67TH SESSION, INTERNATIONAL LAW COMMISSION: REPORT

SUBMITTED BY:

Prithviraj Chauhan (11B107)

TABLE OF CONTENTS

PROTECTION OF ENVIRONMENT IN RELATION TO ARMED CONFLICTS

INTRODUCTION

The commission decided to include the aforementioned topic in the program of work in its 65th session (2013) and appointed Ms. Marie G. Jacobsson as the Special Rapporteur for the topic. During the very next session, the Commission considered the preliminary report of the special rapporteur.

At the present session, the Commission had before it, the second report of the Special Rapporteur. The Commission referred the preambular paragraphs and the draft principles one through five to the Drafting Committee. The provision on 'Use of terms' was to be left pending by the Drafting Committee as it was to be referred for the purpose of facilitating discussions.

The Drafting Committee proceeded to present its interim report containing the principles provisionally adopted by the Drafting Committee. The commission took note of the draft principles as presented by the Drafting Committee.

The purpose of the second report consisted in identifying existing rules of armed conflict directly relevant to the protection of the environment in relation to armed conflict and included an examination of such rules. The report also contained proposals of a preamble and five draft principles The preambular paragraphs contained provisions on the scope of the draft principles, the purpose and use of terms, delineating the terms 'armed conflict' and 'environment' for the purposes of the draft principles. The suggested formulations on 'armed conflict' and 'environment' had been submitted in the preliminary report.

Draft Principle 1 contained a provision on the protection of the environment during armed conflict, and was general in nature.

Draft Principle 2 concerned the application of the law of armed conflict to the environment.

Draft Principle 3 addressed the need to take into account environmental considerations when assessing what is necessary and proportionate in the pursuit of military objectives.

Draft Principle 4 contained a prohibition on attacks against the environment by way of reprisals.

Draft Principle 5 concerned the designation of areas of major ecological importance as demilitarized zones

The Special Rapporteur clarified that 'principles' had been proposed as the most adequate outcome of work since they offered sufficient flexibility to cover all stages of the topic. The Special Rapporteur noted that two conclusions were worth highlighting, from the information provided by the states. The majority of regulations on peacetime military obligations was of recent date and that multilateral operations were increasingly undertaken within a framework of relatively newly adopted environmental regulations.

The report report also addressed protected zones and areas and examined the legal framework with regard to demilitarized zones, nuclear – weapon – free zones and natural heritage zones and areas of major ecological importance in relation to the topic. The Special Rapporteur noted that this section aimed at analysing the relationship between environmental and cultural heritage zones as well as the right of indigenous peoples to their environment as a cultural and natural resource.

The Special Rapporteur further drew attention to certain issues that the second report did not cover, including the Martens clause, multilateral operations, and the work of the United Nations Compensation Commission and situations of occupation, all of which would be analysed in the third report in light of their relevance also to phase III – post-conflict obligations.

GENERAL COMMENTS

While several delegations indicated the importance that they attached to the topic, some other delegations reiterated their concerns regarding its feasibility, noting that it was difficult to delineate. It was also pointed out that the relationship between international environmental law and situations of armed conflict required further analysis.

Some members acknowledged that the purpose of the second report was to identify the existing rules of armed conflict that are directly relevant to the protection of the environment.

At the same time, some members also stressed the need to methodically examine rules and principles of international environment law. It was acknowledged that the law of armed conflict applied as *lex specialis* during armed conflict.

The detailed information on State practice and analysis applicable rules contained in the report was generally welcomed, though some members also observed that it was not clear what conclusions could be drawn from it and how the information fed into the elaboration and content of the proposed draft principles. It was stressed that the Commission would need to know how to use the information in its work, whether the practice represented customary international law, emerging rules or new trends. The view was also expressed that rules under the law of armed conflict relating to the protection of the environment did not seem to reflect customary international law. The Commission would therefore have to consider to what extent the final outcome would contribute to the development of *lex ferenda.*

With regard to the outcome and form of the topic, some members expressed a preference for draft articles, as this corresponded better with the prescriptive nature of the terminology used in some of the proposed draft articles. Several members supported the Special Rapporteur's proposal to develop draft principles. They did not agree with the view of some members that the Commission had adopted principles only when motivated by a desire to influence the development of international law, rather than laying down normative prescriptions. In their view, principles did indeed have legal normativity, albeit at a more general and abstract level than rules. It was also argued that draft principles were particularly appropriate if the intention was not to develop a new convention. It was also pointed out that the Commission may not wish to limit itself to principles but also to propose recommendations, or best practices. While several members considered that the structure of the draft principles should align with the temporal phases, it was also observed that since some draft principles would span over more than one phase, a strict temporal division would neither be desirable nor feasible.

SPECIFIC COMMENTS

With regard to methodology, a number of delegations welcomed the temporal approach adopted by the Special Rapporteur (before, during and after armed conflict, phases I, II and III, respectively), while agreeing that no strict dividing line should be drawn between those

phases. Doubts were nevertheless reiterated concerning the feasibility of proceeding with a temporal methodology, and it was suggested that a thematic approach be considered. Whereas some delegations welcomed the confirmation by the Special Rapporteur that the focus of work remained on phases I and III, a number of delegations stressed the relevance of phase II. Concerning phase II, some delegations reiterated their view that the Commission should not attempt to modify the laws of armed conflict. In that regard, it was suggested that the Commission limit itself to assessing the provisions within the laws of armed conflict related to the protection of the environment without attempting to determine their customary international law status or to modify them. However, attention was also drawn to the imprecise nature of terms relating to environmental protection in the laws of armed conflict and it was suggested that those terms might require further clarification or enhancement. It was observed that the Commission should consider embarking on a progressive development exercise if the existing protection was deemed insufficient.

Noting the importance of clearly defining the scope of the topic, the cautious approach of the Special Rapporteur was welcomed and some delegations expressed support for her proposed limitations. However, the need for substantively limiting the topic was also questioned. Various views concerning the precise scope of the topic were nevertheless voiced, including on whether or not to consider issues relating to human rights, indigenous peoples, refugees, internally displaced persons, natural heritage protection, cultural heritage protection and the effect of weapons on the environment.

Concerning the environmental principles identified by the Special Rapporteur in the preliminary report (A/CN.4/663), while some delegations emphasized their relevance for the development of the topic, the appropriateness of considering some of those principles in the current context was also questioned. In that regard, attention was particularly drawn to the principle of sustainable development and the need for environmental impact assessment as part of military planning. With regard to the latter, however, the view was also expressed that an analysis of the issue would be welcome. On a more general level, concerns were also expressed over the manner in which some of the principles had been characterized in the preliminary report; the Commission was urged to consider them further in order to determine their applicability in the context of the topic.

While the need for elaborating definitions for the terms “environment” and “armed conflict” was questioned, the view was also expressed that the Commission should develop broad

working definitions in order not to limit its consideration of the topic prematurely. A number of delegations also observed that the elaboration of use of terms required further consideration. Concerning the term "environment", it was noted that the definition adopted by the Commission in the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities seemed an appropriate starting point. According to another view, the term needed to be defined with reference to its specific context. Regarding the term "armed conflict", some delegations stressed that the definition contained in international humanitarian law should be retained. Reference was also made to the definition used in the Tadić case1 and subsequent jurisprudence, as well as to the definition contained in the Commission's work on effects of armed conflicts on treaties. Whereas the appropriateness of including in the scope of the topic situations of non-international armed conflict and conflict between organized armed groups or between such groups within a State was questioned by some delegations, other delegations considered that those situations should be addressed. Some delegations observed that situations of limited intensity of hostilities should fall within the scope of this topic. 3. Final form

A number of delegations favoured the elaboration of non-binding guidelines, or a handbook, rather than a draft convention. The point was also made that it was premature to take a stance on this issue.

DRAFT PRINCIPLES

The Draft Principles were renumbered, now also indicating the phase to which they apply. So Draft Principles having the prefix II would apply to the second phase, which is armed conflict. They apply to both International and Non-International Armed Conflict.

Draft Principle I – (x) – Designation of protected zones

States shall designate areas of major environmental and cultural importance as protected zones before the commencement of an armed conflict.

Draft Principle II – 1 – General Protection of the environment during armed conflict.

The [natural] environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.

Care shall be taken to protect the [natural] environment against widespread, long-term and severe damage.

No part of the [natural] environment may be attacked unless it becomes a military objective.

Draft Principle II – 2 – Application of the Law of Armed Conflict to the environment.

The law of Armed Conflict, including the principles and rules on distinction, proportionality, military necessity and precaution in attack, shall be applied to the [natural] environment, with a view to its protection.

Draft Principle II – 3 – Environmental considerations

Environmental considerations shall be taken in to account when applying the principle of distinction and the rules on military necessity.

Draft Principle II – 4 – Prohibition of reprisals

Attacks against the [natural] environment by way of reprisals are prohibited.

Draft Principle II – 5 – Protected zones

Designated areas of major environmental and cultural importance shall be respected as protected zones as long as they are not a military objective.

PROVISIONAL APPLICATION OF TREATIES

GENERAL COMMENTS

While the increasing importance of provisional application of treaties in the practice of States was acknowledged, some delegations observed that, in cases of lengthy ratification processes owing to constitutional requirements, provisional application could provide a suitable method of bringing a treaty into early effect. As such, it was described as being an instrument which granted States some flexibility in shaping their legal relations by accelerating the acceptance of international obligations. At the same time, it was noted that any analysis of the mechanism had to be coupled with an appreciation of the constitutional challenges that provisional application presented for many States. The view was expressed that the Commission's examination of the provisional application of treaties was critical and timely; it was in particular pointed out that when a validly concluded treaty actually applied and became binding on States was important. It was suggested that the Commission also consider the travaux préparatoires of the Vienna Convention on Succession of States in respect of Treaties, of 1978.

There was also general agreement expressed with the view that the task of the Commission was neither to encourage nor to discourage the provisional application of treaties, but rather to provide guidance so as to enhance understanding of the mechanism.

SPECIFIC COMMENTS

As regards the legal effects of provisional application, support was expressed for the position of the Commission that the rights and obligations of a State, which had decided to provisionally apply the treaty, or parts thereof, were the same as if the treaty were in force for that State. It was noted by some delegations that article 25 of the Vienna Convention on the Law of Treaties went beyond the general obligation not to defeat the object and purpose of the treaty prior to its entry into force. In terms of a further view, the exercise and discharge of the rights and obligations under the treaty could be limited either by the terms of the treaty being provisionally applied or by a separate agreement between the parties to the treaty. It was also observed that, in practice, the provisional application of certain provisions of treaties

could be limited by the application of domestic law provisions requiring prior approval by the respective legislatures. In some situations, domestic law could prevent provisional application entirely. However, the view was expressed that the provisional application of a treaty could not lead to a modification of the rights and obligations themselves.

It was observed that the consequence of provisional application was that a breach of the applicable provisions of a treaty being provisionally applied constituted an internationally wrongful act that triggered the international responsibility of the State. Furthermore, in line with article 27 of the Vienna Convention, a State that validly opted to provisionally apply the treaty could not rely on its domestic law as an excuse to justify its failure to discharge its obligations under the treaty. According to some delegations, further study of State practice, including analysis of the circumstances under which States have recourse to the provisional application of treaties, was required before any determination of its legal effects.

Several delegations spoke in support of considering the effect of a unilateral commitment to provisionally apply all or part of a treaty. However, disagreement was expressed with the suggestion that the decision to provisionally apply a treaty could be characterized as a unilateral act, as the Vienna Convention specifically envisaged agreement between States. Several delegations spoke in favour of the understanding that the source of the obligation remained the treaty (being provisionally applied) itself and not the declaration of provisional application. Doubts were also expressed concerning the possibility that article 25 of the Vienna Convention could be interpreted as permitting a State to unilaterally declare the provisional application of a treaty if the treaty itself was silent on the matter. It was observed that since provisional application is deemed to establish treaty relations with the States parties, a unilateral provisional application would oblige the States parties to accept treaty relations with a State without their consent. As such, in terms of that view, a provisional application of a treaty by unilateral declaration without a special clause in the treaty could only take place if it could be established that the States parties agreed to such a procedure. That conclusion did not rule out the possibility that a State could commit itself to respecting the provisions of a treaty by means of a unilateral declaration without obtaining the agreement of the States parties. In so doing, the application resulting from a unilateral declaration could only lead to obligations incumbent upon the declaring State. In terms of another view, unilateral action could lead only to the application of an international treaty rule in domestic law.

As to the point in time from which the obligation arose, the view was expressed that the Special Rapporteur's assessment that the legal obligation for the State arose not when the treaty was concluded, but at the point in time at which the State unilaterally decided to resort to provisional application, applied only to multilateral treaties. For bilateral treaties, the obligation would arise when the treaty was concluded.

Concerning the termination of provisional application, some delegations expressed disagreement with the assertion that a State that had decided to terminate the provisional application of a treaty would be required, as a matter of law, to explain the reasons for doing so to other States to which the treaty applied provisionally or to other negotiating or signatory States. Likewise, doubts were expressed regarding the view that provisional application could not be revoked arbitrarily.

FUTURE WORK

Support was expressed by several delegations for the Special Rapporteur's intended consideration of the provisional application of treaties by international organizations. Special reference was made to relevant practice in the context of the European Union. It was suggested that the Commission take into account situations where the treaty was applied provisionally by an international organization as well as by its members States, since the scope of the provisional application would be different for those entities.

Several delegations expressed support for the preference of the Special Rapporteur not to embark on a comparative study of domestic provisions relating to the provisional application of treaties. According to that view, whether or not a State resorted to provisional application was essentially a constitutional and policy matter. Several other delegations called for a thorough analysis of State practice, which for some delegations also implied a comparative study of practice at both the international and domestic levels. It was observed, in support of that more inclusive approach, that it was possible to find in treaty practice provisions stating that the contracting States were to apply provisionally an international agreement only to the extent permitted by their respective national legislation. It was also noted that reliance on relevant State and judicial practice was crucial when examining the consequences arising from a breach of an obligation in a treaty being provisionally applied.

Suggestions for specific issues to be considered by the Commission included the extent to which provisions involving institutional elements, such as provisions establishing joint bodies, might be subject to provisional application; whether provisional application should also extend to provisions adopted by such joint bodies during provisional application; whether there existed limitations with regard to the duration of the provisional application; the relationship with other provisions of the Vienna Convention and other rules of international law, including on responsibility for breach of international obligations; the customary international law character of provisional application; whether or not provisional application could result in the modification of the content of the treaty; the modalities for and effects of termination of provisional application; the applicability of the regime on reservations to treaties; the effects of other treaty actions, such as modification of the treaty or ratification without entry into force, during provisional application; and the different consequences of the provisional application of bilateral and multilateral treaties. It was also suggested that the Commission consider the legal difference between a State's provisional application of a treaty that had not yet entered into force internationally but which the State had ratified according to its domestic constitutional requirements, and a State's provisional application of a treaty that had entered into force internationally but which had not yet entered into force for the State. Support was also expressed for a study of the practice of treaty depositaries.

FINAL FORM

Suggestions by delegations included developing model clauses on provisional application, a guide with commentaries and draft guidelines or conclusions.

Draft Article 2(f) – Act Performed in an Official Capacity –

An "act performed in an official capacity" means any act performed by a State official in the exercise of State authority.

Draft Article 6 – Scope of Immunity *Rationae Materiae* –

1. *State officials enjoy immunity ratione materiae only with respect to acts performed in an official capacity.*

2. *Immunity ratione materiae with respect to acts performed in an official capacity continue to subsist after the individuals concerned have ceased to be State officials.*
3. *Individuals, who enjoyed immunity ratione materiae in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office*

IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

GENERAL COMMENTS

Delegations welcomed the progress the Commission had made on the topic to date. It was acknowledged that the topic was not only of relevance and genuine practical significance but also complex. Accordingly, it was considered crucial that the Commission, in developing the topic, be cautious and pay due regard to State and judicial practice concerning immunity, even though the paucity of such practice in respect of criminal matters was recognized. A clear, accurate and well documented statement of the law by the Commission, reflecting a high degree of consensus of States, was viewed as desirable.

While the analytical approach that drew systematic distinctions between criminal and civil jurisdiction, immunities ratione personae and ratione materiae and rules of immunity and criminal jurisdiction was commended, the point was made that it was important that the Commission ensure that its outcome did not lead to fragmentation of international law or to the alteration of existing immunity regimes. Attention was also drawn to the need further clarify the meaning of the expression "from the exercise of foreign criminal jurisdiction", in particular in relation to the criminal jurisdiction exercised by administrative authorities and its instantiation, especially whether immunity covered measures to ascertain the facts of a case. Moreover, additional clarifications were required on the exercise of criminal jurisdiction in the context of relations of a State with international courts and tribunals, in particular with respect to acts of judicial authorities on the basis of an arrest warrant issued by an international criminal tribunal. The Commission was also urged, at the appropriate time, to deal comprehensively with the issue of immunity of military forces of the State.

SPECIFIC COMMENTS

With respect to draft article 2 (e), "State official", some delegations considered that it was better to retain the term "State official" than to use "State organ", despite recognizing the ambiguity occasioned in its French version (représentant de l´Etat) or its Spanish version

(funcionario del Estado). A comment was also made reiterating a preference for "representative of the State acting in that capacity" to the term "State official".

While the point was made that it was unnecessary to define "State official" for the purposes of the draft articles, some delegations viewed the need for such a definition and the definition proposed favourably, stressing the importance of coherence and noting that the restriction to natural persons, as opposed to legal persons, was entirely appropriate.

Some delegations welcomed the fact that the definition covered beneficiaries of both immunity ratione personae and immunity ratione materiae. Several delegations supported the representative and functional approaches taken by the Commission in identifying criteria relevant for defining "State official" for purposes of immunity. The point was made that such an effort could be useful in revisiting, as a matter of progressive development, the question of expanding the number of beneficiaries of immunity ratione personae beyond the troika without necessarily developing a list, a matter which was problematic and impractical. Several delegations emphasized the importance of dealing with each situation on a case - bycase basis, and the decisive nature of the link of an official to the State, with some noting that the conduct should be directly linked to the exercise of State sovereignty. The point was nevertheless made that there might be a need for greater clarity with regard to the specific link between the individual and the State.

With regard to the scope of the definition, for some delegations, the effect of the text should be to cover all acts performed by State officials in an official capacity. In terms of another view, the proposed definition needed further explanation. It was, for instance, suggested that the terms "represents the State" and "State functions" might need to be further defined, as the scope was not exactly clear. The question was asked whether personnel contractually mandated by a State to exercise certain functions would fall under the definition of "State official" and whether the term covered teachers and professors in State-run institutions of learning. Moreover, even though the commentary stated that "State functions" should be construed broadly, it was not exactly clear what the term meant, including whether domestic law or international law or both governed the determination of such functions. Nor was it apparent whether there was intended to be a distinction between "State functions" and "governmental authority", as used in article 5 of the articles on the responsibility of States for internationally wrongful acts. Accordingly, the suggestion was made that the nature of the acts concerning which immunity was invoked would require definition in further work

concerning the topic. In addition, it was noted that the question of the definition should be revisited once work on the topic had advanced.

Several delegations supported draft article 5, Immunity ratione materiae, as it corresponded to draft article 3 on immunity ratione personae, provisionally adopted in 2013. It was noted that the material scope of immunity ratione materiae, which was a key aspect of the topic to be taken up at a later stage, was not prejudged.

For some delegations, the formulation of the draft article was imprecise and needed improvement. The suggestion was made to clarify further the meaning of "State officials acting as such", in particular whether it covered ultra vires acts or acts contravening instructions. The point was also made that the Commission might wish to develop the concept of "elements of governmental authority" in respect of the draft article, while according to another view the use of "State officials acting as such" was an improvement over the earlier reference to "State officials who exercise elements of governmental authority", which was considered as too narrow. In that connection, it was observed that "acting as such", in combination with the definition of "State official" in draft article 2 (e), for purposes of immunity ratione materiae could be understood to mean acts in which a State official either represented the State or exercised State functions. A suggestion was also made to use "acting in that capacity" to denote that an individual was acting in an official rather than a private capacity.

The point was made that it would be useful to examine the relationship between the present topic and rules on State responsibility in order to clarify the extent to which acts giving rise to responsibility for internationally wrongful acts would be covered by immunity ratione materiae. It was also considered a crucial challenge to define the kinds of acts with regard to which State officials acting as such would enjoy immunity ratione materiae. It was also noted that immunity ratione materiae of former State officials should be considered.

Concerning the question of possible exceptions to immunity, several delegations encouraged the Commission to analyse critically the available practice, taking into account landmark treaties and jurisprudence covering a long period of cases. It was also suggested that the Commission might wish to consider whether an update of the memorandum by the Secretariat (A/CN.4/596), which contained a study of State practice, would helpful.

On the possible exceptions to immunity ratione personae, the point was made that the current state of international law required a highly restrictive approach, and in particular that the present topic concerned immunity from national jurisdiction and therefore did not extend to prosecutions before the International Criminal Court or ad hoc tribunals. It was also noted that there should be no exceptions to the immunity of a Head of State as there was no support for such exceptions in the practice of States, except in the case of waiver.

On the possible exceptions to immunity ratione materiae, several delegations underscored, given the gradual developments in international criminal law, that no State official should be shielded by rules of immunity with respect to the most serious crimes that concerned the international community as a whole, as that would effectively lead to impunity. On that account, it would be difficult to contemplate that immunity ratione materiae could apply in the case of international crimes committed in the course of duty or to any act performed for personal benefit given the functional nature of such immunity. It was suggested that crimes such as genocide, crimes against humanity and serious war crimes should not be included in any definition of acts covered by immunity.

Some other delegations doubted that rules of customary international law relating to serious crimes had developed concerning the non-application of the immunity of State officials in respect of such crimes. The Commission was cautioned against any dangerous inclusion in customary law of exceptions to immunity. It was recalled that the procedural nature of immunity, which was emphasized, did not preclude the consideration of the substantive aspects of the matter and immunity should not be equated to impunity.

For some delegations, it was necessary that account be taken of relevant criminal law treaties, such as the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or the International Convention for the Protection of All Persons from Enforced Disappearance, which provided for extraterritorial criminal jurisdiction. The point was also made that the Convention against Torture constituted lex specialis or an exception to the usual rule on immunity ratione materiae of a former Head of State because under the Convention’s definition of torture it could be committed only by persons acting in an official capacity. Moreover, a plea of immunity ratione materiae would not operate in respect of certain criminal proceedings for acts of a State official committed on the territory of the forum State.

On the other hand, there was doubt regarding whether the application of universal jurisdiction or the obligation to extradite or prosecute had any effect on State officials who enjoyed immunity.

FINAL FORM

Draft Guideline 1 – Scope –

The present guidelines concerns the provisional application of treaties.

Draft Guideline 2 - Purpose –

The purpose of the present draft guideline is to provide guidance regarding the law and practice the provisional application of treaties, on the basis of Article 25 of the Vienna Convention on the Law of Treaties and other rules of International Law.

Draft Guideline 3 – General Rule –

A treaty or a part of a treaty may be provisionally applied, pending its entry into force, if the treaty itself so provides, or if in some other manner it has been so agreed.