

Document:-  
**A/CN.4/3281**

**Summary record of the 3281st meeting**

Topic:  
**Protection of the environment in relation to armed conflicts**

Extract from the Yearbook of the International Law Commission:-  
**2015, vol. I**

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42. For convenience, the text of the 16 draft conclusions provisionally adopted by the Drafting Committee had been set out in document A/CN.4/L.869. At the current stage, the Commission was not being requested to adopt the draft conclusions, which had been presented for information purposes only. The Special Rapporteur would begin preparing commentaries to the draft conclusions as well as his fourth report, which would address all other outstanding issues on the topic. The Drafting Committee recommended that the Commission provisionally adopt the draft conclusions early in its sixty-eighth session. The Special Rapporteur would then submit the accompanying draft commentaries to the Commission for consideration later in that session. That would enable the full set of draft conclusions and commentaries to be adopted on first reading by the Commission prior to the conclusion of its sixty-eighth session.

43. Sir Michael WOOD (Special Rapporteur) said that, in keeping with his proposed future programme of work, he intended to prepare an informal preliminary draft of the commentaries and make it available to Commission members for their comments and suggestions before the start of the sixty-eighth session. If time allowed, the draft commentaries could be considered by the Drafting Committee early in the session, which would greatly assist him in preparing them for formal submission to the Commission in good time for its consideration.

44. Mr. HASSOUNA, referring to draft conclusion 15 [16], asked whether the issue of persistent objection to a *jus cogens* rule, which was both important and controversial, would be referred to in the commentary to that draft conclusion.

45. Mr. KITTICHAISAREE asked whether, following the provisional adoption of the draft conclusions on first reading at the end of its sixty-eighth session, the Commission would leave a gap year in order to allow States time for reflection on the draft conclusions before the Commission adopted them on second reading.

46. Mr. McRAE said he sought confirmation of his recollection that, in draft conclusion 15 [16], paragraph 1, the Drafting Committee had decided to replace the words “so long as” with “as long as”.

47. Mr. CAFLISCH asked at what point Commission members would be given the opportunity to comment on the set of draft conclusions.

48. Mr. FORTEAU (Chairperson of the Drafting Committee), responding to Mr. McRae’s question, said that the latest version of draft conclusion 15 [16], paragraph 1, which had been provisionally adopted by the Drafting Committee, contained the expression “so long as”. That said, the wording of that expression could be left to the discretion of the English-speakers of the Commission, as it was purely an editorial matter.

49. In response to Mr. Kittichaisaree’s question, he noted that allowing one year for States to reflect on the draft conclusions would afford them the opportunity not only to comment on them orally in the Sixth Committee but also to submit written comments to the Commission.

50. Sir Michael WOOD (Special Rapporteur), responding to the point raised by Mr. Hassouna, said that the issue of persistent objection to a rule of *jus cogens* was indeed important; the commentary would mention that the issue had been raised and would be considered under the future topic of *jus cogens*. In response to Mr. Kittichaisaree’s question, he would suggest that the Commission adopt the draft conclusions on first reading at its sixty-eighth session, leave a gap of one year in order to allow time for States to consider them and submit written comments, if they so desired, and subsequently adopt the draft conclusions on second reading at its seventieth session. The topic would benefit greatly from such an approach. Responding to Mr. Caflich’s question, he supposed that one appropriate time for Commission members to comment on the draft conclusions would be at the start of the sixty-eighth session, when the Commission would revisit them with a view to their provisional adoption, so that the commentaries thereto could be formally submitted and considered thereafter.

51. The CHAIRPERSON confirmed that the adoption of the draft conclusions on the identification of customary international law would be deferred to the Commission’s sixty-eighth session, at which time members would have an opportunity to comment on them.

#### Organization of the work of the session (concluded)

[Agenda item 1]

52. Mr. FORTEAU (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of provisional application of treaties was composed of Ms. Escobar Hernández, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Petrič, Mr. Tladi and Sir Michael Wood, together with Mr. Gómez Robledo (Special Rapporteur) and Mr. Vázquez-Bermúdez (Rapporteur, *ex officio*).

*The meeting rose at 11.30 a.m.*

### 3281st MEETING

*Thursday, 30 July 2015, at 10.05 a.m.*

*Chairperson: Mr. Narinder SINGH*

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

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

[Agenda item 8]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. FORTEAU (Chairperson of the Drafting Committee) said that he was pleased to introduce the fifth report of the Drafting Committee for the sixty-seventh session of the International Law Commission, which concerned the topic “Protection of the environment in relation to armed conflicts” (A/CN.4/L.870). The Drafting Committee had devoted five meetings, on 14, 15, 16, 20 and 21 July 2015, to its consideration of the draft principles on the topic. It had examined the draft principles presented by the Special Rapporteur in her second report (A/CN.4/685), together with the reformulations that had been presented by her in response to the suggestions and concerns raised during the debate in plenary. He wished to pay tribute to the Special Rapporteur, whose mastery of the subject, guidance and cooperation had greatly facilitated the work of the Drafting Committee. He also wished to thank the members of the Drafting Committee for their active participation and valuable contributions to the successful outcome and the secretariat for its valuable assistance. He would also like to thank Mr. McRae for chairing the Drafting Committee on 15 July. The present statement would be posted on the website of the Commission, in both French and English. In that regard, he welcomed the fact that the Drafting Committee had worked in both languages.

2. At its 3269th meeting on 14 July 2015, the Commission had decided to refer the five draft principles proposed by the Special Rapporteur in her second report to the Drafting Committee, with the understanding that the preambular provision on the use of terms would be submitted to it in order to facilitate the discussion, but that it would be left pending.

3. The Drafting Committee had considered the relevant provisions of the draft principles on the basis of the texts prepared by the Special Rapporteur in the light of the plenary debate. The draft text provisionally adopted by the Committee in English and French, as presented in document A/CN.4/L.870, contained an introduction setting out provisions on the scope and purpose of the draft principles, as well as six draft principles. Regarding the “Introduction”, which had previously been entitled “Preamble”, it was understood that a preamble, formulated in the usual manner, would be prepared at the appropriate time to accompany the draft principles. Since the two provisions on scope and purpose, which had previously formed part of a preamble, were not principles as such, the Commission had decided, on the basis of a proposal by the Special Rapporteur, to place them in an introductory section. The provision on “Scope”, which had been shortened from “Scope of the principles” in accordance with the more recent practice of the Commission, provided that “[t]he present draft principles apply to the protection of the environment before, during or after an armed conflict”. As the topic addressed the protection

of the environment in those three temporal phases, it had been considered important to signal at an early stage that the scope of the draft principles related to those three phases. The disjunctive conjunction “or” sought to underline that not all the draft principles would be applicable during each phase. The Drafting Committee had taken full account of the existence of a close relationship for purposes of protection of the environment among the three above-mentioned phases. The Committee had decided to formulate draft principles, as proposed by the Special Rapporteur, on the understanding that the final form would be considered at a later stage. Given the intersection between, in particular, environmental law and the law of armed conflict, which was inherent to the topic, the principles were cast normatively at a general level of abstraction.

4. The second provision in the introduction, which concerned the purpose of the draft principles and was entitled “Purpose”, sought to enhance the protection of the environment in relation to armed conflict, including through preventive measures for minimizing damage to the environment during armed conflict and through remedial measures. The purposive nature of the provision was found in the term “enhancing”, which in the present case was not regarded as implying an effort to progressively develop the law. Consequently, that term did not in any way constitute a statement on the statutory role of the Commission; it had been chosen after a detailed discussion on how the provision should be formulated. In the main, it had been considered that the provision should state the purpose, which would be the subject of further elaboration in the ensuing draft principles. The reference to “including through preventive measures for minimizing damage to the environment during armed conflict and through remedial measures” was meant to signal the general kinds of measures required to offer the necessary protection. A suggestion to qualify the text with words like “as appropriate” had been considered inopportune at the current stage, particularly for a provision dealing with the purpose of the project.

5. Like the previous provision, the present provision covered the three temporal phases. In that connection, the phrase “preventive measures for minimizing damage” related predominantly to the situation before and during armed conflict. For its part, the reference to “remedial measures” concerned primarily the post-conflict phase. The Drafting Committee had nonetheless recognized that there was a close relationship among the three phases and that, as a result, remedial measures might be required during an occupation. The phrase “remedial measures” had been preferred to “restorative measures”, as it had been viewed as clearer and broader in scope, encompassing any measure of remediation that might be taken to restore the environment. That might include loss or damage by impairment to the environment, the costs of reasonable measures of reinstatement, as well as reasonable costs of clean-up associated with the costs of reasonable response measures. The Drafting Committee had also chosen to delete the temporal element denoted by the phrase “taken at the end of active hostilities”, on the understanding that the commentary would include the notion that remedial measures could be undertaken even before the conflict ended.

\* Resumed from the 3269th meeting.

6. As to the draft principles themselves, it was important first to note that the Drafting Committee had structured them bearing in mind the three phases covered by the topic; that had entailed the introduction of several parts. The draft principles provisionally adopted thus far covered two parts. Part One, entitled “Preventive measures”, consisted of one draft principle, while Part Two, entitled “Draft principles applicable during armed conflict”, consisted of five draft principles. Moreover, the numbering of the draft principles was such that the roman numeral denoted the phase to which the particular draft principle predominantly related. The draft principles had been prepared on the general understanding that they would normally apply to both international and non-international armed conflicts. Regarding draft principle I-(x), entitled “Designation of protected zones”, it should be noted that an appropriate number was yet to be assigned to it, as the Special Rapporteur intended, in the future, to propose additional draft proposals that would be contained in Part One. Part One, on “Preventive measures”, dealt mostly with the pre-conflict stage, when peace was prevailing. It was anticipated that a State might already take the necessary measures to protect the environment in general, and also in particular, as part of preventive measures in the event that an armed conflict might occur. It was also recognized that there might be certain draft principles that cut across and straddled the various phases. It would be recalled that initially the Special Rapporteur had proposed the draft principle as draft principle 5. It had then been presented in the Drafting Committee reformulated into two draft principles, in view of the comments made in plenary. Suggestions had then been made to broaden the temporal scope of draft principle 5 to cover the various phases and to address the legal implications of such zones *vis-à-vis* the other parties, including obligations not to attack such zones. The new provision provided that States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones. It had been placed in Part One as it dealt primarily with the pre-conflict phase; that did not exclude instances in which such areas could be designated during armed conflict or indeed in the post-conflict phase. The Drafting Committee had preferred to refer to “protected zones” rather than “demilitarized zones”, as the latter term could have several meanings. Such areas might be designated by “agreement or otherwise”, a phrase that was intended to introduce some flexibility. It might include an agreement concluded verbally or in writing, as well as reciprocal and concordant declarations. It might also include a unilateral declaration of a protected zone by a State or through an international organization. The area designated had to be of “major environmental and cultural importance”. The Drafting Committee had taken into account the fact that the Convention for the Protection of Cultural Property in the Event of Armed Conflict, including its Protocols, was the regime that governed the protection of cultural property, whose provisions applied in time of peace, as well as during armed conflict. The draft principle was intended not to replicate that regime, but to protect areas of major “environmental importance”. The reference to “cultural” was intended to highlight the existence of a close linkage to the environment, which might include, for example, ancestral lands of indigenous peoples, who depended on the environment for their sustenance and livelihood. While the draft principle dealt

predominantly with the pre-conflict phase, it had a corresponding provision in draft principle II-5. As had been pointed out earlier, a protected zone might be designated during an armed conflict or indeed in the post-conflict phase. The commentary would indicate that the reference to “States” did not preclude the possibility of such a designation being made by agreement with non-State actors, particularly during armed conflict.

7. As to Part Two, which was entitled “Draft principles applicable during armed conflict”, the word “natural” still appeared in square brackets in the title of draft principle II-1 (“General protection of the [natural] environment during armed conflict”) because the Drafting Committee had not yet decided whether it should use the term “environment” or “natural environment” throughout the text, or whether it should use the latter term only in cases in which the principle related to the “natural environment” during armed conflict, as it was that term that the law of armed conflict employed. The concept of the natural environment, which, in the current context, should be understood in the widest sense, covered the biological environment in which a population was living, in accordance with the commentary to the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), which provided that “[i]t does not consist merely of the objects indispensable to survival ... but also includes forests and other vegetation mentioned in the [Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or have indiscriminate effects], as well as fauna, flora and other biological or climatic elements”.<sup>316</sup>

8. Paragraph 1 of draft principle II-1, which consisted of three paragraphs, set out the general proposition that the [natural] environment should be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict. The Drafting Committee on the basis of, *inter alia*, language used in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, in which the International Court of Justice noted that the environment should be respected and protected, had decided to retain the phrase “respected and protected”, as proposed by the Special Rapporteur. It should be noted, moreover, that the concepts of “respect” and “protect” had a long pedigree in the law of armed conflict, as well as in environmental law and human rights law. International law applicable to the environment remained relevant during armed conflict, where the law of armed conflict was applicable as *lex specialis*. It was also understood that, insofar as respect for the law of armed conflict was applicable before, during and after armed conflict, paragraph 1 was relevant during all three phases. The Drafting Committee had decided to use the term “law of armed conflict” rather than “international humanitarian law”, even though the terms were increasingly understood synonymously, because the scope of the law of armed conflict was broader. That would also ensure consistency with the terminology employed

<sup>316</sup> See C. Pilloud, *et al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949: Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, Geneva, ICRC, Martinus Nijhoff, 1987, p. 662, para. 2126.

in the draft articles on the effects of armed conflicts on treaties adopted by the Commission in 2011,<sup>317</sup> to which the present topic was related. The Drafting Committee had also decided to use “in accordance with” rather than the more nuanced “consistent with”.

9. The new paragraph 2 was inspired by article 55 of Protocol I and provided that “[c]are shall be taken to protect the [natural] environment against widespread, long-term and severe damage”. The discussion in the Drafting Committee had centred on whether it was necessary, in order to ensure greater balance, to add a provision on means and methods of warfare, reproducing the one contained in article 35 of Protocol I. It had been noted that the new paragraph was incomplete as it covered only the first sentence of article 55, paragraph 1, and made no mention of the second sentence, which specifically stated that the protection envisaged included a prohibition of the use of methods or means of warfare which were “intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population”. During the discussion in the Drafting Committee, it had been pointed out that leaving out the rest of the second sentence of article 55, paragraph 1, might weaken the proposed text. The Committee had recognized that draft principle II-1 had a general character and that, accordingly, it had to be read together with draft principle II-2, which addressed the application of principles and rules of the law of armed conflict to the natural environment with a view to its protection. It had been suggested that the more specific issue on means and methods of warfare would be better dealt with separately, in a draft principle or in the commentaries.

10. Paragraph 3 sought to treat the natural environment in the same way as a civilian object. Given that the assertion that the natural environment was “civilian in nature”—which appeared in a proposal by the Special Rapporteur in her second report—had been the subject of comment in the plenary debate, the Special Rapporteur had chosen not to retain it, in order not to introduce unnecessary ambiguity. The Drafting Committee had therefore considered a new proposal that stated that no part of the natural environment might be the object of an attack, unless it had become a military objective. The phrase “has become” introduced a temporal element that was intended to stress that the environment was not, as such, a military objective, although it might become one in certain circumstances. Following further debate in the Drafting Committee, paragraph 3, as it was currently worded, was based on Rule 43 (A) of the ICRC study on customary international humanitarian law.<sup>318</sup> Given the specificity of the current formulation and its reliance on Rule 43, the issue had then arisen as to whether paragraph 3 should be balanced with the other paragraphs of that Rule. It had been recognized that the draft principles were general in nature and that the intention was not to reformulate rules and principles already recognized by the law of armed

conflict. It was understood that paragraph 3, like paragraph 2, had to be read together with draft principle II-2, which in particular made reference to, *inter alia*, the application of the principle of distinction.

11. The structure and wording of draft principle II-2, which was entitled “Application of the law of armed conflict to the environment”, had been modified slightly to take into account the comments made in plenary and the adoption of the title of Part Two—“Draft principles applicable during armed conflict”—which indicated the temporal phase in which the draft principle applied. Accordingly, the words “during an armed conflict” had been deleted, as had the adjective “fundamental”, which appeared before the words “principles and rules” and had been considered superfluous and likely to give rise to confusion. Furthermore, it had been decided, as in the case of draft principle II-1, to refer to the “law of armed conflict” instead of “international humanitarian law”. As to the phrase “the strongest possible protection”, which had appeared in the Special Rapporteur’s initial proposal and had generated much comment in plenary, it had been decided to delete it in order to avoid giving the mistaken impression that the draft principle sought to introduce a hierarchy between the protection of the environment and the protection of other civilian objects in the law of armed conflict.

12. As adopted, the draft principle highlighted two specific elements. First, as indicated by its title, it dealt solely with the law of armed conflict and aimed to emphasize the most relevant principles and rules in that context. The principles and rules on distinction, proportionality, military necessity and precautions in attack were therefore explicitly referred to by way of example and should not be perceived as representing an exhaustive list. Second, the draft principle specified that those principles and rules should be applied to the environment with a view to its protection, thus introducing an objective rather than simply confirming their application to the environment. In order to maintain the general nature of the draft principle, it had been decided not to elaborate the meaning of the said principles and rules in the provision, which could have resulted in developing or interpreting already established rules.

13. Regarding draft principle II-3, which was entitled “Environmental considerations”, the Drafting Committee had discussed whether it should be included as a separate provision, merged with draft principle II-2 or deleted. It had been considered that the draft principle had an added value of specificity, in that it related to the application of the principle of proportionality and the rules of military necessity, which had operational importance. The Drafting Committee had therefore decided to retain the draft principle and to reformulate it. As currently worded, draft principle II-3 provided that environmental considerations should “be taken into account when applying the principle of proportionality and the rules on military necessity”—wording that was inspired by the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*. Given that the draft principle was aimed at addressing military conduct rather than the process of determining what constituted a military objective as such, it had been modified by the Drafting Committee to clarify that point. The phrase “in the pursuit of lawful military objectives” had been deleted and the term

<sup>317</sup> 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.

<sup>318</sup> J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. I, *Rules*, Cambridge University Press, 2005, p. 143.

“assessing” replaced with “applying”. Also for purposes of clarity and in order to emphasize the link between draft principles II-2 and II-3, it had been decided to refer explicitly to the principle of proportionality and the rules on military necessity.

14. Draft principle II-4, which was entitled “Prohibition of reprisals”, reproduced article 55, paragraph 2, of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). The Drafting Committee’s consideration of the draft principle had revealed the same divisions as in the plenary debate. Some members had expressed support for its inclusion, considering that a prohibition of reprisals was entirely appropriate, given that the present topic concerned the protection of the environment in relation to armed conflict. They linked the proposed text to article 51 of Protocol I, which was one of the most important articles in the Protocol, since it confirmed the customary rule that innocent civilians should be kept outside hostilities as far as possible and enjoy general protection against danger arising from hostilities. In their view, if the environment, or part thereof, became an object of reprisals, that would be tantamount to an attack against the civilian population or civilian objects. The fact that the prohibition only existed as a treaty obligation and not as a customary rule was a matter of nuance that could be explained in the commentary. Some members were of the view that the prohibition formed part of customary international law, and, furthermore, it had been considered that any other formulation could be perceived as weakening an existing rule.

15. Other members were of the view that paragraph 2 of article 55 of Protocol I, on which draft principle II-4 was based, represented no more than a conventional rule and that it was not necessary to replicate it in the draft principles, since the latter were intended to apply generally. It had been considered important to note in that regard that the prohibition of reprisals against the environment was not generally accepted as a rule of customary international law, and those members had called for it to be reflected as such in the draft principle. They had also drawn attention to the reservations and declarations made with respect to paragraph 2 of article 55 by States and had stressed that, as presently formulated, the draft principle seemingly applied to both international and non-international armed conflicts, although neither common article 3 of the Geneva Conventions for the protection of war victims nor the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) contained a specific prohibition of belligerent reprisals. They therefore proposed either reformulating the draft principle in order to include appropriate caveats or deleting it altogether. A proposal had been made, for example, to use less obligatory language to the effect that attacks should not be made against the [natural] environment. Several proposals had also been made with a view to limiting the draft principle to situations of international armed conflict—for example, the inclusion of a paragraph that would limit the provision to international armed conflict and the addition of another paragraph, drafted in hortatory terms, to encourage parties in a non-international

armed conflict not to resort to reprisals. However, as no compromise had been reached, the text remained as proposed by the Special Rapporteur and provided that attacks against the [natural] environment by way of reprisals were prohibited. The extent of the divisions regarding the text would be reflected in the commentary, which would indicate in particular that some members had been opposed to its inclusion. It was understood that the text had particular significance for States parties to Protocol I because of the obligations arising from that treaty; the commentary would also take note of the kinds of reservations and declarations that had been made by some States parties. In that context, the Special Rapporteur had noted that none of those declarations or reservations referred explicitly to paragraph 2 of article 55 or to the natural environment. The commentary would also recognize that some States were not party to Protocol I.

16. Draft principle II-5, which was entitled “Protected zones” and was a parallel provision to the draft principle contained in Part One, provided that “[a]n area of major environmental and cultural importance designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective”. Unlike draft principle I-(x), it covered only areas that were protected by agreement. The designation had to be the subject of an express agreement, which could be concluded in time of peace as well as in time of armed conflict. It was understood that the reference to an “agreement” should be taken in its broadest sense and include reciprocal unilateral declarations accepted by the other party, treaties and other types of agreements, as well as potential agreements with non-State actors. Such zones were protected from attack during armed conflict. The reference to “contain” in the phrase “as long as it does not contain a military objective” was intended to indicate that it might concern the entire zone or parts thereof. Moreover, the protection afforded to a zone ceased if one of the parties committed a material breach of the agreement establishing the zone.

17. In conclusion, he said that the Commission did not need, at the current stage, to take a decision on the draft principles, as they had been presented for information purposes only. It was the Drafting Committee’s hope that the draft principles could be provisionally adopted by the Commission in 2016.

18. The CHAIRPERSON thanked the Chairperson of the Drafting Committee for his presentation and gave the floor to the Special Rapporteur on protection of the environment in relation to armed conflicts.

19. Ms. JACOBSSON (Special Rapporteur) asked that the text of the draft introductory provisions and the draft principles provisionally adopted by the Drafting Committee be reproduced in a footnote in the Commission’s report.

20. Mr. NOLTE said that this represented a shift in practice that should not become the rule because it would modify the long-standing relationship between the Commission and the Sixth Committee. The Sixth Committee should discuss an end product; to present it with a semi-finished product would amount to having a pre-debate

before the debate. Furthermore, when it took note of texts provisionally adopted by the Drafting Committee, the Commission was making a firmer undertaking. It had every interest in protecting its deliberations and in presenting the results of its work in a consolidated fashion.

21. Sir Michael WOOD said that he was not opposed to that new practice, but it should be pursued in a uniform manner. For example, the Commission had not taken note of the draft conclusions on the identification of customary international law provisionally adopted by the Drafting Committee.

22. Ms. ESCOBAR HERNÁNDEZ, supported by Mr. SABOIA, said that it was important that the work of the Commission be transparent and that States have as much information as possible in order to have an informed debate. They should know what the Drafting Committee did. However, a uniform procedure should be adopted for all topics because they were all equally important.

23. Mr. GÓMEZ ROBLEDO said that, for a delegate to the Sixth Committee, it was more practical to have a single reference document, namely the report of the Commission.

24. Mr. VÁZQUEZ-BERMÚDEZ said that the Commission should report on all the progress that had been made in its consideration of a topic, even partial progress. Uniformity of practice was not necessarily required; consideration could be given to leaving it to each special rapporteur to decide whether texts provisionally adopted by the Drafting Committee should appear in the report. In any event, it was a matter to be considered in the context of the organization of work.

25. Mr. HASSOUNA said that it was also important to show States that progress—interim or otherwise—was being made on current topics.

26. Mr. CANDIOTI said that the Sixth Committee had on occasion not been adequately informed of the progress of work and that it had discussed issues that had already been settled. There was no reason why the Drafting Committee's excellent work on the identification of customary international law should not be disseminated, even though it had not yet been completed.

27. Mr. FORTEAU (Chairperson of the Drafting Committee) said that draft articles and draft conclusions formed a whole with their commentaries, which enabled minority views to be reflected. The question of whether the texts provisionally adopted by the Drafting Committee should appear in the Commission's report could be discussed when the draft chapters were adopted. A case-by-case approach should not be ruled out, however. As to transparency, it could be improved by using different formulations in the report.

28. Mr. CAFLISCH said that he supported the Special Rapporteur's proposal to publish the draft principles that had been provisionally adopted by the Drafting Committee in the Commission's report on the work of the session, provided that the same procedure was followed for all the other topics.

29. Mr. KAMTO said that, as Mr. Nolte had rightly recalled, it had thus far not been the Commission's practice—except on rare occasions—to publish texts provisionally adopted by the Drafting Committee in its annual reports; there had been instances where the work of the Drafting Committee on some topics had extended over several sessions without the Sixth Committee being informed of the progress made. There was nothing to prevent the Commission from modifying its practice in that regard, provided that it did so knowingly and that it adopted a general principle that applied uniformly to all its work, and not to one topic rather than another. In order for the publication of draft principles provisionally adopted by the Drafting Committee to be of real use to the debates of the Sixth Committee, the whole report of the Drafting Committee should be published so that States could acquaint themselves with the Committee's work, including the differences that had been expressed in that context. He was willing to support Ms. Jacobsson's proposal, with that proviso.

30. Mr. ŠTURMA said that what Ms. Jacobsson was proposing had already been done in the past and that, therefore, the Commission had already begun to develop a new practice in that regard. He personally was not opposed to the idea, provided that it was expressly indicated in the footnote containing the draft principles provisionally adopted by the Drafting Committee that they had not yet been adopted by the Commission. The same clarification could be made in chapter II of the Commission's report, which contained a summary of the work of the session. With a view to the discussions within the Sixth Committee, the Commission could also indicate, in chapter III of its report, which aspects of its work on the protection of the environment in relation to armed conflicts on which it would like Governments to comment. Publishing the entire report of the Drafting Committee, as Mr. Kamto had proposed, could create a problem in terms of the page limit for the Commission's report. However, since the report of the Drafting Committee was published in full on the Commission's website, a reference to the corresponding link could be included in the above-mentioned footnote.

31. Sir Michael WOOD said that, as Special Rapporteur on the topic "Identification of customary international law", he had found very helpful for his future work the debates that had taken place in 2014 in the Sixth Committee based on the report of the Drafting Committee and the draft conclusions provisionally adopted by it, to which reference had been made in the report of the Commission on the work of its sixty-sixth session.<sup>319</sup> He would therefore be strongly in favour of a new practice of publishing, in a footnote in the Commission's annual report, draft texts provisionally adopted by the Drafting Committee, provided that the provisional status of those texts was clearly pointed out and that a reference to the Drafting Committee's report was added. Publishing, in the Commission's report, the entire report of the Drafting Committee for each of the topics considered by it was not appropriate: apart from the fact that it would confer on the reports of the Drafting Committee a status that they did not have, it would make the Commission's report too

<sup>319</sup> *Yearbook ... 2014*, vol. II (Part Two) and corrigendum, p. 147, para. 136.

long and might give rise to confusion. If the Commission adopted that new practice, it would be a good idea to define the criteria governing its use and to explain the reasons for its decision, for example in its report, or, better still, when presenting the work of the Commission to the Sixth Committee.

32. Ms. ESCOBAR HERNÁNDEZ, referring to the report of the Commission on the work of its sixty-sixth session, said that it had been made clear, in the chapter on the identification of customary international law, that the report of the Drafting Committee and the draft conclusions provisionally adopted by it had been presented for information only at that stage.<sup>320</sup> There was therefore no ambiguity as to the fact that the drafts in question were not definitive. The fact that the Commission reported provisional outcomes to the Sixth Committee did not commit it in any way as to the ultimate outcome of the work to be adopted in plenary and therefore posed no threat whatsoever to its independence. It was simply a question of informing States about the progress made at a particular session and eliciting their views on the topic, which could only be helpful.

33. Mr. VALENCIA-OSPINA, supported by Mr. GÓMEZ ROBLEDO, thanked Mr. Nolte for launching the debate and said that, in his view, all the opinions expressed contained elements of truth. If the Commission decided to institutionalize a practice that hitherto had been followed only in exceptional cases, it should do so on an informed basis. Thus far, the usual practice was to have a plenary debate, following which the draft articles or other draft texts were referred to the Drafting Committee, which then submitted the outcome of its work to the plenary for adoption, and the drafts thus adopted, together with their commentaries, were included in the report of the Commission to the General Assembly. That approach had a considerable drawback: either the comments made by States to the Sixth Committee related to draft articles or other draft texts that had been adopted by the Commission and could therefore be taken into consideration only on second reading, if at all, or they related to drafts whose wording had already been modified by the Drafting Committee during the session and which were therefore no longer valid. He had been confronted with the latter scenario as Special Rapporteur on the protection of persons in the event of disasters; in order to ensure that discussions in the Sixth Committee were not a false debate, he had considered it appropriate to bring to the latter's attention the draft articles that had been only provisionally adopted by the Drafting Committee.

34. If the Commission decided henceforth to present in its report to the General Assembly the results of the work of the Drafting Committee that had not yet been adopted by the plenary in order to facilitate discussion within the Sixth Committee, it would give the impression that it was undertaking to take into consideration the views expressed by States on that occasion before adopting in plenary the drafts prepared by the Drafting Committee. Apart from the fact that this would require the Drafting Committee, together with the Special Rapporteur, to reconsider the drafts provisionally adopted in the light of

the discussions in the Sixth Committee before submitting them for adoption to the plenary, it might lead to a deterioration of relations between the Sixth Committee and the Commission if the drafts that the latter adopted in plenary took no account of the comments made by States in the Sixth Committee. Furthermore, the commentaries to the draft articles were indispensable to an understanding of the meaning of those texts. It was therefore not possible to dispense with the commentaries and publish instead the report of the Drafting Committee.

35. Mr. PETRIČ said that the procedure of presenting draft articles or other such texts to the Sixth Committee before the plenary had adopted them together with the commentaries thereto should be used only on a very exceptional basis. Although he was not opposed to Ms. Jacobsson's proposal, he considered that, if the proposal was adopted by the Commission, the latter should make clear the reasons for its decision in the report and specify that the draft principles in question did not reflect its position.

36. Ms. JACOBSSON (Special Rapporteur) said that it had never been her intention to revolutionize the Commission's practice and that the procedure that she had proposed was not at all unprecedented, since it had already been used in the past. However, the issue should be thoroughly discussed under the agenda item on working methods, which the Commission had not had the opportunity to consider since the end of the previous quinquennium. She maintained her proposal, on the understanding that, as several members had recommended, the provisional status of the draft principles reproduced in the footnote should be clearly indicated.

37. Mr. KAMTO said that Mr. Valencia-Ospina had highlighted a very important point that deserved serious consideration: if the Commission established the practice of submitting for discussion to the Sixth Committee drafts that had not yet been adopted by the plenary, then it followed that the Special Rapporteur would have to prepare a new report taking into account those discussions and submit it for consideration to the plenary. In other words, the Commission would no longer be able to adopt directly, as it currently did, drafts adopted provisionally by the Drafting Committee. In his view, that might constitute a strong reason for rejecting the procedure under discussion.

38. Sir Michael WOOD said that, if Ms. Jacobsson's proposal was taken up and if, as Mr. Gómez Robledo and Ms. Escobar Hernández seemed to wish, the same procedure was followed for draft provisions on their respective topics, he would like the same to apply to the draft conclusions on the identification of customary international law.

39. The CHAIRPERSON suggested that, in view of the opinions that had been expressed, the Commission agree to the draft principles on the protection of the environment in relation to armed conflicts being included in a footnote in the report of the Commission on the work of its sixty-seventh session, together with a reference emphasizing their provisional status and the address of the link to the Drafting Committee's report, and that the same be done for the other drafts provisionally adopted

<sup>320</sup> *Ibid.*



at the current session, on the understanding that the procedure, in particular the question of whether it should be made systematic, would be discussed further at a later session under the agenda item entitled “Programme, procedures and working methods of the Commission and its documentation”.

*It was so decided.*

*The meeting rose at 11.40 a.m.*

## 3282nd MEETING

*Monday, 3 August 2015, at 10 a.m.*

*Chairperson: Mr. Narinder SINGH*

*Present:* Mr. Cafilisch, Mr. Candiotti, Mr. Comisário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

### Draft report of the International Law Commission on the work of its sixty-seventh session

#### CHAPTER VII. *Crimes against humanity* (A/CN.4/L.860 and Add.1)

1. The CHAIRPERSON invited the Commission to consider chapter VII of its draft report, beginning with the portion of the chapter contained in document A/CN.4/L.860.

#### A. Introduction

Paragraph 1

*Paragraph 1 was adopted.*

Paragraph 2

2. Mr. TLADI said that a sentence should be added to read: “The General Assembly, in paragraph 7 of its resolution 69/118 of 10 December 2014, took note of the inclusion of the topic in the Commission’s programme of work.”

*Paragraph 2, as amended, was adopted.*

*Section A, as amended, was adopted.*

#### B. Consideration of the topic at the present session

Paragraphs 3 and 4

3. Mr. PARK said that section B did not appear to be in line with the practice followed in the equivalent sections of some previous reports to the General Assembly, since it contained no summary of the debate on the topic within

the Commission. He asked what principles the Secretariat applied in preparing such sections of the report.

4. Mr. LLEWELLYN (Secretary to the Commission) said that the Secretariat followed the practice of previous years, which was to give a much briefer account of the debate when draft articles or draft conclusions had been adopted than when no texts had been finalized.

5. Mr. MURPHY (Special Rapporteur) said that the reproduction in the footnote to paragraph 4 of the draft articles as they had originally been proposed by the Special Rapporteur was unnecessary and potentially confusing for readers. He therefore proposed the deletion of the footnote.

6. Sir Michael WOOD said that, while he agreed that there was no need to reproduce the draft articles as originally proposed in their entirety, it would nonetheless be helpful to retain a footnote referring readers to that text in the relevant section of the Special Rapporteur’s first report (A/CN.4/680).

7. Mr. CANDIOTTI, supported by Mr. SABOIA, said that, in order to give interested readers such as delegates in the Sixth Committee an idea of the tenor of the debate, the report should, at the very least, contain a reference to the relevant summary records.

8. Mr. NOLTE said that it might indeed be confusing for readers if the report reproduced in full two different versions of the draft articles. He therefore supported the proposed deletion of the text in the footnote to paragraph 4 and the inclusion therein of references to the relevant section of the Special Rapporteur’s report and to the summary records covering the Commission’s conclusions on the matter. That manner of proceeding should be considered to be the Commission’s practice for summarizing debates when draft articles or draft conclusions and the commentaries thereto had been adopted.

9. Ms. ESCOBAR HERNÁNDEZ said that, while she was not opposed to the deletion of the text set out in the footnote to paragraph 4, she did not consider that its inclusion was likely to confuse delegations in the Sixth Committee: in fact, it facilitated understanding of the commentaries. The two sets of draft articles were clearly differentiated in the report, inasmuch as one set was contained in a footnote while the other was set out in the body of the text. However, if the Commission were to delete the original text of the draft articles, the footnote to paragraph 4 should include a reference to the corresponding paragraphs of the Special Rapporteur’s report. In addition, a footnote should be inserted in paragraph 3 indicating the summary records of the meetings at which the Commission had considered the topic. The Commission should then follow that practice when drafting future reports.

10. The CHAIRPERSON said that he took it that the Commission wished to adopt paragraph 3, with a footnote referring readers to the relevant summary records, and paragraph 4, with a footnote indicating the paragraphs of the Special Rapporteur’s first report containing the texts of the proposed draft articles.

*Paragraphs 3 and 4 were adopted with those amendments.*