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Summary record of the 3228th meeting

Topic:
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expressed the opinion that States and international organizations had an awareness of environmental issues and clearly intended to take them into account when planning and conducting military operations in peacetime. It was doubtful whether that statement was true everywhere, for the practice examined in the preliminary report was essentially that of industrialized States that had the financial, material and technical resources to factor in environmental concerns. Moreover, that practice was not homogenous. In *Winter, Secretary of the Navy, et al. v. Natural Resources Defense Council, Inc., et al.*, the United States Supreme Court had ruled against an environmental defence association which had sought the adoption by the American navy of maximum precautions when training with sonar equipment that might jeopardize marine mammals. It would therefore not be altogether correct to draw conclusions as to the existence of firmly established, generally recognized obligations to protect the environment during military operations, even in peacetime. The Commission must be cautious and not expect unreserved support from States when broaching issues pertaining to national security and defence.

26. The protection of the cultural heritage, which was already regulated by several international instruments, should not be addressed; the same was true of the effects of certain weapons. On the other hand, the Special Rapporteur's emphasis on the need to deal with non-international armed conflicts inevitably posed the question of whether non-State actors were bound by the rules of international environmental law. The distinction between the "natural environment" and the "human environment" should not be reflected in the definition of the environment for the purposes of the topic; first, because it was not plain from the ICRC commentary²⁵³ to article 35, paragraph 3, of Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), what purpose was served by that distinction, or what legal value it had and, second, because the different natural interrelationships between ecosystems were not a matter for legal analysis. No decision had yet been reached on whether the principle of a sustainable environment remained applicable in an armed conflict. The general, imprecise nature of that principle seemed to suggest that it did not play a key role. In addition, the fact that it was usually regarded as more of a political and socioeconomic concept than a legal principle confirmed the view that it would be impossible to class it among the legal rules applicable in an armed conflict without leading to greater confusion. The findings of the WTO Appellate Body referring to that notion were of little relevance to the Commission's work, for they were predicated on purely trade-oriented considerations. Lastly, with regard to the precautionary principle, the decisions of the Court of Justice of the European Union cited in paragraphs 143 and 144 of the preliminary report were contradictory. While the judgment in the case concerning *Alpharma Inc. v. Council of the European Union* stated that the Community institutions might adopt a measure based on the precautionary principle, the Special Rapporteur inferred from the *Waddenzee* judgment that the member States of the European Union were bound by that

principle. The following report should clarify the legal status and content of States' obligations stemming from the precautionary principle.

The meeting rose at 12.40 p.m.

3228th MEETING

Tuesday, 22 July 2014, at 10 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: 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.

Cooperation with other bodies (*continued*)*

[Agenda item 14]

STATEMENT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIRPERSON welcomed Judge Peter Tomka, President of the International Court of Justice, and invited him to address the Commission.
2. Judge TOMKA (President of the International Court of Justice) said that, in fulfilling its role as the principal judicial organ of the United Nations, the International Court of Justice had rendered three major judgments in the past year on the merits of cases concerning international disputes.
3. The first of those judgments had been delivered in the case concerning the *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)*. The case had been brought before the Court by Cambodia in 1959 following the occupation of the Temple of Preah Vihear by Thailand in 1954 and the failure of subsequent negotiations between the two countries. During the proceedings in the original case, Cambodia had relied on a map, referred to as the "Annex I map", which showed the frontier between it and Thailand as passing to the north of Preah Vihear, thus leaving the Temple in Cambodian territory. In its 1962 judgment, the Court had found that the Temple was situated in territory under the sovereignty of Cambodia; that Thailand was under an obligation to withdraw any military or police forces, or other guards or keepers, stationed by it at the Temple, or in its vicinity on Cambodian territory; and that Thailand was

²⁵³ Available from the ICRC website: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>.

* Resumed from the 3224th meeting.

under an obligation to restore to Cambodia any objects which might, since the time of the occupation of the Temple by Thailand in 1954, have been removed from the Temple or the Temple area by the Thai authorities.

4. In its judgment, delivered on 11 November 2013, the Court had concluded that there was a dispute between the parties as to three specific aspects of the 1962 judgment: first, whether the 1962 judgment had or had not decided with binding force that the line depicted on the Annex I map constituted the frontier between the parties in the area of the Temple; second, the meaning and scope of the phrase “vicinity on Cambodian territory”, used in the second operative paragraph of the judgment; and third, the nature of the obligation of Thailand to withdraw its personnel, imposed by the second operative paragraph of the judgment.

5. The Court had observed that three features of the original judgment were of particular relevance: first, in 1962, the Court had considered that it was dealing with a dispute regarding territorial sovereignty over the area in which the Temple was located and that it was not engaged in delimiting the frontier between the parties; second, the Annex I map had played a central role in the reasoning of the Court; and third, in defining the dispute before it, the Court had made it clear that it was concerned only with sovereignty in the “region of the Temple of Preah Vihear”.

6. After analysing the scope and meaning of the first operative paragraph of the 1962 judgment, the Court had concluded that it was clearly a finding that the Temple was situated in territory under the sovereignty of Cambodia. Having then clarified the meaning of the term “vicinity”, as employed in the 1962 judgment, the Court had concluded that the “vicinity” of the Temple would extend to the entirety of the Preah Vihear promontory on which the Temple was situated, but to not territory outside that promontory. It thereby rejected the contention by Cambodia that the “vicinity” also included the hill of Phnom Trap. Lastly, the Court had found that the terms “vicinity [of the Temple] on Cambodian territory”, in the second operative paragraph, and “area of the Temple”, in the third operative paragraph, referred to the same small parcel of territory. The obligations that had been imposed by the Court in 1962 with respect to that parcel of territory were thus a consequence of the finding contained in the first operative paragraph. Lastly, the Court had concluded that the territorial scope of the three operative paragraphs was the same and corresponded to the limits of the promontory of Preah Vihear.

7. On 27 January 2014, the Court had delivered another judgment on the merits—in the *Maritime Dispute* between Peru and Chile, which had presented a peculiar factual scenario. The parties had advanced opposite—and fundamentally different—views on how the Court should proceed in allocating their respective maritime areas. Peru had argued that no agreed maritime boundary existed between the two countries and had asked the Court to determine the delimitation by applying its usual three-stage methodology. For its part, Chile had taken the view that the Court should not effect any delimitation, since there was already an international maritime boundary, agreed between both parties, along the parallel of latitude passing through the starting point of the Peru–Chile land boundary and extending to a minimum of 200 nautical miles.

8. On the basis of the evidence submitted to it, the Court had found that the parties had acknowledged, in a 1954 agreement,²⁵⁴ the existence of a maritime boundary, along the parallel of latitude, running out to an unspecified distance. In view, in particular, of the fishing practice and activities of the parties in the early 1950s, the Court had concluded that the agreed maritime boundary extended to a distance of 80 nautical miles along the parallel from its starting point.

9. Turning to the determination of the undefined maritime boundary from the endpoint of the agreed maritime boundary, the Court had proceeded on the basis of article 74, paragraph 1, and article 83, paragraph 1, of the United Nations Convention on the Law of the Sea, which reflected customary international law. In applying its three-stage methodology, the Court had considered that no relevant circumstances called for an adjustment of the provisional equidistance line and that no significant disproportion was evident, such as would call into question the equitable nature of the provisional equidistance line.

10. He wished to commend both parties on reaching—soon after the delivery of the judgment—an agreement on the precise geographical coordinates of their maritime boundary on the basis of the description thereof in the Court’s judgment.

11. The third major judgment rendered during the period under review related to the case concerning *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*. Australia had alleged that the continued pursuit by Japan of a large-scale programme of whaling under the Second Phase of its Japanese Whale Research Programme under Special Permit in the Antarctic (JARPA II) was in breach of obligations assumed by Japan under the International Convention for the Regulation of Whaling.

12. Australia had further alleged that, because JARPA II was not a programme for purposes of scientific research within the meaning of article VIII of the Convention, Japan had breached three substantive provisions of the Schedule to the Convention. The provisions in question were the obligation to respect the moratorium setting zero-catch limits for the killing for commercial purposes of whales from all stocks; the obligation not to undertake commercial whaling of fin whales in the Southern Ocean Sanctuary; and the obligation to observe the moratorium on the taking, killing or treating of whales, except minke whales, by factory ships. Japan had contested all of those allegations, arguing that its JARPA II programme had been undertaken for purposes of scientific research and that it was therefore covered by the exemptions provided for in article VIII, paragraph 1, of the Convention.

13. The Court had considered that article VIII of the Convention gave discretion to a State party to the Convention to reject the request for a special permit or to specify the conditions under which a permit would be granted, but that the question of whether the killing, taking and treating of whales pursuant to a requested special permit

²⁵⁴ Agreement relating to a Special Maritime Frontier Zone (Lima, 4 December 1954).

was for purposes of scientific research could not depend simply on that State's perception. In order to ascertain whether a programme's use of lethal methods was for purposes of scientific research, in accordance with the wording of article VIII, the Court had had to consider whether the elements of a programme's design and implementation were reasonable in relation to its stated objectives. In the Court's view, the fact that a programme involved the sale of meat and the use of proceeds to fund research was not sufficient, taken alone, to cause a special permit to fall outside article VIII.

14. Following an assessment of the design and implementation of JARPA II in light of article VIII of the Convention, the Court had considered that the evidence showed that, at least for some of the data sought by the programme's researchers, non-lethal methods were not feasible. However, the Court had considered that the Japanese whaling programme should have included some analysis of the feasibility of non-lethal methods as a means of reducing the planned scale of lethal sampling in the programme.

15. The Court had then assessed the scale of the use of lethal methods in JARPA II, concluding that the failure by Japan to make any changes to the programme's objectives and the target sample size, despite a discrepancy between the actual take and those targets, cast doubt on the characterization of JARPA II as a programme for purposes of scientific research.

16. In its judgment, the Court had considered that, while JARPA II involved activities that could broadly be characterized as scientific research, the evidence before it had not established that the programme's design and implementation were reasonable in relation to achieving the programme's objectives. Accordingly, the Court had held that the special permits granted by Japan for the killing, taking and treating of whales in connection with JARPA II were not "for purposes of scientific research" pursuant to article VIII, paragraph 1, of the Convention. The Court had therefore found, *inter alia*, that Japan had not acted in conformity with its obligations concerning the moratorium on commercial whaling and concerning the factory ship moratorium in each of the seasons during which fin whales had been taken, killed and treated in JARPA II.

17. With regard to remedies, the Court had ordered that Japan should revoke any extant authorization, permit or licence to kill, take or treat whales in relation to JARPA II and refrain from granting any further permits under article VIII, paragraph 1, of the Convention in pursuance of that programme.

18. The judgment, which had demonstrated the Court's ability to handle highly scientific evidence, was a fitting response to criticism voiced in certain scholarly circles and elsewhere that the Court was ill-equipped to handle fact-intensive, science-heavy cases. Furthermore, the Court's preparatory work relating to the subsequently discontinued case concerning *Aerial Herbicide Spraying*, which had also involved complex facts and technical considerations, had been praised by both parties, which had acknowledged the Court's key contribution to the settlement of the case.

19. In early 2014, the Court had held public hearings on the merits of the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*. That case raised some difficult issues with regard to the merits of the main claim and counterclaim, and some very challenging jurisdictional questions. Croatia complained that Serbia had committed violations of international humanitarian law from 1991 to 1995, while Serbia, by way of counterclaim, alleged similar violations with respect to acts carried out by Croatia in 1995. The judgment was now being meticulously prepared, and it was hoped that it would be rendered in early 2015, enabling the parties to close a final chapter in the aftermath of the break-up of Yugoslavia.

20. In September 2014, the Court would hold public hearings on the merits of the case concerning *Questions relating to the Seizure and Detention of Certain Documents and Data*, which had been brought to the Court only in December 2013. In March 2014, the Court had already indicated certain provisional measures in response to the request of Timor-Leste for such measures, a timeline that showed that the Court was capable of delivering timely and efficient dispute resolution.

21. The Court had again been kept busy with the cases concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, in which the proceedings had been joined. In November 2013, in response to a request from Costa Rica, the Court had rendered an order on provisional measures to be taken by Nicaragua. In December 2013, the Court had unanimously found that the circumstances were not such as to require the indication of the provisional measures against Costa Rica that had been requested by Nicaragua. It hoped to be able to hold public hearings on the merits of the joined proceedings in the spring of 2015.

22. The Court's recent activities were proof that States were increasingly turning to the principal judicial organ of the United Nations as a propitious forum for achieving the peaceful settlement of disputes that had potential consequences for the conservation of the natural environment. Two cases in point were the *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)* and *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, both of which had been filed in 2013. In February 2014, Costa Rica had instituted proceedings in the case concerning *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean*. Those proceedings were historically significant in that it was the first time that a State had asked the Court to effect a maritime delimitation in areas lying seaward of both extremities of a shared land frontier. In April 2014, the Marshall Islands had instituted proceedings against India, Pakistan and the United Kingdom in three separate cases involving *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*. In the proceedings against the United Kingdom, the Marshall Islands had relied on obligations under the 1969 Treaty on the Non-Proliferation of Nuclear Weapons; in those against

India and Pakistan, it had cited customary international law. In all those proceedings, the Marshall Islands invoked as the jurisdictional basis the reciprocal declarations recognizing the Court's jurisdiction as compulsory made by the parties pursuant to Article 36, paragraph 2, of the Statute of the International Court of Justice.

23. On 23 September 2013, the Court had held a conference to celebrate the centenary of the Peace Palace. The conference, which had brought together a roster of distinguished speakers, had been a resounding success and had offered an opportunity for lively exchanges and dialogue. The speakers' contributions were to be published under the title *Enhancing the Rule of Law through the International Court of Justice*.²⁵⁵

24. In just under 25 years, the Court had delivered more judgments than in the first 45 years of its existence, achieving the peaceful resolution of disputes on such matters as maritime or land boundaries, treaty interpretation, environmental law, sovereignty over maritime features and the protection of living resources and human health. However, like all international adjudicative models, the Court's jurisdiction to proceed with the settlement of disputes remained subject to the consent of the parties appearing before it. It was therefore unfortunate that only approximately one third of States Members of the United Nations had made the declaration under Article 36, paragraph 2, of the Statute of the International Court of Justice. He hoped that States which publicly declared their support for the rule of law in international relations would make that declaration in the near future.

25. Mr. MURPHY observed that the Court's extensive treatment of scientific data in the case concerning *Whaling in the Antarctic* stood as a rebuttal of the criticism voiced after the case concerning *Pulp Mills on the River Uruguay*. He would welcome additional information about the Court's approach to dealing with evidence in the case concerning *Aerial Herbicide Spraying*, and wished to know whether it might serve as a model in cases involving complicated facts and scientific evidence in the future.

26. Mr. TOMKA (President of the International Court of Justice) explained that in some cases requiring the consideration of a wealth of facts or scientific data, it was useful to commence preparations for a hearing well in advance. In the case in question, 15 months before the scheduled hearing, the judges had held a short exchange of views and had appointed two members of the Court to prepare a detailed report summarizing the voluminous pleadings. Questions had then been sent to the parties, which had been invited to concentrate on particular issues in the oral proceedings. The Court had also identified three United Nations agencies whose experts could be called in, if necessary, to explicate the scientific data.

27. Mr. VÁZQUEZ-BERMÚDEZ said that the number of cases brought to the International Court of Justice by Latin American countries betokened their trust in the work of the principal judicial organ of the United Nations.

He asked whether principles of municipal law, as general practice accepted by *opinio juris*, could become part of the sources of international law which were referred to anachronistically, in Article 38, paragraph 1 c, of the Statute of the International Court of Justice, as "general principles of law recognized by civilized nations".

28. Mr. TOMKA (President of the International Court of Justice) agreed that Article 38 was couched in antiquated language: after all, it had been based on the Statute of the Permanent Court of International Justice. The Court could apply general principles of domestic law or of customary international law to settle a dispute when there were no specific conventions or treaties governing the subject matter, or to clarify the terms of international conventions. General principles might play a more important role in some cases than in others. For example, it would be hard to find a specific international convention concerning the confidentiality of communications between lawyers and their clients, but some principles could certainly be found in States' legal systems. The case concerning *Questions relating to the Seizure and Detention of Certain Documents and Data* might therefore be one where such general principles might play a role.

29. Mr. FORTEAU, referring to the Court's recent case law such as its advisory opinion on the *Accordance with International Law of the Unilateral Declaration of Independence with respect to Kosovo* and the case concerning *Whaling in the Antarctic*, noted that in each case it had applied special rules to the interpretation of unilateral acts which are not identical to the rules applicable to the interpretation of treaties. That gave the impression that the rules governing the interpretation of international instruments were becoming fragmented. Perhaps there was now a need to clarify the rules of interpretation that applied outside the realm of the law of treaties.

30. Mr. TOMKA (President of the International Court of Justice) said that the Court, in its advisory opinion on the *Accordance with International Law of the Unilateral Declaration of Independence with respect to Kosovo*, had formulated certain rules concerning the interpretation of the resolutions of international bodies such as the Security Council. The rules for the interpretation of unilateral acts, to which the law of treaties did not apply, might be a topic for possible consideration by the Commission, but it would not be an easy topic.

31. Mr. HASSOUNA asked whether the imminent appointment of new members of the Court would slow down the adjudication of pending cases. He wished to know what steps would be taken to enable new judges to familiarize themselves with those cases. Although all the judges had to be neutral and objective, he wondered whether their national cultural and legal background influenced their approaches and their opinions on the Court's final judgments.

32. Mr. TOMKA (President of the International Court of Justice) said that as soon as they were elected, the new judges would receive case files in order to prepare themselves for hearings. Judges had to recuse themselves only if they had previously acted in the capacity of agent or counsel for one of the parties to a case. Nationality did not

²⁵⁵ G. Gaja and J. Grote Stoutenburg (eds.), *Enhancing the Rule of Law through the International Court of Justice*, Developments in International Law, vol. 68, Leiden, Brill Nijhoff, 2014.

constitute grounds for disqualifying a judge from participation in a case. It was possible that judges might have slightly different approaches owing to their legal background and education, but the nationality factor was neutralized by the fact that a panel of 15 judges examined each case. After the hearing, each judge had to prepare a note on the legal issues raised by the case and arrive at reasoned conclusions, to be presented at a meeting at which his or her reasoning could be challenged. That process guaranteed the impartial consideration of each case.

33. The CHAIRPERSON thanked Judge Tomka for his valuable insights and informative replies to questions.

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

[Agenda item 10]

PRELIMINARY REPORT OF THE
SPECIAL RAPPORTEUR (*continued*)

34. The CHAIRPERSON invited the Commission to resume its consideration of the preliminary report on the protection of the environment in relation to armed conflicts (A/CN.4/674).

35. Mr. PARK said that, in the Republic of Korea, environmental considerations were generally integrated into the decision-making of the armed forces in peacetime, although national security interests had led to certain legal exemptions and military regulations that favoured defence considerations over environmental concerns.

36. Referring to the methodology adopted by the Special Rapporteur whereby three phases were identified—before, during and after an armed conflict, or phases I, II and III—he said that most of the principles of international environmental law and human rights law that applied to phase I also applied to phases II and III. As phase I was technically considered peacetime, most of the peacetime rules and principles of international law also applied to it. It was therefore hard to see a meaningful distinction between peacetime and “preparation for potential armed conflict”, or phase I. The military exemptions to environmental laws provided for in certain countries suggested that national security was sometimes valued over environmental interests; it was therefore likely that any new obligations introduced as *lex ferenda* would be resisted.

37. Given that the content, scope and addressees of any guidelines that the Commission produced on the topic would vary for each of the three phases, attention should be given to formulating a coherent set of rules and principles that could be applied consistently and effectively in each phase. As there was no strict dividing line between phases, it might be that the rules for different phases would blend into one another. Contrary to the suggestion made by the Special Rapporteur in paragraph 59 of her preliminary report, he thought that, rather than focusing on phases I and III in discussions of the topic, equal weight should be given to phase II. Although some international laws dealt with environmental protection in times of armed conflict, they were now outdated.

38. While he understood the Special Rapporteur’s reluctance to address the protection of cultural heritage as part of the topic, to exclude cultural heritage and yet define “environment” to include aesthetic aspects of the landscape, as suggested by the reference to the latter’s “characteristics”, seemed inconsistent. The definition used in the 1993 Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment included property that formed part of the cultural heritage. The crux of the matter was whether “cultural heritage” constituted “environmental values”. The use of the term “characteristics” appeared to refer not only to artifacts and cultivated land, but also to the values attributed by the public to the qualities of a certain area, in addition to natural resources. In refining the definition of “environment”, therefore, the question of whether cultural heritage should be included in the notion of “characteristics of the landscape” needed to be discussed.

39. If, as the Special Rapporteur had proposed in paragraph 66 of her preliminary report, the Commission did not discuss the controversial issue of weapons separately as part of the topic, then it would be unable to deal with the environmental damage that might be triggered by nuclear, chemical and biological weapons. The existence of specific treaties dealing with different weapon types indicated that customized laws were needed in that regard. His preference would be for the outcome of the topic to be an “umbrella” formula that would be applicable to all such problems.

40. In paragraph 67 of her preliminary report, the Special Rapporteur noted that the issue of internally displaced persons and refugees should be approached cautiously. However, it did not seem directly relevant to the topic at hand and could give rise to a number of complicated legal questions, such as the environmental impact of massive population movements and claims for compensation for land.

41. With regard to the definition of “armed conflict”, he agreed that adapting the definition used in draft article 2 of the draft articles on the effect of armed conflicts on treaties²⁵⁶ to include situations in which an armed conflict took place without the involvement of a State would be the most appropriate course of action. However, to refer only to “organized” armed groups might be unnecessarily restrictive, as not every armed group involved in an internal conflict that negatively affected the environment would fall into that category. The qualifier “within a State” was also unnecessary, as many armed groups were organized transnationally. Irrespective of the difficulty of enforcing laws on individual groups that were not well organized, they should be included, especially as the Commission was aiming to produce guidelines rather than a treaty. However, the issue of how to enforce rules and principles effectively in peacetime against *de facto* politically independent entities that were out of control should be addressed, especially with respect to phase I.

42. Defining “environment” was not easy, as its scope varied depending on context. The definition used in the 2006 draft principles on the allocation of loss in the case

²⁵⁶ General Assembly 66/99 of 9 December 2011, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Two), pp. 107 *et seq.*, paras. 100–101.

of transboundary harm arising out of hazardous activities²⁵⁷ was intended only as a working definition for that particular context. Instead of transposing a definition from a previous topic, the Commission should focus on determining the scope of the concept of “environment” in relation to armed conflicts, something that would be particularly relevant to the issue of compensation in phase III.

43. While the preliminary report was informative, it lacked an in-depth analysis of the actual application of the various principles of international environmental and human rights law described. Whether those principles were applicable in armed conflicts, and, if so, in which phases and in what way, were questions that should be tackled in the next report. Further consideration of other rules and principles was also recommended, although he had some reservations as to whether the issue of indigenous rights should be addressed separately.

44. Mr. MURPHY expressed doubt at the Special Rapporteur’s conviction, set out in paragraph 24 of the preliminary report, that “a considerable number of States [had] legislation or regulations in force aimed at protecting the environment in relation to armed conflict”. While most States had national environmental laws, it could not be assumed that a State’s military forces were governed by such laws, at least in times of armed conflict. That was certainly not true of the United States, where numerous exemptions on national security grounds could be invoked with respect to military activities within the country. Moreover, most of its environmental laws were not interpreted as applying extraterritorially.

45. With regard to paragraph 47 of the preliminary report, he concurred that it was impossible to claim that a general, universal practice existed or to establish evidence of customary international law in that area. He expressed support for the Special Rapporteur’s cautious approach, including her intention not to cover various matters that would considerably complicate the Commission’s work on the topic, and to produce guidelines rather than draft articles. The working definitions provided were useful for framing the discussion, but they might not be needed in the final text. He noted that 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 Rome Statute of the International Criminal Court referred to “natural environment”, not just “environment”.

46. As was pointed out in paragraph 88 of the preliminary report, only a limited number of treaties directly regulated the protection of the environment in armed conflict. Most peacetime environmental treaties were silent on their operation during armed conflict or expressly provided that they did not apply in such situations.

47. It was not clear to what extent the Special Rapporteur saw the environmental and human rights concepts and principles set out in the preliminary report as legal rules of general applicability, nor what connection she was drawing

between them and armed conflict. For example, it was difficult to see a connection between sustainable development and armed conflict. Assuming that some of the principles and concepts canvassed in the preliminary report did have a legal content relating to armed conflict, he took the view that the specific rules of *jus in bello* that expressly or indirectly protected the environment served as the application of those environmental principles and concepts. He stressed, however, that such *jus in bello* rules did not displace other rules of international law, and that *jus in bello* was not a self-contained regime.

48. Mr. ŠTURMA expressed support for the three-phase approach taken, but sought clarification as to what rules were particularly relevant to each of the three phases. It was difficult to see how the Commission could identify obligations concerning the protection of the environment in internal conflicts, which were not covered by existing international law, without developing rules, which would entail touching upon the law of armed conflict—despite the Special Rapporteur’s statement that the Commission had no intention of modifying the law of armed conflict.

49. It might be too soon to indicate clearly what form the outcome of the topic should take, but it was important to know whether it would cover the obligations of States alone or also of non-State actors. If the latter was the case, then the customary international law that was binding on non-State organized armed groups would need to be identified. Although he supported the definition of armed conflict proposed in paragraph 78 *in abstracto*, its usefulness for the purposes of the topic would depend on who was bound by the obligations in question.

50. While he agreed with the Special Rapporteur’s reluctance to address the protection of cultural heritage, he pointed out that the proposed definition of the environment might result in some overlap with the World Heritage List maintained by UNESCO; in addition, the definition might benefit from the inclusion of subsoil or underground spaces.

51. While welcoming the Secretariat survey of State practice and the reiteration of the Commission’s previous work on related topics, he expressed concern that the key issue of the extent to which environmental principles and concepts might be applicable during armed conflict had not been addressed. Some of the principles set out in the preliminary report were not obviously relevant to armed conflicts; moreover, contrary to what the Special Rapporteur stated in her preliminary report, the “polluter pays” principle was not a principle of reparation of damage caused by an internationally wrongful act, but rather an economic and legal principle aimed at internalizing the costs associated with the use and pollution of certain parts of the environment, such as water or air. In his view, the link between human rights and the environment might provide the best way of connecting the three phases of the topic. Finally, given its complexity, more time would be required to work on the topic than the three years suggested by the Special Rapporteur.

The meeting rose at 1 p.m.

²⁵⁷ See the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities adopted by the Commission at its fifty-eighth session and the commentaries thereto in *Yearbook ... 2006*, vol. II (Part Two), pp. 58 *et seq.*, paras. 66–67. See also General Assembly resolution 61/36 of 4 December 2006, annex.