International Law Commission
Sixty-seventh session (second part)

Provisional summary record of the 3267th meeting
Held at the Palais des Nations, Geneva, on Thursday, 9 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. 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

Secretariat:

Mr. Llewellyn Secretary to the Commission
The meeting was called to order at 10.05 a.m.

Organization of the work of the session (agenda item 1) (continued)

The Chairman 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 (agenda item 7) (continued) (A/CN.4/685)

The Chairman 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).

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 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.

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.

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.

The first two provisions of the proposed preamble, on scope and purpose, should be sent to the Drafting Committee, as they might benefit from possible improvements in formulation. In the third provision, on use of terms, he supported the broad definition of “armed conflict”, which was based on a combination of the definitions in the Tadić case and in the articles on the effect of armed conflicts on treaties. He also supported the inclusion of non-international armed conflicts, reflecting a general trend in international law towards a rapprochement between rules applicable to international and non-international armed conflicts. The International Committee of the Red Cross (ICRC) study on customary international humanitarian law appeared to confirm that trend.

In his view, it did not make sense for the Commission to consider the complicated question of non-State actors and the extent to which the draft principles might be applicable to them. It was sufficient to note that current international humanitarian law was generally interpreted as being applicable to States not parties to conflicts, and that it should be equally applicable to them when it came to the
protection of the environment in armed conflicts. The assumption that the topic covered both international and non-international armed conflicts was of course important for the interpretation of all five draft principles.

With regard to draft principle 1, he agreed with other Commission members that the word “natural environment” was not in conformity with the definition of “environment” provided under “Use of terms” and could give rise to confusion. Moreover, he did not see much sense in the abstract qualification of the environment as “civilian in nature”; he would prefer simply to retain the core of the provision, indicating that the environment “may not be the object of an attack, unless and until portions of it become a military objective”. The idea that certain parts of the environment could become a military objective and that the prohibition of an attack on them should therefore not be absolute had logical implications for draft principle 4. That draft principle dealt with belligerent reprisals, one of the most difficult questions in the law of armed conflicts. If the protection of the environment per se was not absolute, then the prohibition of belligerent reprisals against the environment should not be absolute either. He agreed with other speakers that, as a matter of progressive development of international law, draft principle 4 also applied in non-international armed conflicts.

Draft principle 2, rather than formulating some abstract principle, successfully conveyed the key message that well-known fundamental principles of international humanitarian law such as distinction, proportionality and rules on military necessity were applicable to the protection of the environment in relation to armed conflicts. However, the phrase “the strongest possible protection” should perhaps be modified, since in a situation of armed conflict the strongest protection should be given to protected persons, then to the facilities necessary for their survival, and finally to the environment per se, at least as it was defined under “Use of terms”. Like other Commission members, he considered that another draft principle should also be formulated, drawing on the language of rule 45 of the ICRC study on customary international humanitarian law, to specify that “the use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the environment is prohibited”.

He did not see draft principle 3 as a simple repetition of the normative content of draft principle 2: it had a slightly different object and purpose. While draft principle 2 confirmed the applicability of principles of international humanitarian law to the protection of the environment, draft principle 3 suggested a certain “environmentally-friendly” way of interpreting the concepts of necessity and proportionality in the pursuit of military objectives. It was for the Drafting Committee to decide whether it was more appropriate to refer to “lawful military objectives” or “legitimate military objectives”.

Lastly, while he was generally in favour of draft principle 5, he thought that it would benefit greatly from clarification — in particular, of what was meant by the designation of “areas of major ecological importance” and the purpose of their designation. In the absence of a specific agreement between parties, which was always a possibility, the draft principle should explicitly provide for the obligation of parties other than the States that made the designation to respect the designated areas. However, the precise legal meaning of draft principle 5 was open to question. Did it mean that only such areas must not be the object of an attack? Or did it aim to establish a regime of special or enhanced protection, similar to that provided for by the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Second Protocol? Such an interpretation might be an interesting development of international law but would go beyond the mere restatement of general principles in that field.
He recommended that all the draft principles, together with the first two provisions of the preamble, should be sent to the Drafting Committee.

Sir Michael Wood said that the Special Rapporteur’s second report on the topic was well researched and realistic. Bearing in mind that the purpose of the report was to identify existing rules of armed conflict directly relevant to the protection of the environment in relation to armed conflicts, the materials provided must be examined very carefully to see how far they supported the draft texts proposed.

He agreed with the Special Rapporteur that the Commission should be working towards draft principles, but there appeared to be some terminological uncertainty in the texts proposed. The use of a variety of descriptive phrases in referring to the principles might introduce certain unintended distinctions, raising questions about the normative value of the text. The use of the two terms “natural environment” and “environment” was also problematic.

With regard to the three preambular provisions, he understood why the Special Rapporteur had separated them from the draft principles; however, it would be entirely consistent with the Commission’s practice to label all the provisions, including those on purpose, scope and use of terms, as principles. While the first preambular provision, on the scope of the principles, simply reflected the title of the topic, as was standard practice, there was a certain deliberate ambiguity in the choice of the term “in relation to”, which could perhaps be clarified once the full set of draft principles had been formulated. The term “armed conflicts” was obviously broad enough to cover non-international armed conflicts, something that would be elaborated in the third preambular provision, on the use of terms.

The second preambular provision set out the purpose of the draft principles; however, the paragraph that referred to minimizing “collateral damage to the environment during armed conflict” could be placed elsewhere, as it was more of a principle than a purpose. Moreover, the reference in the first paragraph to “preventive and restorative measures” seemed to suggest that the object of the principles was purely practical: to prevent and restore damage to the environment and to minimize collateral damage. However, another view was that the aim of the exercise was to reiterate applicable principles. It was important that the provision on purpose should be clear; he therefore hoped that the Drafting Committee would pay careful attention to that matter.

Although the Special Rapporteur was still not convinced that a paragraph on use of terms was needed, he himself believed it was important to have a clear idea of the meaning of “environment” (or “natural environment”) and “armed conflict”, since the study being undertaken turned precisely on those two terms.

It was not entirely clear what draft principle 1 added to applicable principles of the law of armed conflict, which distinguished between “civilian objects” and “military objectives”. The environment was not an “object” or a “civilian object”, although it could be considered to include objects. Furthermore, the notion that the natural environment was “civilian in nature” was not clear, and the term “portions”, which presumably referred to particular components of the environment (objects) that could under certain circumstances become military objectives, was awkward. Clearly, objects that were not military objectives must be protected pursuant to the applicable law of armed conflict.

In draft principle 2, he was unsure what the term “fundamental principles” was intended to suggest. The non-exhaustive list contained therein was also somewhat surprising. Normally, in the context of the law of armed conflict, authors referred to such principles as distinction, proportionality, necessity and humanity, whereas the obligation to take “precautions in attack” appeared more like a rule of international
humanitarian law. Moreover, the reference to the “strongest possible” protection of the environment did not accurately state the requirement in that regard.

While draft principle 3 appeared to state the obvious, there must be cases where environmental considerations were simply not relevant when deciding what was necessary and proportionate. The principle could perhaps be qualified by words such as “where appropriate”.

In relation to draft principle 4, a number of Commission members had referred to the deterrent effect of reprisals in the context of the laws of war. It should be recalled that, upon ratifying Additional Protocol I, some States had made reservations with regard to the right to take reprisals in certain narrow circumstances, on the grounds of the need to compel the adverse party to cease committing violations of the Protocol. Such reservations should be borne in mind when considering draft principle 4.

With regard to draft principle 5, he was unsure whether the reference to the designation of “areas of major ecological importance” as demilitarized zones was desirable, even in a “soft law” text. Further clarity should be provided on how that draft principle would operate in practice. For example, what would happen if a State decided to make such a designation in order to gain military advantage, or was forced by the necessity of war to use sites of ecological importance for military purposes?

With regard to the future programme of work, it was to be hoped that the next report would clarify the Special Rapporteur’s vision for the future of the topic. The reference in her second report to a possible need to continue with enhanced progressive development or codification was surprising, since that would constitute a very different approach, and one which the Commission might not necessarily wish to pursue. He welcomed the Special Rapporteur’s intention to continue consultations with other entities, most importantly, ICRC, as well as with regional organizations. He also agreed that it would be helpful if States could continue to provide examples of national legislation relevant to the topic and case law in which international or domestic environmental law had been applied.

In his opinion, all of the draft texts proposed in the Special Rapporteur’s report, including the provision on use of terms, could be sent to the Drafting Committee.

Mr. Kamto said that the Special Rapporteur could certainly not be criticized for drawing inspiration from the rules of international humanitarian law and reasoning by way of analogy, as she did in paragraphs 147–154 of her report. Nevertheless, it was important to avoid the temptation simply to transpose the rules of international humanitarian law to the protection of the environment in relation to armed conflicts. The starting point for the current topic should be environmental considerations, particularly as expressed in the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons.

He had doubts as to whether the judgements of international courts cited in paragraphs 110–119 of the report were relevant. The consideration of issues relating to the protection of indigenous peoples’ land and forests, for example, would constitute a departure from the topic. It would be better to remain focused on the identification of principles to permit the natural environment to be preserved in the event of an armed conflict. Furthermore, the distinction being made between the terms “environment” and “natural environment” was unclear, and the Special Rapporteur should clarify that point.

He still believed that it would be difficult to structure the draft principles on the basis of the three-phase approach, since the conditions for preserving the environment during or after an armed conflict were at the heart of the topic. He considered that the three preambular provisions should be incorporated within the principles themselves.
Furthermore, the Special Rapporteur should, in a future report, propose a general pattern for the draft principles, even if it was adjusted in subsequent reports, so that the Commission could obtain a general idea of the work to be undertaken.

With reference to the preamble, the word “purpose” in the second provision was not particularly appropriate in the light of the content. The provision on the use of terms should be analysed in greater depth before it was sent to the Drafting Committee.

Concerning draft principle 1, it was not because “the natural environment is civilian in nature” that it should be protected; rather, the reasons for its protection derived from the 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*. As for draft principle 2, it was doubtful whether the principles referred to therein were intended to provide the environment with the “strongest possible” protection. The wording was in any case ambiguous, since it was not clear whether the level of protection in question was the same as that which normally existed in peacetime, or whether a special level of protection during armed conflict was envisaged. If the latter was the case, what was the threshold above which the strongest possible protection could be said to exist? He wondered why draft principle 4 referred to “attacks” in the plural. Surely just one attack would be sufficient to give rise to the application of that principle. Lastly, he remained doubtful both about the legal basis of draft principle 5 and about how it would be implemented.

He was in favour of sending the paragraphs constituting the preamble to the Drafting Committee, on the understanding that it would give only provisional consideration to the one on use of terms until the Special Rapporteur had incorporated any additional elements; he was also in favour of sending draft principles 1 to 5 to the Drafting Committee.

*The meeting rose at 10.50 a.m. to enable the Drafting Committee on Identification of customary international law to meet.*