

Document:-
A/CN.4/3264

Summary record of the 3264th meeting

Topic:
<multiple topics>

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

*Downloaded from the web site of the International Law Commission
(<http://legal.un.org/ilc/>)*

SUMMARY RECORDS OF THE SECOND PART OF THE SIXTY-SEVENTH SESSION

Held at Geneva from 6 July to 7 August 2015

3264th MEETING

Monday, 6 July 2015, at 3.05 p.m.

Chairperson: Mr. Narinder SINGH

Present: Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. 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.

The most-favoured-nation clause (A/CN.4/678, Part II, sect. H,¹⁵⁰ A/CN.4/L.852¹⁵¹)

[Agenda item 5]

FINAL REPORT OF THE STUDY GROUP

1. The CHAIRPERSON invited Mr. McRae, Chairperson of the Study Group on the most-favoured-nation clause, to introduce the Study Group's final report (A/CN.4/L.852).

2. Mr. McRAE (Chairperson of the Study Group on the most-favoured-nation clause) said that the Study Group had met on 12 May 2015 to undertake a technical review of the draft final report. Comments made at that meeting had been incorporated into the final version of the report.

3. The final report was divided into five parts. In Part I, the Study Group provided the background to the topic, including the origins and purpose of its work, the prior work of the Commission on the 1978 draft articles on most-favoured-nation clauses,¹⁵² and developments since 1978,

¹⁵⁰ Mimeographed; available from the Commission's website, documents of the sixty-seventh session.

¹⁵¹ *Idem*.

¹⁵² *Yearbook ... 1978*, vol. II (Part Two), pp. 16 *et seq.*, para. 74.

in particular in the area of investment. The Study Group's general intention had not been to review the 1978 draft articles or to prepare a new set of draft articles. Part I also contained an analysis of most-favoured-nation provisions by other bodies, namely the United Nations Conference on Trade and Development and the Organisation for Economic Co-operation and Development.

4. In Part II, the Study Group addressed the contemporary relevance of most-favoured-nation clauses and issues concerning their interpretation, including in the context of the General Agreement on Tariffs and Trade (GATT), WTO agreements and other trade and investment treaties. It also considered the types of most-favoured-nation clauses contained in bilateral investment treaties and highlighted interpretative issues that had arisen in relation to those treaties, namely: (a) defining the beneficiary of a most-favoured-nation clause; (b) defining the necessary treatment; and (c) defining the scope of the clause.

5. In Part III, the Study Group analysed: (a) the general policy considerations in the interpretation of investment agreements, taking into account questions of asymmetry in bilateral investment treaty negotiations and the specificity of each treaty; (b) the implications of "mixed" arbitration as a means of settling investment disputes; and (c) the contemporary relevance of the 1978 draft articles on most-favoured-nation clauses.

6. In Part IV, the Study Group provided guidance on the interpretation of most-favoured-nation clauses, setting out a framework for the proper application of the principles of treaty interpretation to such clauses. It considered the different approaches in the case law to the interpretation of most-favoured-nation provisions in investment agreements, addressing in particular three central questions: (a) could most-favoured-nation provisions be applied in principle to the dispute settlement provisions of bilateral investment treaties?; (b) was the jurisdiction of a tribunal affected by conditions provided for under bilateral investment treaties regarding the dispute settlement provisions that could be invoked by investors?; and (c) in determining whether a most-favoured-nation provision in a bilateral investment treaty applied to the conditions for invoking dispute settlement, what factors were relevant in the interpretative process?

7. There was also an examination of the various ways in which States had reacted in their treaty practice to the *Maffezini* decision, including by specifically stating whether or not the most-favoured-nation clause applied to dispute resolution provisions or specifically enumerating the fields to which the clause applied.

8. Part IV constituted the core substantive contribution of the Study Group. Part V contained some general conclusions. The Study Group noted that most-favoured-nation clauses had remained unchanged in character since the 1978 draft articles had been concluded and that the core provisions of those draft articles continued to be the basis for the interpretation and application of most-favoured-nation clauses. They did not, however, provide answers to all the interpretative issues that could arise in relation to most-favoured-nation clauses.

9. In that connection, the Study Group wished to highlight that the interpretative techniques reviewed in its report were designed to assist in the interpretation and application of most-favoured-nation provisions. In particular, it underlined the importance and relevance of the 1969 Vienna Convention as a basis for the interpretation of investment treaties. The interpretation of most-favoured-nation clauses was to be undertaken on the basis of the rules for the interpretation of treaties as set out in the 1969 Vienna Convention. The Study Group also noted that the central interpretative issue with respect to most-favoured-nation clauses related to the scope of the clause and the application of the *ejusdem generis* principle. In other words, the scope and nature of the benefit that could be obtained under a most-favoured-nation provision depended on the interpretation of the provision itself.

10. The Study Group also noted that the application of most-favoured-nation clauses to dispute settlement provisions in investment treaty arbitration, rather than limiting them to substantive obligations, had introduced new considerations *vis-à-vis* most-favoured-nation provisions and perhaps had had consequences that had not been foreseen by the parties when they had negotiated their investment agreements. Nonetheless, the matter remained one of treaty interpretation. Indeed, whether most-favoured-nation clauses were to encompass dispute settlement provisions was for the States negotiating such clauses to decide. Explicit wording could ensure that a most-favoured-nation provision did or did not apply to dispute settlement provisions. Otherwise, dispute settlement tribunals would be left to interpret most-favoured-nation clauses on a case-by-case basis.

11. In conclusion, he said that it was the Study Group's wish that the Commission should endorse its final report and annex it to the report of the Commission on the work of its current session.¹⁵³

12. Mr. CANDIOTI asked whether the Study Group planned to submit recommendations to the Commission. In his view, the report should be brought to the attention of Member States.

13. Mr. NOLTE asked what the Study Group meant by "endorse" and whether the endorsement of the report would amount to its adoption.

14. Mr. McRAE said that the Study Group did not intend to produce recommendations or guidelines and that the final report simply contained conclusions that provided guidance for the interpretation of most-favoured-nation clauses. As to the term "endorsement", it was a matter of the Commission adopting the report and taking ownership of it.

15. Mr. KITTICHAISAREE recalled that, when it had considered the final report on the obligation to extradite or prosecute (*aut dedere aut judicare*),¹⁵⁴ the Commission had debated whether it should take note of or adopt the report, and had decided to consider it and adopt it paragraph by paragraph. A choice must also be made with respect to the final report of the Study Group on the most-favoured-nation clause.

16. Given the importance of the topic in question, he was of the view that the General Assembly should not only take note of the final report on the most-favoured-nation clause but also call for it to be disseminated as widely as possible among States and interested parties, as it had done with respect to the report on the obligation to extradite or prosecute (*aut dedere aut judicare*) introduced at the previous session.

17. The CHAIRPERSON invited the members of the Commission to adopt the final report of the Study Group on the most-favoured-nation clause and to annex it to the report of the Commission on the work of its current session.

18. Mr. NOLTE, noting that Mr. McRae seemed to wish the Commission to endorse the conclusions of the final report, said that there was a not insignificant difference between adopting the conclusions and adopting the report as a whole. In his view, it would be premature to take a decision concerning the report.

19. Mr. PARK asked what procedure had been used to adopt the final report on the fragmentation of international law.¹⁵⁵

20. Mr. CANDIOTI said that the members of the Commission had not had enough time to analyse the report, which had just been presented to them. He recalled that the Commission had unfortunately not had the time to consider in detail the final report of the Study Group on the fragmentation of international law, which had thus not been adopted as a whole. He proposed deferring adoption of the report by a week in order to give the members time to read it carefully before commenting.

21. Mr. McRAE, supporting Mr. Candiotti's proposal, said that by deferring the adoption, the members would also have time to reach a consensus on whether to adopt the conclusions of the report or the report as a whole.

22. The CHAIRPERSON said that he took it that the members wished to postpone the adoption of the final report of the Study Group on the most-favoured-nation clause.

It was so decided.

¹⁵⁴ *Yearbook ... 2014*, vol. II (Part Two) and corrigendum, pp. 92–105, para. 65.

¹⁵⁵ *Yearbook ... 2006*, vol. II (Part Two), pp. 176–184, paras. 241–251.

¹⁵³ *Yearbook ... 2015*, vol. II (Part Two).

Protection of the environment in relation to armed conflicts¹⁵⁶ (A/CN.4/678, Part II, sect. F,¹⁵⁷ A/CN.4/685,¹⁵⁸ A/CN.4/L.870¹⁵⁹)

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

23. The CHAIRPERSON invited Ms. Jacobsson, Special Rapporteur on the topic “Protection of the environment in relation to armed conflicts”, to introduce her second report (A/CN.4/685).

24. Ms. JACOBSSON (Special Rapporteur) recalled that the preliminary report she had presented to the Commission at its previous session had provided an introductory overview of the rules and principles applicable to a potential armed conflict (“peacetime obligations”).¹⁶⁰

25. In her second report, the purpose of which was to identify existing rules of armed conflict directly relevant to the protection of the environment in relation to armed conflict, she had therefore examined such rules and proposed a “preamble” and five draft principles, which were reproduced in annex I. She was of the view that the paragraph entitled “Use of terms” contained in the preamble, the need for which was not clear, should not be sent to the Drafting Committee. At the same time, it would be premature to delete it, and she would evaluate the need for it in the light of the coming debates.

26. Having considered various options, she had decided to propose draft principles rather than draft conclusions, guidelines or articles. The term “guidelines” might indicate that some parts of the outcome did not reflect existing law, but rather would serve to guide States on how to act. In addition, ICRC had already issued the Guidelines for military manuals and instructions on the protection of the environment in times of armed conflict,¹⁶¹ which should not be confused with the work of the Commission. The term “conclusions” seemed to be too definitive and allowed for less flexibility in addressing preventive measures and cooperation. There was no consensus on the solution “draft articles”, at least at the current stage.

27. The second report consisted of nine chapters. The first two were of an introductory nature and set out the purpose of the report as well as the methodology and sources used in drafting it. They also contained a brief summary of the Commission’s deliberations at its sixty-sixth session.

¹⁵⁶ At its sixty-fifth session (2013), the Commission decided to include the topic “Protection of the environment in relation to armed conflicts” in its programme of work and to appoint Ms. Marie G. Jacobsson as Special Rapporteur for the topic (*Yearbook ... 2013*, vol. II (Part Two), p. 72, para. 131). At its sixty-sixth session (2014), the Commission considered the preliminary report of the Special Rapporteur (*Yearbook ... 2014*, vol. II (Part One), document A/CN.4/674).

¹⁵⁷ Mimeographed; available from the Commission’s website, documents of the sixty-seventh session.

¹⁵⁸ Reproduced in *Yearbook ... 2015*, vol. II (Part One).

¹⁵⁹ Mimeographed; available from the Commission’s website, documents of the sixty-seventh session.

¹⁶⁰ *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/674, p. 215, para. 49.

¹⁶¹ A/48/269, annex.

28. Chapters III to V reflected the practice and views of States, as expressed in the debate in the Sixth Committee and in their responses to questions posed by the Commission. Chapter V dealt with the practice of States and international organizations and chapter VI covered legal cases and judgments. Chapter VII, which dealt with the law applicable during armed conflict, included an analysis of the directly applicable treaty provisions and relevant principles of the law of armed conflict. It also considered the study on customary international humanitarian law by ICRC¹⁶² and international law manuals applicable in armed conflicts. Chapter VIII covered protective zones and areas, and the ninth and last chapter set out the future programme of work. The proposed preamble was reproduced in annex I, as were the five draft principles. Draft principle 4 on reprisals might have been better placed in another part of the report, but she had ultimately decided to include it in chapter VII, in which the issue of reprisals was addressed. Annex II contained a bibliography. She had decided not to add further references in the footnotes at the current stage, given the number and length of those already in the report, but if the Commission decided to adopt the draft principles on the topic, specific references to the literature would be made in the commentaries.

29. Turning to the views expressed on the topic by more than 30 States during the debate in the Sixth Committee of the General Assembly at its sixty-ninth session (2014), she said that a large number of delegations had indicated the importance of the topic and several had made substantive statements. Three delegations had expressed concerns about the feasibility of work on the topic. Many delegations had welcomed the Special Rapporteur’s temporal approach and agreed that it was not possible to draw a strict dividing line between the three phases (before, during and after an armed conflict). A few delegations had reiterated their doubts regarding the practicality of applying the temporal methodology, and one delegation had remarked that a thematic approach might be considered instead. Some delegations had commented that the Commission should consider embarking on a progressive development exercise if the existing protection regime proved insufficient.

30. A number of delegations had welcomed the approach adopted by the Special Rapporteur in defining and limiting the scope of the topic, while others had stated that the topic should not be unduly limited. The issue of whether the protection of cultural and natural heritage should be addressed had been raised by many delegations. In addition, a range of views had been expressed concerning the precise scope of the topic, including whether to consider issues relating to human rights, indigenous peoples, refugees, internally displaced persons and the effect of weapons on the environment. Ultimately, the comments made by States in the debate of the Sixth Committee corresponded in many respects to those made by members of the Commission at the previous session. She had attempted to take account of those views in her second report.

¹⁶² J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. I, *Rules*, Cambridge, Cambridge University Press; and J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol. II, *Practice* (2 Parts), Cambridge, Cambridge University Press, 2005.

31. Eleven States had submitted written responses to the request for information included in the Commission's report on its sixty-sixth session.¹⁶³ She had taken them all into account, even those that had arrived after the deadline. The responses and information provided by States on their practice, such as legislation and policies, were reflected in the report as received, and she had not sought to explain them. She encouraged members of the Commission, if they had any questions, to check the original documents through her or the secretariat.

32. The information contained in the oral and written responses of States was highly heterogeneous. Some States had provided general information on their environmental legislation while others had referred to specific provisions relating to obligations imposed on the defence forces to protect the environment in their daily operational work; others had cited constitutional obligations to protect the environment. North Atlantic Treaty Organization (NATO) standards had been mentioned by several States, not all of which were members. Other States had simply referred to their obligations under the Convention on the prohibition of military or any other hostile use of environmental modification techniques or the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), or their own criminal code. It was difficult to identify any general trend in State practice on the basis of the information provided, but two conclusions could nevertheless be drawn. The first was that the majority of regulations on peacetime military operations, such as planning and training, were recent. The second was that environmental regulations played an increasingly important role in multilateral operations.

33. In order to find relevant case-law examples for her second report, the Special Rapporteur had had to limit her analysis to cases in which the court had applied provisions of international humanitarian treaty law that directly or indirectly protected the environment in times of armed conflict or had considered, explicitly or implicitly, that there was a connection between armed conflicts and the protection of the environment. One challenge in analysing such cases lay in the distinction between property, livelihood, nature, land and natural resources. That was particularly relevant in situations involving indigenous peoples. There was a clear link to human rights in that context, and it would be necessary to revisit the issue in the third report.

34. The chapter of the second report entitled "Law applicable during armed conflict" was focused on the fundamental treaties that expressly referred to the protection of the environment. In her analysis of the treaty provisions, she had taken account of the declarations and interpretations by States that were relevant to the topic. She had also focused on the basic principles of the law of armed conflict, namely the principles of distinction, proportionality and precaution in attack, as well as the rules on military necessity. Since it was not the task of the Commission to revise the law of armed conflict, she had refrained from analysing the measures needed to apply those principles,

as she had considered it sufficient, for the purposes of the report, to establish whether or not the application of the principles also covered measures aimed at protecting the environment.

35. At the previous session, different views had been expressed with respect to whether certain categories of weapons should be considered under the topic. She maintained that, strictly from the perspective of the law of warfare, all weapons were subject to the same basic rules and principles, unless they were specifically regulated in a treaty, as was the case with anti-personnel land mines. At the same time, it was important to reflect the views expressed by States on the applicability of some treaty instruments to certain weapons the use of which had the potential to cause extensive environmental destruction, such as nuclear weapons, which were discussed in the chapter on protected zones and areas. That chapter also addressed natural heritage zones and other protected areas, as well as the intricate relationship between environment and cultural heritage and the rights of indigenous peoples to their environment as a cultural and natural resource.

36. Turning to the issues that she had not addressed in the second report, she explained that the Martens clause and the principle of humanity, specifically whether or not the two were identical and of relevance to the topic, would be dealt with in the third report. Given their overarching nature, they would be particularly relevant in analysing the pre- and post-conflict phases. The Commission's work on the protection of persons in the event of disasters would be taken into account in that context.¹⁶⁴ With regard to multilateral operations, since the focus of the second report was essentially the law of armed conflict, she had not gone into detail on the work done by the United Nations in the broader context of peacekeeping operations, but it would be necessary to revisit the issue in a subsequent report. The resolutions pertaining to the work of the United Nations Compensation Commission established after the Iraq–Kuwait war would be discussed in a subsequent report on the post-conflict phase. Situations of occupation were not covered in the second report because they often extended beyond the cessation of active military hostilities and compensation for breaches of the law of occupation could be linked to both a breach of a *jus ad bellum* rule and a rule connected with the obligation of the occupying power and was closely connected to private property rights. Occupation would therefore be addressed in the third report.

37. With regard to the future programme of work, she would endeavour to conclude the analysis of the three temporal phases in the third report, which would also contain proposed post-conflict measures, including cooperation, sharing of information and best practices, and reparations. The Commission should then have all of the necessary elements to decide how to proceed with the topic. She recalled that the Commission or the States would have to decide whether to continue with progressive development or codification on the basis of the work undertaken, in accordance with the Commission's mandate under article 1 of its statute. She would continue consultations with institutions such as ICRC, UNESCO and UNEP, and

¹⁶³ *Yearbook ... 2014*, vol. II (Part Two) and corrigendum, p. 19, paras. 31–32.

¹⁶⁴ *Ibid.*, chap. V, pp. 60 *et seq.*

with regional organizations. It would also be helpful if the Commission received from States additional examples of cases in which international environmental law, including regional and bilateral treaties, had continued to apply in times of armed international or non-international conflict as well as national legislation and case law in which international or domestic environmental law had been applied.

38. In conclusion, she proposed that the Commission refer the first two preambular provisions and draft principles 1 to 5 to the Drafting Committee with a view to their provisional adoption.

39. Mr. MURPHY thanked the Special Rapporteur for her excellent second report, in which she provided a thorough bibliography and proposed some important principles that merited close attention. In terms of the methodology, it was regrettable that the copious information contained in the first half of the report was not clearly connected to the draft principles. However, he applauded the Special Rapporteur's cautious approach, which demonstrated an understanding that international humanitarian law reflected a balancing of interests which the Commission should not seek to upend and that the law was only observed because it accommodated those interests. While there was much that might be said about the second report, he would make three general comments and then address each of the draft principles.

40. His first comment related to whether the project should take the form of "principles" and, if so, what that would mean for the drafting process. The Commission had drafted principles on three occasions in the past, motivated by a desire to influence the development of international or national law, but not to codify it into specific rules; it had never formulated principles that asserted what States "shall" or "must" do as a matter of international law. Thus, the seven Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal¹⁶⁵ which it had adopted in 1950 did not provide for any obligations of States. Similarly, in its 2006 draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities¹⁶⁶ aimed at promoting (but not compelling) the harmonization of national laws, the Commission had merely formulated recommendations rather than binding obligations. Again, the Commission's 2006 guiding principles applicable to unilateral declarations of States capable of creating legal obligations¹⁶⁷ did not set out any obligations. That was not the case with the set of draft principles proposed by the Special Rapporteur, several of which were drafted using the words "shall" and "must". The simplest solution would be to replace "shall" and "must" with "should" or to redraft the principles to be less prescriptive. On the other hand, if the objective was

to codify firm rules that States "shall" abide by, he wondered whether a set of principles was the proper approach for the project.

41. As a second general comment, he said that he was puzzled by the structure of the principles proposed in annex I to the second report. The first section, entitled "Preamble", contained three paragraphs on the scope and purpose of the principles and the use of terms, which was not the normal content of a preamble, while the substantive principles were found in the second part, entitled "Draft principles". It would be more appropriate to follow the structure of the 2006 draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, which had a standard preamble followed by three principles on the scope of application, use of terms and purposes, respectively, and a series of substantive principles.

42. His third general point concerned the three-phase temporal approach. Although the Special Rapporteur had indicated from the outset that it was useful to follow such an approach, it was not clear from the draft principles how the three temporal phases related, if at all, to the principles. While it was clear from the words "During an armed conflict" used at the beginning of draft principle 2 that this principle applied only to the second phase, draft principles 1, 3 and 4 contained no such qualifier indicating that they applied to a particular phase, and so they could arguably apply to all three phases. Yet draft principles 1 to 4 were dealt with in chapter VII of the second report, which was entitled "Law applicable during armed conflict". If those principles applied only during an armed conflict, that should be clearly stated. The wording of draft principle 5, which did not appear in chapter VII, seemed to indicate that it applied both to the first phase and to the beginning of the second phase, which had implications that he would return to at a later stage.

43. Turning to draft principle 1, he said that the first sentence was vague, ambiguous and overly broad. Although he agreed that parts or features of the natural environment, such as a forest or a lake, should not be the object of attacks unless they became military objectives, he did not see how the natural environment, as a whole, could be regarded as civilian in nature, at least in the context of international humanitarian law. Generally speaking, the law of war, which was intended to provide guidance to the military as to what it should refrain from doing, did not consider the protection of persons or things in the abstract. For example, Part IV, chapter III, 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) contained very specific provisions on the protection of civilian objects (art. 52), cultural objects (art. 53), places of worship (art. 53) and particular objects indispensable to the survival of the civilian population (art. 54), and not a general and abstract assertion that the enemy territory or the world in general was "civilian in nature". By focusing on concrete objects, Protocol I allowed for a rule that required the military not to attack such objects unless, by their nature, location, purpose or use, they made an effective contribution to military action and their destruction offered a definite military advantage.

¹⁶⁵ The text of the Principles is reproduced in *Yearbook ... 1950*, vol. II, document A/1316, pp. 374–378, paras. 97–127.

¹⁶⁶ General Assembly resolution 61/36 of 4 December 2006, annex. The draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities adopted by the Commission at its fifty-eighth session and commentaries thereto are reproduced in *Yearbook ... 2006*, vol. II (Part Two), pp. 58 *et seq.*, paras. 66–67.

¹⁶⁷ The guiding principles adopted by the Commission and commentaries thereto are reproduced in *Yearbook ... 2006*, vol. II (Part Two), pp. 169 *et seq.*, paras. 176–177.

44. The same approach should be used in formulating draft principle 1, by expressing the requirement of protection not in terms of the environment in general but of certain specific elements, parts or features of the environment. The draft principle could be reformulated to read: “No part of the natural environment may be made the object of an attack, unless and until it becomes a military objective.” Such language would be consistent with the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) to 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, which did not prohibit attacks against the environment as a whole, but against “natural elements” such as “forests or other kinds of plant cover” (art. 2, para. 2). Scholars who had considered the issue seemed to be in accord with that approach. Some had noted that the term “object”, as it was used in the law of war, referred to material things that could be seen or touched, and thus that the “natural environment”, as the sum of different and differing natural components and processes, could not be characterized as such an “object”. Others had shared that view, noting that it was difficult, given the nebulous character of the natural environment, to consider the environment as a whole to be an object *per se* and, from a military perspective, a civilian object, and instead parts or elements of the environment that could be considered civilian in nature. For example, in *The Handbook of International Humanitarian Law*, it was asserted that “[n]o part of the natural environment may be attacked, unless it is a military objective”.¹⁶⁸ The same rule was mentioned in exactly the same terms in the study of customary humanitarian international law conducted by ICRC, and was also reflected in the 2006 manual on the law of non-international armed conflict.¹⁶⁹

45. Although it was not a party 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), the United States of America appeared to accept the idea that parts of the natural environment could not be made the object of an attack unless they became a military objective, as demonstrated by statements in which the Government of the United States explained that, in certain situations, natural property was part of “enemy property”, which, under the Regulations concerning the Laws and Customs of War on Land, could not be destroyed or seized unless such destruction or seizure was imperatively demanded by the necessities of war.¹⁷⁰ On several occasions, the Government of the United States of America had maintained that certain features or parts of the environment, such as natural resources, could, like cultural property, constitute a civilian object that could not be the object of an attack, unless the feature or part became a military objective.

46. Labelling the natural environment as a whole “civilian in nature” gave rise to several problems. First, it was

¹⁶⁸ See D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, 2013, p. 211.

¹⁶⁹ M. N. Schmitt, C. H. B. Garraway and Y. Dinstein, *The Manual on the Law of Non-International Armed Conflict with Commentary*, San Remo, International Institute of Humanitarian Law, 2006.

¹⁷⁰ See article 23 (g) of the Regulations concerning the Laws and Customs of War on Land.

difficult to reconcile such an approach with the obligation to keep civilian and military objects separate. If the natural environment as a whole was considered a civilian object, it would be impossible, for example, to move military forces out of a city and into an uninhabited forest. There was, furthermore, a risk that the civilian population would be afforded less protection. In his view, that was why the authors of Protocol I had chosen not to classify the natural environment as an “object” in article 55 (Protection of the natural environment).

47. The second problem that arose as a result of classifying the natural environment as a whole as civilian in nature was that it appeared to suggest that if any part of the natural environment of a State was used for military purposes—for example, if an army was posted in a forest—the entire natural environment could become the object of an attack. It would be preferable to restrict draft principle 1 to parts or features of a State’s natural environment so that only the feature or part used for military purposes could become the object of a military attack. The third problem was that the standard for evaluating attacks against civilian objects and those against the environment as such did not appear to be the same. For example, under article 8, paragraph 2 (b) (iv), of the Rome Statute of the International Criminal Court, the acts that constituted war crimes in international armed conflict included “[i]ntentionally launching an attack in the knowledge that such attack would cause *incidental* loss of life or injury to civilians or damage to civilian objects or *widespread, long-term and severe* damage to the natural environment which would be clearly excessive in relation to the concrete and overall military advantage anticipated”. Consequently, incidental damage to the natural environment was considered to be different from incidental damage to civilian objects. If the purpose of draft principle 1 was to articulate a standard comparable to the standard that applied to civilian objects, the reference should be to parts, features or elements of the natural environment rather than to the environment as a whole.

48. The fourth problem with labelling the natural environment as “civilian in nature” related to ruses of war. Under the law of war, it was permissible to disguise tanks and troops using camouflage, which meant that an army could make itself look like the natural environment. If draft principle 1 suggested that the natural environment as a whole was essentially a civilian object, that would, at a minimum, create confusion, if not outright conflict, in relation to the law relating to ruses of war. Normally, it was not permissible for an army to disguise itself as something that the belligerent was prohibited from attacking.

49. It might be noted that the diplomatic conference that had adopted the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict had decided not to include “natural sites of great beauty” among the cultural property protected by that Convention, apparently on the basis of, *inter alia*, concerns that the protection of such sites would be too subjective and the view that natural sites could often be restored quickly. That suggested that the “natural environment” as such was not already protected under the laws of war and that providing such protection would be impractical and anomalous.

50. While welcoming the idea expressed in the second sentence of draft principle 1, he said that its formulation might be improved by the Drafting Committee. The sentence did not indicate who or what should respect and protect the natural environment or under what circumstances. Did that sentence require that a State, in advance of an armed conflict, respect and protect its own environment? If so, what was the source of that obligation? The words “consistent with applicable international law” did not make it clear that the source was international law. Perhaps such problems could be avoided by redrafting the sentence to read: “During an armed conflict, each part of the natural environment, if not a military objective, should be respected and protected in accordance with applicable rules of international law”, replacing the words “consistent with” with the phrase “in accordance with applicable rules of”.

51. With regard to draft principle 2, other than some of the conclusions relating to the precautionary principle or approach, he was in agreement with the analysis in the second report and with the thrust of the draft principle, although the wording could be improved in the Drafting Committee. He was concerned, however, that it was not recognized in the draft principle that, in some situations, the strongest possible protection could not be afforded both to civilians and to the environment during a military attack. The rule should be that the belligerent should ensure the strongest possible protection for civilians and, where feasible, also for the environment.

52. The language of draft principle 3 appeared to have been drawn from paragraph 30 of the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*. However, many observers, such as Louise Doswald-Beck, were of the view that the Court’s assertion in that paragraph had to do with *jus ad bellum* and not *jus in bello*. In other words, the Court appeared to have been referring to necessity and proportionality as they related to self-defence and not as they related to targeting decisions in an armed conflict. If that was true, he wondered whether the proposition in draft principle 3 was supported by the Court’s advisory opinion. If the proposition was regarded as relating to *jus in bello*, there were reasons to believe that it was wrong, at least in some cases. For example, supposing that a particular natural resource, such as a forest, was being used exclusively to provide wood for an army to build forts or trenches, that forest would become a military objective and could be attacked and destroyed without requiring an analysis of the necessity or proportionality of the attack under the law of war.

53. Draft principle 4 repeated verbatim 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). States parties to that Protocol that had not formulated a reservation or declaration relating to that provision were bound by that rule but those that had ratified the Protocol but formulated a reservation or declaration concerning the provision, such as the United Kingdom, were not bound by it or bound by it only subject to certain conditions. Egypt, France, Germany and Italy had also formulated declarations in relation to the provisions of Protocol I concerning reprisals.

54. Furthermore, States that were not parties to Protocol I, such as India, the Islamic Republic of Iran, Israel, Pakistan, Turkey and the United States, were not bound by article 55, paragraph 2. State practice was not analysed sufficiently in the report to establish that such a rule was now part of customary international law separate from the Protocol, either because State practice in relation to the Protocol indicated that it was now part of customary international law or because non-parties to the Protocol believed that it was.

55. While a large number of States had ratified or acceded to Protocol I, it was not generally accepted that all of the provisions of the Protocol, including those on reprisals, had passed into customary international law. In the *Legality of the Threat or Use of Nuclear Weapons* case, the International Court of Justice had taken a more cautious approach than was indicated in the report. The Court had recognized that “[a]rticles 35, paragraph 3, and 55 of ... Protocol I provide additional protection for the environment” and that one of those protections was “the prohibition of attacks against the natural environment by way of reprisals”, but it had concluded: “These are powerful constraints for all the States having subscribed to these provisions*” (para. 31 of the advisory opinion). By emphasizing that those rules were binding on the States parties to Protocol I, the Court was clearly not indicating that the rules had passed into customary international law.

56. Others, such as the Commission of Experts established pursuant to Security Council resolution 780 (1992) of 6 October 1992, had taken the same view. Reflecting on the provisions on reprisals in Protocol I, Judge Fausto Pocar of the International Tribunal for the Former Yugoslavia had stated:

It is well known that the controversy on this matter has been and still is important, and different views have been expressed both at the Geneva Diplomatic Conference where Protocol I was negotiated and subsequently. The dominant view is probably that the provisions of the Protocol [on reprisals] neither reflect pre-existing customary law nor have subsequently reached that nature, but contain significant developments in this regard.¹⁷¹

57. Likewise, in its study of customary international law, ICRC, referring to articles 52 to 56 of Protocol I and the practice of various States, asserted that:

While the vast majority of States have now specifically committed themselves not to take reprisal action against such [protected] objects, because of existing contrary practice, albeit very limited, it is difficult to conclude that there has yet crystallised a customary rule specifically prohibiting reprisals against these civilian objects in all situations*.¹⁷²

58. In her second report, the Special Rapporteur indicated that only 14 States had banned reprisals against the natural environment in their national laws, and although other States had prohibited reprisals in their military manuals, it could be argued that those States were simply repeating the obligation that they had assumed by ratifying Protocol I.

¹⁷¹ F. Pocar, “To what extent is Protocol I customary international law?”, in A. E. Wall (ed.), *International Law Studies: Legal and Ethical Lessons of NATO’s Kosovo Campaign*, vol. 78 (2002), pp. 337–351, at p. 349.

¹⁷² J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. I, *Rules* (see footnote 162 above), p. 525.

59. Furthermore, to the extent that the draft principles addressed all armed conflict, including non-international armed conflict, it should be noted that reprisals were not specifically prohibited under either common article 3 of the Geneva Conventions for the protection of war victims or 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). A. P. V. Rogers had noted that, at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, some delegations had expressed the view that the rules on reprisals only applied to international armed conflict, and he had concluded that the existence of the doctrine of belligerent reprisals “in the law of internal armed conflict, where the treaty rules are silent on the issue, must remain a matter of debate”.¹⁷³ In her second report, the Special Rapporteur touched on the issue of applying rules for international armed conflict to non-international armed conflict, but she did not squarely address it in the context of reprisals, although she did acknowledge in the footnote to paragraph 206 that “the concept of reprisals does not exist in non-international armed conflict”. Therefore, he had doubts that the rule could be expressed as firmly as it was in draft principle 4. It seemed that many States, including some of the major military powers, regarded the preservation of the possibility of reprisals against an enemy’s natural environment as a safeguard for the protection of their own environment or civilians during armed conflict. If draft principle 4 was sent to the Drafting Committee, it should be reformulated with the appropriate caveats.

60. Noting that, in paragraph 192 of her second report, the Special Rapporteur indicated that “significant declarations and reservations relate to the non-applicability” 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) to nuclear weapons, he said that, given that many of the draft principles relied upon Protocol I and 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 their source of law, it seemed unlikely that the draft principles would be applied to nuclear weapons as a matter of existing law, a point that should be made in the commentary.

61. He supported the substance and tone of draft principle 5 and said that the use of the word “should” encouraged States to designate demilitarized zones without ordering them to do so.

62. As for the substance, the text of draft principle 5 was focused on the pre-conflict period and the outset of the armed conflict, but its scope could be extended to cover the entire period of the armed conflict. In the pre-conflict period, a unilateral designation by the State in which the zone was situated would suffice, but during the conflict, only an agreement or arrangement between the two belligerents would be consistent with the Geneva Conventions

for the protection of war victims and Protocol I thereto. He proposed adding a second sentence, to read: “During armed conflict, parties to a conflict should conclude agreements or arrangements to establish areas of major ecological importance as demilitarized or neutralized zones.”

63. In conclusion, he said that the preamble and the draft principles contained in the second report should be sent to the Drafting Committee for adjustments in the light of the comments made in the plenary.

64. Mr. MURASE said that the topic under consideration was extremely challenging as it reflected the tension and interaction between two fields of international law, namely the law of armed conflict and environmental law. The challenge lay in achieving a proper balance between safeguarding the legitimate rights of the parties to an armed conflict, on the one hand, and protecting the environment, on the other. In that regard, it was necessary to recognize that, while certain inhumane weapons and forms of warfare were prohibited, *jus in bello*, or the law of armed conflict, was essentially a body of rules that authorized soldiers to kill and injure enemies on the battlefield in order not to sacrifice their own lives. In such a context, protection of the environment was a remote concern, if not entirely irrelevant to the engaged parties. If military necessity prevailed over environmental considerations, the parties to an armed conflict could be permitted to employ any means of warfare available, unless specifically prohibited by the law of armed conflict. That was the reality, and it was crucial to strike the proper balance in the exercise of codification and progressive development of international law on the topic.

65. From that perspective, he had some concerns and reservations about the draft principles proposed in the report. First, the Special Rapporteur had elaborated draft “principles”, the normative status of which was unclear. Some of the draft principles would be better characterized as concrete rules rather than abstract principles, and it might be preferable to prepare draft articles that covered both principles and rules.

66. Second, the provisions on the scope and use of terms should be included in the operative text rather than in the preamble. While it might be appropriate to define the purpose of the project in the preamble, he had reservations about the use of the term “restorative measures” in the first paragraph of that definition. The term “collateral damage” in the second paragraph could pose a more serious problem: that concept required an in-depth analysis and careful treatment in the context of the draft principles.

67. Third, referring to the definition of “armed conflict”, he was not sure that situations of non-international armed conflict should be included in the project. The law of armed conflict was not applicable to situations of internal disturbances and tensions. As stated by ICRC in its commentary on 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), in such situations, “the State use[d] armed

¹⁷³ A. P. V. Rogers, *Law on the Battlefield*, Melland Schill Studies in International Law, 2nd ed., Manchester University Press and Juris Publishing, 2004, p. 235.

force to maintain order”,¹⁷⁴ in the form of law enforcement actions based on domestic criminal law rather than the international law of armed conflict.

68. Fourth, the definition of the term “environment” was too broad for the purposes of the project, as it was not a matter of protecting the environment as a whole. The scope of protection should be limited to the environment in relation to situations of armed conflict. The Special Rapporteur had mentioned that the definition had been borrowed from the Commission’s draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, but that instrument related to peacetime environmental law and the definition it contained did not seem appropriate for situations of armed conflict, which required a much narrower definition. The expression “applicable international law” in draft principle 1 should be clarified, as it involved the fundamental question of the relationship between *jus in bello* or the law of armed conflict and peacetime treaties, including environmental treaties. It would be necessary to explain to what extent and on what grounds the existing multilateral environmental agreements could be applied in a period of armed conflict.

69. Fifth, with regard to draft principles 1 to 3, a clear distinction should be made between the two core principles, namely the distinction between civilian and military objects and the proportionality between military advantage and incidental loss or collateral damage to civilian objects. Draft principle 1 dealt with the distinction between civilian and military objects, but draft principles 2 and 3 seemed to mix the two principles because they both referred to proportionality. Furthermore, it was fundamental to consider the balance to be struck between military necessity and humanitarian or environmental considerations, as it was the determining factor in the interpretation and application of the law of armed conflict. In that context, the question of how to determine that balance was indeed a central issue. In his view, it was precisely in that process that the notion of “widespread, long-term and severe damage” played an important role. In her second report, the Special Rapporteur had made only passing reference to that notion, whereas it would be necessary to conduct an in-depth analysis of its meaning and function in order to achieve a balance between military necessity and environmental considerations. In the law of armed conflict, there was a prohibition not on all environmental damages but rather only on “widespread, long-term and severe damage” caused when military actions exceeded the threshold of military necessity. The question then was what standards applied to those factors.

70. In that connection, article I of the Convention on the prohibition of military or any other hostile use of environmental modification techniques was often cited because it was the first instrument to have referred to “widespread, long-term and severe” damage. According to the interpretation by the Disarmament Commission, the term

“widespread” meant the geographical scope of “a few hundred square kilometres”, “long-term” meant “a few months or one season”, and “severe” meant something similar to “serious damage”. Under that provision of the Convention, the required standards for application would be met if one of the three conditions was satisfied because of the connecting word “or”, and thus the threshold might not be as high as expected. However, caution was advised in citing that Convention because it did not relate to the law of armed conflict but rather to arms control and disarmament. The standards it set out were absolute, whereas under the law of armed conflict the standards were relative, in the sense that they were applied in proportion to military necessity. Another difference was that the prohibition set forth in the Convention was related to intentional or deliberate acts of modification of the environment, as stipulated in article II, and therefore “incidental loss” or “collateral damage” which might occur in the course of military actions was not the main concern.

71. The threshold established in article 35, paragraph 3, and article 55 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) was much higher, as those provisions dealt with “widespread, long-term and severe” environmental damage, and all three elements must be cumulatively satisfied because of the use of the conjunction “and”. Furthermore, in Protocol I, the word “long-term” was interpreted as meaning “decades” and not “a few months” as in the Convention on the prohibition of military or any other hostile use of environmental modification techniques. Accordingly, under the Protocol, any weapons or warfare would be permissible with the possible exception of nuclear weapons, the effects of which lasted for decades, as had been seen with respect to the victims of Hiroshima and Nagasaki.

72. In fact, the Report submitted to the Prosecutor of the International Tribunal for the Former Yugoslavia by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia confirmed that those articles of Protocol I set “a very high threshold of application” and that the conditions for their application were “extremely stringent”. The Committee had thus concluded that “the environmental damage caused during the NATO bombing campaign does not reach the ... Protocol I threshold”.¹⁷⁵

73. Article 56 of the same Protocol provided for the relativity of the use of warfare in relation to the environment regarding attacks on dams, dykes and nuclear power stations. While paragraph 1 prohibited attacks on such objects, paragraph 2 permitted them if the object in question had been “used for other than its normal function and in regular, significant and direct support of military operations”. Furthermore, in paragraph 30 of its advisory opinion in the *Legality of the Threat or Use of Nuclear Weapons* case, the International Court of Justice referred to the relativity rule, stating that “[r]espect for the environment is one of the elements that go to assessing whether

¹⁷⁴ S.-S. Junod, *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 Non-International Armed Conflicts (Protocol II)*, Geneva, ICRC, Martinus Nijhoff, 1987, p. 1355, para. 4477.

¹⁷⁵ Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, paras. 15 and 17 (available from the website of the International Tribunal for the Former Yugoslavia: www.icty.org/).

an action is in conformity with the principles of necessity and proportionality”.

74. The report to the Prosecutor of the International Tribunal for the Former Yugoslavia also confirmed relative permissibility, stating that “[i]n applying this principle [of proportionality], it is necessary to assess the importance of the target in relation to the incidental damage expected: if the target is sufficiently important, a greater degree of risk to the environment may be justified”.¹⁷⁶

75. Despite the humanitarian rules relating to the protection of civilian populations from attacks, the damage suffered by innocent third parties was classified as “incidental loss” or “collateral damage” to the extent that military advantage prevailed and, as such, was considered permissible. That was a cold, cruel reality of international law, and there should be no illusions about that.

76. He drew attention to a diagram that he had prepared and distributed to the members of the Commission to demonstrate the normative scale of permissible and prohibited warfare in armed conflicts in relation to the protection of the environment. The diagram showed four zones: zone 1, on the extreme left-hand side, showed fully permissible weapons and warfare which involved no environmental damage, such as bamboo spears, and which could be classified as the most “environmentally friendly” weapon. Zone 4, on the far right, was the absolute prohibition of those weapons and warfare whose sole purpose was the wanton destruction of the environment. Between those two extremes, zone 2 was the zone of normative relativity and zone 3 was the zone of relative prohibition. If military necessity prevailed over environmental considerations as in zone 2, attacks using such weapons or warfare would be permitted, and even if collateral damage occurred, it would not entail any responsibility for the engaged party. The point separating zone 2 from zone 3 was the equilibrium point between military necessity and environmental consideration, which should be determined by the criterion of “widespread, long-term and severe” environmental damage.

77. In any event, he believed that the Special Rapporteur and the Commission should make every effort to clarify how the equilibrium point was set, in balancing military necessity and humanitarian or environmental considerations, which was the central question of the project.

78. With those remarks in mind, he wished to propose a number of changes to the draft principles prepared by the Special Rapporteur. With regard to the preamble, only the paragraph on the purpose of the principles should be retained, subject to deletion of the words “through preventive and restorative measures” in the first sentence; the second sentence on collateral damage should be moved to the operative part of the text. In addition, it would be preferable to wait until the end of the second reading to draft the preamble. With regard to the use of terms, the words “to be regulated by the law of armed conflict” could be added at the end of the proposed definition of armed conflict to make it clear that the draft principles did not deal with events covered by internal

law enforcement actions. The words “both abiotic and biotic” should also be deleted from the definition of the environment, as should the end of the sentence, from “fauna and flora”; and the word “and” should be added before the word “soil”. With regard to draft principle 1, the expression “civilian in nature” in the first sentence was not appropriate and should be replaced with “civilian object(s)”, in reference 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). The phrase “unless and until portions of it become a military objective” should also be deleted, as that issue should be dealt with separately in a second paragraph under draft principle 3, and the expression “military objective” should be replaced with “military objects”. The term “applicable international law” should be clarified in the commentary, with an explanation of how to treat peacetime environmental treaties in relation to the law of armed conflict. The expression “international humanitarian law” might better be replaced with “the law of armed conflict”, as the law of war, which authorized killing and injuring, was not humanitarian. With regard to draft principle 2, the word “distinction” should be deleted, as that question was already dealt with in draft principle 1, as should the words “strongest possible” before the word “protection”. He would welcome the inclusion of a principle on the scope of permissible collateral damage and its limits. While all agreed that collateral damage should be minimized, it was an unfortunate fact of life that such damage did occur as part of legitimate warfare for which a party to the armed conflict would not be responsible. Regarding the content of draft principle 5, it would be preferable to deal with the question of designating “demilitarized zones”, which was similar to disarmament and arms control, as part of phase I. In that connection, the order of the draft principles (or draft articles) should be in accordance with the temporal phases defined by the Special Rapporteur.

79. One important remaining issue, which had been debated at length in the context of the negotiations on Protocol I, was whether to include nuclear weapons or warfare in the project. Although the Commission did not intend to address specific weapons, it might be advisable for it to invite military experts to inform it of the latest developments in that area as part of an informal dialogue. In conclusion, he supported sending the draft principles, with the exception of the paragraph on the use of terms, to the Drafting Committee.

80. Mr. SABOIA congratulated the Special Rapporteur on her remarkably clear, in-depth and well-documented analysis, which covered varied but interrelated fields of international law. In his comments, he would highlight some particularly noteworthy aspects of the second report. First, while some of the written responses by States to the Commission’s request for information reflected regional concerns, others demonstrated more general trends. For example, Peru had reported on the impact of the arms trade on the environment and the environmental problems caused by non-international armed conflicts and the use of military force in the fight against drug production and trafficking. Finland had expressed a position that held true in the majority of situations, namely that in challenging conditions, a lower level of environmental protection was

¹⁷⁶ *Ibid.*, para. 19.

sometimes justified. It was regrettable that the Special Rapporteur had identified that position, in paragraph 91 of her second report, as an exception to her (substantiated) conclusion that a considerable number of States had legislation aimed at protecting the environment during armed conflict. Furthermore, with regard to the practice of non-State actors, he reiterated that it was neither sensible nor helpful not to consider it as practice in a legal sense. If non-State actors in a conflict had an obligation to comply with the norms of international humanitarian law, their practice should be taken into consideration and analysed from a legal perspective, even if it was to condemn them for violations. With regard to so-called “partnership” missions involving NATO, which appeared to refer to military actions not covered by Security Council resolutions, there should not be a blanket presumption that partnership States followed the same standards issued by NATO, as indicated by the Special Rapporteur in paragraph 88 of her second report. In that regard, Mr. Murase’s comments concerning the report to the Prosecutor of the International Tribunal for the Former Yugoslavia on the NATO bombings in 1999 shed some light on the matter.

81. With respect to the chapter of the second report dealing with legal cases and judgments, he welcomed the Special Rapporteur’s analysis of the jurisprudence of the Inter-American Court of Human Rights on the rights of indigenous peoples to their ancestral lands irrespective of ownership. The chapter on the law applicable during armed conflicts revealed regrettable aspects of the human character that unfortunately could not be ignored. For example, nuclear weapon States had, not surprisingly, made declarations in favour of the non-applicability to nuclear weapons of the prohibition set out in articles 35 and 55 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) of the use of certain methods or means of warfare because they believed, rightly, although they had not said so, that in the event of a nuclear war there would be no environment to protect in any case, and those who survived would envy the dead.

82. With regard to draft principle 1, the words “may not” should be replaced with the words “shall not” in order to strengthen the prohibition. Although he supported draft principles 2, 3 and 4, he wondered why reference was made sometimes to the “environment” and other times to the “natural environment”. Nuclear-weapon-free zones and other protected zones should be dealt with in a separate draft principle on the protection of their environment and the need for third States to fulfil the obligations they had assumed to respect the intrinsically peaceful nature of such zones. In that respect, it should be noted that, although non-hostile military activities were compatible with the peaceful use provided for under the United Nations Convention on the Law of the Sea, they could still pose a threat to the marine environment or give rise to damage to the environment or persons. It was also necessary to mention the issue of the obligations of third States, particularly nuclear-weapon States, under treaties establishing nuclear-weapon-free zones; that issue was especially important in the event that an accident occurred during the passage of ships transporting such weapons, causing severe environmental damage and constituting a violation of the obligation to protect and respect the status

of those zones. Given its very limited scope, draft principle 5, as it stood, did not seem particularly useful, and he encouraged the Special Rapporteur to supplement it, in line with Mr. Murphy’s proposal. In conclusion, he supported sending all of the draft principles to the Drafting Committee, taking into account the comments that had been made.

83. Mr. PETRIČ commended the Special Rapporteur on her extremely interesting and well-written second report, particularly her detailed attention to the position of States and the wealth of references from the case law and writings supporting her work. The topic at hand was rather sensitive, as the Commission was seeking to strike a balance between armed conflicts—including internal and international conflicts—in which the engaged parties were constantly tempted to flout the rules in order to achieve their objectives, and the efforts that must be made to protect the environment in such situations. That being said, it was an essential topic, as the development of international humanitarian law for more than a century—since the Hague Conferences and the adoption of the Martens clause—reflected a growing awareness by humankind that armed conflicts were the most unacceptable and damaging of all human activities and led to total destruction, including of the environment, particularly given increasingly sophisticated weapons. Although that was a strong argument to justify the importance attached to the topic, the outcome of the Commission’s work should nonetheless be in the form of draft principles—rather than legal rules or principles—that could help to further strengthen the existing awareness and perhaps take on the role played by the Martens clause a century before. He thus shared Mr. Murphy’s view that, if the Commission was elaborating principles, the language used should not take the form of orders; the Drafting Committee would remedy that problem. The three-phase approach should not be followed too mechanically, as the three phases were so closely linked that they were sometimes inseparable.

84. With regard to the draft principles and the preamble, the paragraphs on the scope and purpose of the principles would probably be incorporated into the operative text. As for the paragraphs on the use of terms, it was of the utmost importance to take all armed conflicts, including internal conflicts, into consideration in the definition of armed conflict; indeed, armed conflicts between States were ultimately quite rare, short and most often organized, and thus caused less damage to the environment than internal conflicts. The definition of the environment proposed by the Special Rapporteur was too broad and, read in conjunction with draft principle 1, it might be said, somewhat cynically perhaps, that it did not leave any room for the conduct of the war. That point would have to be revisited at a later stage.

85. He shared Mr. Murphy’s reservations with regard to draft principle 1. However, he supported draft principle 2. As for draft principle 3, environmental considerations should be taken into account not only when assessing what was necessary and proportionate in the pursuit of lawful military objectives, but also in the implementation of those objectives. It was regrettable that draft principle 4 on reprisals was drafted in the form of a rule, the prescriptive nature of which was at

odds with the cautious wording of draft principle 3. The Special Rapporteur and the Drafting Committee should keep in mind that reprisals could also be considered an indirect means of encouraging respect for the law. In addition, Mr. Murphy had rightly noted that this rule was not part of customary international law. Although it was regrettable, as others had already pointed out, that the temporal scope of draft principle 5 was too restrictive, especially since some conflicts extended over years, there was nothing to prevent a single party to a conflict, and not two as had been proposed, from designating areas of major ecological importance as demilitarized zones. In conclusion, he expressed the hope that the Commission would be able to make significant progress on the topic over the current quinquennium.

The meeting rose at 6 p.m.

3265th MEETING

Tuesday, 7 July 2015, at 10.15 a.m.

Chairperson: Mr. Narinder SINGH

Present: Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. 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.

Cooperation with other bodies (*continued*)*

[Agenda item 13]

STATEMENT BY THE REPRESENTATIVE
OF THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRPERSON welcomed Mr. Mata Prates, Vice-Chairperson of the Inter-American Juridical Committee (IAJC) and invited him to address the Commission.

2. Mr. MATA PRATES (Inter-American Juridical Committee) said that in 2014 the IAJC had held its customary two regular sessions, during which it had adopted four reports. The first, on sexual orientation, gender identity and gender expression, had been prepared at the request of the General Assembly of the Organization of American States (OAS). It took stock of the issue, detailed the achievements made in the hemisphere in terms of protecting the vulnerable persons concerned and discussed the principle of non-discrimination. One of its conclusions was that this principle encompassed the basic rights of individuals with an alternative sexual orientation.

3. The other three reports had been prepared at the Committee's own initiative. The report containing recommendations to the States of the Americas on border or neighbouring district integration urged States to establish national administrative authorities in order to facilitate the mechanisms of border integration. The report on corporate social responsibility in the field of human rights and environment in the Americas, the second on the topic, discussed important regional initiatives, outlined differences between national laws and analysed corporate practices. In it the Committee recommended that the OAS General Assembly should consider taking note of the IAJC guidelines concerning corporate social responsibility in the area of human rights and environment in the Americas. The report on alternatives for regulation of the use of psychotropic substances, as well as for the prevention of pharmacodependency, especially as regards marijuana or *Cannabis sativa*, took stock of the current situation, included suggestions for regulating such substances and recommended specific changes that States should make to their national laws in that area.

4. Among other activities, the IAJC had decided to appoint rapporteurs for three new topics: guidelines on the protection of stateless persons, mandated by the OAS General Assembly; law applicable to international contracts; and representative democracy. The IAJC had furthermore decided to keep the following topics under consideration: model law on access to public information and the protection of personal data; immunity of States and international organizations; electronic warehouse receipts for agricultural products; and guidelines for migration management in bilateral relations.

5. With regard to the topic of the protection of stateless persons, the OAS General Assembly had instructed the IAJC to draft an instrument establishing the relevant international rules. On the topic of jurisdictional immunities, he himself had been assigned to study jurisdictional immunities of States, while another Committee member was working on jurisdictional immunities of international organizations. In both cases, a report would be prepared analysing States' domestic legislation and practice and ways of determining such immunity.

6. With regard to the topic of electronic warehouse receipts for agricultural products, the objective was to develop an instrument to facilitate harmonization of data within a secure computerized system that would allow for the issuance of negotiable receipts for such products. The work on the topic of migration management in bilateral relations focused on preparing a model to facilitate the integration of nationals who wished to emigrate to a neighbouring country. As to the topic of the law applicable to international contracts, the aim was to promote existing legal instruments in that area through a questionnaire sent to OAS member States and another sent to experts in the field of private international law. Lastly, the Rapporteur on the topic of representative democracy had proposed conducting a study whose objective would be to outline and capitalize on the achievements made by the OAS in that area.

7. To date in 2015, the IAJC had held one regular meeting in Rio de Janeiro in March and had adopted a

* Resumed from the 3250th meeting.