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**Summary record of the 3266th meeting**

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overstated, as many of the Security Council resolutions that she mentioned were concerned with the causes or financing of conflict rather than environmental protection. In any event, 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 that 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 second report, it would be helpful to discover in what circumstances they could be regarded as legitimate targets.

64. Since paragraphs 92 and 11 of the second 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.

65. Although, in paragraphs 97 to 99 of the second report, the Special Rapporteur raised the question of how interaction between international humanitarian law and human rights law affected the topic under consideration, she 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 welcomed the Special Rapporteur's intention to elucidate the link between the topic and human rights in her next report.

66. 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 draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.<sup>185</sup> 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.

<sup>185</sup> 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.

67. 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 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) in the chapter on civilian objects as an indication that the environment fell into that category; however, article 55, paragraph 1, referred to damaging the natural environment in a way that "prejudice[d] the health or survival of the population". It might be preferable to single out parts or features of the environment that could be considered to be civilian objects.

68. 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.

69. In his view, the aim was not necessarily to produce a catalogue of rules drawn from customary international 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.*

## 3266th MEETING

*Wednesday, 8 July 2015, at 10.05 a.m.*

*Chairperson:* Mr. Narinder SINGH

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

**Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*concluded*)\* (A/CN.4/678, Part II, sect. B, A/CN.4/683, A/CN.4/L.854)**

[Agenda item 4]

REPORT OF THE DRAFTING COMMITTEE

1. The CHAIRPERSON invited Mr. Forteau, Chairperson of the Drafting Committee, to present the Drafting Committee's report on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" (A/CN.4/L.854).

2. Mr. FORTEAU (Chairperson of the Drafting Committee) said that the Drafting Committee had devoted two meetings, held on 4 June 2015, to the consideration of the draft conclusion that had been proposed by the Special Rapporteur in his third report (A/CN.4/683) and of the reformulated wording which the Special Rapporteur had presented to the Committee in response to the comments made during the debate in plenary meetings. The Drafting Committee's report therefore contained just one draft conclusion, draft conclusion 11, entitled "Constituent instruments of international organizations", the title originally proposed by the Special Rapporteur. The draft conclusion addressed the role of subsequent agreements and subsequent practice in relation to the interpretation of treaties that were the constituent instruments of international organizations. Its content and structure had been revised by the Drafting Committee in the light of the Special Rapporteur's suggestions and of comments made during the debate in plenary meetings. It comprised four paragraphs.

3. Paragraph 1 set out the general principle regarding the role of subsequent agreements and subsequent practice in relation to the interpretation of treaties which were the constituent instruments of international organizations. Two non-substantive amendments had been made to it. The reference to "any relevant rules of the organization" had been moved to a new paragraph 4 and the reference to article 31, paragraph 3 (a) and (b), of the 1969 Vienna Convention had been deleted for the sake of consistency with the draft conclusions that had been provisionally adopted in 2013 and 2014. The first sentence of paragraph 1 was a reminder that "articles 31 and 32 [of the 1969 Vienna Convention] apply to a treaty which is the constituent instrument of an international organization". Moreover, article 5 of the 1969 Vienna Convention provided that it "applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rule of the organization".

4. As the Special Rapporteur had explained in his third report, the draft conclusion did not concern the role of international organizations in the interpretation of treaties adopted within such organizations, or in the interpretation of treaties concluded by international organizations, which were not constituent instruments thereof. Nor did it specifically address the decisions of treaty monitoring bodies consisting of independent experts, or questions

related to the interpretation of decisions of organs of an international organization as such.

5. The second sentence of paragraph 1 described the implications of the general principle stated in the first sentence. It clarified the purpose of the draft conclusion and tracked the language of previous draft conclusions.

6. Paragraph 2 concerned the practice of parties to the constituent instrument of an international organization, although it did not contain the term "parties", since that term was already used in the definitions set out in draft conclusion 4, which defined a subsequent agreement and subsequent practice within the meaning of article 31, paragraph 3, and of article 32 of the 1969 Vienna Convention as an agreement or the practice "of the parties". That reference to draft conclusion 4 would be incorporated in the commentary. The purpose of the paragraph was to indicate that a subsequent agreement or a subsequent practice that was attributable to the parties to the constituent instrument of an international organization and which had to be taken into account in pursuance of article 31, paragraph 3, might arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument. In other words, the practice of an international organization in the context of paragraph 2 did not *per se* play an interpretative role; it did so only insofar as it gave rise to, or expressed, a subsequent agreement or subsequent practice attributable to the parties to the constituent instrument (or to some of them, in the case of subsequent practice under article 32).

7. The phrases "arise from" or "be expressed in" had been retained in preference to the expressions "give rise to" or "articulate" in order better to capture the two different possibilities encompassed in that paragraph. The practice of an international organization could either generate a subsequent agreement or subsequent practice, or it could reflect a subsequent agreement or a subsequent practice. The verb "may" was intended as a warning that some caution was required when assessing the role of an international organization's practice in order to determine whether it gave rise to a subsequent agreement or a subsequent practice of the parties, or whether it reflected one or the other. Lastly, the Drafting Committee had considered it more appropriate to refer to the practice of an international organization as a whole, rather than to the practice of an organ of an international organization, since the latter's practice could also be generated by the joint conduct of two or more organs.

8. Paragraph 3 concerned the role of international organizations' practice as such in the interpretation of their constituent instrument. It combined different elements originally formulated in paragraphs 3 and 4 of the draft conclusion 11 proposed in the Special Rapporteur's third report. The expression "practice of an international organization" had been used rather than "conduct of an organ of an international organization" for the same reasons as those given with respect to paragraph 2. The Drafting Committee had discussed the possibility of adding the qualifier "competent" before the words "international organizations", but had concluded that it would be more advisable to deal with that matter in the commentary, since it was an essential requirement of any action by an international organization. It had therefore been decided not to describe the practice of

\* Resumed from the 3262nd meeting.

an international organization as “general” or “established” in the text of paragraph 3, since the effect of those forms of practice was not always clear nor sufficiently well established in contemporary general international law. For that reason, paragraph 3 referred only to the “[p]ractice of an international organization” and stated that it “may”, but did not necessarily, contribute to interpretation. The Commission might revisit the definition of “other subsequent practice” in draft conclusion 1, paragraph 4, and draft conclusion 4, paragraph 3, in order to ascertain whether an international organization’s practice as such should be classified in that category, which had hitherto been confined to the practice of States parties.

9. The Drafting Committee had ruled out the possibility of basing the interpretative role of international organizations’ practice on article 31, paragraph 3, of the 1969 Vienna Convention, because that paragraph referred only to the parties’ practice. There had likewise been agreement that the role of international organizations’ practice could not be confined to that referred to in article 32, and the Drafting Committee had therefore decided to anchor it in article 31, paragraph 1, as well as in article 32. That meant in particular that the international organization’s practice did not modify the general rule of interpretation under article 31. It merely contributed to the application of that general rule, without prejudice to any relevant rule of the organization (as provided for in paragraph 4 of draft conclusion 11). That brought out more clearly the distinction from paragraph 2 of the draft conclusion, which concerned the indirect role that an international organization’s practice could play under article 31, paragraph 3, of the 1969 Vienna Convention.

10. Paragraph 4 reflected the language used in article 5 of the 1969 Vienna Convention. The Drafting Committee had decided to place that provision in a separate paragraph of draft conclusion 11 because it applied to the situations covered in paragraphs 1 to 3, and in the last paragraph in order not to overemphasize it. It had also been agreed that the term “rules of the organization” was to be defined in the same way as in the 1969 Vienna Convention and in the 2011 draft articles on the responsibility of international organizations.<sup>186</sup>

11. The CHAIRPERSON invited the members of the Commission to adopt the draft conclusion.

*The draft conclusion was adopted.*

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

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (continued)

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

13. Mr. HASSOUNA, after congratulating the Special Rapporteur on the quality of her second report, said that the topic under consideration lay at the intersection of various international law regimes, where a number of similar principles and notions already existed and, in some cases, overlapped. Developments in international law and the international system meant that they required adaptation and coordination if they were to be applied effectively. The topic was therefore difficult, because it straddled different branches of international law and because the international system, and more especially the nature of war, was evolving. The numerous ongoing armed conflicts of different kinds and varying intensity often inflicted serious damage on the environment. The great diversity of the conflicts mentioned in the second report made it hard to pinpoint the rules of the law of war that applied in a given situation. While some rules of customary law always applied, the relevance of others depended on the nature of the conflict.

14. In her second report, the Special Rapporteur had identified the existing rules of armed conflict of direct relevance to the protection of the environment in relation to armed conflicts. In doing so, she had drawn on a variety of sources, including State practice, relevant treaties, case law and international humanitarian law. It was, however, regrettable that she had not examined the practice of non-State armed groups whose activities could have grave consequences for the environment. Although such armed groups were bound by the law of armed conflicts, no effective measures seemed to have been taken to enforce their compliance with it. It was therefore incumbent upon States not only to abide by the law of armed conflicts, but also to ensure that it was respected by non-State armed groups.

15. More generally speaking, the Special Rapporteur had noted in her second report that the rules on the protection of the environment were applied better in international than in non-international armed conflicts. At least in the commentary to the draft principles, it would be desirable to refer to the sizeable differences between those two types of armed conflict in order to identify gaps in protection, the reasons for them and possible remedies.

16. Various opinions had been expressed on the form to be taken by the outcome of the Commission’s work on the topic under consideration. Given the purpose of that work and in order to secure its approval by the States Members of the United Nations, it would be preferable to opt for draft principles of a legal nature. In the light of the Special Rapporteur’s comments on the preamble to the draft principles, their structure should be reconsidered in order to ascertain to what extent each principle applied to the different phases and interpret some vague terms such as “collateral damage”. The provisions on the use of terms, which clarified the content of the draft principles, should be retained. He approved of the proposed definition of the term “armed conflict”, since it was in line with that set forth in the Rome Statute of the International Criminal Court and rightly encompassed non-international armed conflicts. On the other hand, the definition of the environment was too broad and should be confined to the scope of the environment in relation to armed conflicts.

<sup>186</sup> General Assembly resolution 66/100 of 9 December 2011, annex. The draft articles adopted by the Commission on second reading and commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88.

17. In draft principle 1, the Special Rapporteur referred to the natural environment as “civilian in nature” and stated that it was protected as such by international humanitarian law and the law of armed conflicts. While some scholars supported that approach, others considered that the environment in its entirety should not be classified as an “object”, because traditionally that term referred to material things and not to abstract notions. As suggested, that draft principle should therefore be reformulated to read: “No part of the natural environment may be the object of an attack unless and until it becomes a military objective.” In the same draft principle, the Special Rapporteur employed the expression “natural environment” as it was used in international law, whereas the provisions on the use of terms, which the Commission had provisionally adopted at its previous session, already contained a definition of the term “environment”. That might suggest that the two terms were not synonymous; it might therefore be confusing and lead to disparate interpretations. Moreover, while it was well settled that the natural environment may not be the object of an attack unless portions of it become a military objective, it would be wise to clarify in the commentary in what circumstances a civilian object became a military objective and could therefore be attacked. The meaning of the term “portions” of the environment should be elucidated and an explanation should be given as to how the environment could make an “effective contribution to military action”. In addition, the second sentence of the draft principle could become a core principle applicable in pursuance of draft principle 2, which should be redrafted accordingly.

18. The underlying intention in draft principle 2 was to indicate that the principles of international humanitarian law applied when the military objective targeted was part of the environment. In his view, those principles should be tailored to fit the specific type of environment. The scale of the damage done to the environment should be measured on the basis of precise scientific data. In addition, it should be made clear that the principle of proportionality applied to the portions of the environment that were no longer protected. That raised the question of defining “portions” of the environment and the difficulties that this entailed when resources could not be divided or separated. Lastly, in the English version, the word “enhance” should be replaced with the word “ensure”.

19. Draft principles 3 and 4 both dealt with the notion of a lawful military objective and the considerations entering into the assessment of situations. They could therefore be merged in a single draft principle comprising two paragraphs with a meaningful title. In fact, it would be useful to give each draft principle a title, as had been done for other draft texts drawn up by the Commission. Furthermore, in the commentary, it would be helpful to clarify the notion of “reprisals” in draft principle 4. Although the provisions of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) had become rules of customary international law, it was uncertain whether the same could be said of the provisions 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).

20. Either the text of draft principle 5 should be worded more clearly or some elucidation should be provided in the commentary. For example, it could be made clear that a State could unilaterally designate demilitarized zones prior to a conflict and that, in the event of a lengthy conflict, both parties’ agreement was necessary. Some examples of “areas of major ecological importance” could be given and the practical aspects of designating and managing those areas could be described. In other words, that notion should be clarified. Subject to those comments, he approved of all the proposed draft principles and was in favour of referring them to the Drafting Committee.

21. As for the future programme of work, he was pleased to note that, in her third report, the Special Rapporteur intended to complete the study of the three temporal phases, which were in fact interdependent, and to present a comprehensive analysis of them. He also welcomed the Special Rapporteur’s intention to pursue her consultations with other bodies, such as ICRC, UNESCO and UNEP, and with regional organizations. In view of the relevance and importance of the work of those bodies, which were operating at the intersections of very different fields of international law, it would be useful to learn of their best practices and to seek their views.

22. With regard to the way forward on the topic, the Special Rapporteur had suggested that, after the submission of the third report and the adoption of the proposals contained in it, the Commission or States would have to express an opinion on how to proceed. While it was axiomatic that the Commission must give its opinion on the course to follow, that opinion should primarily be guided by that of the Special Rapporteur, who should decide if all the aspects of the topic that she had proposed had been dealt with in a comprehensive manner.

23. Mr. PARK congratulated the Special Rapporteur on her detailed study of the case law on the topic under consideration and her in-depth research into the law that was applicable during armed conflict. The abundant bibliography accompanying the second report would greatly assist the Commission’s work in the future. He was particularly interested in the subject, because the demilitarized zone, which covered more than 900 square kilometres and which had separated the Republic of Korea and the Democratic People’s Republic of Korea for more than 60 years, had gradually turned into an exceptional area where the ecosystem formed by its fauna and flora had been conserved. In the words of draft principle 5, it had become an “area of major ecological importance”. That area was, however, fragile and could easily be destroyed if armed conflict were to break out one day.

24. Before turning to the text of the preamble and the five draft principles, he wished to make some general comments on the scope of the topic, the methodology and the working definitions of the terms “armed conflict” and “environment” provisionally proposed by the Special Rapporteur, as they would essentially set the direction that would be taken by the draft text.

25. First, with regard to the three-phase temporal approach, it had been clearly stated at the previous session that a strict differentiation of the three phases was

impossible. The Special Rapporteur had stated that her second report would deal with the protection of the environment during an armed conflict and would cover the rules of the law of armed conflict that might serve to protect the environment during an armed conflict, as well as the rules that would create obligations before such a conflict. As Mr. Murphy had rightly noted, it was not possible to discern from the second report which rules applied before and which rules applied during an armed conflict, nor did the proposed draft principles seem to differentiate between those phases. He therefore wished to know if the Commission intended to retain that approach. If it did, it would be preferable to rearrange the draft principles in chronological order in keeping with the three phases.

26. The proposed working definition of “armed conflict” seemed to require clarification since, as the Special Rapporteur commented in her second report, the considerable variety and realities of modern armed conflicts made it necessary to determine the scope of that term for the purposes of the draft principles. Armed conflicts in the modern world tended to be non-international and they broke out between non-State armed groups. Asymmetric warfare between States and non-State actors had become more common than traditional international armed conflicts between States. Although the definition proposed by the Special Rapporteur paid due heed to that situation, her reasoning was somewhat worrying. First, the Special Rapporteur admitted, in paragraph 8 of the second report, that it was very difficult to acquire information on State practice in non-international armed conflicts and, in paragraph 9, that she had not examined the practice of non-State armed groups. He therefore wondered how the Commission could continue its work on the protection of the environment in relation to armed conflicts if it had insufficient information regarding the practice of belligerents and non-State armed groups. Second, the Special Rapporteur stated in paragraph 8 of her second report that the conduct of non-State actors did not constitute “practice” for the purposes of the topic under consideration and, in paragraph 6, that “[n]ot all rules applicable in relation to international armed conflict are considered applicable during non-international armed conflict”. In that same paragraph she went on to say “[a]t the same time, it is clear that fundamental principles such as the principle of distinction and the principle of humanity ... reflect customary law and are applicable in all types of armed conflict”. It was, however, doubtful whether non-State armed groups such as ISIL or Boko Haram, which were plainly terrorist groups representing a new type of belligerent uncontrolled by any Government, could be made to respect such fundamental principles of customary international law as those which prohibited the destruction of the natural environment, or the looting and exploitation of natural resources. In that connection, it should be noted that the Rome Statute of the International Criminal Court had only one provision that was expressly applicable to damage done to the natural environment in the course of an armed conflict, namely article 8, paragraph 2 (b) (iv). Since the difficulty of obtaining information on the practice of non-State armed groups might hamper the Commission’s debates, it might be preferable to focus on the principles applicable to the protection of the environment in relation to

international armed conflicts, even if it were necessary to explain that some of those principles applied *mutatis mutandis* to non-international armed conflicts.

27. The definition of the environment proposed by the Special Rapporteur also required clarification, because the reasoning in the second report seemed to make it broad in scope. First, although paragraph 15 of the second report noted the need for further examination of the connection between the legal protection of natural resources and the natural environment and the Special Rapporteur stated that the question of natural resources as a cause of conflict would not be addressed *per se*, the Security Council resolutions cited in paragraph 79 and following as examples of texts protecting the environment in fact dealt solely with the protection of natural resources. The same criticism could be made of the analysis of case law; paragraph 96 stated that a distinction had to be made between the protection of the environment as such, and the protection of natural objects in the natural environment and natural resources. The case concerning *Armed Activities on the Territory of the Congo*, cited in paragraph 106 as an example of a case of environmental protection, dealt with the looting and exploitation of natural resources. He agreed with Mr. Forteau that issues related to the exploitation of natural resources had no direct bearing on the topic under consideration and lay outside its scope. Moreover, in her preliminary report, the Special Rapporteur had drawn the requisite distinction between the “natural environment” and the “human environment”<sup>187</sup> in order to restrict the scope of the study to the former and to exclude the latter, for which it was difficult to provide a set definition. However, some of the analyses in the second report ignored that distinction. That was true in particular of the section devoted to case law: the analysis of cases where the various international courts mentioned had considered the situation of peoples and the civilian population and where the decisions cited had dealt with issues related to the human environment. If the Commission were to include such matters within the scope of the topic under consideration, it was likely to widen its scope to take in issues related to the protection of civilians who were already covered in the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV). Expressly limiting the scope of the topic to the natural environment would make it possible to achieve more tangible results. The inconsistent use of the terms “environment” and “natural environment” should be corrected.

28. Paragraph 13 of the second report expressly stated that biological and chemical weapons did not come within the scope of the topic. It was, however, doubtful whether chemical weapons could be excluded, since the adoption of the Convention on the prohibition of military or any other hostile use of environmental modification techniques, which might be described as one of the most rigorous existing frameworks for the protection of the environment in relation to armed conflicts, had been prompted by the use of toxic defoliants. It would therefore be wise to delimit the scope of the topic much more precisely with respect to weapons.

<sup>187</sup> See *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/674, p. 219, para. 83.

29. Turning to the text of the draft principles, Mr. Park said that he wished to know whether, in the definition of the scope of the principles, the Commission intended to retain the expression “armed conflicts” or to replace it, for example, with that of “international armed conflicts”, or with the phrase “mainly in relation to international armed conflicts”. In the provisions on purpose, the phrase “through preventive and restorative measures” was too restrictive, since elsewhere in the second report the Special Rapporteur referred to preparatory, preventive, reparative and reconstructive measures. It would therefore be preferable to replace the phrase with broader wording such as “in relation to, before, during and after armed conflicts”. Throughout the report, a distinction should have been drawn between wilful acts of environmental destruction as a military strategy and collateral damage to the environment during armed conflicts. Lastly, the provisions on scope, purpose and use of terms would be better placed in the body of the text than in the preamble.

30. In draft principle 1, the expression “civilian in nature” should be deleted, as other members had proposed. It was questionable whether the phrase “unless portions of it become a military objective” was apposite, since it would be hard to determine the extent to which “portions” of the environment had to be used for military purposes in order for them to become a military target. It would therefore be preferable to replace that phrase with a new one drawn from paragraph 189 of the report, so that the text of draft principle 1 would read: “The natural environment *per se* may not be the object of an attack. However, the natural environment may become a military objective by virtue of its nature, location, purpose or use.” In addition, article 55, paragraph 1, 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) which provided that “[c]are shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage” should be either incorporated in the text of draft principle 1, or included as a separate text, for it was one of the relevant principles of the topic under consideration.

31. Draft principle 2, which covered all the principles generally applicable to the protection of the environment in relation to armed conflicts, mentioned the principle of precautions in attack, but after perusing the second report, he wondered why the Special Rapporteur had not tried to formulate a broader provision.

32. Plenty had already been said about the fact that draft principle 3 was drawn directly from the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*. It would, however, be wise to supplement it with a second paragraph which would echo the statement in paragraph 129 of the second report that “the risk of environmental damage is to be assessed ... objectively and on the basis of the information available at the time”.

33. As had also been stated earlier, it was debatable whether the material cited in support of draft principle 4 reflected State practice. As Mr. Murphy had pointed out, a number of States were still not bound by article 55 of Protocol I and it was plain from paragraph 180 of the

second report that it was uncertain how much legal value the manuals on the law applicable in armed conflicts, on which part of the ICRC study<sup>188</sup> rested, could be said to have. In addition, in order to provide a firm basis for the debate on reprisals, it would be helpful if the Commission were to ascertain whether damage to the environment could be treated in the same way as the prohibition of reprisals against persons protected by humanitarian treaties, which was embodied in article 60, paragraph 5, of the 1969 Vienna Convention.

34. While he fully understood the importance of the natural conservation zones or areas to which draft principle 5 referred, it would be preferable for those zones to be designated by mutual agreement among belligerents rather than by means of a unilateral declaration of one party. That draft principle belonged more to phase I.

35. Mr. WISNUMURTI welcomed the Special Rapporteur’s excellent second report and her lucid presentation thereof. Before making any general or specific comments on the draft principles, he wished to focus on the proposed text of the preamble. He agreed that it needed to be improved so that its wording met the relevant requirements. The two paragraphs on purpose should remain there, subject to some editorial improvements. It would be helpful if the Special Rapporteur were to propose a fuller draft preamble before submitting it to the Drafting Committee. As for the use of terms, it was true that the proposed definition of the environment was too broad and that it should be recast to make it more precise and narrower in scope. It was regrettable that the terms “environment” and “natural environment” were used interchangeably, but that problem could be solved by rewording the definition and the draft principles concerned. He shared the view that the language of the draft principles, especially draft principles 1 and 2, resembled that of draft rules owing to the use of the mandatory “shall” and “must”. If the Commission still wished to prepare draft principles, those terms should be replaced with the hortatory “should” and “may”. He was against a solution that would consist in changing the outcome of the work to draft articles and he supported the Special Rapporteur’s choice of draft principles.

36. Moving on to some more general comments, he was in favour of the approach consisting in limiting the scope of the topic under consideration, although it should not be unduly restricted. In the light of the current situation in some regions, the protection of the cultural and natural heritage should be included within the scope of the topic. He was likewise in favour of encompassing non-international armed conflicts, which was the predominant type of conflict in various parts of the world and came within the definition of armed conflicts proposed by the Special Rapporteur.

37. The Special Rapporteur had been right to focus her second report on the identification of existing rules on armed conflict that were of direct relevance to the protection of

<sup>188</sup> J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. I, *Rules*, Cambridge University Press; and J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol. II, *Practice* (2 Parts), Cambridge University Press, 2005.

the environment in relation to armed conflicts. In general, members of the Sixth Committee had supported the three-phase temporal approach (before, during and after the conflict), which was encouraging. While he was convinced that phase II should form the core of the subject, it was essential to ensure that ultimately the same weight was given to each of the three phases since, as the Special Rapporteur had recognized in her previous report, the rules applicable in each case tended to blend into each other. That did not, however, mean that no distinction should be drawn between the three phases in the draft principles, and it would be a good idea if the Special Rapporteur were to revise the structure of the draft text accordingly.

38. States' replies to the Commission's request for information along with the information regarding the practice of States and international organizations in chapters IV and V of the second report were most useful. Since many States had laws on the protection of the environment in relation to armed conflicts and since that legislation played an important role, a stand-alone draft principle should be added, to the effect that each State must undertake, unilaterally or through international agreements, to protect the environment in relation to armed conflicts by adopting legislative measures consistent with the applicable international law.

39. He noted that in chapter VII, entitled "Law applicable during armed conflict", the Special Rapporteur concluded, after an analysis focusing on three instruments—the Convention on the prohibition of military or any other hostile use of environmental modification techniques, the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) and the Rome Statute of the International Criminal Court—that few of the provisions of the treaties on the law of armed conflicts were of direct relevance to the protection of the environment during an armed conflict. Protocol I nevertheless contained two provisions, the importance of which was worth underscoring, namely article 35 (Basic rules) and article 55 (Protection of the natural environment). In its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice had held that "[t]aken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage" (para. 31 of the advisory opinion). The same obligation was to be found in the Convention on the prohibition of military or any other hostile use of environmental modification techniques. In view of the importance of the first sentence of paragraph 1 of article 55 of Protocol I, a draft principle based on that provision should be added and should read: "Care shall be taken in an armed conflict to protect the natural environment against widespread, long-term and severe damage."

40. As for the fundamental principles of the law of armed conflict—the principles of distinction, proportionality and precautions—those which were deemed to form part of customary international law should be reflected in the draft principles. He approved of draft principle 1, which was consistent with article 52 of Protocol I and conveyed well the essence of the principle of distinction, provided that, in the English version, the word "portions"

was replaced with the word "parts". Alternatively, he could accept the reformulation proposed by Mr. Murphy ("No part of the natural environment may be made the object of an attack unless and until it becomes a military objective"), which would render his own proposal moot. He had no objection to draft principle 2 because the obligation which it embodied to apply, in addition to the principles of distinction and proportionality and the rules concerning military necessity, the principle of precautions in attack, in order to ensure the highest possible level of environmental protection, was consonant with the purpose of the principle of precautions in attack as established in customary international law, namely that of sparing the civilian population, civilians and civilian objects.

41. The principle of proportionality as a fundamental rule of the law of armed conflicts, which formed the subject of draft principle 3, was likewise anchored in customary international law. It was set forth in article 51, paragraph 5 (b), and article 57 of Protocol I and in the advisory opinion rendered by the International Court of Justice in the case concerning the *Legality of the Threat or Use of Nuclear Weapons*, where the Court had found that "States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives" (para. 30 of the advisory opinion). While in principle he had no objection to draft principle 3, he did wonder if it was really necessary. It might be preferable to incorporate its contents in draft principle 2, which already provided that the principle of proportionality must apply during an armed conflict.

42. The question of belligerents' reprisals was discussed in the light of the customary international humanitarian law study of ICRC, the Commission's earlier work which was of relevance in that respect, and article 55, paragraph 2, of Protocol I, which prohibited attacks against the natural environment by way of reprisals, a ban which was also included in the Tallinn Manual on the International Law Applicable to Cyber Warfare.<sup>189</sup> There were therefore sufficient grounds warranting the prohibition embodied in draft principle 4. It might, however, be advisable to tone down its absolute nature by incorporating some of the elements of the ICRC definition of reprisals quoted in paragraph 134 of the second report.

43. Turning to chapter VIII of the second report, on protected zones and areas, he said that as one of the members who had proposed that the issue of protecting the cultural and natural heritage be dealt with as part of the topic, he considered that draft principle 5 should therefore also cover the zones in question. In conclusion, he took note of the future programme of work proposed by the Special Rapporteur and in particular of her intention to reflect the three-phase approach more clearly in the draft principles.

44. Mr. CANDIOTI wished to know if it should be inferred from the comments made by Mr. Hassouna and Mr. Wisnumurti on the preamble to the draft principles that they were against the referral of the paragraphs in question to the Drafting Committee.

<sup>189</sup> M. N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge, Cambridge University Press, 2013.

45. Mr. SABOIA said that he endorsed Mr. Wisnumurti's proposal to include a draft principle based on article 55, paragraph 1, 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).

46. Ms. JACOBSSON (Special Rapporteur) said that she had placed the three first sections entitled "Scope of the principles", "Purpose" and "Use of terms" in what she had called a "preamble" because, in her view, those provisions could not be termed "principles". Admittedly, the term "preamble" might not be felicitous and she apologized for any misunderstandings that this title might have caused among some members.

47. Mr. HASSOUNA, replying to Mr. Candiotti, said that he was in favour of the Special Rapporteur's proposal to refer to the Drafting Committee the five draft principles and the first two preambular provisions (scope and purpose).

48. Mr. KAMTO said that, at that stage of the discussion, it was vital to decide whether the aim of the exercise was to produce draft principles, as proposed by the Special Rapporteur, or draft articles, as some members seemed to wish. Irrespective of the outcome chosen, it would be preferable to revise the preamble to bring it into line with normal standards of presentation before referring it to the Drafting Committee.

49. Mr. CANDIOTTI said that he was in favour of drawing up draft principles, in other words general standards. As for the structure of the draft text, he suggested that it should comprise a preamble which could incorporate the purpose of the principles, followed by an introduction comprising the provisions on scope and use of terms, then by a section devoted to the actual principles divided into three parts dealing with the principles applicable before, during and after a conflict and lastly a section containing, for example, saving clauses.

50. Mr. WISNUMURTI said that, at that stage, only the five draft principles seemed to be ready for referral to the Drafting Committee, since the preambular provisions needed to be supplemented with more precise wording.

51. Mr. TLADI said that, if there were to be a preamble, it should take the usual form. It was probably stylistically wrong to call scope, purpose and use of terms "principles" and he could understand the Special Rapporteur's reluctance to do so, but that should not really pose a problem in view of the practice of the Commission, whose draft guidelines on the protection of the atmosphere, which had been adopted at the current session, contained a draft guideline 1 on use of terms and a draft guideline 2 on their scope.<sup>190</sup>

52. Mr. FORTEAU agreed with Mr. Kamto that the Commission must decide if it wished to draw up draft principles or draft articles. If it opted for the former, it should base itself on the structure of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, which had been

adopted in 2006<sup>191</sup> and which comprised a preamble, three principles concerning scope, use of terms and purpose, and a list of fundamental principles.

53. Sir Michael WOOD said that, at that stage, it seemed unwise to discuss the form that the final outcome should take. Moreover, it would be preferable to revert to the question of which parts of the draft text should be referred to the Drafting Committee once all the members who wished to say something about the second report had spoken.

54. Mr. KITTICHAISAREE said that he had five general comments to make on the second report, together with some specific suggestions regarding all the proposed draft principles.

55. First, like Mr. Murphy and Mr. Tladi, he thought that there was a disconnect between the analysis of practice and case law on the protection of the environment in relation to armed conflicts and the proposed draft principles. It would be helpful if the Special Rapporteur were to explain how those draft principles followed from the report and, more specifically, how they were based on the analyses contained therein.

56. Second, with regard to the State practice described in the second report, in paragraph 91, having examined the practice of States and international organizations, the Special Rapporteur concluded that many States had passed laws or regulations to protect the environment during an armed conflict and that an increasing number of States and international organizations were adopting measures, ranging from policies to legally binding texts, to ensure that the environment would be protected during military operations. Such practice was, however, not widespread. In her second report, the Special Rapporteur mainly referred to statements made or information provided by industrialized States that had the necessary financial, material and technical resources to factor in environmental concerns. Although she referred to the practice of some "primarily Latin American and Caribbean States", she mentioned only three in this Part of the second report: Argentina, in the first footnote to paragraph 71, and Colombia and Peru in both the footnotes to that paragraph. Furthermore, the practice of the industrialized States that she had cited was not homogenous. For example, Finland had stated that the "[military] operation came first", in other words "if conditions were difficult, a lower level of environmental protection would at times be justified". Similarly, in the case *Winter v. Natural Resources Defense Council, Inc.*, the Supreme Court of the United States had denied the request of an environmental defence association that the United States Navy be required to take maximum precautions when using sonar equipment during training activities, owing to the risk that this might pose to marine mammals.

57. Third, like Mr. Tladi, he thought that the conclusions in paragraphs 11 and 92 were contradictory. His own conclusion was that few cases had concerned the protection

<sup>190</sup> See *Yearbook ... 2015*, vol. II (Part Two), pp. 19 *et seq.*, para. 54.

<sup>191</sup> 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.

of the environment during armed conflicts. That might be due to the fact that States were reluctant to submit their disputes to judicial bodies for a ruling on such matters, that it was very difficult to enforce the relevant law owing to a lack of clarity, and that security and national defence demands overrode environmental concerns. In view of the foregoing, there did not seem to be any general customary international law or *lex lata* on the protection of the environment in relation to armed conflicts. The Commission should therefore ask itself to what extent the outcome of its work would contribute to the development of *lex ferenda*, especially in view of the conclusion reached in paragraph 208 of the report under consideration that there had been no development in the protection of the environment in relation to armed conflicts in the field of treaty law. That did not, of course, mean that the Commission would be unable to identify rules of customary international law as *lex specialis* which would be of use for its work on the topic. International humanitarian law would be helpful in that respect, although given its material, temporal and personal scope, it could not be transposed wholesale.

58. Fourth, like Mr. Murphy and Mr. Tladi, he considered with regard to the temporal application of the draft principles that although, in paragraph 15 of her report, the Special Rapporteur defined three temporal phases—preventive measures, conduct of hostilities and reparative measures—there was no clear indication of the phase to which the draft principles applied. The Drafting Committee might be able to provide some clarification on that score.

59. While the Special Rapporteur's stance on whether non-State armed groups should be covered by the draft principles was quite understandable, like Mr. Tladi, Mr. Hassouna, Mr. Park and Mr. Saboia, he thought that it would be regrettable if the outcome of the Commission's work did not apply to non-State armed groups such as ISIL. While the practice of non-State actors could not create customary law rules, or contribute to their creation, the Commission must find some principles of international law, for example the due diligence of the territorial State, to counter action by non-State armed groups who harmed the environment.

60. Even if the provisions on use of terms were not referred to the Drafting Committee, it would be important to have some clear definitions.

61. He had five comments to make on draft principle 1. First, in paragraph 149, in chapter VII, section B, of her second report, the Special Rapporteur drew a distinction between civilian and military objects and she commented that, according to article 52, 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), a civilian object was a "thing" and not an abstract configuration and she emphasized that private land, crops and natural resources "may very well be considered civilian objects". Draft principle 1 failed, however, to maintain that distinction. The environment was more indirectly protected by the provisions on civilian objects to which the Special Rapporteur referred in paragraphs 112 to 119 and 148 to 154 of her second report and on which she largely based draft principle 1. That

might, however, be problematic, for that protection had rarely been implemented in international law, especially with reference to environmental protection.

62. Second, the three main treaties that specifically protected the environment in relation to armed conflicts were the Convention on the prohibition of military or any other hostile use of environmental modification techniques; Protocol I, articles 35 and 55 of which were the most relevant in that context; and the Rome Statute of the International Criminal Court. The Convention had been ratified by only 77 States and Protocol I had been ratified by 174 out of the 194 States in the world. The basic rule set forth in article 35, paragraph 3, of Protocol I prohibited the employment of methods or means of warfare which were intended, or which might be expected, to cause widespread, long-term and severe damage to the natural environment. Even though the issue of whether article 35 was part of customary international law was a moot point, its wording had been regarded as acceptable by the numerous States that had ratified the Protocol. The wording of draft principle 1 seemed to be much broader than that of article 35. That draft principle was likely to engender two different regimes applicable to damage to the environment: on the one hand, a regime prohibiting any attack that would inflict direct as opposed to collateral damage on the environment unless it had become a legitimate military objective and, on the other, a regime prohibiting attacks intended to cause, or expected to cause, widespread, long-term and severe damage to the natural environment.

63. Third, article 8, paragraph 2 (b) (iv), of the Rome Statute of the International Criminal Court proscribed as a war crime "[i]ntentionally launching an attack in the knowledge that such attack will 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 direct overall military advantage anticipated". In that connection, in paragraph 140 of her second report, the Special Rapporteur, while acknowledging that there was no corresponding provision applicable in non-international armed conflicts, emphasized that the fact that the International Criminal Court had no jurisdiction over widespread, long-term and severe damage to the natural environment in a non-international armed conflict did not necessarily imply that it would be lawful to cause such damage. In her view, that was because the Statute dealt only with crimes under the jurisdiction of the Court and *no contrario* conclusion could be automatically drawn. That position was not, however, supported by the *travaux préparatoires* leading to the Statute. Several States had opposed the extension to non-international conflicts of many rules of engagement applicable to international armed conflicts. That was why there was no equivalent of article 8, paragraph 2 (b) (iv), of the Rome Statute of the International Criminal Court that applied to non-international armed conflicts. As the Special Rapporteur rightly suggested in paragraph 169 of her second report, while ICRC had recognized that State practice established that the obligation to have due regard to the natural environment during military operations was a norm of customary international law applicable in international armed conflicts, it was debatable whether that was the case in the event of non-international armed conflicts.

64. Fourth, it was unclear whether the phrase “may not be the object of attack” in draft principle 1 reflected an existing rule of customary international law. For example, the statement by Finland that, in some conditions, a lower level of environmental protection would be justified, reflected the doctrine of NATO. Since affording a lower level of protection to civilian objects such as schools and homes would not be consistent with international humanitarian law, the statement by Finland referring to NATO doctrine did not appear to regard the whole environment as a civilian object.

65. Fifth, it followed that the definition of the environment for the specific purpose of the draft text was vital with respect to the current wording of draft principle 1. The Special Rapporteur had asked the Commission not to refer the provision on use of terms to the Drafting Committee, but it was necessary to bear in mind the fact that, as it stood, the definition of the natural environment in the draft principles was much broader than in international humanitarian law. In conclusion, it was clear that draft principle 1 concerned *jus in bello* and would therefore apply only during the second of the three temporal phases: during an armed conflict.

66. With regard to draft principle 2, the Special Rapporteur failed to make clear whether the rules on the protection of the environment applied during armed conflicts. In paragraph 91 of her second report, the Special Rapporteur stated that, while some States, principally those in Latin America and the Caribbean, had legislation to protect the environment and promote sustainable development that continued to apply during armed conflicts, States had not indicated whether environmental treaties ceased to be applicable in armed conflicts. Clarification was likewise needed as to whether all the principles and rules of international humanitarian law, including the principle of precautions in attack, were applicable in the light of the civilian nature of the environment mentioned in draft principle 1. In the context of precautions, draft principle 2 should explain what was meant by damage for the purpose of assessing potential damage to the environment prior to an attack. As had been commented with respect to draft principle 1, the question still arose of whether a distinction should be drawn between that damage and “widespread, long-term and severe damage”. That was particularly important for States with fewer financial, material and technological resources and which might be obliged to adjust their practice with regard to precautions against the effects of attacks in line with the draft principles. He would welcome an express statement in draft principle 2 to the effect that it likewise concerned *jus in bello* and would apply only during the second temporal phase: during an armed conflict.

67. The wording of draft principle 3 was drawn from that of paragraph 30 of the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*. In paragraph 33 thereof the Court had found that “while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles

and rules of the law applicable in armed conflict”. As for Mr. Murphy’s contention that paragraph 30 of that advisory opinion concerned *jus ad bellum* and not *jus in bello*, or international humanitarian law, the Court stated in paragraph 105 (2) (E) of the operative part of that opinion that “the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law”. In addition, Judge Bedjaoui, then President of the Court, had written in paragraph 22 of his declaration that “[a] State’s right to survival is also a fundamental law, similar in many respects to a ‘natural’ law. However, self-defence—if exercised in extreme circumstances in which the very survival of a State is in question—cannot produce a situation in which a State would exonerate itself from compliance with the ‘intransgressible’ norms of international humanitarian law”. The position adopted by the Court in 1996 could well serve as the basis for drawing up some principles on that subject.

68. Draft principle 3 set forth two separate concepts. First, it referred to “[e]nvironmental considerations”, an expression that should be clearly defined, and then to “assessing what is necessary and proportionate in pursuit of lawful military objectives”, for which some criteria should be given—either a threshold or a limit. Lastly, in view of the purpose of draft principle 3, it would be advisable to state expressly to which temporal phase it applied.

69. Despite what the Special Rapporteur had said in paragraphs 140 and 203, she proposed draft principle 4 in paragraph 207 of her second report. He submitted that the protection provided for in 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) did include the ban on using methods or means of war which were intended, or which might be expected, to cause damage to the natural environment such as to prejudice the health or survival of the population. Moreover, as Mr. Murphy had already observed, the Special Rapporteur had not sought to determine whether articles 35 and 55 of Protocol I laid down rules of customary international law. In particular, Mr. Murphy had drawn attention to paragraph 31 of the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, which showed that back in 1987 those principles were not deemed to reflect customary international law, as they were binding only upon “the States having subscribed to these provisions”. In addition, it was surprising that the Special Rapporteur devoted one of the proposed draft principles to reprisals but not to the other important aspects of articles 35 and 55 of Protocol I. Lastly, it should be noted that, in its work on the responsibility of States for internationally wrongful acts,<sup>192</sup> the Commission had taken the view that the term “reprisals” was limited to action taken during an international armed conflict. Draft principle 4 should therefore explicitly state that it applied only during the second of the temporal phases and in the context of international armed conflicts.

<sup>192</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, chap. IV, pp. 20 *et seq.*

70. It was unclear whether the obligation contained in draft principle 5 was supported by State practice which, in any case, was not widespread. That was probably why the Special Rapporteur used the verb “should” rather than the verbs “shall” or “must”. The “protected zones and areas” which formed the subject of chapter VIII of the report under consideration were already regulated by several international instruments, including the 1972 Convention for the protection of the world cultural and natural heritage. It was debatable whether the idea of creating demilitarized zones was realistic. It was plain that it was often impossible to confine environmental damage and its effects to a specified area. For example, soil erosion could spread contamination of groundwater by uranium. Draft principle 5 applied during the first two temporal phases, in other words before the outbreak of conflict and during the latter, and this should be made clear in the text.

71. In her following report, the Special Rapporteur might give more in-depth consideration to other treaties in the sphere of international humanitarian law which restricted the use of methods and means of warfare that might have an adverse impact on the natural environment. A detailed account of them and a description of developments in new technologies and weapons would be a useful guide for States. As a member of the international group of experts of the NATO Cooperative Cyber Defence Centre of Excellence, he welcomed the reference to the Tallinn Manual on the International Law Applicable to Cyber Warfare, as a contributor to its second edition, since cyberwarfare was a good example of new technologies that could have a potential impact on the environment. The universal ratification of the pertinent treaties should be encouraged and States should be invited to cooperate in the implementation of obligations thereunder. Consideration might also be given to setting up a monitoring body with governance functions that could oversee compliance with those obligations and assess environmental damage caused by international and internal armed conflicts. Such monitoring bodies had often proved useful in the field of environmental protection when it came to implementing preventive and reparative measures.

72. In conclusion, in line with the Special Rapporteur’s suggestion, he was in favour of referring to the Drafting Committee all the draft principles proposed in the report under consideration, apart from of the third preambular provision on the use of terms.

*The meeting rose at 12.40 p.m.*

## 3267th MEETING

*Thursday, 9 July 2015, at 10.05 a.m.*

*Chairperson: Mr. Narinder SINGH*

*Present: Mr. Caflisch, 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. Kittichai-saree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus,*

*Mr. Nolte, Mr. Park, Mr. Petrič, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.*

### Organization of the work of the session (*continued*)\*

[Agenda item 1]

1. The CHAIRPERSON drew attention to the revised programme of work for the second week of the second half of the session, which had been distributed to Commission members. If he heard no objection, he would take it that the Commission wished to adopt the revised programme of work as proposed by the Bureau.

*It was so decided.*

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

[Agenda item 8]

#### SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

3. Mr. ŠTURMA said that, while he supported the approach taken by the Special Rapporteur, based on three temporal phases—before, during and after an armed conflict—the second report would benefit from clarification as to which rules were particularly relevant in each phase. The Special Rapporteur was right not merely to discuss recognized rules of international humanitarian law, but to seek also to include certain principles applicable before and after armed conflicts.

4. With regard to form, he pointed out that the structure of the draft principles did not follow the temporal approach. Instead, the Special Rapporteur had chosen to start from the most general principles and proceed to more specific principles or rules, an approach that was of course legitimate and perhaps had certain advantages. On the more important matter of substance, principles on the dissemination of laws on the protection of the environment in armed conflicts, the training of armed forces and the updating of military manuals, for example, could perhaps be included among those relating to phase I.

5. With regard to the outcome of the Commission’s work, he supported the Special Rapporteur’s proposal to draw up draft principles, although he would also have accepted draft articles. In his view, draft principles, like draft articles, had a normative content or value. He agreed with other Commission members that the content of the so-called preamble was not preambular in nature; however, it could easily be converted into the introductory provisions of the future text.

\* Resumed from the 3263rd meeting.