

Document:-
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Summary record of the 3227th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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81. Referring to draft conclusion 8, paragraph 2, he said that, in considering a State's practice as a whole, it would be useful to identify which organs were competent and had the authority to act on behalf of the State. The practice of States whose organs did not speak with one voice could not be completely disregarded.

82. Lastly, he shared the concerns of members who had expressed doubts on draft conclusion 9, paragraph 4.

83. Mr. GEVORGIAN, speaking as a member of the Commission, said that he supported the combined "two-element approach", as reflected in draft conclusion 3. Attempts to separate State practice from *opinio juris* might result in overemphasizing one element or in futile arguments like the one as to which came first, the chicken or the egg. Both elements—State practice and *opinio juris*—had to exist simultaneously in order to give rise to rules of customary international law. However, he endorsed Mr. Nolte's suggestion that the term "*opinio juris*" be used in tandem with "accepted as law", since the two terms combined overcame the inadequacies of each when used in isolation.

84. He supported the scope of the topic as set forth in draft conclusion 1. The Commission should concern itself only with the methods of determining the existence and content of rules of customary international law, and not with their formation, and it should not deal with peremptory norms of international law. He was not troubled by the use of the term "methodology", and he would object to replacing it with a reference to "rules", as it might alarm some States. Moreover, a provision should be included to the effect that the existence or formation of rules of customary law must not conflict with *jus cogens*, in accordance with the principle embodied in the 1969 Vienna Convention that a breach of the law could not create law.

85. Like the Special Rapporteur, he doubted whether the definitions in draft conclusion 2 were necessary. On the whole, he supported draft conclusion 3, the wording of which could be improved in the Drafting Committee. Indeed, several of the draft conclusions should be fleshed out and made less vague. Like other members, he had some doubts about the phrase "regard must be had to the context" in draft conclusion 4. If it was supposed to mean that different types of evidence of the existence of practice could have dissimilar weight depending on the context, then that idea should be better conveyed.

86. The Commission should make it plain, either in the draft conclusions or in the commentary, that it was State practice coupled with *opinio juris* that was of relevance for the formation of rules of customary law. The practice of individuals and NGOs was not pertinent for that purpose; the practice of international organizations was simply an additional means of shedding light on State practice. The Commission should also pay serious attention to the attribution of conduct to a State and to the weight of various acts of a State in the formation of customary rules. State practice directed at the outside world, especially when it was that of organs competent to bind the State at the international level, should be accorded the greatest significance. For that reason, draft

conclusion 8, paragraph 1, should be deleted. Similarly, he was unconvinced of the need for a provision establishing that if the organs of a State were not unanimous, a practice was less important. In general, State practice could take the form of physical and verbal actions, inaction and silence. What was important was the interaction between them. It would be necessary to look more closely at the role of inaction and the circumstances in which it could be regarded as State practice for the purpose of forming customary international law.

87. On the whole, he could support draft conclusion 10, which covered two highly important elements: practice as a legal obligation and acceptance as law as a criterion for distinguishing between a customary rule and usage.

88. With regard to draft conclusion 11, while the evidence of *opinio juris* could sometimes be contained in the same acts as those which established State practice, it might be wise to restrict the list of such sources to State acts chiefly directed at the outside world. That section should reflect the idea, implicit in the reference in paragraph 64 of the second report to the "general consensus of States", that universal *opinio juris* was vital if State practice itself, albeit widespread, was not universal.

89. He was in favour of referring the draft conclusions to the Drafting Committee.

The meeting rose at 5.50 p.m.

3227th MEETING

Friday, 18 July 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

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

Programme, procedures and working methods of the Commission and its documentation

[Agenda item 12]

1. The CHAIRPERSON proposed, in light of the consensus which had emerged from consultations, to include the topic "Crimes against humanity" in the Commission's programme of work and to appoint Mr. Murphy Special Rapporteur.

It was so decided.

Identification of customary international law (continued)
(A/CN.4/666, Part II, sect. D, A/CN.4/672)

[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (concluded)

2. The CHAIRPERSON invited the Commission members to resume their consideration of the second report on the identification of customary international law (A/CN.4/672).

3. Mr. GÓMEZ ROBLEDÓ said that he wished to address a few comments to the Drafting Committee. First, the structure of the draft conclusions and the separate treatment given to definitions and to each of the constituent elements of custom would indeed help practitioners to identify customary international law. Second, since “methodology” was acknowledged to be the main purpose of the draft conclusions, consideration of the genesis, or formative elements of custom, necessarily formed part of the intellectual process of identifying customary law, without prejudice to the flexibility which must naturally be displayed in that exercise. A note to that effect could be included in the commentary, where it could also be explained, with reference to draft conclusion 4, that the terms “context” and “surrounding circumstances” might not cover all aspects of the formation of a customary rule. Third, it might be preferable to mention *erga omnes* obligations in the commentary to draft conclusion 1, paragraph 2, for although they were often customary in nature and might help to determine the existence of a customary rule, they did not belong to the subject under consideration. Fourth, an express reference to *opinio juris* was really required when speaking of the psychological element, otherwise users who were not specialists in international law might incorrectly assume that it was a separate concept. Fifth, it was questionable whether the phrase “that derive from” was indispensable in the proposed definition of customary international law, since general practice and the acceptance of that practice as law were central to the identification of a customary rule. It would be sufficient to state that the rules of customary international law “reflect” the existence of both elements. In addition, the disputed term seemed to imply hierarchies among the various forms of practice, an eventuality which draft conclusion 8, paragraph 1, expressly ruled out. Sixth, it would be wise to specify that customary international law could be *universal* or *regional* and to define the notion of “international conference”. Seventh, although the relevant practice was primarily that of States, it was also appropriate to consider that of *non-State actors* with respect to the rules of international humanitarian law, especially in the context of non-international armed conflicts. The third report should examine the question of the acts of international organizations in greater depth and should also consider the acts of *sui generis* subjects of international law, such as ICRC. While it was true that, provided there was certainty as to the consistency of a practice, no particular duration was necessary, it would be helpful if the third report were to contain a more detailed analysis of “instant custom”, an issue which likewise encompassed the acts of international organizations and the value of their resolutions, especially in light of the “Castañeda doctrine”. Eighth, as far as evidence of practice was

concerned, unanimity would be hard to prove owing to the increasing participation of non-traditional State entities in international affairs. Was there perhaps a presumption that the executive branch was competent to speak on behalf of the State as a whole? As for *opinio juris*, it would be necessary to examine the impact of a customary rule on legal certainty and of contradictory positions expressed by the same State as a result of a change in government. Draft conclusion 9, paragraph 4, was confusing, for practitioners should focus their attention on whether a practice was sufficiently representative and not on the possible existence of special interests. Lastly, the Special Rapporteur should look more closely at the relationship between the topic under consideration and the provisional application of treaties, for it might contribute to the crystallization of a rule of customary international law.

4. The CHAIRPERSON invited the Special Rapporteur on the identification of customary international law to sum up the debate on his second report.

5. Sir Michael WOOD (Special Rapporteur) said that the debate had confirmed that there was widespread support for the “two element” approach. As had been suggested, the temporal aspects of the two elements and the relationship between them should be addressed, possibly in a new part of the draft conclusions. Generally speaking, the members of the Commission still agreed that the decisions of international courts and tribunals must primarily guide its work. Likewise there was continuing consensus on the outcome of that work which, in Mr. Park’s words, should take the form of a “practical guide to assist practitioners in the task of identifying customary international law” and should not be overly prescriptive. As Mr. Tladi, Mr. Saboia and Mr. Gómez Robledo had noted, it would be necessary to clarify—at least in an introductory commentary—to what extent the Commission intended to cover the formation *and* the identification of custom. Mr. Murphy had rightly raised the question of the balance between the draft conclusions and the commentaries, because he feared that the reader would stop at the former and not go on to read the latter. The reader’s attention could be drawn to the importance of the commentaries in the body of the draft conclusions, or in the introduction thereto, in language similar to that to be found in the introduction to the Guide to Practice on Reservations to Treaties.²⁴⁵ The commentaries themselves should be concise, modelled on the commentaries to the draft articles on responsibility of States for internationally wrongful acts,²⁴⁶ or the draft articles on the responsibility of international organizations.²⁴⁷ A brief

²⁴⁵ General Assembly resolution 68/111 of 16 December 2013, annex. The guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Three), chap. IV, sects. F.1 and F.2.

²⁴⁶ General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

²⁴⁷ See the draft articles on the responsibility of international organizations adopted by the Commission at its sixty-third session and the commentaries thereto in *Yearbook ... 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

general introductory commentary could touch on the importance and role of customary international law in the modern world. The overall length of the draft conclusions and commentaries thereto should not exceed 20 to 30 pages. Any reader who wanted further details could refer to the reports and debates and to a bibliography drawn up for that purpose.

6. Turning to issues of substance, he agreed that it would be wise to specify that the practice in question was above all that of States, but without going so far as to dismiss the practice of intergovernmental organizations, at least that of certain organizations in fields such as treaties, privileges and immunities and the internal law of international organizations. The European Union was admittedly a special organization, but the fact remained that it exercised some of its member States' powers.

7. With regard to draft conclusion 1, he had noted with interest that the word "methodology" caused some difficulty, perhaps for reasons of translation. Several solutions had been proposed; they consisted in either omitting the term, which would deprive the draft conclusion of meaning, or replacing it either with "methods", which might suggest that other methods existed for the identification of custom and that they should be taken into consideration; or with "method", which would be less appropriate in English; or with the term "rules", as proposed by Mr. Forteau and Mr. Nolte. His own reaction, however, was the same as that of Mr. Candioti and Mr. Gevorgian; he would not take the risk of opening a debate on the nature of those rules. Mr. Petrič had suggested that a reference should be made to "rules and principles of international law", but that might wrongly create the impression that two separate categories—rules and principles—existed. The commentary could make it clear that the expression "rules of international law" must be understood in the broad sense to cover legal principles as well. He left it to the Drafting Committee to decide whether the contents of draft conclusion 1, paragraph 2, should be included in the commentary, and whether draft conclusion 2 should be deleted, as proposed by Mr. Tladi, Mr. Vázquez-Bermúdez, Ms. Escobar Hernández and Mr. Gevorgian, for the Commission's opinion was sharply divided and he personally was uncertain on that point.

8. In draft conclusion 3, the expression "general practice" left room for practice other than that of States and had met with widespread approval. On the other hand, "accepted as law" appeared to be more controversial and the proposal had been made that it should be followed by the term "*opinio juris*", possibly in brackets. It seemed that, while the majority of Commission members endorsed the idea that the basic approach to custom did not vary according to the different fields of international law, some had rightly emphasized that this did not exclude the possibility that it might be *applied* differently, depending on the type of rule. With regard to draft conclusion 4, the whole question of the assessment of evidence, including the burden of proof, required more careful consideration. The main issue raised in relation to draft conclusion 5 concerned the expression "primarily" which was used to take account of the role of international organizations, but which seemed to

cause some uncertainty. Draft conclusion 6 needed to be looked at more closely, in order to determine whether the rules on attribution adopted in the context of State responsibility could be transposed in their entirety. The questions raised by Mr. Huang about the lawfulness of practice also required more reflection.

9. Draft conclusion 7, paragraphs 1 and 2, had received wide support, subject to some minor modifications. All the members who had spoken on that point had seemed to welcome the inclusion of verbal as well as physical acts. On the other hand, paragraphs 3 and 4 raised bigger issues which would be addressed in the following report. Some interesting comments on drafting and substance had been made on draft conclusion 8, in particular with regard to a possible hierarchy of forms of practice and conflicting practice within the same State. Some of those points might be dealt with in the commentary, depending on the form taken by the final wording of that draft conclusion. In any event, the emphasis was on the adjective "predetermined" and not on the lack of a hierarchy, since the acts of a low-level local official obviously did not carry the same weight as those of spokesperson of a Ministry for Foreign Affairs. Draft conclusion 9, paragraphs 1 to 3, had been regarded as acceptable on the whole, although the use of some terms had been rightly criticized. While paragraph 4, with its reference to "specially affected States" had been well received by several members, it had attracted a good deal of comment and criticism, some of which, from Mr. Forteau, Mr. Vázquez-Bermúdez, Ms. Escobar Hernández and Mr. Singh, among others, had not been entirely warranted. Some members had apparently misunderstood what was intended by that provision, which reflected the case law of the International Court of Justice. He had certainly not intended to suggest that the practice of certain "Great Powers", or of the permanent members of the Security Council, should be deemed essential for the formation of a rule of customary international law. He had thought that the explanation supplied in paragraph 54 would be sufficient to clarify the meaning of that provision, especially as it was not couched in peremptory language ("due regard is to be given") and as the category of States, those "whose interests are specially affected", varied from rule to rule and by no means included any particular State. He would clearly have to explain that concept if the paragraph were retained in one form or another.

10. Draft conclusions 10 and 11 had elicited comments similar to those concerning the corresponding conclusions on "general practice". It had been pointed out that the wording could be more closely aligned. The "double counting" in draft conclusion 11, paragraph 4, and the similarity of the lists in draft conclusion 11, paragraph 2, and draft conclusion 7, paragraph 2, had been much disputed and debated. That issue required in-depth consideration, since there was clearly a substantive difference among members which he did not fully understand.

11. Obviously much ground still needed to be covered in future work on the topic. It would be necessary to make a more detailed examination of some aspects of international organizations; the ideas put forward on that subject by Mr. Murphy, Mr. Tladi and Mr. Hassouna would be helpful. Although international organizations

must certainly be included in the draft conclusions, the various issues which arose would have to be explained with more care. It would also be necessary to look more closely at customary international law and treaties and customary international law and resolutions, including the “Castañeda doctrine”. In addition, he intended to cover the subjects of the “persistent objector” and regional, local and bilateral custom. The role of inaction also required further scrutiny.

12. Mr. Park, Mr. Murase and Ms. Jacobsson had put forward the idea of more thoroughly exploring the question of the burden of proof of the existence of customary international law. Mr. Caffisch and Mr. Kamto had thought that it would be wise to address the question of the transformation of general principles into customary international law. Mr. Nolte and Ms. Escobar Hernández would welcome a study of the relationship between general principles and customary international law. He wondered exactly what Mr. Murase had had in mind when he had suggested that it was necessary to deal with the “question of unilateral measures and their opposability”. Several members had deemed it necessary to examine the temporal aspects of the two elements and the relationship between them.

13. The proposed plan of work seemed to have received general approval, notwithstanding Mr. Forteau’s *festina lente* comment and similar words of caution from Mr. Nolte. Admittedly the timetable seemed ambitious, but there was no harm in trying. In any event, he would not sacrifice quality for speed. If, as almost all members had recommended, the draft conclusions were referred to the Drafting Committee, he hoped that it would have the time to examine most, if not all, of them at the current session. If the Commission managed to adopt the draft conclusions at the first part of the 2015 session, he could submit the corresponding draft commentaries at the second part of the same session.

14. The question put by Mr. Hassouna regarding the means of making evidence of customary international law more readily available should be included in chapter III of the Commission’s report.

15. The CHAIRPERSON said that, if he heard no objections, he would take it that the Commission wished to refer the 11 draft conclusions contained in document A/CN.4/672 to the Drafting Committee.

It was so decided.

Organization of the work of the session (concluded)*

[Agenda item 1]

16. The list of members of the Drafting Committee on the identification of customary international law was read out: Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hmoud, Mr. Kamto, Mr. Kittichaisaree, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Petrič, Mr. Sabia (Chairperson), Mr. Vázquez-Bermúdez and Mr. Tladi (*ex officio*).

* Resumed from the 3225th meeting.

Protection of the environment in relation to armed conflicts²⁴⁸ (A/CN.4/666, Part II, sect. F, A/CN.4/674²⁴⁹)

[Agenda item 10]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR

17. The CHAIRPERSON invited the Special Rapporteur, Ms. Jacobsson, to present her preliminary report on the protection of the environment in relation to armed conflicts (A/CN.4/674).

18. Ms. JACOBSSON (Special Rapporteur) said that, for the sake of conciseness, she had not repeated the background to the topic in her preliminary report and that the latter should therefore be read in conjunction with the syllabus annexed to the Commission’s report on its session in 2011.²⁵⁰ She proposed that the topic be approached by looking at three temporal phases, namely those before, during and after an armed conflict, since that would make it easier to study the topic, to draw conclusions or to formulate specific guidelines. Although the members of the Commission and States in the Sixth Committee had welcomed that approach, opinions had diverged as to the relative importance to be attached to each of those phases. In her view, the emphasis should be on the first phase, in other words on peacetime obligations of relevance to a potential armed conflict, and on the third phase, in other words on post-conflict measures. No strict dividing line should, however, be drawn between the various phases, since it would be artificial and would give the wrong idea of how the pertinent legal rules applied.

19. She intended to examine the guiding principles and/or obligations with regard to environmental protection under international law in the context of: (a) preparations for a potential armed conflict; (b) the conduct of armed conflict, and (c) post-conflict measures in relation to environmental damage. She wished to exclude the root causes of armed conflicts, protection of the cultural heritage and the effect of particular weapons from the scope of the topic, and the matter of refugees and displaced persons had to be approached with caution.

20. In her preliminary report, the Special Rapporteur offered an overview of the first phase of the topic: the rules and principles applicable in the event of a potential armed conflict (peacetime obligations). She did not address measures to be taken during or after an armed conflict, even if preparatory action necessary for the execution of those measures had to be undertaken prior to the outbreak of an armed conflict. She examined aspects related to scope and the use of certain terms and sources, and the manner in which the topic related to other topics previously considered by the Commission, such as the effects of armed conflicts on treaties, non-navigational uses

²⁴⁸ At its sixty-third session (2011), the Commission decided to include the topic in its long-term programme of work (*Yearbook ... 2011*, vol. II (Part Two), p. 175, para. 365, and *ibid.*, annex V, pp. 211 *et seq.*). At its sixty-fifth session (2013), the Commission decided to include the topic in its programme of work and appointed Ms. Marie G. Jacobsson Special Rapporteur on the topic (*Yearbook ... 2013*, vol. II (Part Two), p. 72, para. 131).

²⁴⁹ Reproduced in *Yearbook ... 2014*, vol. II (Part One).

²⁵⁰ *Yearbook ... 2011*, vol. II (Part Two), annex V, pp. 211 *et seq.*

of international watercourses, shared natural resources, the prevention of transboundary damage from hazardous activities and the allocation of loss from transboundary harm arising out of hazardous activities. She identified the legal obligations and principles stemming from international environmental law that might serve as guidelines for preventive measures to reduce the adverse impact which a potential armed conflict could have on the environment. Since peacetime law was fully applicable when there was no armed conflict, the challenge was that of identifying peacetime rules and principles of relevance to the topic. At the current stage of deliberations, it would have been premature to attempt to evaluate the extent to which those rules might continue to apply during or after an armed conflict. Although the precautionary principle and the duty to undertake an environmental impact assessment had their counterparts in international humanitarian law, responsibilities under the law of armed conflict differed greatly from peacetime obligations. Some aspects of the aim and purpose of those obligations were, however, similar in war and in peacetime. She would compare those rules in a later report on the second phase of the topic.

21. The report under consideration was confined to the most important principles, concepts and obligations and did not attempt to determine the conventions that continued to apply during an armed conflict. She had not listed all the bilateral or international agreements that regulated the protection of the environment or of human rights, for those treaties applied in full in peacetime. She had suggested definitions of the terms “armed conflict” and “environment” in order to facilitate discussion. It would be interesting to hear members’ views on those terms, including whether they considered it preferable not to define them. She had based the section on human rights and the environment on the work of John Knox, the United Nations Independent Expert on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, in particular on two reports that he had presented to the Human Rights Council.²⁵¹ The report under consideration contained conclusions that were consonant with those of the Independent Expert with regard to the existence of a right to a healthy environment, procedural obligations, substantive obligations and vulnerable groups.

22. The three-year timetable proposed in paragraph 168 of the preliminary report was realistic only if the Commission drew up draft guidelines, conclusions or recommendations. She was doubtful about formulating draft articles, but deferred to the Commission on that matter. She would continue to consult ICRC, UNESCO, the United Nations Development Programme and regional organizations. It would also be most helpful if States were to provide examples of cases where the rules of international environmental law, including bilateral or regional treaties, had continued to apply in times of international or non-international armed conflict, examples of provisions of relevance to the topic under consideration and examples of decisions applying national or international environmental law.

²⁵¹ Preliminary report (A/HRC/22/43) and mapping report and addendum on the Independent Expert’s mission to Costa Rica (A/HRC/25/53 and Add.1), submitted to the Human Rights Council at its twenty-second and twenty-fifth sessions, respectively.

23. Mr. MURASE said that the topic under consideration was particularly important because it addressed both the linkages and the tension between two fields of international law, namely environmental law and the law of armed conflict. While he commended the Special Rapporteur’s cautious approach, the way she had delimited the scope of the topic was problematic. During consultations at the previous session, he and many other members had held that work should focus mainly on the rules applicable during an armed conflict, which the preliminary report did not appear to have done. He failed to understand why the Special Rapporteur intended to concentrate on internal armed conflicts, to the exclusion of international armed conflicts. In the syllabus that she had submitted in 2011,²⁵² she had, however, clearly focused on the protection of the environment during armed conflict, and had quoted the Viet Nam War and the first Gulf War as examples of warfare that raised the vital legal issue of whether the use of certain weapons capable of wreaking havoc on the environment could be justified under *jus in bello*.

24. In addition, in paragraph 61 of her preliminary report, the Special Rapporteur stated that “there cannot be a strict dividing line between the different phases” of an armed conflict, whereas the application of the law of armed conflict was premised on the idea of a clear dividing line between those phases, as was plain from article 3 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). He wondered why the preliminary report focused on a discussion of peacetime international environmental law, when the topic did not concern the protection of the environment in general, but specifically its protection in relation to armed conflict. For example, the principle of sustainable development was of limited relevance to the Commission’s work, because it was concerned with protection of the environment associated with economic development, which was not a priority in the exceptional circumstances of an armed conflict. The Special Rapporteur rightly stated that some rules of the law of armed conflict also applied in the phases before and after the conflict, but she had not specified which, whereas those provisions were vital, above all if draft articles or guidelines were to cover the first phase of a conflict. In any event, with regard to the first phase, the Commission must limit itself to the content of the existing rules of the law of armed conflict. For example, article 36 of Protocol I made it possible to cover any new weapon that might endanger international watercourses or transboundary aquifers. It was, however, difficult, if not impossible, to construe it as extending to all the principles and rules of international environmental law. That showed that initially the Commission should confine itself to recommending to States parties that they should carefully test new weapons, while taking all the necessary precautions and draw up military manuals in anticipation of future armed conflicts. It was unclear whether protection of the environment around military bases fell within the ambit of the topic.

25. Mr. KITTICHAISAREE noted that, in paragraph 47 of her preliminary report, the Special Rapporteur

²⁵² *Yearbook ... 2011*, vol. II (Part Two), annex V, pp. 211 *et seq.*, and especially pp. 211–212, paras. 6 and 10.

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

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

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

The meeting rose at 12.40 p.m.

3228th MEETING

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

Chairperson: Mr. Kirill GEVORGIAN

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

Cooperation with other bodies (*continued*)*

[Agenda item 14]

STATEMENT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

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

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

* Resumed from the 3224th meeting.