

Provisional

For participants only

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International Law Commission

Sixty-seventh session (second part)

Provisional summary record of the 3265th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 7 July 2015, at 10 a.m.

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Present:

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

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 10.15 a.m.

Cooperation with other bodies

Visit by the representative of the Inter-American Juridical Committee

The Chairman welcomed Mr. Mata Prates, Vice-Chairman of the Inter-American Juridical Committee, and invited him to address the Commission.

Mr. Mata Prates (Inter-American Juridical Committee) said that in 2014 the Committee had held its customary two regular sessions, during which it had adopted four reports. The first, on sexual orientation, gender identify 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 that principle encompassed the basic rights of individuals with an alternative sexual orientation.

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 report 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 Committee's 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.

Among other activities, the Committee 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 Committee 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.

With regard to the topic of the protection of stateless persons, the OAS General Assembly had instructed the Committee 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.

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 to conduct a study whose objective would be to outline and capitalize on the achievements made by OAS in that area.

To date in 2015, the Committee had held one regular meeting in Rio de Janeiro in March and had adopted a report on protection of personal data, which set out 12 principles on the privacy and protection of personal data, all of which could serve as a basis for the formulation of national laws to ensure respect for people's privacy, reputation and dignity.

In preparing its reports, the Committee's preferred method was to send questionnaires to OAS member States asking for information on their legislation and case law and on how the rules were applied by their administrative authorities. That methodology was considered crucial for testing theory against State practice.

With regard to the promotion of international law, the Committee welcomed visits, for the purpose of exchanging views, from academics and experts who specialized in the interpretation or application of international law. In the past year, the Committee had received visits from, among others, judges from the International Court of Justice and the International Criminal Court, a representative of the African Union Commission on International Law and two representatives of the Office of the United Nations High Commissioner for Refugees (UNHCR), who had offered to work with the Committee in drafting its guidelines on the protection of stateless persons.

The Committee had given its traditional Course on International Law from 4 to 22 August 2014 in Rio de Janeiro, on the central theme of dispute resolution in international law. The panellists included recognized academic experts from the Americas and Europe, legal advisers from the foreign ministries of OAS member States and officials from international organizations. Course participants had also included a former OAS secretary general, two judges from the International Court of Justice and the president of the International Criminal Court. The course had been attended by 31 students, 20 of whom were recipients of OAS-funded fellowships.

For further details of the work of the Inter-American Juridical Committee he referred the Commission to the Committee's 2014 annual report to the General Assembly of the Organization of American States (CJI/doc.472/14). He warmly invited the Commission to send one of its members to visit the Committee at its seat in Rio de Janeiro during one of its regular sessions.

Mr. Kittichaisaree asked whether, in the light of the revelations by Edward Snowden, Mr. Mata Prates considered cyberespionage to be prohibited by customary international law and whether there was any treaty law in the inter-American system that proscribed such espionage. He wished to know whether the 12 principles on privacy and protection of personal data were considered to reflect existing customary international law.

Mr. Mata Prates (Inter-American Juridical Committee) said that the issue raised by Mr. Kittichaisaree was quite complex. In his own personal view, cyberespionage was an illegal act under customary international law. The 12 principles on privacy and protection of personal data were based primarily on customary international law, although certain aspects were more reflective of progressive development.

Mr. Niehaus noted that the two fundamental principles set forth in the OAS Charter, namely continental solidarity and representative democracy, had been ignored by some OAS member States in the past, resulting in the exclusion of Cuba from participation in the Organization's activities. Since that situation was changing, and Cuba would be returning to the Organization, he asked how the Inter-American

Juridical Committee envisioned the future of the inter-American system in the face of the repeated failure of some of its member States to adhere to those principles.

Mr. Mata Prates (Inter-American Juridical Committee) said that member States of the inter-American system had the obligation to fulfil the principles referred to by Mr. Niehaus, although they did not necessarily do so in a uniform manner. Like States in other parts of the world, OAS member States had experienced difficult periods in their history. Beyond those isolated problems, however, the Americas robustly embraced the two principles of continental solidarity and representative democracy. The OAS Charter and the Inter-American Democratic Charter provided organs, mechanisms and procedures for ensuring that the States respected the principles that member States themselves had adopted.

Mr. Vázquez-Bermúdez, recalling that the United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted in 2004 on the basis of draft articles prepared by the Commission, had not yet entered into effect, asked what influence its provisions had had on the practice of OAS member States and whether, in their case law, member States were endorsing the rules contained in the Convention or whether they were applying different solutions. He also asked what the expected outcome was of the Committee's work on that topic. He wondered what approach the Committee planned to take to the topic of representative democracy, given that its mandate was to promote the progressive development and codification of international law, and not to conduct a political or social study on the topic.

Mr. Mata Prates (Inter-American Juridical Committee) said that the Committee's first priority was to encourage the ratification of the United Nations Convention on Jurisdictional Immunities of States and Their Property. Accordingly, in the questionnaire sent to OAS member States on that topic, the Committee's first question was whether or not the State had ratified the Convention. Subsequent questions asked which judicial or administrative authority was responsible for resolving matters relating to the jurisdictional immunity of the State. The responses indicated that, although the majority of respondents had not ratified the Convention, judges in many States were applying its provisions or citing them in their decisions. The Convention was therefore exerting a significant influence over case law in the Americas.

As to the projected outcome of the Committee's study on immunity, after taking stock of the situation in the OAS member States with regard to how such immunity was applied, the Committee would probably recommend that OAS member States should ratify the Convention, since the majority were already applying its provisions. The outcome of the study might therefore be simply to strengthen international law by reiterating the need for States to ratify the Convention.

Regarding the point raised by Mr. Niehaus, the scope of representative democracy was currently the subject of considerable discussion in Latin America. Although several articles of the OAS Charter referred specifically to the concept, as did a declaration of the OAS General Assembly, it was still worth conducting another study on the basis of which the Committee might be able to recommend new standards not currently reflected in either the OAS Charter or the declarations of the OAS General Assembly.

Mr. Candiotti said he was pleased that the Inter-American Juridical Committee intended to promote greater ratification of the United Nations Convention on Jurisdictional Immunities of States and Their Property by American States. It would also be beneficial if the Committee could, where necessary, recommend implementation of the Convention through national laws on State immunity, bearing in mind that many Latin American and Caribbean States already had national legislation

on jurisdictional immunities, which could be aligned with the provisions of the Convention. It was interesting to note that a considerable number of States in the region were in fact already implementing the provisions of that Convention even though they had not yet become parties to the instrument itself.

In order to strengthen principles of representative democracy in Latin America and the Caribbean, where most States were republics, it was important to reinforce republican values such as separation of powers, human rights and freedom of the press, which were under threat in some countries.

Mr. Mata Prates (Inter-American Juridical Committee) said that a study of representative democracy also entailed a study of republicanism, which was the preferred form of democracy in the Americas. The Committee should also take into account the action of other technical bodies that had played an important role in assessing mechanisms for the protection of civil rights, including human rights. For example, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights had recently issued important decisions in that regard, many of which tended towards the progressive development of international law and thus made an important contribution to the development of representative democracy and the protection of human rights.

Mr. Saboia said that he agreed with other speakers on the importance of republican values, such as freedom of the press and the balance of powers, in relation to democracy. He was pleased that the Inter-American Juridical Committee had decided to examine the question of regional migration and would be interested to know whether the Committee would be conducting its study from a particular perspective, such as that of the protection of persons. He recalled that the Commission had paid considerable attention to the issue of migration in its work on the expulsion of aliens.

The issue of the use of psychotropic drugs was very high on the regional agenda in Latin America and the Caribbean, owing to the violence generated by that phenomenon and the apparent lack of results yielded by current policies, which called into question the validity of a purely repressive approach. He would be grateful for more information in that regard.

Mr. Mata Prates (Inter-American Juridical Committee) said that the Committee intended to establish guidelines for adoption by States on the issue of regional migration, with a particular focus on ensuring effective protection of the human rights of migrants. Although treaties provided valuable legal security once they entered into force, the draft conventions prepared by the Committee had often received few ratifications; the Committee therefore often now opted to prepare draft model laws or guidelines in order to provide greater flexibility, since States could adopt such instruments without being constrained by any of the constitutional impediments or legal traditions that might prevent them from ratifying a convention. Moreover, model laws could be adopted in part, thus facilitating the gradual harmonization of legislation in the Americas. Alongside its work on migration, the Committee, in collaboration with the Office of the United Nations High Commissioner for Refugees, was also developing a mechanism that States could apply uniformly in order to protect the human rights of stateless persons, pursuant to a specific mandate from the OAS General Assembly to draft a set of guidelines on that topic.

With reference to the use of psychotropic substances, the debate in Latin America and the Caribbean was essentially focused on cannabis. It was widely believed that a policy based solely on the suppression of trafficking and consumption had failed to produce the anticipated results. While there was no doubt that ongoing efforts were needed to eliminate trafficking, more flexible policies for combating

consumption were being considered. Thus, the domestic legislation of most American countries now permitted the consumption of certain psychotropic drugs and, in cases where such consumption was not permitted by law or domestic regulations, it was tolerated by the administrative authorities. Rather than starting from scratch or inventing new ideas, the Committee was therefore seeking to draft guidelines or principles for regulating the consumption of certain psychotropic drugs on the basis of current realities.

Sir Michael Wood said that it would indeed be very useful if the Committee and OAS could urge member States to become parties to the United Nations Convention on Jurisdictional Immunities of States and Their Property. A total of 18 States had become parties to the Convention to date, out of the 30 needed for its entry into force. Input from the Americas in that regard would therefore be very helpful.

With regard to the questionnaire on immunity of States, he noted the doubts expressed in the Committee's annual report to the OAS General Assembly about whether it would be possible to obtain as many replies from States as was desirable and asked whether the questions had in fact been sent to professors, experts and non-governmental organizations, as suggested in that report. If so, had satisfactory responses been received? He also wondered whether the replies had been made public, for example, whether Commission members would be able to see what had been said about whether national courts regarded the United Nations Convention on Jurisdictional Immunities of States and Their Property as reflecting customary law. Lastly, he would be interested to know whether progress had been made regarding the immunity of international organizations and what the likely outcome of that aspect of the topic would be.

Mr. Mata Prates (Inter-American Juridical Committee) said that the Committee sought to address issues of jurisdictional immunity with academics and representatives of non-governmental organizations at its annual Course on International Law. However, it must be borne in mind that the body taking decisions on jurisdictional immunity was always an organ of the State, either the judiciary or an administrative authority such as a government ministry. The aim of the questionnaire was therefore to identify case law, which was quite complex in many countries, by establishing how States acted when confronted with claims of jurisdictional immunity; in other words, it sought to establish whether the judiciary or administrative authority of a given State would accept such a claim, and hence rule that it did not have authority to settle the case in question, or whether, on occasion, it would find a claim of jurisdictional immunity to be inadmissible and proceed to hear the case on its merits.

A total of 15 out of 35 States had responded to the questionnaire to date; however, the Committee expected to receive up to 12 more replies shortly. At the end of the Committee's eighty-seventh regular session in August 2015 the responses received from States on jurisdictional immunity would be made public, since the rapporteur's report on that topic would contain an analysis of the positions of the various States. While the initial scope of the topic had encompassed the immunity of both States and international organizations, the Committee had subsequently decided that the two aspects should be addressed separately, and the questionnaire had thus focused exclusively on the immunity of States. Initial progress was expected to be made on the issue of the immunity of international organizations at the Commission's session in August 2015.

Mr. Valencia-Ospina, noting the Committee's interest in a visit by a representative of the Commission, said it was regrettable that the Commission had not been represented at sessions of the Inter-American Juridical Committee for many years. Such absence was not attributable to any lack of interest on the part of the Commission, but rather to scheduling difficulties arising from the fact that the session

of the Committee held in August each year almost always coincided with the second part of the Commission's session. However, the Commission should consider sending a representative to future sessions of the Committee, perhaps those held in March each year, especially given that the Inter-American Juridical Committee was one of the oldest regional bodies dedicated to the codification and development of international law.

Secondly, he would like to know whether the Committee was required to seek the endorsement of the OAS General Assembly for its actions, especially those taken at its own initiative. Could it submit the outcome of its work on a given topic directly to States or did its recommendations need to be formally adopted by the OAS General Assembly?

Mr. Mata Prates (Inter-American Juridical Committee) said that the Committee, as a main organ of OAS, maintained fluid relations with the OAS General Assembly and reported to it each year, both orally and in the form of an annual report, on the progress being made on specific mandates conferred by the Assembly, as well as on work undertaken at its own initiative. Although it sent questionnaires directly to States, it did not submit the final outcome of any topic directly to States; such outcomes were always submitted to the OAS General Assembly.

Mr. Hassouna asked whether the visit of a representative of the African Union Commission on International Law to the Inter-American Juridical Committee had provided an opportunity for substantive discussion of issues of mutual concern to the two bodies. Since both the African nations and the member States of the inter-American system had contributed to the development of international law through the establishment of universally recognized principles in many areas, he wondered what kind of cooperation between the two regional bodies might be envisaged in future.

Mr. Mata Prates (Inter-American Juridical Committee) said that there had been no discussion of substantive issues at the first meeting between representatives of the two bodies. However, he hoped that a representative of the African Union Commission on International Law would attend part of the Committee's upcoming regular session in Rio de Janeiro. The Committee had not yet followed up on the invitation to visit the headquarters of the African Union Commission, but he was confident that an appropriate form of cooperation would be established in the near future.

Ms. Escobar Hernández said that as Special Rapporteur on the topic of immunity of State officials from foreign criminal jurisdiction she was particularly interested in the topics of immunity of States and immunity of international organizations currently under consideration by the Committee. She enquired what the Committee's approach was to the category of officials, and in particular whether it was considering the notion of an official only as an expression of the State, a person acting on its behalf, as in the United Nations Convention on Jurisdictional Immunities of States and Their Property, which concerned primarily civil matters, or whether it intended to consider also the immunity of officials as individuals, in particular their immunity from criminal jurisdiction.

Mr. Mata Prates (Inter-American Juridical Committee) said that at its forthcoming session in August, the Committee expected to make progress on the topic of immunity of States. With regard to the status of officials in international organizations, if they were based in the States where they discharged their duties their status was generally governed by the relevant headquarters agreement. In other States where the organizations did not have headquarters international customary law was applicable. In regional organizations the situation was more problematic if the officials were outside the area where regional organizations operated. It was a complex issue and there was contradictory case law on the matter. As a result progress

on that side of the question had been slim and the rapporteur's report to be discussed at the forthcoming session in August would cover the topic of immunity of States only.

The Chairman thanked Mr. Mata Prates for the valuable information he had given on the work of the Committee and his detailed replies to comments and questions raised by Commission members. The Commission would look into the matter of sending a member of the Commission to attend a regular session of the Committee.

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

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

Mr. Forteau said that the second report was perhaps too dense; given the complexity of the subject matter, it might have been better to focus on fewer issues. The report nonetheless contained much useful information, although, regrettably, not on practice relating to non-State armed groups. He agreed with the Special Rapporteur that such practice warranted consideration; the Commission should look into ways of accessing it.

Concerning the methodology of the report, he commended the Special Rapporteur's careful assessment of the weight to be accorded to the conclusions of the study of the International Committee of the Red Cross (ICRC) on customary international humanitarian law; while the material was invaluable, the conclusions could not be considered binding on States or on the Commission. The same caution should be exercised with regard to other similar documents, in particular the Tallinn Manual on International Law Applicable to Cyber Warfare, whose conclusions were controversial and whose value the Special Rapporteur somewhat overestimated. In addition, he shared the view that the Special Rapporteur should have explained more systematically her reasons for framing the draft principles as she had done based on the material available.

Regarding the Special Rapporteur's proposed draft principles he, like other members, questioned the appropriateness of placing provisions on the use of terms and the scope of the draft principles in a preamble. Moreover, there was no reason why the Commission needed to confine itself to principles; by way of progressive development it could propose recommendations or best practices. For example, the Commission could propose that States should conduct an impact study before launching an attack that could have serious effects on the environment. Indeed, draft principle 5 read more like a guideline or recommendation. He therefore wondered whether draft articles might be a more appropriate form for the project, as other members had suggested.

With regard to the law applicable to the topic, the Special Rapporteur asserted that the purpose of the second report was to identify existing rules governing armed conflict that were directly relevant to environmental protection in relation to armed conflict. However, it was equally important to identify the rules of international environmental law that might continue to apply in the event of armed conflict. The relevance of rules other than those of armed conflict was implied, moreover, by the phrase in draft principle 1 "applicable international law and, in particular, international humanitarian law". Indeed, establishing whether the rules applicable to the environment in peacetime would apply in the event of armed conflict was a key issue. He would therefore suggest that a case-by-case study of universal multilateral treaties and general principles relating to environmental law should be conducted, drawing on the Commission's previous work on the effects of armed conflicts, to

ascertain whether and to what extent each of those texts applied to armed conflicts and whether they applied to non-international as well as international armed conflicts. The principle established by the International Court of Justice in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* concerning the general obligation of States to ensure that activities within their jurisdiction and control respected the environment of other States or of areas beyond national control might also be considered in that connection. The results of the study could be annexed to the Commission's draft output on the topic.

With regard to the scope of the topic, how much attention would be devoted to the distinction between the rules applicable to international armed conflicts and those governing non-international armed conflicts required further clarification. The Special Rapporteur touched upon the issue in paragraphs 138 to 140 of her report. She seemed to favour a single regime covering both types of armed conflict, an approach that was not without merit. However, she did not clearly explain the methodology employed in reaching that conclusion: the information provided in paragraph 6 of the report in that regard was too general in nature. It would be essential to take a position of principle on the matter if the Commission should decide to codify or progressively develop only those rules applicable to both types of conflict in an effort to create a unified regime.

Furthermore, there was the question of how the draft should deal with nuclear weapons. The draft could include a "without prejudice" clause specifically relating to nuclear weapons. Such a clause was justified in view of the declarations made by several States when ratifying Additional Protocol I of 1977 to the Geneva Conventions of 1949 that the Protocol would apply only to conventional weapons. A "without prejudice" clause would also prevent too much being read into the 1996 advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*, which drew no firm conclusions as to whether nuclear weapons were covered by ordinary environmental law or were granted a special status.

He did not consider that the exploitation of natural resources should come under the scope of the topic. While he agreed with the Special Rapporteur that the definition of the environment encompassed natural resources, it did so from the standpoint of their protection, not their exploitation. Consequently, the examples of practice cited in paragraphs 83 to 86 of the report, the references to the 2005 judgment of the International Court of Justice in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* in paragraphs 106 to 107, and the case law on the protection of goods and property of peoples and civilian populations mentioned in paragraphs 110 to 119 were not relevant to the protection of the environment properly speaking.

He wished to draw attention to a number of lacunae in the draft principles. First, he wondered why the Special Rapporteur had not proposed a draft principle based on article 35, paragraph 3, of Additional Protocol I, which prohibited the use of methods or means of warfare which were intended, or might be expected, to cause widespread, long-term and severe damage to the natural environment. Although the provision was very restrictive, particularly since the three criteria were cumulative, at least it set a minimum threshold, and the Commission could provide a flexible definition of the three criteria it laid down. Admittedly, some States had expressed reservations with regard to the provision, but those reservations seemed to concern only the nuclear weapons issue, and that obstacle could be overcome by a "without prejudice" clause on nuclear weapons.

He wondered why the Special Rapporteur had not proposed a draft principle based on the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1976, which had been ratified by a considerable number of States. Although ICRC had cast doubt on its customary status,

he believed that given the current situation of international environmental law such a principle was difficult to challenge and should therefore be included.

Lastly, the Special Rapporteur had not proposed a draft principle prohibiting the destruction of the environment when it was not justified by military necessity and was carried out wantonly, which was clearly contrary to international law, as stated, *inter alia*, in General Assembly resolution 47/37 on protection of the environment in times of armed conflict. Perhaps the Special Rapporteur considered that that prohibition was covered by draft principle 1. However, surely a distinction must be drawn between being the object of an attack and being destroyed, a distinction that was drawn in other relevant texts, including rule 43 of the ICRC study.

With regard to the text of the preamble to the draft principles, he concurred with the suggestion that it might be appropriate to include under “Scope of the principles” a statement to the effect that the draft principles concerned only significant damage to the environment in the event of armed conflict. Since the environment was protected not only through preventive and restorative measures but also through prohibitive and precautionary measures, the text of the first paragraph under “Purpose” should be amended along those lines. In the second paragraph, he questioned whether “collateral damage” was a term of art; it should perhaps be defined under “Use of terms” following the example of the San Remo Manual on International Armed Conflicts at Sea, which spoke of “incidental loss”.

In the first sentence of draft principle 1, the adjective “natural” before the word “environment” should be deleted for consistency with the preamble and draft principle 2. Draft principle 1 could be worded in simpler terms, eliminating the phrase “civilian in nature”; he endorsed the proposal made by Mr. Murphy at the previous meeting in that connection. It would be preferable not to use the conditional tense, but to word the draft principle in a more prescriptive manner. The related commentary should explain what was meant by the expression “applicable international law” in the second sentence. In fact, the second sentence, which was not directly related to the first, should be a principle in its own right, ideally the introductory principle.

In draft principle 2, he agreed that it was advisable to base the principle of precaution on the law of armed conflict, as set forth in article 57 (1) and (2) of Additional Protocol I, rather than on international environmental law. The law of armed conflict constituted a sounder and less ambiguous basis than Rule 44 of the ICRC study, which had been predicated on an emerging principle of environmental law. However, the phrase “shall be applied in a manner so as to enhance the strongest possible protection of the environment” should be reformulated in the Drafting Committee in order to make its meaning plainer. To that end, it might be wise to echo the wording of article 57 (2) of Additional Protocol I and to speak of “avoiding” or “minimizing” damage.

He wondered whether draft principles 2 and 3 were redundant, or whether they should be merged in a single draft principle in order to ensure that they were not contradictory. Stating that environmental considerations must be taken into account was not the same thing as saying that the strongest possible protection of the environment must be ensured.

He endorsed draft principle 3, drawn from paragraph 30 of the advisory opinion of the International Court of Justice on *Legality of the Threat or Use of Nuclear Weapons*, as it was a means of introducing the interests of the environment into the classical rules of the law of armed conflict. In his view, that paragraph was indeed concerned with *jus in bello* and not just with *jus ad bellum*. Although it was less strongly worded than article 55 of Additional Protocol I, the draft principle afforded greater protection in that it covered all types of damage, whereas article 55 of

Additional Protocol I applied only to widespread, long-term and severe damage; furthermore it codified the case law of the International Court of Justice as established in the aforementioned paragraph 30. It should be adopted for those reasons. However, the word “lawful” should be replaced with “legitimate” in order to bring it into line with the Court’s wording.

Draft principle 4, which merely repeated the wording of article 55 (2) of Additional Protocol I, should be included in the Commission’s text, since it was plain from the development of international environmental law over the previous 40 years that it would be unlawful for a State to engage in attacks against the environment by way of reprisals.

As far as draft principle 5 was concerned, it would be necessary to clarify the circumstances where the designation of a demilitarized zone would be binding not only upon the States parties to that designation, but on other States as well, and when that protection might cease, for example, if the zone was used for military purposes. The addition of a paragraph defining the expression “area of major ecological importance” was also required. That recommendation could do with being fleshed out in order to arrive at a fuller, more precise text with greater legal force, and it should then be reconsidered at the next session.

He recommended the referral of the first two sections of the preamble and of draft principles 1 to 5 to the Drafting Committee.

Mr. Tladi thanked the Special Rapporteur for her detailed and widely researched second report. Unlike some other members, he was of the view that the Commission should draw up draft principles rather than draft articles owing to the sensitive nature of the topic. In the context under consideration, draft principles were more than mere statements designed to encourage certain behaviour from States; they could in fact have the power legally to constrain States’ behaviour. However, they differed from rules in that they did not operate in an all or nothing fashion. In most instances the simplest solution as far as their wording was concerned would be to replace the mandatory tense with “should”; on the other hand, draft principles 2 and 3, although using the verbs “shall” and “must”, respectively, could be conceived of as principles in that they did not dictate to States a particular course of action but rather named factors to be considered in the course of decision-making.

With regard to the debate over whether to focus on phase II measures, namely those which had to be taken to protect the environment during an armed conflict, insofar as the rules of armed conflict were sufficiently well developed the Commission’s aim with regard to that phase should be accurately to codify them, although personally he did not see why progressive development should be ruled out. The draft principles did not, however, appear to reflect the three-phase approach and a way should therefore be found to do so.

It was appropriate for the Commission to identify environmental protection rules applicable to all types of armed conflicts, regardless of the distinction between international and non-international conflicts and the separate legal frameworks that might apply to them, since both international and internal conflicts could inflict serious environmental damage. He noted that the Special Rapporteur had not consulted environmental treaties in order to discover whether they contained rules or principles of relevance to the topic. He trusted that the Special Rapporteur intended to investigate the interaction between international environmental law and international humanitarian law in subsequent reports.

Despite the Special Rapporteur’s statement that the focus of her second report was to identify existing rules of armed conflict relevant to the topic, she included references to some rules with a broader application. For example, the order of the

International Court of Justice in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1970 in the Nuclear Tests (New Zealand v. France) Case*, cited in paragraph 109 of the second report, did not concern a situation of armed conflict; rather, it considered unilateral actions by one State which allegedly had adverse effects on the environment. For that reason, by stating in paragraph 64 that its decision to dismiss was “without prejudice to the obligations of States to respect and protect the natural environment”, the Court had established a principle which could be applied in a wider context than that of armed conflict.

In response to the Special Rapporteur's request for information in paragraph 90 of her report, he said that article XV of the revised version of the African Convention on the Conservation of Nature and Natural Resources covered the protection of the environment in armed conflicts and required the parties to take every practical measure to protect the environment from harm, to refrain from employing methods or means of combat which might cause widespread, long-term or severe harm to the environment and to refrain from using the destruction or modification of the environment as a means of combat or reprisal.

The Special Rapporteur did not draw any conclusion from her finding that a considerable number of States had legislation or regulations aimed at protecting the environment in relation to armed conflict. It was unclear whether the practice identified in the report reflected existing or emerging rules of customary international law. Hence it was not evident whether the draft principles proposed in the report reflected customary law or were an extrapolation of existing principles from various sources. Her assumption that the Security Council had assigned importance to environmental protection in times of armed conflict was overstated, as many of the Security Council resolutions which she mentioned were concerned with the causes or financing of conflict rather than environmental protection. At all events, it would be necessary to dig a little deeper to find more practice and to obtain more details of the content of domestic rules. He was curious to know whether the 10 States which had included instructions on environmental protection in their military manuals had also passed national legislation on the subject. Did those manuals adopt a different approach to that evident in legislation? In view of the apparent inconsistency in the United States stance on targeting natural resources as outlined in paragraph 74 of the report, it would be helpful to discover in what circumstances they could be regarded as legitimate targets.

Since paragraphs 92 and 11 of the report seemed to contradict one another, he would appreciate clarification of whether case law on protection of the environment in relation to armed conflict was not extensive, or whether a large amount of such case law existed but was limited to only a few aspects of the topic. He would welcome direct references to the literature in future commentaries, as it was important to identify the sources of doctrine on which the Commission was relying.

Although paragraphs 97 to 99 of the report raised the question of how interaction between international humanitarian law and human rights law affected the topic under consideration, the report did not indicate whether environmental protection fell into the category of human rights protection, or why the link between property and livelihood brought human rights into the current analysis. Might the relevance of human rights be explained by virtue of the right to the environment, or conversely could environmental protection arguably constitute a subset of human rights law? Alternatively, did human rights protection and environmental protection exist in parallel, with environmental law applying subject to international humanitarian law as *lex specialis* in cases where the two branches of law overlapped? He therefore

welcomed the Special Rapporteur's intention to elucidate the link between the topic and human rights in her next report.

With regard to the proposed draft principles, there was a need to clarify whether the definition of "environment" under "Use of terms" covered land forms without resources and whether the term "characteristics" encompassed non-service values such as aesthetic aspects of the landscape and the recreational attributes of nature, as in the Commission's earlier definition of environment in its principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. Similarly, he wondered whether he was correct in assuming that, as the principles were currently drafted, the envisaged environmental protection related to the natural environment as such and did not extend to certain human rights, such as the right to water, that might be infringed by damage to natural resources.

Draft principle 1 proclaimed that the natural environment was civilian in nature. Further investigation was needed in order to determine in what circumstances the environment could be deemed a civilian object. The Special Rapporteur referred to the placement of article 55 (2) of Additional Protocol I in the civilian objects chapter as an indication that the environment fell into that category; however, article 55 (2) referred to damaging the natural environment in a way that prejudiced the health or survival of the population. It might be preferable to single out parts or features of the environment which could be considered to be civilian objects.

He would like to see an express, albeit not necessarily absolute, limitation on the intentional destruction of the environment by means of warfare. It would also be beneficial to include non-State actors within the scope of the draft principles in view of the nature of modern warfare and the growing threat of terrorist or cyberattacks by such non-State armed groups.

In his view, the aim was not necessarily to produce a catalogue of rules drawn from international customary law. The rule contained in draft principle 4 was a treaty rule, which could be clarified in the commentary. With reference to draft principle 5, he was uncertain whether the unilateral designation of an area of major ecological importance as a demilitarized zone by one State would produce a legal effect for another, or whether only the State of designation would be bound by it. Before draft principle 5 could be adopted, its normative content should be identified and the issues related to the designation of a demilitarized zone and the implications of the second paragraph proposed by Mr. Murphy pertaining to the designation of such zones during armed conflict by the parties to the conflict should be examined in greater depth.

The meeting rose at 1 p.m.