Document:-
A/CN.4/3231

Summary record of the 3231st meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2014, **vol. I**

41. In light of the foregoing, it was best not to jump to the conclusion that the Commission had no intention of modifying the law of armed conflict, as was stated in paragraph 62 of the preliminary report. It was inevitable that the Commission would analyse the rules in the law of armed conflict in relation to the protection of the environment and clarify their content and scope and their parallel application with other rules of international law. It would adapt those rules to the current reality of the international community—including, but not limited to, the increased number of non-international armed conflicts—and to the technological developments that had fostered the proliferation of weapons of mass destruction, the use of which could have catastrophic consequences for the environment. In that connection, he shared the view expressed by Mr. Kamto about including within the scope of the topic the methods and means of warfare.

42. There had been important developments with regard to the protection of the environment in the national laws of certain South American countries where the ancestral world view of the indigenous peoples encompassed not only respect for Mother Nature—or "Pacha Mama" in the Quechua language—but also living in harmony with nature (art. 71). The Constitution of Ecuador went so far as to recognize nature as a subject of rights. Recognition of the rights of nature was also included as a cross-cutting theme in other constitutional provisions, such as those relating to a nation's overall development.

43. In the first sentence of paragraph 106 of her preliminary report, the Special Rapporteur referred to the "presumption" that the existence of an armed conflict did not *ipso facto* terminate or suspend the operation of treaties, as provided for in the articles on the effects of armed conflicts on treaties (art. 3). He agreed with Sir Michael that the reference was not to a presumption; rather it was to a general principle, as evidenced by the fact that the title of article 3 was "General principle". Some items on the indicative list of categories of treaties whose subject matter implied that they continued in operation during armed conflict, included in the annex to the articles on the effects of armed conflicts on treaties, were illustrative for the purposes of the current topic. Also relevant were article 10 (Obligations imposed by international law independently of a treaty) and aspects relating to the law of armed conflict to be found in article 14 (Effect of the exercise of the right to self-defence on a treaty) and article 15 (Prohibition of benefit to an aggressor State).

44. The definition of "armed conflict" proposed by the Special Rapporteur was appropriate, and he agreed with adding the phrase "or between such groups within a State" at the end. The definition of "environment" should be broad enough to refer not only to transboundary harm but also to the environment in general. The Commission's previous definition[266] provided a good starting point and would enable the protection of the natural heritage to be included in the scope of the topic. That would align the Commission's approach with the Convention for the protection of the world cultural and natural heritage which, with 191 States parties, had achieved near universal ratification. Among the serious threats that could have permanent effects on cultural and natural heritage sites, the Convention listed the outbreak or the threat of an armed conflict. He agreed that the scope of the present topic should not include cultural property, however.

45. The Special Rapporteur had done a good job in identifying the various concepts and principles relevant to the topic. The special relationship that indigenous peoples had with the environment was particularly susceptible to the effects of armed conflict and justified the need for granting them special legal status, as rightly noted by the Special Rapporteur in paragraph 165 of her preliminary report. In that regard, he drew attention to paragraph 147 of the judgment of 25 May 2010 handed down by the Inter-American Court of Human Rights in the well-known *Case of Chitay Nech* at al. v. *Guatemala*, in which the Court had considered that the forced displacement of indigenous peoples from their communities could place them in a special situation of vulnerability and create a clear risk of extinction, and that it was therefore indispensable for States to adopt specific measures of protection to prevent and reverse the effects of such situations.

The meeting rose at 1.05 p.m.

3231st MEETING

Friday, 25 July 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, 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.

Protection of the environment in relation to armed conflicts (*concluded*) (A/CN.4/666, Part II, sect. F, A/CN.4/674)

[Agenda item 10]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON 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).

2. 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

[266] *Yearbook … 2006*, vol. II (Part Two), p. 58, para. 66, principle 2 (*b*).

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 the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), 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.

3. 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,[267] 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 II in the preliminary report, she 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 II 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 II. 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 for the protection of war victims and their additional protocols. There was no doubt that this 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 the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I).

4. 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 UNESCO 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 preliminary report. Lastly, there seemed to be a general understanding that there was no urgent need to address the question of the use of terms.

5. 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.

6. Chapters X and XI 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.[268]

[267] United Nations Environment Programme, *Protecting the Environment During Armed Conflict: an Inventory and Analysis of International Law*, Nairobi, 2009.

[268] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution I, annex I.

7. 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 obligations relating to the enjoyment of a safe, clean, healthy and sustainable 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.

8. 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 and 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[269] (A/CN.4/666, Part II, sect. E, A/CN.4/675[270])

[Agenda item 8]

Second report of the Special Rapporteur

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

10. 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. Chapter I 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. Chapter II of the report dealt with the legal effects of the provisional application of treaties, which was the most important aspect of the work. This chapter 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 types 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 third chapter 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 chapter 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.

11. 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).

12. 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

[269] At its sixty-third session (2011), the Commission decided to include the topic in its long-term programme of work (*Yearbook … 2011*, vol. II (Part Two), p. 175, para. 365, and *ibid*., annex III, pp. 198 *et seq.*). At its sixty-fourth session (2012), the Commission decided to include the topic in its programme of work and to appoint Mr. Juan Manuel Gómez Robledo Special Rapporteur on the topic (*Yearbook … 2012*, vol. II (Part Two), p. 67, para. 141). At its sixty-fifth session (2013), the Commission examined the first report of the Special Rapporteur (*Yearbook … 2013*, vol. II (Part One), document A/CN.4/664) and a Secretariat memorandum on the work previously carried out by the Commission on the topic (*ibid*., document A/CN.4/658).

[270] Reproduced in *Yearbook … 2014*, vol. II (Part One).

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 Permanent 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 light of the 1969 Vienna Convention, 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 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 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.

13. 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.

14. Mr. KITTICHAISAREE said that he agreed with that remark: the Commission might well have to rely on other sources, especially doctrine, to avoid delaying work on the topic. In addition, he noted that often special rapporteurs had to prepare reports without having received comments and observations from States; this was the case, in particular, for the Commission's reports on the obligation to extradite or prosecute (*aut dedere aut judicare*).

Immunity of State officials from foreign criminal jurisdiction (*concluded*)* (A/CN.4/666, Part II, sect. B, A/CN.4/673, A/CN.4/L.850)

[Agenda item 5]

Report of the Drafting Committee

15. Mr. SABOIA (Chairperson 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.

16. 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.

17. 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.

18. 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.

19. 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

* Resumed from the 3222nd meeting.

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 satistifed with that term. With regard to 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.

20. 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.

21. 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,[271] 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*.

22. The CHAIRPERSON 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

23. Mr. FORTEAU (Acting Chairperson of the Study Group on the most-favoured-nation clause) said that, in the absence of Mr. McRae, he had served as Chairperson 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 Chairperson that was divided into three parts. Part I recalled the origins of the work, the contemporary relevance of most-favoured-nation clauses and the questions raised by such clauses, Part II gave an overview of the interpretation by the courts of most-favoured-nation 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.

24. 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.[272] It had once again stressed the importance and relevance of the 1969 Vienna Convention in the interpretation of investment treaties and the need to take account of the Commission's previous work on the fragmentation of international law[273] and on subsequent agreements and subsequent practice in relation to the interpretation of treaties.[274] 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.

25. The CHAIRPERSON 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.

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[271] General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

[272] *Yearbook … 1978*, vol. II (Part Two), chap. II, sects. C and D, pp. 16 *et seq.*

[273] See *Yearbook … 2006*, vol. II (Part Two), chap. XII, pp. 175 *et seq.*

[274] See *Yearbook … 2013*, vol. II (Part Two), chap. IV, pp. 16 *et seq.*