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For participants only

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Sixty-seventh session (second part)

Provisional summary record of the 3268th meeting

Held at the Palais des Nations, Geneva, on Friday, 10 July 2015, at 10 a.m.

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Present:

Chairman: Mr. Singh
Members: Mr. Caflisch
Mr. Candiotti
Mr. El-Murtadi
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

Secretariat:

Mr. Llewellyn Secretary to the Commission

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

Cooperation with other bodies (agenda item 12) (*continued*)

Visit by representatives of the Council of Europe

The Chairman welcomed Mr. Rietjens, Chair of the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe, 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.

Mr. Rietjens (Council of Europe) said that, as the new Chair 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 (CDCJ), 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 Chairs and Vice-Chairs 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 of 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 might contribute more specifically to the Commission's work, and lastly those that might have an impact on other United Nations bodies and international organizations, such as the European Union.

With regard to the first category, the CAHDI approach was underpinned by in-depth, pragmatic debates on topical issues that arose in the respective ministries of its members. For example, in order to address the recurring problem of the seizure of State-owned cultural property on loan at the request of private creditors calling for the enforcement of court decisions, CAHDI had elaborated a declaration in support of the recognition of the customary nature of the pertinent provisions of the United Nations Convention on Jurisdictional Immunities of States and Their Property. The declaration was a non-binding legal document that expressed a common understanding of *opinio juris* based on the fundamental rule that certain kinds of State-owned property — in that case cultural property on display — enjoyed immunity from all measures of constraint, such as attachment, arrest or execution. The declaration had been signed by the foreign ministers of 11 States members of the Council of Europe, and several delegations had indicated that their national authorities also planned to sign it. It was thus to be hoped that practice — if not custom — would develop in relation to the immunity of such property.

Starting in 2014, CAHDI had also undertaken a review of eight Council of Europe conventions concerning public international law in order to determine their impact and effectiveness and to highlight any implementation problems or obstacles to their ratification. It had concluded that the European Convention on Consular Functions was of limited practical use, given that the 1963 Vienna Convention on Consular Relations better

addressed the issues of public international law. On the other hand, CAHDI had found that the European Convention on the Abolition of Legalization of Documents Executed by Diplomatic Agents or Consular Officers was very useful in practice, as it facilitated inter-State relations, and States had been encouraged to accede to it. Conflicting views had been expressed during the consideration of the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes. Whereas some delegations had considered that it had become irrelevant following the adoption of the Rome Statute, others had stressed that it was of value in its own right, as its objective was to ensure that statutory limitation was not an obstacle to the punishment of the most serious crimes that it covered, and, moreover, that it could be evidence of a rule of customary international law. The debate would be resumed at the fiftieth meeting of CAHDI, when the European Convention on State Immunity and Additional Protocol would be considered.

At its forty-eighth meeting, CAHDI had discussed legal issues related to the phenomenon of foreign terrorist fighters had been discussed, in particular whether persons who travelled to a foreign country to join groups involved in an armed conflict in that country could be stripped of their nationality. In that regard, two instruments that included provisions on the loss of nationality had been examined. The 1961 Convention on the Reduction of Statelessness, which provided that a Contracting State could not deprive a person of his nationality if such deprivation would render him stateless, and the 1997 European Convention on Nationality, which, although it had the same objective, provided for several exceptions, including the fraudulent acquisition of nationality and voluntary service in a foreign military force. Although those instruments did not address the increasingly widespread phenomenon of foreign terrorist fighters, CAHDI had considered whether that phenomenon could be covered by those conventions by means of declarations or reservations and whether it was permissible under those instruments to deprive the persons in question of their nationality. With regard to the latter question, it was found that the withdrawal of nationality from persons with dual nationality appeared to be in conformity with international law, including the aforementioned instruments. Problems arose, however, when the withdrawal of nationality gave rise to situations of statelessness. As to whether treaty law provided solutions that would allow foreign terrorist fighters to be deprived of their nationality, two possibilities had been considered: either to denounce the two conventions, change national legislation and accede to the conventions with a new declaration and a new reservation; or, for States that had formulated reservations, to explain through an interpretative declaration that the purpose of the reservations formulated in respect of the two conventions had been to penalize citizens taking part in military activities abroad, thereby covering the issue of “foreign fighters” joining groups involved in non-international armed conflicts. It had been highlighted during the ensuing discussions that the first possibility was contrary to treaty law and considered an evasion of the law. Concerns had also been expressed with regard to the second possibility, as formulating an interpretative declaration in respect of an existing reservation would expand the scope of both conventions to foreign terrorist fighters and would be contrary to the object and purpose of both conventions if it resulted in statelessness for the persons concerned. In that regard, the work of the International Law Commission had been mentioned, specifically, in its Guide to Practice on Reservations to Treaties, the guideline on the “widening of the scope of a reservation”, the commentary to which dealt with the established practice in the Council of Europe of prohibiting changes that widened the scope of reservations.

Turning to the contribution of CAHDI to the work of the Commission, he recalled that the Commission’s work had been included as an item on the agenda for the Committee’s September meetings and stressed the importance of the dialogue between the two bodies, which included the annual visit by a member of the Commission. CAHDI included on its agenda ongoing topics such as “immunities of States and international organisations” and “law and practice relating to reservations and interpretative declarations

concerning international treaties”, which were the subject of lively debates that often made mention of the Commission’s work. As the European Observatory of Reservations to International Treaties, CAHDI considered at each of its meetings a list of reservations and/or declarations to which there might be objections, making extensive reference to the Commission’s Guide to Practice on Reservations to Treaties and the commentaries to the guidelines contained therein. Furthermore, although the CAHDI database on immunities covered primarily immunities of States and international organizations, the issue of the immunity of State representatives was receiving growing interest and, in March 2014, CAHDI had held a seminar on “Immunity *ratione materiae* of State officials from foreign criminal jurisdiction”, in which Ms. Escobar Hernández, the Special Rapporteur on that topic, had participated. As there had been a great deal of interest in the proceedings of the conference held in September 2012 on “The judge and international custom”, they had been supplemented by additional contributions from eminent national and international judges and made into a book to be published in September 2015.

With regard to the contribution made by CAHDI to the work of other bodies, the fact that the legal advisers of the member and observer States of the Council of Europe also met in the forums of other bodies, such as the European Union and the United Nations, facilitated the adoption of consistent approaches and the sharing of views on legal matters. Examples included the current discussions on the settlement of private law disputes to which an international organization was a party. CAHDI considered it necessary to address that issue because the immunity of such organizations often prevented individuals who had been the victims of harm caused by the conduct of an international organization from obtaining reparations before national courts. However, in recent years, such immunity had been increasingly challenged on the grounds that maintaining it would be incompatible with the right of access to a court. Although that topic clearly extended beyond the regional framework of the Council of Europe, it was very difficult at that stage to discuss it in a broader context. In September 2014, CAHDI had also organized a seminar on “The legal aspects of the role of the host State of international organizations”, during which guidelines for States hosting international organizations had been identified, particularly in relation to national legislation governing the status of the organizations and the issue of the application of national law.

CAHDI had reviewed relations between the European Union and the Council of Europe once again when it had adopted, at the request of the Committee of Ministers, an opinion on the Parliamentary Assembly’s recommendation entitled “The Implementation of the Memorandum of Understanding between the Council of Europe and the European Union”, which dealt with, *inter alia*, the possibility of accession by the European Union to Council of Europe conventions. In that regard, it had highlighted that the European Union was already a party to 10 Council of Europe conventions and that it had signed but not yet ratified 4 more. It had also noted that the European Union could become a party to 23 additional conventions and could be invited to accede to 12 others after their entry into force. The members of CAHDI had agreed, however, that in order to avoid any interference with the current negotiations, they would postpone consideration of Opinion 2/13 in which the European Union Court of Justice had indicated, on 18 December 2014, that the draft agreement on the accession of the European Union to the European Convention on Human Rights was incompatible with certain provisions of European Union law.

In conclusion, he said that cooperation was key in international law. CAHDI intended to continue exchanging views and holding debates and would propose solutions to contemporary problems through active cooperation with other actors of international society.

Ms. Requena (Council of Europe) said that the links between the United Nations and the Council of Europe in the field of international law had been further strengthened

through the participation of representatives of the Council of Europe in International Law Week in the framework of the Sixth Committee's review of the Commission's report on its work. For example, at the twenty-fifth meeting of legal advisers held on 27 and 28 October 2014, Mr. Polakiewicz, the Director of the Directorate of Legal Advice and Public International Law, had taken part in a discussion panel on the topic "Extraterritorial access to information: rights and duties of States", which included giving a presentation on the problem of reconciling effective law enforcement and data protection.

She would begin by giving an overview of recent developments in relation to the chairmanship of the Council of Europe's Committee of Ministers before moving on to aspects of treaty law of relevance to the conventions of the Council of Europe and the activities of the Council of Europe in relation to the fight against terrorism. She would conclude by presenting a number of issues concerning the credentials of the delegation of the Russian Federation in the Parliamentary Assembly.

With regard to the first point, the Parliamentary Assembly had renewed the mandate of the Deputy Secretary General, Ms. Battaini-Dragoni. Furthermore, in November 2014, Belgium had taken over the chairmanship of the Committee of Ministers from Azerbaijan, and in turn had been replaced by Bosnia and Herzegovina in May 2015. One of the priorities of the Bosnia and Herzegovina chairmanship was to promote the ratification and implementation of the Council of Europe Convention on preventing and combating violence against women and domestic violence, which had entered into force on 1 August 2014. Other priorities included expanding the policy of the Council of Europe in respect of neighbouring regions, specifically the partnerships concluded with Jordan, Morocco and Tunisia for the period 2015-2017, and strengthening cooperation with Kazakhstan and Kyrgyzstan, in order to ensure that the legal standards of the Council of Europe served as the basis for the development of the legal framework in those countries. The chairmanship would also focus on the cultural activities of the Council of Europe, with special emphasis on the European Cultural Convention and on the activities conducted by the Council through the European Cinema Support Fund (EURIMAGES), and on enhancing the action of the Council of Europe with respect to the religious dimension of intercultural dialogue.

With regard to recent developments concerning the treaty law of the Council of Europe, on 3 June 2015, the Committee of Ministers had adopted a resolution to amend article 26 of the Statute of the Council of Europe and increase the number of seats allocated to Turkey in the Parliamentary Assembly to 18. That decision had been taken in order to remedy the underrepresentation of the Turkish Parliament in the Assembly. Turkey, which had offered to become a major contributor to the Council's budgets, now had the same number of seats as the five other major contributors: France, Germany, Italy, the Russian Federation and the United Kingdom.

On 9 June 2015, the Ukrainian Government had notified the Secretary General of the Council of Europe of its decision to exercise the right of derogation under article 15 of the European Convention on Human Rights. Citing a public emergency threatening the life of the nation, it had stated that it had to take measures that derogated from certain obligations under the International Covenant on Civil and Political Rights and the European Convention on Human Rights. The measures included the restriction of the rights guaranteed under articles 5 (Right to liberty and security), 6 (Right to a fair trial), 8 (Right to respect for private and family life) and 13 (Right to an effective remedy) of the European Convention on Human Rights and article 2 (Freedom of movement) of Protocol No. 4 thereto. According to the Ukrainian authorities, the measures, which were related to antiterrorist operations being carried out in certain areas of the Donetsk and Luhansk provinces, would be applied only in those areas, and any changes to their implementation, including their territorial application, would be notified to the Secretary General of the Council of Europe. That was not the first time that the right of derogation provided for

under article 15 of the Convention had been invoked; several States parties — Albania, Armenia, France, Georgia, Greece, Ireland, Turkey and the United Kingdom — had exercised it in the past. The Council of Europe would continue to cooperate with the Ukrainian Government to ensure that the derogations were lifted as soon as possible. In the meantime, the European Court of Human Rights would continue to receive and consider applications alleging violations by Ukraine of the rights guaranteed under the Convention and, in the cases brought before it, would determine whether the measures taken by virtue of the derogation were justified in the light of the threat that had motivated them.

At its last session, held in May 2015, the Committee of Ministers had adopted a series of decisions aimed at enhancing the effectiveness of the monitoring mechanism for the European Convention on Human Rights, the proper functioning of which was hindered by perennial problems such as delays in dealing with applications submitted to the Court, failure by States to enforce the Court's decisions and the increasing workload it created for the Committee of Ministers, which was responsible for monitoring the enforcement of decisions handed down by the Court. Among the measures taken to improve the implementation of the Convention, the Committee of Ministers had encouraged the many States parties to the Convention that had not yet done so to sign and ratify its Protocols Nos. 15 and 16. Protocol No. 15 provided for the addition of a specific reference to the principle of subsidiarity and a margin of appreciation and established that the Court could only deal with a matter within a period of four months — as opposed to the current six months — from the date on which a final decision had been taken by the domestic courts. Protocol No. 16 provided for the possibility of the highest national courts requesting the Court to give advisory opinions on questions of principle relating to the interpretation or application of the Convention or the protocols thereto. The Committee of Ministers was convinced of the importance of the European Union acceding to the European Convention on Human Rights, which it strongly encouraged, but it could not prejudge the outcome of the ongoing negotiations on the matter between the States members of the European Union and its institutions.

Two new Council of Europe conventions had been opened for signature: the Convention on the Manipulation of Sports Competitions in September 2014 and the Convention against Trafficking in Human Organs in March 2015. The European Convention on the Repatriation of Minors, which had been adopted in 1970, would enter into force on 28 July 2015. According to the Treaty Office, a growing number of non-member States of the Council of Europe was requesting the option to accede to its conventions. Of the 216 existing conventions, 159 were open to non-member States. Since July 2014, there had been 10 accessions and 9 requests for accession by non-member States. The procedure for accession to Council of Europe conventions for non-member States had been simplified and shortened considerably. Requests for accession no longer necessitated an initial consultation of all States members of the Council of Europe followed by a second consultation of non-member States that were parties to the convention in question, but now required a single consultation of all States parties to the convention, regardless of whether they were members of the Council of Europe; that process took six weeks at most, compared to several months under the old procedure.

Following the horrendous terrorist attacks in Belgium, France and Denmark, the Secretary General of the Council of Europe had presented to the Committee of Ministers on 9 February 2015 a document containing proposals for immediate action to combat extremism and radicalization leading to terrorism. On the basis of that document, at its session in May 2015 the Committee of Ministers had adopted a declaration and an action plan centred on two main objectives: reinforcing the legal framework against terrorism and violent extremism and preventing and fighting violent radicalization, particularly in schools and prisons and on the Internet. At the same session, the Committee of Ministers had also adopted an Additional Protocol to the Council of Europe Convention on the Prevention of

Terrorism which dealt with foreign terrorist fighters and provided a more precise definition of the offences covered under United Nations Security Council resolution 2178 (2014). The action plan adopted by the Committee of Ministers provided for, *inter alia*, the elaboration of a new recommendation on terrorists acting alone and guidelines on the prevention of radicalization in prisons.

In January 2015, the Parliamentary Assembly of the Council of Europe had decided to ratify the credentials of the Russian delegation but at the same time to suspend its voting rights and its right to be represented in the Assembly's leading bodies, as a clear expression of condemnation of the continuing grave violations of international law in respect of Ukraine by the Russian Federation. At its session in June 2015, the Assembly had decided not to annul the already ratified credentials in order to foster dialogue with the Russian Federation, but had maintained the existing sanctions. In a decision of 15 April 2015, the Committee of Ministers had called on all parties concerned to respect the Minsk Agreements, including the package of measures for the implementation of the agreements adopted in February 2015.

Referring to United Nations General Assembly resolution 69/83, in which the General Assembly welcomed the contribution of the Council of Europe to the work of the Sixth Committee and the International Law Commission, she said that the Council of Europe also valued that cooperation.

Mr. Kittichaisaree asked what legal provisions had provided the basis for the decision of the European Union to use armed forces to stop the boats being used by human traffickers. With regard to the immunity of State representatives, in its judgment in the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* case, the International Court of Justice had recognized the principle of the personal immunity of Heads of State, Heads of Government and Ministers for Foreign Affairs — the so-called “troika”. That issue was being debated in the Commission and some members were of the view that only Heads of State or of Government should enjoy such immunity, although several States had stated in the Sixth Committee that it should apply not only to the members of the “troika” but also to other State representatives. It would be interesting to know the position of CAHDI on that matter and on whether private service providers should be allowed to enjoy functional immunity and, if so, for what reasons.

Mr. Park said that foreign terrorist fighters were a new phenomenon that had not existed when the 1961 Convention on the Reduction of Statelessness had been concluded and could thus be considered a “fundamental change of circumstances” in accordance with article 62 of the Vienna Convention on the Law of Treaties. He wished to know whether that article had been taken into consideration in the debates that had led CAHDI to conclude that denouncing the Convention and reaccessing to it with a reservation to the effect that foreign terrorist fighters could be stripped of their nationality would be contrary to treaty law and considered an evasion of the law.

Mr. Rietjens (Council of Europe) said that he could not speak on behalf of the European Union about the reasons that had led it to take the measures mentioned by Mr. Kittichaisaree, but that he would be happy to discuss the matter with him in another context. On the issue of foreign terrorist fighters, he said that CAHDI, which was primarily a forum for exchange, had not adopted an official position on the matter and that discussions were continuing at the national level on how to effectively combat the problem in compliance with the law. He did not recall article 62 of the Vienna Convention on the Law of Treaties having been mentioned during the CAHDI debates, but that article undeniably offered a very relevant perspective that he would be sure to bring to the attention of the CAHDI members during future discussions. Speaking in a personal capacity, he said that, in responding to terrorism, political leaders often felt obliged to take tough measures very quickly in order to reassure the public, as had been the case following the attacks on 11

September 2001, for example, at the risk of sometimes disregarding certain principles to which a State governed by the rule of law must adhere. It was only at a later stage, after discussions had taken place, often guided by eminent jurists like the members of the Commission, that the initial measures were amended. The contribution of experts in international law was therefore essential in defining responses that were observed legal principles.

Ms. Escobar Hernández said that the meetings between the Commission and CAHDI always resulted in very fruitful exchanges of views on matters of common interest, and it was important to continue the tradition. On the issue of foreign terrorist fighters, she fully supported the CAHDI position that denouncing the relevant conventions and reacceding to them with a reservation in order to be able to strip the persons concerned of their nationality was an evasion of the law.

However, she was not convinced that such an approach was contrary to treaty law, as suggested by the case of Bolivia and the 1961 Single Convention on Narcotic Drugs. Bolivia, which had been a party to that Convention since 1976, had denounced it in June 2011 with effect from 1 January 2012 and had reacceded to it in 2013 with a reservation allowing it to authorize the consumption of coca leaves on its territory as a traditional practice. Fourteen States had lodged objections, but as they had not made up the one third of States parties required under the Convention for the reservation to be rejected, it had been deemed to be permitted.

Mr. Forteau asked what precluded the issue of settlement of private law disputes to which an international organization was a party from being discussed in a broader framework than the Council of Europe.

Mr. Rietjens (Council of Europe) thanked Ms. Escobar Hernández for having mentioned the case of the reaccession of Bolivia to the Single Convention on Narcotic Drugs, but said that he did not recall whether that country's reservation had been considered by CAHDI in its capacity as European Observatory and did not know which countries had lodged objections to it. The discussion on foreign terrorist fighters came under the agenda item on topical issues of international law, which meant that it was a very general exchange of views that did not, in theory, result in CAHDI adopting any conclusions. The opinions he had mentioned were those of the delegations that had expressed them. However, Ms. Escobar Hernández had clearly shown that there were doubts as to the absolute nature of the claim that the approach adopted by Bolivia, for example, would be contrary to treaty law. With regard to the settlement of private law disputes to which an international organization was a party, the opportunity had not yet arisen to discuss the issue at the international level. The members of CAHDI had taken an interest in the matter because it arose frequently in practice, and they had wondered how the principle of the functional immunity of organizations and the right of access to a court could be reconciled in order to assert one's rights. Other bodies would no doubt also address the issue at some point.

Ms. Requena (Council of Europe) said that the case of the Bolivian reservation to the Single Convention on Narcotic Drugs had not been considered during the CAHDI debates. The Treaty Office of the Council of Europe had, however, examined whether it could be considered evasion of the law for a State party to the European Convention on Nationality to denounce the Convention and accede to it again with a reservation in order to be able to deprive foreign terrorist fighters of their nationality. Rather than focusing on the actual course of action, the Office had focused on the reservation itself and whether it was compatible with the object and purpose of the Convention. Given that, for the purposes of the Convention, the loss of nationality at the initiative of a State party was provided for, *inter alia*, in the case of voluntary service in a foreign military force, the Office had considered that a reservation to allow the withdrawal of nationality from foreign terrorist

fighters was prohibited under the Convention and would be contrary to its object and purpose on the grounds that the armed groups that the fighters were joining were not official national armed forces. As there were no official records of CAHDI meetings, the debates were more informal than those in other bodies, such as in the United Nations system; therefore, the positions taken were sometimes more unconventional.

Mr. Hassouna asked whether CAHDI had considered the possibility of cooperating with the Asian-African Legal Consultative Organization (AALCO). Such cooperation would be mutually beneficial as the two bodies dealt with common subjects. It would also be very helpful if CAHDI were to propose topics to be included in the Commission's long-term programme of work.

Mr. Šturma, referring to the issue of foreign terrorist fighters, said that he agreed that the solution of formulating reservations to the European Convention on Nationality would not be the most appropriate. However, CAHDI could perhaps consider adopting an agreement, even in a simplified format, on the interpretation of the Convention with regard to the issue of service in foreign armed forces so that measures could be taken against the individuals concerned.

Mr. Rietjens (Council of Europe) thanked Mr. Hassouna for his proposals and said that he would suggest to the members of CAHDI that they should invite the Secretary General of AALCO to present the organization's work to them, as exchanges between regional organizations were mutually enriching. He would also ask the CAHDI member delegations to consider possible topics they could propose to the Commission, which they could convey to Mr. Singh during his visit in September 2015. Noting that Mr. Šturma's comments were in line with those made during the discussion on the subject of a change in circumstances, he said that CAHDI should take that argument into consideration in its future discussions on finding a legal basis to support the measures that States were intent on taking, although they would rather do so in accordance with the rule of law.

Protection of the environment in relation to armed conflicts (agenda item 7) (*continued*)
(A/CN.4/685)

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

Mr. Hmoud said that undertaking a project on the protection of the environment in relation to armed conflicts was an ambitious endeavour for the Commission, as the rules on the topic might not be sufficient and the concept of the environment was not clearly defined in law or science. It was imperative to develop rules or principles that were applicable both during armed conflict and in peacetime. That was not an easy task given the *lex specialis* nature of certain rules, such as those governing armed conflict. Nonetheless, the Commission had made the right decision in adopting the Special Rapporteur's proposal not to limit the scope of the topic to the protection of the environment during armed conflict. If the goal was to maximize the protection of the environment, a comprehensive legal regime should be put in place to regulate or provide guidance on the conduct of the parties before, during and after conflicts. Of course, States played the primary role in that regard, especially in terms of precaution, preparedness and mitigation, but intergovernmental organizations, to the extent that they were subject to the rules or were involved in their implementation, could also play a significant role. Therefore, he wondered whether the Special Rapporteur, in her future reports, might wish to consider if only by way of proposals, how international organizations could contribute to the legal protection of the environment, including in the form of a duty of cooperation or information sharing.

Regarding the form the outcome of the work should take, the Special Rapporteur was of the view that principles would be preferable, although they could, depending on the context, be binding. In fact, as formulated, principles 1 to 4 created obligations on States and other parties to a conflict. Principles could reflect existing law or be intended as *de lege ferenda*, regardless of the name given to them, but their provisions were more likely to be adhered to if they took a non-treaty form. There was merit, however, to the idea of elaborating a set of draft articles, especially since most rules related to armed conflict were codified in universal treaties.

He was of the view that the project should address both international and non-international armed conflicts. As had been said by several members, most contemporary armed conflicts were non-international and the added value of the Commission's work would be minimal if it was confined to international armed conflicts. Although there was some uncertainty regarding the applicability of certain rules on environmental protection to non-international armed conflicts, there was no reason not to affirm their applicability or to progressively develop new rules to apply to such conflicts. In that regard, the principles should expressly provide that they applied to both types of conflicts, without dwelling on a definition. While the definition provided in the preamble was more comprehensive in terms of non-international armed conflicts and had been used by international tribunals, such as the International Criminal Tribunal for the Former Yugoslavia, there was no reason for the Commission to be involved in the debate on which situations should be considered armed conflicts. Common article 3 of the 1949 Geneva Conventions encompassed the use of force between armed groups, whereas Additional Protocol II provided that, in order to fall within its scope, a non-international armed conflict must involve the State and armed groups that exercised control over part of its territory in such a way as to allow them to carry out sustained military operations and implement the Protocol. In any case, if the Commission decided to adopt a definition of "armed conflict", it should require that the protracted use of force should reach a minimum level of intensity.

With regard to the definition of the environment, there were few international or regional instruments that defined the environment or the natural environment, and the definitions they provided did not always include natural resources. In the context of the protection of the environment or of the human environment in relation to armed conflicts, the inclusion of natural resources could be problematic, as the rules that applied to such resources under international humanitarian law served goals that did not necessarily overlap with the goal of environmental protection. Several of those rules, as well as judicial rulings relating to the treatment of natural resources during armed conflict and Security Council resolutions on conflict situations, were mostly concerned with the protection of economic and property rights from destruction and exploitation and not environmental protection *per se*. In any case, if natural resources were to be included in the definition of the environment, a distinction should be made between environmental protection and the protection of economic and property rights associated with natural resources. Furthermore, the existing rules on environmental protection during armed conflict, including those set out in Protocol I, related essentially to the natural environment. If the Commission were to also address protection of the human environment or natural heritage, it would have to find a strong legal basis, as existing international law did not seem to provide for such protection.

On the issue of weapons, he saw no reason to exclude any sort of weapon, whether conventional or non-conventional, from the scope of the principles, especially those that would apply during armed conflict. Although the International Court of Justice, in its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, had found that no convention or customary international law universally and comprehensively prohibited the threat or use of nuclear weapons, it had concluded that such a threat or use would generally be contrary to the rules of international law applicable during armed conflict, which confirmed that the use of nuclear weapons fell within the scope of the law of armed

conflict and that any specific prohibitions or protections under that law that related to the environment applied to those weapons. In that regard, he was, like some other members, in favour of including a principle on the prohibition of the use of methods and means of warfare that were intended, or could be expected, to cause widespread, long-term and severe damage to the natural environment. The related rule contained in Protocol I arguably had a customary law character, at least in relation to international armed conflict, and such methods and means of warfare were perhaps incompatible with the strict application of the principles of distinction, proportionality and military necessity.

Another general observation related to the rules of international environmental law that might apply both in peacetime and during armed conflict. In the 2011 draft articles on the effects of armed conflicts on treaties, environmental treaties had been included in the indicative list of treaties that, owing to their subject matter, continued to apply during armed conflicts. It would be worth exploring which conventional rules contained in universal treaties on environmental protection had that character. Similarly, he wondered whether there were customary environmental rules that applied during both peacetime and war. The Special Rapporteur had raised that issue when discussing the principles of precaution and prevention in paragraph 52 of her second report. Concerning the precautionary principle at least, the International Court of Justice seemed to recognize, in its 1996 advisory opinion on the *Nuclear Weapons* case, that it applied during armed conflict. Thus, it might be essential to reach conclusions on the temporal application of those and other principles.

Concerning the draft principles and the preamble proposed by the Special Rapporteur, he was of the view that the purpose of the principles should be to enhance environmental protection before, during and after an armed conflict. However, the wording of the stated purpose seemed to indicate that enhancing protection was confined to preventive and restorative measures in all phases of the conflict, whereas during the conflict the aim was to minimize collateral damage. On the other hand, in principle 2, it was stated that, during an armed conflict, fundamental principles and rules of international humanitarian law should be applied in a manner so as to enhance the strongest possible protection. Those goals needed to be harmonized in order to be able to set benchmarks for the application and interpretation of the principles. As other members had suggested, the reference to “preventive and restorative measures” should be deleted, as it appeared to limit the goal of enhancing protection to those measures only. It should also be clarified that enhancing protection and minimizing collateral damage were not mutually exclusive, for instance, by amending the text to state that the goal of enhancing protection during armed conflict included minimizing such damage. He was also in favour of deleting the word “collateral”, because one goal should be to minimize all damage, whether collateral or not. Regarding draft principle 2, although it did not create a hierarchy between environmental protection and the protection of civilians or civilian objects, it would be preferable to replace the words “so as to enhance the strongest possible protection of the environment” with the words “so as to enhance protection of the environment”.

With regard to draft principle 1, as had been stated by several members, the characterization of the natural environment as civilian in nature would create uncertainties without achieving any specific outcomes in relation to legal protection. The difficulty of describing the natural environment as an “object” was understandable, as it was more of a concept than an object. However, for the purpose of a legal description that would determine the set of rules and principles that applied to the protection of the environment during an armed conflict, two categories — civilians and civilian objects versus military objectives — were established under international law. If the intention was to classify the natural environment in draft principle 1, it should be described as a “civilian object” to ensure that it was protected under the rules generally applied to the protection of such objects. It should be recalled, however, that certain provisions applicable to the protection

of civilian objects under international humanitarian law were not automatically applicable by analogy to the protection of the natural environment, again because it was a concept rather than an object and therefore required a *sui generis* legal treatment. As such, it might be better to establish specific legal rules applicable to the protection of the natural environment during an armed conflict rather than simply classifying it as a civilian object. The main purpose of draft principle 1 was to prohibit attacks against the natural environment, in the same manner that attacks against civilian objects were prohibited, unless and to the extent that it became a military objective. That rule stemmed from the principle of distinction, which was at the core of the legal protection of civilian objects and, as was demonstrated in the report, there was sufficient practice to establish it for the protection of the natural environment. The question was when the environment or part of it became a military objective. It might be easier to identify that moment for civilian objects other than the natural environment. Did changing part of the environment into a military objective render the whole of the environment the legitimate target of an attack? Such distinctions and situations should be clarified in the text of the draft principles or in the commentaries. Regarding the second part of principle 1, on the obligation to respect and protect the natural environment, it should be clarified whether that obligation was particular to the situation of armed conflict or applied to all temporal phases. Both options were substantiated by sufficient practice and jurisprudence.

Draft principle 2 encompassed two ideas: the first was that fundamental principles and rules of international humanitarian law applied to the environment, a notion that was supported by rule 43 of the study by the International Committee of the Red Cross on customary international humanitarian law, which provided that the general principles on the conduct of hostilities applied to the natural environment. The study concluded that the rule applied to both international and non-international armed conflicts. It also confirmed that such fundamental or general principles included distinction and proportionality as well as the rules on military necessity. In addition, as had been demonstrated in the second report, practice seemed to confirm the applicability of such principles and rules to the natural environment. Regarding the principle of precaution in an attack, two matters needed to be clarified: the first was the application of the principle to non-international armed conflicts, a matter that had remained unresolved, and the second was the standard of damage. Was any incidental damage concerned or did the damage have to meet the high standard of article 55 of Protocol I, namely be “widespread, long-term and severe”? The second idea expressed in draft principle 2 was that the rules and principles of international humanitarian law were to be applied in a manner so as to enhance the protection of the environment or to ensure the strongest possible protection. That could have a significant effect on the application of such principles, especially considering that the threshold of damage to the natural environment was higher than that for civilians or civilian objects. At a minimum, as had been mentioned, that threshold was not clear. That was a policy consideration that the Commission must decide.

Draft principle 3, which reiterated what had been stated by the International Court of Justice in its advisory opinion on the *Nuclear Weapons* case, might be included as a separate principle, depending on how draft principle 2 was reworded. The Special Rapporteur had stated in paragraph 161 of her report that it was not the task of the Commission to determine the parameters of the principle of proportionality. Nonetheless, it seemed important that the content of principle 3 as a whole should be elaborated upon, namely by indicating how environmental considerations could be taken into account in assessing necessity and proportionality in pursuing military objectives. It was the interaction between the elements of that provision that should be clarified, possibly in the commentaries.

He supported the inclusion of the principle of the prohibition of reprisals, without any exceptions or conditions for total prohibition. It was hard to imagine how an attack

against the natural environment could be considered a lawful reprisal. If the environment or a part thereof became a military objective, other rules applied to ensuing attacks. The absolute prohibition of reprisals against the environment was reaffirmed in article 55, paragraph 2, of Protocol I and in the Convention on Certain Conventional Weapons.

On draft principle 5, concerning the designation of demilitarized zones, the Commission should indeed signal the importance of providing legal protection for areas of major ecological importance. It would be useful, however, to add a provision to the principle to the effect that agreements concluded by the parties prior to or during an armed conflict designating demilitarized zones should be respected during the conflict and that such areas could not be attacked.

In conclusion, he recommended sending the proposed draft principles and the preambular paragraphs concerning the scope and purpose to the Drafting Committee.

Ms. Escobar Hernández, recalling that the Special Rapporteur had explained in detail when introducing her report why she had chosen to present the results of her work in the form of draft principles, said that the term “principle” had been interpreted in a variety of ways by the Commission members. In her view, the choice of term did not in any way detract from the normative nature of the outcome of the work. As she had stated several times during the quinquennium, “principles” should not automatically be considered to be mere guidance. On the contrary, they had normative value and there was no doubt that they created obligations. Although she understood the reasons cited by the Special Rapporteur, she believed that, given the content of the proposals made at the current stage, it would be better to refer to “draft articles”, although she would not object to keeping the term “draft principles” if the majority of the members preferred that.

As she had noted at the previous session, she was of the view that the Special Rapporteur’s temporal approach was appropriate as it facilitated the methodical treatment of the problems related to the protection of the environment in relation to armed conflicts before, during and after the conflict. In that regard, she unreservedly supported the Special Rapporteur’s position that the topic could not be addressed without taking into account those three phases, which were obviously closely linked. Furthermore, by studying each of the phases separately, it was possible to isolate the problems and avoid having to consider the issue of the protection of the environment in relation to armed conflicts as a whole, which would give rise to a never-ending debate from which it would be difficult to draw conclusions. She disagreed with other members who considered that the temporal approach — albeit a useful methodological tool — should also be applied to the formulation of the draft principles in such a way that each principle should apply to a single phase. On the contrary, if the Commission wished to produce a useful instrument for States, it must, of course, take into consideration the particularities of the principles in each of the three phases, but also formulate draft principles that were general in scope and would be fully applicable to the three phases. In her view, some of the draft principles presented by the Special Rapporteur, in full or in part, had the necessary general scope, particularly the second sentence of draft principle 1 and draft principles 3 and 5. The Commission could decide at a later stage in what form and in which order to present the principles that it would ultimately adopt.

With regard to the practice to be taken into consideration, it was important to analyse the practice of non-State actors who were involved in armed conflicts, because to exclude them would be to omit an essential element of contemporary practice in relation to armed conflicts for which the issue of attacks against the environment was, unfortunately, particularly relevant. It was also important to draw a distinction between the “human environment” and the “natural environment” more clearly than was currently the case in the report. The Special Rapporteur should keep that point in mind and address it in her next report if she considered it necessary.

With regard to the preamble, she agreed with other members that it did not contain the provisions one would expect under that heading. That said, she believed that the amendment proposed by several members — namely to isolate the first and third paragraphs as separate principles — would not be the best solution. After all, none of the preambular paragraphs set out principles as such. Although the Commission's practice in relation to the elaboration of draft principles varied greatly, the language used, particularly when the scope and use of terms were presented as principles, had not always been entirely appropriate from a technical perspective; she would propose including the three preambular paragraphs, as proposed by the Special Rapporteur, in a section entitled "Introduction", which would better reflect their content. Furthermore, she was not convinced of the need to retain the paragraph entitled "Purpose" as currently formulated. If the Commission should decide to maintain it, the paragraph should become the first paragraph of an introduction and that protection measures should be mentioned in addition to preventive and restorative measures. Furthermore, the expression "collateral damage" should not be deleted entirely because, even though it was not a traditional term, it was used relatively commonly.

With regard to the paragraph "Scope", she was of the view that express mention should be made to "all" armed conflicts. As the Special Rapporteur and other members of the Commission had noted, the draft principles would be considerably less useful if they applied only to international armed conflicts; it was therefore necessary to establish from the outset that they also applied to non-international armed conflicts, especially since the Special Rapporteur had expressed doubts about the appropriateness of the paragraph "Use of terms". In her view, it was essential that that paragraph should be included in the draft principles, regardless of whether its content was discussed at the current session. The Commission could therefore consider referring it to the Draft Committee, on the understanding that it would be examined at a later stage. With regard to the definitions proposed by the Special Rapporteur, she had already commented on them at the previous session and did not see the need to repeat her opinions on the matter.

Noting that draft principle 1 was composed of two distinct parts, she said that they would be better understood if their order were inverted. The idea that the environment must be respected and protected should be stated at the beginning of the draft principles. That would be one way of addressing the difficulties highlighted by several members of the Commission in respect of the first sentence ("the natural environment is civilian in nature and may not be the object of an attack"). It was her understanding that that sentence was aimed at ensuring that the environment was considered as a whole for the purpose of its protection in relation to armed conflicts. However, she believed that that objective would be achieved more readily if the text began with the general principle that the environment as a whole must be protected before specific reference was made to the protection of the portions of the environment that were civilian objects and not military objectives. In any case, the Drafting Committee could consider the matter in more detail.

With regard to draft principle 2, she said that, although she broadly shared the Special Rapporteur's position, that draft principle should include a reference to all principles of international humanitarian law, including the principle of humanity. Although she supported the idea of ensuring the strongest possible protection of the environment, she was not convinced that the expression "*lo máximo posible*" in the Spanish version was the most appropriate language for a legal text, and in any case its meaning was also problematic. The Drafting Committee might therefore consider replacing it with the word "*adecuadamente*".

As she had already noted, draft principle 3 applied to the three phases taken into consideration by the Special Rapporteur. However, it needed to be reworded so as to be more general in scope, as the word "assessing" appeared to reduce its scope of application

to the first phase. Furthermore, as already suggested by other Commission members, and for the same reasons, the word “lawful” should be replaced with the word “legitimate”.

She unreservedly supported the formulation of draft principle 4, as well as the arguments the Special Rapporteur had presented in her report to justify its inclusion. Regarding draft principle 5, the issue of areas of major ecological importance and their designation as demilitarized zones was general in nature and, as such, should be considered as a whole in relation to the three phases. In that regard, it was particularly important to address the issue of areas of major ecological importance after an armed conflict, in terms of both reparations and reconstruction. It would therefore be helpful if the Special Rapporteur covered that issue in her third report and if the draft principle were reformulated accordingly.

Mr. Huang said that it was with some reservations that he was joining the debate on the matter.

First, 2015 marked the seventieth anniversary of the establishment of the United Nations and the victory of the Allies in the Second World War. As everyone knew, Article 1 of the Charter of the United Nations provided that the primary purpose of the United Nations was to “maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace”. While the international community, in the context of the commemorative activities, was reaffirming its wish to eliminate the scourge of war and to foster lasting peace, the Commission was working on regulating armed conflicts in relation to the protection of the environment. That presented a paradox.

On the issue of armed conflicts, since its establishment the Commission had worked consistently against the unlawful use of force and towards peacekeeping, seeking to ensure that war criminals were severely punished. From that fundamental standpoint, it had always rejected the notions of war, murder and the unlawful use of force, as was reflected in the series of important declarations, principles and draft articles that it had prepared and adopted over the past 60 years, particularly the draft Declaration on Rights and Duties of States, the formulation of the Nürnberg Principles, the question of defining aggression, the draft Code of Crimes against the Peace and Security of Mankind, the draft articles on responsibility of States for internationally wrongful acts and the draft Statute of the International Criminal Court. Although it had studied the effects of armed conflict on treaties, the Commission had never attempted to regulate armed conflicts and had never opened the door to them.

Furthermore, everyone knew that there were many kinds of wars and armed conflicts, some lawful and others unlawful. In accordance with the Charter of the United Nations, except in cases of legitimate self-defence and actions undertaken in application of the provisions of the Charter for the maintenance of international peace and security, the threat or use of force in international relations was prohibited under international law. It was therefore inappropriate for the Commission to consider the general question of the protection of the environment in relation to armed conflicts without distinction or restriction. In short, in the event of an unlawful armed conflict or the unlawful use of force during a conflict, the international community must first and foremost put an end to the conflict as soon as possible and restore the peace, and not call on the parties to the conflict to pay adequate attention to the protection of the environment in wartime. Such an approach, which did not take account of the nature of armed conflicts and did not oppose unlawful conflicts but instead merely concerned itself with the protection of the environment, amounted to instructing the warring parties to fight each other if they must, provided they

did not damage the environment. While that approach seemed objective and fair in principle, it was in fact contrary to the essence of peace and justice. Ultimately, it was impossible to achieve the objective of protecting the environment because, inevitably, all armed conflicts caused environmental damage, whether to the natural environment or to the human environment.

Second, in the current international legal order, there were many rules specifically concerning armed conflict, such as the Geneva Conventions of 1949, which provided primarily for the protection of civilians, and the Hague Conventions of 1899 and 1907, which focused on restricting methods of warfare. That legal framework also included many rules concerning the protection of the environment during a conflict, such as the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and the two protocols thereto, the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects and the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction. Many of the provisions of those conventions were considered part of customary international law and, as such, applied to all States. At present, the problem was not a lack of rules but the lack of compliance with the rules.

Unfortunately, countless examples of violations of international law arose during armed conflicts. Therefore, if the Commission did indeed deem it necessary to address issues concerning the protection of the environment in relation to armed conflicts, it should not simply make a compilation of the relevant provisions of existing international law, but should boldly tackle the specific problems that had a major impact on the protection of the environment, such as the use of depleted uranium. During the war in the former Yugoslavia in the 1990s, the North Atlantic Treaty Organization (NATO) had dropped tens of thousands of depleted uranium bombs, which had caused severe environmental damage throughout the Balkan region. Similarly, during the 1991 Gulf War, one of the parties to the conflict had used depleted uranium penetrator bombs, dispersing a large quantity of the substance in the Persian Gulf and causing massive uranium pollution in the region. The European Parliament had in fact adopted a resolution calling on NATO to suspend its use of depleted uranium weapons and to take all necessary measures to protect human health and the environment.

There were also other weapons of mass destruction, such as nuclear and biochemical weapons, and if the Commission was reluctant, for political reasons, to tackle those facts of armed conflict, which seriously threatened the human environment, the meaningfulness of its work on the protection of the environment in relation to armed conflicts was far from evident.

Third, in the context of the topic at hand, the concepts of “armed conflict” and the “environment” were vague and incompatible by their very nature. Protection of the environment differed from protection of civilians in wartime, as human beings were mobile and it was normally possible to distinguish between combatants and non-combatants. The environment, however, was immobile, even though the battlefield could be moved. Regardless of whether the battlefield moved from one city to another or one village to another, it was always in the environment, which was inevitably damaged by war.

Forms of international armed conflict were constantly evolving and a growing number involved conflict between a State and non-State armed groups, or lawful combatants and unlawful combatants, such as in the current war being waged against Islamic State in Iraq and the Levant (ISIL), Al-Qaida and other terrorist organizations. It

was a war between mankind and the devil, and the devil laughed in the face of international law. In such conflicts, no distinction was made between combatants and civilians or between military objectives and civilian objects, as civilians were used by combatants as human shields. Schools, hospitals, churches and other civilian objects were readily used as bunkers. What place did the concept of “protection of the environment” have in such circumstances? The problem was that the draft principles that the Commission intended to adopt must also be applicable to all battlefields; that was a prerequisite and a starting point, as well as another paradox the Commission must address.

Faced with that paradox, the Special Rapporteur should rearrange the proposed structure of the draft principles, specifically by redrafting the preamble in order to reaffirm the Commission’s commitment to the purposes and principles of the Charter of the United Nations and its fundamental stance in relation to peace, justice, war and armed conflict. A classic example in that regard was the preamble to the 1907 Convention respecting the Laws and Customs of War on Land: “while seeking means to preserve peace and prevent armed conflicts between nations, it is likewise necessary to bear in mind the case where the appeal to arms has been brought about by events which their care was unable to avert” and “[a]nimated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization”. If the drafters of that Convention had been able to put the emphasis on peace and justice when codifying the rules of war more than one hundred years earlier, there was no reason the Commission could not do the same.

Owing to a lack of time, he would not be able to read his detailed comments on the Special Rapporteur’s second report, which he would forward directly to her, but would simply highlight a few points.

The Special Rapporteur expressly mentioned the Tallinn Manual on the International Law Applicable to Cyber Warfare as one of the international law manuals applicable to armed conflicts. However, as had been pointed out by several members, that manual was not recognized as authoritative. It did not represent the official position of the NATO countries, but was an unofficial publication that had been drafted by experts. It was also perilous to include such a reference because it suggested applying the rules concerning the use of force, the right to self-defence, State responsibility, the law of armed conflict and international humanitarian law to cyberspace, thus implicitly recognizing the lawfulness of cyberwar. The weight given by the Special Rapporteur to the Tallinn Manual, which was challenged in university circles, was inappropriate, given that many States did not accept its authority.

With regard to methods of warfare, the report merely mentioned the use of certain weapons and excluded from the scope of the topic weapons of mass destruction prohibited under international law. However, it was those weapons of mass destruction, such as nuclear weapons, that caused the most environmental damage during an armed conflict. Although existing rules of international law did not expressly prohibit the use of nuclear weapons, the Commission, without prejudice to those rules, could not ignore the question of nuclear weapons when dealing with the protection of the environment in relation to armed conflicts. At the least, it should endeavour to prohibit the use of nuclear weapons against States that did not possess such weapons and to prohibit nuclear-weapon States from being the first to use nuclear weapons in an armed conflict.

As to the form that the outcome of the work on the topic should take, the draft principles proposed by the Special Rapporteur seemed appropriate at the current stage, as it might be premature to discuss the final form. For the moment, it would be better for the Commission to prepare a set of non-binding guidelines or conclusions rather than a draft convention.

The meeting rose at 1.05 p.m.