case, which would have a bearing on the procedural aspects of immunity. It would be noted in the commentary that some members had not been entirely content with that term. As regards the use of the present tense in the definition of “State official”, it was understood that it was without prejudice to the application of immunity *ratione materiae* to former State officials. Some members had been of the view that it was not necessary to define “State official”, as the most important aspect in relation to immunity *ratione materiae* was the nature of the acts and not the person who had carried them out; that view would be reflected in the commentary.

Draft article 5, entitled “Persons enjoying immunity *ratione materiae*”, tracked the language of draft article 3 on persons enjoying immunity *ratione personae*, and read:

“Draft article 5

Persons enjoying immunity *ratione materiae*

State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.”

That draft article was at the beginning of Part Three, on immunity *ratione materiae*, which the Special Rapporteur would expand in her next report. As doubts had been raised about the expression “who exercise governmental authority”, which had been taken from the articles on responsibility of States for internationally wrongful acts, it had been deleted. However, although the draft article dealt only with subjective scope, there was a need to show a link between the State and the person that justified the person’s capacity to exercise

governmental authority, even though the nature of that link would be specified later in the context of the material scope. The Special Rapporteur had proposed referring to State officials “acting as such” or “acting in an official capacity”. The former option had been selected, as it referred to individuals who represented the State or exercised State functions, without referring to the material scope of immunity *ratione materiae*. When immunity *ratione materiae* was addressed, the expression “acting as such” could be reviewed. At that point it would also be necessary to consider the question of the immunity *ratione materiae* of the members of the troika, since draft article 4, provisionally adopted at the previous session, provided that the cessation of immunity *ratione personae* was without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

The Chairman invited the Commission to adopt document A/CN.4/L.850, containing draft articles 2 (e) and 5 on the immunity of State officials from foreign criminal jurisdiction, as provisionally adopted by the Drafting Committee.

Draft article 2 (e)

Definitions

Draft article 2 (e) was adopted.

Draft article 5

Persons enjoying immunity ratione materiae

Draft article 5 was adopted.

The Drafting Committee’s report as a whole, as contained in document A/CN.4/L.850, was adopted.

The Most-Favoured-Nation clause (agenda item 7)

Oral report of the Study Group

Mr. Forteau (Acting Chairman of the Study Group on the Most-Favoured-Nation clause) said that, in the absence of Mr. McRae, he had served as Chairman of the Study Group, which had been reconstituted during the current session. The Study Group had met three times, on 9, 10 and 18 July 2014. It had considered a draft report prepared by its Chairman that was divided into three parts. Part I recalled the origins of the work, the contemporary relevance of most-favoured-nation (MFN) clauses and the questions raised by such clauses, Part II gave an overview of the interpretation by the courts of MFN clauses contained in investment treaties, and Part III analysed in greater detail the various elements related to such interpretation. The final draft report was based on the working papers and other informal documents that had been discussed since 2009. The Study Group’s objective had been to prepare a new draft final report on that basis for consideration and adoption the following year.

The Study Group had decided to systematically analyse the various issues considered since work had begun on the topic, considering the most-favoured-nation clause within the broader framework of general international law, and taking account of developments since the adoption of the 1978 draft articles. It had once again stressed the importance and relevance of the Vienna Convention on the Law of Treaties in the interpretation of investment treaties and the need to take account of the Commission’s previous work on the fragmentation of international law and on subsequent agreements and subsequent practice in relation to the interpretation of treaties. It had recalled that the final document should be of practical utility to those involved in the field of investment and to

policymakers. The Study Group believed that it would be in a position to submit a revised draft final report at the Commission's sixty-seventh session in 2015.

The Chairman said that he took it that the Commission wished to take note of the oral report of the Study Group on the Most-Favoured-Nation clause.

It was so decided.

The meeting rose at 12.45 p.m.