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Summary record of the 3267th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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70. It was unclear whether the obligation contained in draft principle 5 was supported by State practice which, in any case, was not widespread. That was probably why the Special Rapporteur used the verb "should" rather than the verbs "shall" or "must". The "protected zones and areas" which formed the subject of chapter VIII of the report under consideration were already regulated by several international instruments, including the 1972 Convention for the protection of the world cultural and natural heritage. It was debatable whether the idea of creating demilitarized zones was realistic. It was plain that it was often impossible to confine environmental damage and its effects to a specified area. For example, soil erosion could spread contamination of groundwater by uranium. Draft principle 5 applied during the first two temporal phases, in other words before the outbreak of conflict and during the latter, and this should be made clear in the text.

71. In her following report, the Special Rapporteur might give more in-depth consideration to other treaties in the sphere of international humanitarian law which restricted the use of methods and means of warfare that might have an adverse impact on the natural environment. A detailed account of them and a description of developments in new technologies and weapons would be a useful guide for States. As a member of the international group of experts of the NATO Cooperative Cyber Defence Centre of Excellence, he welcomed the reference to the Tallinn Manual on the International Law Applicable to Cyber Warfare, as a contributor to its second edition, since cyberwarfare was a good example of new technologies that could have a potential impact on the environment. The universal ratification of the pertinent treaties should be encouraged and States should be invited to cooperate in the implementation of obligations thereunder. Consideration might also be given to setting up a monitoring body with governance functions that could oversee compliance with those obligations and assess environmental damage caused by international and internal armed conflicts. Such monitoring bodies had often proved useful in the field of environmental protection when it came to implementing preventive and reparative measures.

72. In conclusion, in line with the Special Rapporteur's suggestion, he was in favour of referring to the Drafting Committee all the draft principles proposed in the report under consideration, apart from of the third preambular provision on the use of terms.

The meeting rose at 12.40 p.m.

3267th MEETING

Thursday, 9 July 2015, at 10.05 a.m.

Chairperson: Mr. Narinder SINGH

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Petrič, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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

[Agenda item 1]

1. The CHAIRPERSON drew attention to the revised programme of work for the second week of the second half of the session, which had been distributed to Commission members. If he heard no objection, he would take it that the Commission wished to adopt the revised programme of work as proposed by the Bureau.

It was so decided.

Protection of the environment in relation to armed conflicts (*continued*) (A/CN.4/678, Part II, sect. F, A/CN.4/685, A/CN.4/L.870)

[Agenda item 8]

Second report of the Special Rapporteur (*continued*)

2. The CHAIRPERSON invited the Commission to resume its consideration of the second report on the protection of the environment in relation to armed conflicts (A/CN.4/685).

3. Mr. ŠTURMA said that, while he supported the approach taken by the Special Rapporteur, based on three temporal phases—before, during and after an armed conflict—the second report would benefit from clarification as to which rules were particularly relevant in each phase. The Special Rapporteur was right not merely to discuss recognized rules of international humanitarian law, but to seek also to include certain principles applicable before and after armed conflicts.

4. With regard to form, he pointed out that the structure of the draft principles did not follow the temporal approach. Instead, the Special Rapporteur had chosen to start from the most general principles and proceed to more specific principles or rules, an approach that was of course legitimate and perhaps had certain advantages. On the more important matter of substance, principles on the dissemination of laws on the protection of the environment in armed conflicts, the training of armed forces and the updating of military manuals, for example, could perhaps be included among those relating to phase I.

5. With regard to the outcome of the Commission's work, he supported the Special Rapporteur's proposal to draw up draft principles, although he would also have accepted draft articles. In his view, draft principles, like draft articles, had a normative content or value. He agreed with other Commission members that the content of the so-called preamble was not preambular in nature; however, it could easily be converted into the introductory provisions of the future text.

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* Resumed from the 3263rd meeting.

6. The first two provisions of the proposed preamble, on scope and purpose, should be sent to the Drafting Committee, as they might benefit from possible improvements in formulation. In the third provision, on use of terms, he supported the broad definition of "armed conflict", which was based on a combination of the definitions in the *Tadić* case and in the draft articles on the effects of armed conflicts on treaties.[193] He also supported the inclusion of non-international armed conflicts, reflecting a general trend in international law towards a *rapprochement* between rules applicable to international and non-international armed conflicts. The ICRC study on customary international humanitarian law[194] appeared to confirm that trend.

7. In his view, it did not make sense for the Commission to consider the complicated question of non-State actors and the extent to which the draft principles might be applicable to them. It was sufficient to note that current international humanitarian law was generally interpreted as being applicable to States not parties to conflicts, and that it should be equally applicable to them when it came to the protection of the environment in armed conflicts. The assumption that the topic covered both international and non-international armed conflicts was of course important for the interpretation of all five draft principles.

8. With regard to draft principle 1, he agreed with other Commission members that the term "natural environment" was not in conformity with the definition of "environment" provided under "Use of terms" and could give rise to confusion. Moreover, he did not see much sense in the abstract qualification of the environment as "civilian in nature"; he would prefer simply to retain the core of the provision, indicating that the environment "may not be the object of an attack, unless and until portions of it become a military objective". The idea that certain parts of the environment could become a military objective and that the prohibition of an attack on them should therefore not be absolute had logical implications for draft principle 4. That draft principle dealt with belligerent reprisals, one of the most difficult questions in the law of armed conflicts. If the protection of the environment *per se* was not absolute, then the prohibition of belligerent reprisals against the environment should not be absolute either. He agreed with other speakers that, as a matter of progressive development of international law, draft principle 4 also applied in non-international armed conflicts.

9. Draft principle 2, rather than formulating some abstract principle, successfully conveyed the key message that well-known fundamental principles of international humanitarian law such as distinction, proportionality and rules on military necessity were applicable to the protection of the environment in relation to armed conflicts. However, the phrase "the strongest possible protection" should perhaps be modified, since in a situation of armed conflict the strongest protection should be given to protected persons, then to the facilities necessary for their survival, and finally to the environment *per se*, at least as it was defined under "Use of terms". Like other Commission members, he considered that another draft principle should also be formulated, drawing on the language of Rule 45 of the ICRC study on customary international humanitarian law, to specify that "[t]he use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the environment is prohibited".[195]

10. He did not see draft principle 3 as a simple repetition of the normative content of draft principle 2: it had a slightly different object and purpose. While draft principle 2 confirmed the applicability of principles of international humanitarian law to the protection of the environment, draft principle 3 suggested a certain "environmentally-friendly" way of interpreting the concepts of necessity and proportionality in the pursuit of military objectives. It was for the Drafting Committee to decide whether it was more appropriate to refer to "lawful military objectives" or "legitimate military objectives".

11. Lastly, while he was generally in favour of draft principle 5, he thought that it would benefit greatly from clarification—in particular, of what was meant by the designation of "areas of major ecological importance" and the purpose of their designation. In the absence of a specific agreement between parties, which was always a possibility, the draft principle should explicitly provide for the obligation of parties other than the States that made the designation to respect the designated areas. However, the precise legal meaning of draft principle 5 was open to question. Did it mean that only such areas must not be the object of an attack? Or did it aim to establish a regime of special or enhanced protection, similar to that provided for by the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Second Protocol? Such an interpretation might be an interesting development of international law, but would go beyond the mere restatement of general principles in that field.

12. He recommended that all the draft principles, together with the first two provisions of the preamble, be sent to the Drafting Committee.

13. Sir Michael WOOD said that the Special Rapporteur's second report on the topic was well researched and realistic. Bearing in mind that the purpose of the report was to identify existing rules of armed conflict directly relevant to the protection of the environment in relation to armed conflicts, the materials provided must be examined very carefully to see how far they supported the draft texts proposed.

14. He agreed with the Special Rapporteur that the Commission should be working towards draft principles, but there appeared to be some terminological uncertainty in the texts proposed. The use of a variety of descriptive phrases in referring to the principles might introduce certain unintended distinctions, raising

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

[194] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. I, *Rules*, Cambridge University Press; and J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol. II, *Practice* (2 Parts), Cambridge University Press, 2005.

[195] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. I, *Rules* (see footnote 194 above), p. 151.

questions about the normative value of the text. The use of the two terms "natural environment" and "environment" was also problematic.

15. With regard to the three preambular provisions, he understood why the Special Rapporteur had separated them from the draft principles; however, it would be entirely consistent with the Commission's practice to label all the provisions, including those on purpose, scope and use of terms, as principles. While the first preambular provision, on the scope of the principles, simply reflected the title of the topic, as was standard practice, there was a certain deliberate ambiguity in the choice of the term "in relation to", which could perhaps be clarified once the full set of draft principles had been formulated. The term "armed conflicts" was obviously broad enough to cover non-international armed conflicts, something that would be elaborated in the third preambular provision, on the use of terms.

16. The second preambular provision set out the purpose of the draft principles; however, the paragraph that referred to minimizing "collateral damage to the environment during armed conflict" could be placed elsewhere, as it was more of a principle than a purpose. Moreover, the reference in the first paragraph to "preventive and restorative measures" seemed to suggest that the object of the principles was purely practical: to prevent and restore damage to the environment and to minimize collateral damage. However, another view was that the aim of the exercise was to reiterate applicable principles. It was important that the provision on purpose be clear; he therefore hoped that the Drafting Committee would pay careful attention to that matter.

17. Although the Special Rapporteur was still not convinced that a paragraph on use of terms was needed, he himself believed it was important to have a clear idea of the meaning of "environment" (or "natural environment") and "armed conflict", since the study being undertaken turned precisely on those two terms.

18. It was not entirely clear what draft principle 1 added to applicable principles of the law of armed conflict, which distinguished between "civilian objects" and "military objectives". The environment was not an "object" or a "civilian object", although it could be considered to include objects. Furthermore, the notion that the natural environment was "civilian in nature" was not clear, and the term "portions", which presumably referred to particular components of the environment (objects) that could under certain circumstances become military objectives, was awkward. Clearly, objects that were not military objectives must be protected pursuant to the applicable law of armed conflict.

19. In draft principle 2, he was unsure what the term "fundamental principles" was intended to suggest. The non-exhaustive list contained therein was also somewhat surprising. Normally, in the context of the law of armed conflict, authors referred to such principles as distinction, proportionality, necessity and humanity, whereas the obligation to take "precautions in attack" appeared more like a rule of international humanitarian law. Moreover, the reference to the "strongest possible" protection of the environment did not accurately state the requirement in that regard.

20. While draft principle 3 appeared to state the obvious, there must be cases where environmental considerations were simply not relevant when deciding what was necessary and proportionate. The principle could perhaps be qualified by words such as "where appropriate".

21. In relation to draft principle 4, a number of Commission members had referred to the deterrent effect of reprisals in the context of the laws of war. It should be recalled that, upon ratifying the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), some States had made reservations with regard to the right to take reprisals in certain narrow circumstances, on the grounds of the need to compel the adverse party to cease committing violations of the Protocol. Such reservations should be borne in mind when considering draft principle 4.

22. With regard to draft principle 5, he was unsure whether the reference to the designation of "areas of major ecological importance" as demilitarized zones was desirable, even in a "soft law" text. Further clarity should be provided on how that draft principle would operate in practice. For example, what would happen if a State decided to make such a designation in order to gain military advantage, or was forced by the necessity of war to use sites of ecological importance for military purposes?

23. With regard to the future programme of work, it was to be hoped that the next report would clarify the Special Rapporteur's vision for the future of the topic. The reference in her second report to a possible need to continue with enhanced progressive development or codification was surprising, since that would constitute a very different approach, and one which the Commission might not necessarily wish to pursue. He welcomed the Special Rapporteur's intention to continue consultations with other entities, most importantly ICRC, as well as with regional organizations. He also agreed that it would be helpful if States could continue to provide examples of national legislation relevant to the topic and case law in which international or domestic environmental law had been applied.

24. In his opinion, all of the draft texts proposed in the Special Rapporteur's second report, including the preambular provision on use of terms, could be sent to the Drafting Committee.

25. Mr. KAMTO said that the Special Rapporteur could certainly not be criticized for drawing inspiration from the rules of international humanitarian law and reasoning by way of analogy, as she did in paragraphs 147 to 154 of her second report. Nevertheless, it was important to avoid the temptation simply to transpose the rules of international humanitarian law to the protection of the environment in relation to armed conflicts. The starting point for the current topic should be environmental considerations, particularly as expressed in the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*.

26. He had doubts as to whether the judgments of international courts cited in paragraphs 110 to 119 of the second report were relevant. The consideration of issues relating to the protection of indigenous peoples' land and forests, for example, would constitute a departure from the topic. It would be better to remain focused on the identification of principles to permit the natural environment to be preserved in the event of an armed conflict. Furthermore, the distinction being made between the terms "environment" and "natural environment" was unclear, and the Special Rapporteur should clarify that point.

27. He still believed that it would be difficult to structure the draft principles on the basis of the three-phase approach, since the conditions for preserving the environment during or after an armed conflict were at the heart of the topic. He considered that the three preambular provisions should be incorporated within the principles themselves. Furthermore, the Special Rapporteur should, in a future report, propose a general pattern for the draft principles, even if it was adjusted in subsequent reports, so that the Commission could obtain a general idea of the work to be undertaken.

28. With reference to the preamble, the term "purpose" in the second provision was not particularly appropriate in the light of the content. The provision on the use of terms should be analysed in greater depth before it was sent to the Drafting Committee.

29. Concerning draft principle 1, it was not because "[t]he natural environment is civilian in nature" that it should be protected; rather, the reasons for its protection derived from the 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*. As for draft principle 2, it was doubtful whether the principles referred to therein were intended to provide the environment with the "strongest possible protection". The wording was in any case ambiguous, since it was not clear whether the level of protection in question was the same as that which normally existed in peacetime, or whether a special level of protection during armed conflict was envisaged. If the latter was the case, what was the threshold above which "the strongest possible protection" could be said to exist? He wondered why draft principle 4 referred to "attacks" in the plural. Surely just one attack would be sufficient to give rise to the application of that principle. Lastly, he remained doubtful both about the legal basis of draft principle 5 and about how it would be implemented.

30. He was in favour of sending the paragraphs constituting the preamble to the Drafting Committee, on the understanding that it would give only provisional consideration to the one on use of terms until the Special Rapporteur had incorporated any additional elements; he was also in favour of sending draft principles 1 to 5 to the Drafting Committee.

The meeting rose at 10.50 a.m.

3268th MEETING

Friday, 10 July 2015, at 10.05 a.m.

Chairperson: Mr. Narinder SINGH

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Park, Mr. Petrič, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies (*continued*)*

[Agenda item 13]

STATEMENT BY REPRESENTATIVES OF THE COUNCIL OF EUROPE

1. The CHAIRPERSON welcomed Mr. Rietjens, Chairperson of the Council of Europe Committee of Legal Advisers on Public International Law (CAHDI), and Ms. Requena, Secretary to CAHDI, and, having noted the great importance the Commission attached to its cooperation with the Council of Europe, particularly CAHDI, invited the representatives to address the Commission.

2. Mr. RIETJENS (Council of Europe) said that, as the new Chairperson of CAHDI, he welcomed the opportunity to appear before the International Law Commission and to update it on the main accomplishments of CAHDI since the Commission's previous session, and to inform it of its plans for the future. The members of CAHDI greatly appreciated the now-traditional meeting with the Commission. Originally created as a subcommittee of the European Committee on Legal Co-operation, CAHDI had become a fully-fledged Committee in 1991, under the Committee of Ministers of the Council of Europe. It had decided to organize a conference on the occasion of its fiftieth meeting, which would take place on 23 September 2015, bringing together all former Chairpersons and Vice-Chairpersons of the Committee on the topic "The CAHDI contribution to the development of public international law: achievements and future challenges". Twice a year, in March and September, CAHDI brought together the legal advisers on public international law of the Ministries for Foreign Affairs of the 47 States members of the Council of Europe as well as the representatives of observer States and a significant number of international organizations, including the United Nations. The rich diversity of CAHDI afforded it a comprehensive and cross-cutting view that took into consideration the development of international law beyond the Council of Europe. CAHDI was a forum for coordination, discussion, deliberation and advice in which information was exchanged on topical issues, experiences and national practice. He would begin by presenting the CAHDI activities that contributed generally to the development and evolution of international law, followed by those that

* Resumed from the 3265th meeting.