

Provisional

For participants only

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International Law Commission

Sixty-seventh. session (second part)

Provisional summary record of the 3269th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 14 July 2015, at 10 a.m.

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Present:

Chairman: Mr. Singh
Members: Mr. Caflisch
Mr. Candioti
Mr. El-Murtadi
Ms. Escobar Hernández
Mr. Forteau
Mr. Gómez-Robledo
Mr. Hassouna
Mr. Hmoud
Mr. Huang
Ms. Jacobsson
Mr. Kittichaisaree
Mr. Kolodkin
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. Wako
Mr. Wisnumurti
Sir Michael Wood

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 10.05 a.m.

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

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

Mr. Valencia-Ospina said that, in order to assess the law applicable to the protection of the environment during an armed conflict, the Special Rapporteur had undertaken a detailed analysis of the law of armed conflict itself, namely, international humanitarian law, and its applicability to the protection of the environment, both directly and by means of transposition or analogy or enlarged interpretation. However, international humanitarian law was not the only law applicable during armed conflict (phase II); it was very likely that some rules of international environmental law were also applicable during armed conflict, as the Special Rapporteur had acknowledged in her preliminary report (A/CN.4/674, para. 3). The question of whether environmental treaties and other environmental norms in general ceased to be applicable or not during an armed conflict was of fundamental importance to the topic. Yet the Special Rapporteur did not address it in her second report; she merely mentioned it a few times. Moreover, according to the future programme of work outlined in paragraphs 230 and 231 of the report, it would seem that she did not intend to take up the matter in her third report, which would focus on post-conflict measures (phase III), although in paragraph 232 she did invite the Commission to renew its request to States to provide examples of rules of environmental law which continued to apply during armed conflict. The Special Rapporteur and the Commission would be well advised to concentrate on the applicability of principles of environmental law in phase II, since, as the Special Rapporteur acknowledged in paragraph 17 of her report, at the sixty-sixth session members had generally agreed that the focus of the work should be to clarify the rules and principles of international environmental law applicable in relation to armed conflicts.

The situation was similar for the related question of whether the rules of international humanitarian law prevailed during an armed conflict as *lex specialis*, a question that the Special Rapporteur had acknowledged as being important in her preliminary report, stating that there was a need to analyse and reach conclusions with respect to the uncertainty surrounding exactly how parallel application worked or when *lex specialis* clearly prevailed as the only applicable law (A/CN.4/674, para. 6). In her second report, the Special Rapporteur appeared to take the position that international humanitarian law did prevail as *lex specialis*. However, he would argue that the maxim *lex specialis derogat legi generali* no longer determined the relationship between international humanitarian law and international environmental law, since the clear-cut distinction between general international law and the law of armed conflict appeared to be eroding. While 100 or 150 years ago wars had been declared formally and had been widely regarded as *ipso facto* suspending other obligations under international law, the current situation was one of undeclared armed conflicts and a general recognition of the continued validity of general international law. One of the key reasons for the change was the increasing prevalence of multilateral treaties as sources of international law, whose suspension or termination as a result of the involvement of one or more of the contracting parties in an armed conflict would greatly destabilize the international legal system.

Three of the conclusions drawn by the Commission in its draft articles on the effects of armed conflicts on treaties and the commentaries thereto were relevant to the current topic. First, as a general principle, it had established that the existence of

an armed conflict did not cause the *ipso facto* termination or suspension of treaties. Secondly, it had found that treaties relating to the protection of the environment belonged, by virtue of their subject matter, to the group of treaties that would presumably continue in operation during an armed conflict. Thirdly, it had decided not to set firm rules regarding which treaties or treaty provisions should continue to operate, but to work with assumptions and presumptions. That approach suggested that treaties which continued to operate during an armed conflict should be applied with some flexibility and might be adapted to wartime requirements. The possibility of limiting that flexibility by applying the concept of necessity had been developed in detail by Silija Vöneky in her work on the applicability of peacetime environmental law in international armed conflicts, referred to in the useful bibliography to be found in annex II of the second report. Moreover, the continued application of international environmental law during armed conflict had also been recognized by the International Committee of the Red Cross (ICRC) in its study on customary international humanitarian law.

Given the need for consistency in the Commission's work across different topics, it was also worthwhile to look at the commentaries to draft articles 20 and 21 on the protection of persons in the event of disasters, which dealt with similar issues, although international humanitarian law and the protection of persons were admittedly more closely related than international humanitarian law and the protection of the environment. In those articles the Commission had decided to address directly the question of which legal framework prevailed and, while it had given precedence to the more specialized rules of international humanitarian law in cases where they applied, it had not ruled out the parallel applicability of the two legal frameworks where disaster and armed conflict coexisted, in order to avoid legal gaps in the protection of persons affected by disaster. Adopting such an approach for the topic under consideration would mean according priority to rules of international humanitarian law, but only after carefully considering whether doing so left gaps in the protection of the environment and how international environmental law could then be applied in parallel to fill those gaps.

The question of international humanitarian law as *lex specialis* arose more often in discourse on the relationship between international humanitarian law and human rights law. The International Court of Justice and scholars had originally taken the approach that international humanitarian law prevailed as *lex specialis* to resolve the issue of which of the two international legal frameworks should be applied in times of armed conflict. However, the eroding distinction between general international law and the law applicable during armed conflict had led to a departure from such a black and white approach. Nowadays a complementary approach was generally applied which sought to identify the most favourable rules for individuals. Yet international humanitarian law could alter the standards set by human rights law, as was evident when considering the issue of the legality of killing in war. The rules defining what constituted legitimate targets and military objectives were to be found in international humanitarian law. Nevertheless, simply affirming that international humanitarian law was *lex specialis* and ending the discourse on its relationship with human rights law at that point was an oversimplification, which did not take into account the specific characteristics of the international legal system with its parallel and overlapping legal frameworks. Similarly, asserting that international humanitarian law was *lex specialis* in the relationship between international humanitarian law and international environmental law was also an oversimplification, which did not do justice to the importance of the topic and the need for its progressive development and codification by the Commission.

There were other reasons why the Special Rapporteur should extend the scope of her research in phase II beyond international humanitarian law. First, the

Commission's work on the topic had been prompted by a 2009 report by the United Nations Environment Programme (UNEP) entitled "Protecting the Environment During Armed Conflict", which found, *inter alia*, that international humanitarian law did not provide effective protection for the environment in times of armed conflict. The UNEP report specifically requested the Commission to study the topic and stated explicitly that clarification of the relationship between international humanitarian law and international environmental law was crucial.

Secondly, international environmental law was a far more contemporary legal framework than international humanitarian law. Focusing the analysis only on international humanitarian law with a view to reproducing or transposing its rules into a new instrument ran the risk of an outcome that would be instantly outmoded. International humanitarian law was inherently anthropocentric, since it had been designed to reduce human suffering. The current topic called for a close look at other less anthropocentric rules to ascertain whether they could or should apply in times of armed conflict.

Lastly, it might be detrimental to the existing Geneva regime of international humanitarian law to focus the analysis in phase II on its provisions, which were aimed at the protection of human beings. Trying to extend the regime to protect the environment might reduce its overall acceptability to States. The second report suggested applying the general principles of international humanitarian law to the protection of the environment by way of analogy or enlarged interpretation, or as autonomous rules of customary international law, as had been done by the International Committee of the Red Cross (ICRC) in its study on customary international humanitarian law. However, that effort clearly stretched the meaning of the agreed texts of the Geneva Conventions of 1949 and the Additional Protocols thereto, the most striking example being the attempt to protect the environment as a whole by defining it as civilian in nature in order to facilitate the transposition. Such an approach would be tantamount to the Commission amending the Geneva Conventions and Additional Protocols, which was outside its mandate. More importantly, there was no support among States for such amendments, as was clear from the responses to specific issues received thus far from States as well as from the status of ratifications and reservations to ratifications 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 included the very few provisions aimed specifically at protecting the environment.

The rules applicable in the event of occupation was another relevant issue in the context of armed conflict that the Special Rapporteur had stated she would not address until the third report because occupation often extended beyond the time when active military hostilities had ceased. Nevertheless, she touched upon the issue in the second report, in paragraph 96, when she referred to the law of occupation being applicable during armed conflict and, in paragraph 119, where she gave an example of the application of the law of armed conflict during military occupation to the environment, as demonstrated during the Nuremberg trials. It was to be hoped that the Special Rapporteur would address the issue of occupation in connection with phase II, as well as the post-conflict phase.

In conclusion, he recommended the referral to the Drafting Committee of all the texts proposed in annex I of the second report .

Mr. Saboia said that he endorsed many of the points raised by Mr. Valencia-Ospina, particularly the need for a more in-depth study of the criteria to be applied for determining which rules of environmental law were applicable in times of armed conflicts and the importance of addressing the issue of occupation during phase II of the study.

Mr. Vázquez-Bermúdez said that the Special Rapporteur's second report was well drafted and supported by in-depth research, practice, case law and doctrine and other materials. Purely on a matter of form, he welcomed the fact that the Special Rapporteur had included her proposed draft principles both in the body of the second report and in an annex thereto. It would be helpful if all the special rapporteurs followed a similar approach, especially when there were several different versions of draft text. It would also be useful to have a second annex setting out the draft text already approved by the Commission for ease of reference.

Although the topic would lend itself well to the elaboration of draft articles, he could acquiesce in the Special Rapporteur's preference for draft principles, which were, of course, of a normative character, since principles generally enunciated rules of a more fundamental or general nature. He supported the idea of a draft preamble identifying the purpose and scope of the draft principles. However, the preamble should also include a reference to the importance of the environment for life on Earth and the need to ensure its protection in relation to armed conflict. The Special Rapporteur might wish to consider drafting a more detailed preamble in her third report or even during the current session, in the light of the debate in plenary session. In any event, the Commission should take the decision to have a draft preamble and refer to the Drafting Committee the two paragraphs proposed under the section entitled "Purpose".

The primary objective of the topic should be to develop and systematize a comprehensive and coherent legal system that ensured the adequate protection of the environment prior to, during and after international and non-international armed conflicts. It should not be confined merely to identifying existing and directly applicable rules of international humanitarian law. The application of the law of armed conflict did not exclude the application of other rules of international law, including those relating to the environment. There was a growing awareness within the international community of the need to ensure the legal protection of the environment, an awareness reflected in the significant development of international environmental law in recent decades, as well as in the practice of States and international organizations and in case law, as the report showed. The Commission should not be overcautious and halt the progress of that process, but rather promote its development. It would be useful to hear the views of Member States in the Sixth Committee and receive their written comments in that regard.

In view of the foregoing, the two paragraphs in the section entitled "Purpose" in the draft preamble should be expanded. The phrase "enhancing the protection of the environment" should be replaced with the words "ensure the broadest possible protection of the environment in relation to armed conflict" [*asegurar la más amplia protección del medio ambiente en relación con los conflictos armados*]. The second paragraph should indicate that such protection covered the phases prior to, during and after armed conflict. An additional paragraph could be drafted to the effect that "environmental protection entails respect for and observance of the rules and principles of applicable international law, in particular international humanitarian law, during the three phases indicated, as well as the adoption of preventive, protection and reparation measures" [*la protección del medio ambiente conlleva el respeto y cumplimiento de las normas y principios del derecho internacional aplicable, en particular del derecho internacional humanitario, durante las tres fase indicadas, así como la adopción de medidas preventivas, de protección y de reparación*].

He endorsed the suggestion to place the text currently appearing in the sections entitled "Scope of the principles" and "Use of terms" at the beginning of the operative part of the set of principles. Although the Special Rapporteur had expressed a preference not to refer to the Drafting Committee the two draft definitions of "armed

conflict” and “environment”, he found them to be a good starting point for the draft principles, as they were based on the previous work of the Commission. Indeed, it was useful to draw on the previous work of the Commission, such as its draft articles on the effects of armed conflicts on treaties, which established the general principle that the existence of an armed conflict did not *ipso facto* terminate a treaty or suspend its application. That principle applied to international treaties on protection of the environment as well to relevant rules of customary international law. In that regard, he welcomed Mr. Forteau’s proposal for a more systematic analysis of the international rules relating to the protection of the environment that continued to apply during armed conflict.

To return to the definitions, it was useful to define the key terms, among other reasons because they helped to delimit the scope of the topic. The definition of “armed conflict” proposed by the Special Rapporteur was appropriate. Any definition of “armed conflict” which narrowed the scope of the topic by excluding non-international armed conflicts would be unsuitable, since recent events had shown that such conflicts could have widespread disastrous consequences on an environment shared by hundreds of thousands of people. Moreover, as could be seen from the study of the International Committee of the Red Cross on customary international humanitarian law, there was a growing tendency to apply the rules of international humanitarian law to both international and non-international armed conflicts.

The definition of “environment” should be broad enough to cover natural resources, the natural heritage and the heritage comprising the combined works of nature and man. Therefore it should not include any reference to the “natural” environment, which would be too restrictive, and care should be taken not to use the terms “environment” and “natural environment” interchangeably in order to obviate problems of interpretation. For the purposes of the draft principles, the notion of the environment should not be confined to wilderness, but should encompass environmental features bearing the traces of human activity. He agreed with the Special Rapporteur that natural resources should be included in the definition, not as a source of armed conflict, but because they could be attacked, destroyed or plundered during hostilities.

Indigenous peoples could be particularly affected by armed conflicts owing to their special spiritual, cultural and material relationship with their environment. He commended the Special Rapporteur for her analysis of the case law of the Inter-American Court of Human Rights in that area. Also pertinent were articles 29 and 30 of the United Nations Declaration on the Rights of Indigenous Peoples and articles XVIII and XXIV of the draft American Declaration on the Rights of Indigenous Peoples, which was close to adoption. The Special Rapporteur should consider drawing up a draft principle referring to the need to afford special protection to indigenous peoples’ lands, territories and resources in times of armed conflict.

He agreed with the Special Rapporteur’s decision to begin with the general principle that the environment must not be the object of an attack. The environment, as the legal interest to be protected under the topic, was to be conceived of, not in the abstract, but in its totality. Only if certain portions of the environment became a military objective would they lose protection. For that reason, it was essential in draft principle 1 to retain the qualifying phrase “unless and until” to make it plain that any loss of protection would be an exception to the general rule. The word “until” denoted the temporal scope of that exception and indicated that the portion of the environment in question would recover its due protection as soon as it ceased to be a military objective.

In view of the importance of the environment for life on the planet for current and future generations, the Special Rapporteur was right in holding that the

environment could not be equated with a mere civilian object protected solely by the *lex specialis* of international humanitarian law; it also enjoyed protection under international environmental, human rights and criminal law, as well as disarmament treaties. Rather than calling the environment a civilian object in draft principle 1, the Special Rapporteur referred to it as “civilian in nature” to denote that it should not be an object of attack. The preamble should highlight the fact that attacks on the environment could undermine the planet’s life cycle and even jeopardize its capacity to sustain life on earth. The reference in the second sentence of the draft principle to “applicable international law” was also vital in that it affirmed that international humanitarian law was not the only law that applied. He was in favour of the suggestion to reverse the order of the sentences in draft principle 1.

He supported draft principle 2, since it applied principles of international humanitarian law, including the principles of precaution, distinction and proportionality and the rules of military necessity, all of which had become customary law, to the due protection of the environment in relation to armed conflicts. He was also in favour of draft principle 3, which was based on the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*. He agreed with other colleagues that a principle should be drafted based on article 35, paragraph 3, of Additional Protocol I to the Geneva Conventions of 1949, 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; that principle applied to all methods and means of waging war without exception. He also endorsed the suggestion that the principle of prohibiting military or any hostile use of environmental modification techniques with widespread, long-lasting or severe effects should be included in the Commission’s text as progressive development.

Draft principle 4 prohibiting attacks against the environment by way of reprisals was taken from article 55, paragraph 2, of Additional Protocol I and was consistent with the recent development of international law on the protection of the environment. He supported draft principle 5, but it would be necessary to determine the scope of the concept “areas of major ecological importance” and the consequences thereof, in particular as far as third States’ respect for them was concerned, and to consider recognition of that status and declarations of demilitarized zones in peacetime. In that context he disagreed with the statement in paragraph 218 of the report that, for the purposes of military activities, exclusive economic zones were considered international waters since, as paragraph 217 noted, some States took the view that the consent of the coastal State was required for military manoeuvres in those zones. Moreover, the coastal State had jurisdiction in the exclusive economic zone with respect to protection and conservation of the marine environment. At all events, that was a controversial area where no definite conclusions could be drawn.

A principle could be drafted referring to protected zones, such as nuclear-weapon-free zones and zones exclusively reserved for peaceful purposes, since the declaration or designation of such zones could be an important means of protecting the environment from the potentially disastrous effects of employing certain weapons of mass destruction and of armed conflicts in general. The protection of World Heritage sites could also form the subject of a specific draft principle.

He would encourage the Special Rapporteur to use the ample material in her report as the basis for further draft principles. He was in favour of referring the draft proposals to the Drafting Committee, including those related to scope and purpose, taking account of the comments made in the debates in plenary session.

Mr. El-Murtadi said that the Special Rapporteur’s second report provided valuable assistance in identifying existing rules of armed conflict which were directly

relevant to the protection of the environment in both international and non-international armed conflicts. The current world situation, where the rising number of non-international conflicts was having increasingly serious repercussions on the environment, demonstrated the growing importance of phase II of the temporal approach adopted by the Special Rapporteur, namely obligations relating to the protection of the environment during an armed conflict.

The Commission should indeed reiterate its request to States to provide information on their relevant practice, as suggested by the Special Rapporteur in paragraph 232 of her report.

Libya was an example of a situation where a military intervention to protect civilians had been followed by a series of acts which had gravely impaired vital elements of the natural environment, including that in neighbouring countries. Although Libyan national legislation made provision for numerous mechanisms to protect natural resources and the environment, the armed conflict in the country had undermined those laws, as immediate security concerns had overridden environmental considerations. The international community therefore had to summon the political will to guarantee the implementation of the law on the protection of the environment in such circumstances.

It was up to the Commission and ultimately the General Assembly to determine the outcome of the Commission's work on the topic. As that work was many-faceted, it might be wise to obtain the input of the Sixth Committee before adopting a final decision on the form which it should take.

Mr. Kittichaisaree asked what legal rules, if any, had been applied in relation to the protection of the environment in Libya during the current hostilities.

Mr. El-Murtadi said that the Security Council had justified its decision to intervene in Libya in 2011 by the need to protect civilians. Although the protection of civilians and the protection of the environment were inseparable, the military intervention had created a situation which facilitated acts which harmed the environment. His point had been that specific provision for protecting the environment therefore had to be made when taking military action to protect civilians.

Ms. Jacobsson (Special Rapporteur), summing up the debate on her second report on the protection of the environment in relation to armed conflicts, thanked her colleagues for their constructive contributions to the debate on the topic and said that she would take all the views expressed into account in her forthcoming third report.

After hearing the statements made during the debate, she realized that she should have explained the rationale behind her choices more clearly. Her plan was that the draft principles would be grouped together according to their functional purpose and in such a way as to reflect the three temporal phases. At a later stage they would be joined up in a comprehensive whole with any necessary adjustments. The proposed draft principles currently numbered 1 to 5 would ultimately be placed in the middle of the final text, which would also contain draft principles on preventive measures, cooperation, the sharing of information and peacekeeping operations, *inter alia*. She agreed that the text needed a proper preamble, but it would be best to leave its drafting until the end of the exercise. The sections on purpose, scope and use of terms had been placed under the heading "preamble" because she had felt uncomfortable about calling scope and purpose a principle. She would propose different headings to the Drafting Committee.

The reason that the report did not address what rules other than the rules of armed conflict might apply to the protection of the environment during an armed conflict was simply because the report was overlong as it stood. She had not even had

space to discuss the rules of armed conflict which applied before and after an armed conflict. She had deemed it necessary to investigate thoroughly the applicable *lex specialis* deriving from treaty regimes, case law, State practice and doctrine in order to offer the Commission a sound basis for its discussion of phase II of the temporal approach, which was the epicentre of the topic. She would examine the possible continued applicability of other treaties in her third report. In that report she would also endeavour to establish a clearer link between the analytical sections and the draft principles.

Several Commission members had noted that the preamble contained a proposed definition of the term “environment”, whereas the draft principles referred to both the “environment” and the “natural environment”. She explained that, in the preamble, it had not seemed appropriate to qualify the environment as “natural” because doing so would have deviated from the title of the topic. In the indicative list of treaties referred to in draft article 7 on the effects of armed conflicts on treaties, the Commission had not used the term “natural environment”, but had referred merely to “the environment”. The International Court of Justice had done the same in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*. On the other hand, both Additional Protocol I to the Geneva Conventions of 1949 and the Rome Statute of the International Criminal Court, in its article 8 on war crimes, contained references to the “natural environment”, since that was what was protected under the law of armed conflict. However, the scope of protection addressed by the current topic, as set out in the syllabus, was broader than that covered under the law of armed conflict, and that fact had to be reflected in the preambular paragraphs in the sections entitled “Scope of the principles” and “Purpose”. Nonetheless, when specifically addressing the law that applied during an armed conflict, as was the case in draft principles 1 and 4, it was important to use the established term “natural environment”.

In draft principle 2, on the other hand, she had not qualified the word “environment” as “natural environment”, in accordance with the purpose of the Commission’s exercise, which was to enhance the protection of the environment from a wider perspective. Ultimately, what that meant was that the current topic was not restricted to the protection of the natural environment. Furthermore, if the request of some members of the Commission and some delegations in the Sixth Committee to cover natural heritage zones, including cultural landscapes, was to be met, a wider reference than “natural environment” was needed. She proposed to reword the section entitled “Purpose” to address some of the concerns that members had expressed. The question remained whether a definition of environment was needed at all and, if so, how it should be worded.

The statement in the first sentence of draft principle 1 that the environment was civilian in nature had elicited many comments. There was an important distinction to be made between the idea that the environment was a civilian object and the idea that the natural environment was civilian in nature, as had been made clear in the writings of several publicists. Although parts of the natural environment could be considered civilian objects, to refer to the entire natural environment as an object would be confusing. She had therefore refrained from using that formulation. To her mind, the only real weakness of the formulation “civilian in nature” in draft principle 1 was that the word “nature” might be misunderstood as a synonym for “environment” rather than part of the idiom “in nature”. However, in the light of the comments made by Commission members and her own doubts about that formulation, she would omit the reference to “civilian in nature” in the revised set of draft principles.

The concept of “collateral damage”, which was included in the preambular paragraph under the heading “Purpose”, was directly linked to the principle of proportionality, which prohibited attacks that were clearly excessive in relation to the

concrete and direct overall military advantage anticipated. However, since some Commission members did not approve of the use of the word “collateral”, she would omit the reference to it in reformulating the draft principle.

Some Commission members had expressed doubts that the prohibition of attacks against the natural environment by way of reprisal, as proposed in draft principle 1, had matured into a rule of customary international law. The goal was less to establish that it was a customary rule than it was to set a standard. To date, there were 174 parties to Additional Protocol I. To the extent that they had not made a reservation to it, those parties were bound by the treaty rule stipulating that the natural environment could not be the object of an attack in reprisal. It would be regrettable if the Commission did not recognize or downplayed that important prohibition. She believed that an acceptable formulation could be found if the proposed draft principle was referred to the Drafting Committee.

She agreed with Commission members who had indicated that it was necessary to further explore and explain the meaning of the term “areas of major ecological importance”. She had been reluctant to address the issue of a threshold of impermissible environmental damage, since she considered that it was not the place of the Commission to do so. Several members had recommended that she should examine the practice of non-State actors further and that she should not let the Commission’s tendency not to include practice by non-State actors as part of the concept of customary international law deter her from doing so. Although there were few publicly available examples of the practice of non-State actors relating to the current topic, she would do her best to find them, and she urged other members to inform her should they come across any. She proposed that all draft principles and the preamble should be referred to the Drafting Committee, on the understanding that the “Use of terms” section, while it might facilitate the thinking of the Drafting Committee, should be left pending.

The Chairman said that, if he heard no objection, he would take it that the Commission wished to refer the preamble and draft principles to the Drafting Committee, on the understanding that the adoption of the introductory subparagraphs under the heading “Use of terms” would be held in abeyance in order to assist in drafting future draft principles.

It was so decided.

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

Mr. Forteau (Chairman of the Drafting Committee) said that the Drafting Committee on the topic of protection of the environment in relation to armed conflicts was composed of Ms. Jacobsson (Special Rapporteur), Ms. Escobar Hernández, Mr. Gómez-Robledo, Mr. Hmoud, Mr. Huang, Mr. Kittichaisaree, Mr. McRae, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Saboia, Sir Michael Wood and Mr. Valencia-Ospina (Rapporteur), *ex officio*.

Provisional application of treaties (agenda item 5) (A/CN.4/687)

The Chairman invited the Special Rapporteur to introduce his third report on the provisional application of treaties, contained in document A/CN.4/687.

Mr. Gómez-Robledo (Special Rapporteur) noted by way of preliminary that the length of Special Rapporteurs’ reports had become an issue for some entities of the Secretariat and the General Assembly; solutions acceptable to all must be found, because the nature of the Commission’s work required meaningful documentation.

His first report on the topic had provided an introduction to the study and had outlined a future plan of work. His second report had analysed the legal effects of provisional application and in particular had focused on the source of the obligations incurred as a result of provisional application; the corresponding rights and obligations to be fulfilled; the termination of obligations; and the legal consequences of the breach of a treaty that was applied provisionally. During the debate on his second report, he had proposed a number of conclusions for the Commission's consideration: that the rights and obligations of a State that had decided to apply a treaty provisionally were the same as if the treaty were in force; that a breach of an obligation assumed under the provisional application of a treaty gave rise to the international responsibility of the State; and that it was not necessary for him to carry out a comparative study of the internal law of States in order to fulfil his mandate as Special Rapporteur. He would, of course, welcome members' comments in that regard.

During the debates in the Sixth Committee at the sixty-ninth session of the General Assembly 30 States and the European Union had provided input on the topic, 18 States had submitted written comments on their national practice and, in the course of informal consultations, 35 delegations in New York had expressed their views.

In keeping with the road map that had been outlined at the Commission's sixty-sixth session, the third report focused on two main issues: the relationship of provisional application to other provisions of the 1969 Vienna Convention on the Law of Treaties and provisional application with regard to international organizations. It also provided an analysis of the views expressed by Member States, either in writing or in statements given in the Sixth Committee. Although the number of States that had submitted comments on their national practice was less than 20, the number of examples of treaties that provided for provisional application and had, in fact, been applied provisionally, was quite high. In many cases, the procedures followed for provisional application were the same as those for the ratification of or accession to a treaty. In other cases, States accepted provisional application by means of an agreement that was separate from the main treaty, as was the practice of the United States of America. Such practice was an indication that States wished to delimit clearly which provisions of the treaty would be subject to provisional application, while at the same time seeking to streamline the start of provisional application.

In some cases, the attempts of publicists to categorize State practice had yielded results that were inconsistent with the comments that had been submitted to the Commission by Member States. That situation demonstrated how difficult it was to assess and classify State practice with regard to the provisional application of treaties and should be seen as a warning to the Commission to proceed cautiously when doing so.

The analysis in his third report of the relationship of provisional application to other provisions of the 1969 Vienna Convention on the Law of Treaties was not exhaustive and would be continued in future reports. It covered the following articles of the 1969 Vienna Convention: article 11 (Means of expressing consent to be bound by a treaty), article 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force), article 24 (Entry into force), article 26 (*Pacta sunt servanda*) and article 27 (Internal law and observance of treaties). That selection of articles were the ones most closely related to provisional application and were the ones most often cited in the literature and case law on that subject.

The conclusion he proposed in paragraph 44 of his report, to the effect that the means of expressing consent to be bound by a treaty, as provided in article 11 of the 1969 Vienna Convention, might also be used to agree to its provisional application, was based on an analysis of the treaties examined in his current and previous two reports on the topic. That point was important to note, since one might otherwise get

the erroneous impression that the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea — the only one mentioned in the third report — was the only relevant case in that regard.

The report also addressed the issue of provisional application with regard to international organizations. The new memorandum by the Secretariat on provisional application of treaties (A/CN.4/676), which dealt with the legislative development of article 25 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, clearly indicated that the States at the 1986 Vienna Conference had accepted the wording formulated in 1969 and had reiterated its content, meaning and scope. As stated in his report, he considered that article 25 of the 1986 Vienna Convention reflected a rule of customary international law; however, he did not think it relevant to provide a detailed study of the elements needed to determine whether that article, or the 1986 Vienna Convention as a whole, did indeed constitute customary international law, since the Commission's study of the provisional application of treaties was independent of that question. In other words, even if the Commission were to decide that article 25 of the 1986 Vienna Convention was not a rule of customary international law, the analysis presented in the report would stand unchanged. Ultimately, the main consideration would be that the 1986 Vienna Convention was not yet in force.

With regard to the report's consideration of the provisional application of treaties establishing international organizations and international regimes, he wished to clarify that the term "international regimes" was not intended to refer to legal regimes in the sense of a set of rules and policies governing international affairs, but rather to the configurations of international forums and entities that might be created by means of treaties and play an important role in the execution and implementation of those treaties, even when they were not intended to become true international organizations.

A key example of the provisional application of treaties negotiated within international organizations or at diplomatic conferences convened under the auspices of international organizations was the establishment and operation of the Comprehensive Nuclear-Test-Ban Treaty Organization. Although the Comprehensive Nuclear-Test-Ban Treaty had not yet entered into force, the Comprehensive Nuclear-Test-Ban Treaty Organization, in its transitional form, had been in operation for almost 20 years. Bearing in mind that the treaty appeared unlikely to enter into force in the near future, it was the provisional operation of the Comprehensive Nuclear-Test-Ban Treaty Organization that gave full, or partial, legal effect to the treaty.

He wished to draw the Commission's attention to a publication entitled "The treaty, protocols, conventions and supplementary acts of the Economic Community of West African States (ECOWAS)", which he had obtained from the Nigerian Ministry of Foreign Affairs after his submission of the third report for processing. An exhaustive review of the 59 treaties concluded under the auspices of ECOWAS between 1975 and 2010 revealed that only 11 of them did not provide for provisional application. The formula generally used in the rest was: "The treaty shall enter into force provisionally upon the signature by Heads of State and Government and definitively upon ratification". While the use of the expression "enter into force provisionally" rather than "be applied provisionally" was unfortunate, the repeated use of the same formula demonstrated the intention of States in the region to apply provisionally the treaties concluded within ECOWAS. That example underscored the relevance of preparing draft guidelines for use by States and international organizations during negotiations, possibly with the inclusion of one or more model clauses. It also underscored the importance of the provisional application of treaties in relation to States' regional commitments; it might therefore be appropriate for the

Commission to prepare a study of practice related to the provisional application of treaties in the context of regional organizations.

The six draft guidelines presented for the Commission's consideration were based on the analysis contained in all three reports he had submitted to date. Article 25 of the 1969 and 1986 Vienna Conventions on the law of treaties was of course the starting point for the proposed text, the aim of which was to provide States and international organizations with greater clarity regarding provisional application and its scope. From a methodological point of view, he had responded to suggestions that he should adopt a more inductive approach by undertaking a more detailed study of national practice, examples of treaties and legal literature.

He had followed the road map established for consideration of the topic and proposed that in future reports he should continue to analyse the relationship of provisional application to other provisions of the 1969 Vienna Convention, such as the regime governing reservations; address the question of the relationship between provisional application and succession of States with respect to treaties; examine the practice of multilateral treaty depositaries; and study the legal effects of the termination of provisional application with respect to treaties granting or recognizing individual rights. He would also continue to formulate further draft guidelines addressing other aspects of provisional application, if the Commission so agreed. He asked the Commission to reiterate its invitation to Member States to submit comments on their national practice with regard to provisional application, which would provide valuable input for the study of the current topic and would allow any doubts or confusion to be addressed through the development of further guidelines.

Mr. Forteau said that the many valuable examples of the provisional application of treaties included in the Special Rapporteur's report were particularly helpful when they highlighted gaps in the Vienna Convention on the Law of Treaties. For example, article 25 of the Vienna Convention did not expressly provide for non-negotiating States to apply the content of a treaty provisionally, although that occurred in practice. It was therefore legitimate to include such a possibility in the draft guidelines, as the Special Rapporteur apparently proposed. Other examples shed light on the status of national law regarding the regime applicable to provisional application, while the information contained in the annex to the report confirmed that international organizations, like States, were able to apply treaties provisionally.

The way in which the Special Rapporteur described State practice was not always sufficiently clear. In paragraph 127 of the report, for example, the Special Rapporteur mentioned several cases where provisional application could have "retroactive" effect; however, in the absence of detailed explanations, it was hard to understand what was meant and what the implications of that practice were. The scope and relevance of the example presented in paragraph 120, regarding the unilateral declaration by the Syrian Arab Republic that it would provisionally apply the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, was not clear either. That example did not appear to concern provisional application within the meaning of article 25 of the Vienna Convention, unless the Special Rapporteur believed that the agreement of the parties was expressed by their inaction or silence with regard to the unilateral declaration. If so, a more detailed examination of what should be understood by the phrase "in some other manner so agreed" was needed in order to determine whether silence or inaction might be considered to express agreement to the provisional application of a treaty within the meaning of article 25 of the Vienna Convention.

Although the Special Rapporteur had stated that he did not intend to examine the provisions of domestic law, in paragraph 25 of the report he categorized States according to whether their domestic law permitted provisional application or not,

without explaining the basis for his classification, except by means of a footnote reference to a 2012 legal publication. Great caution was required when taking a position on the law in force in a given State. For example, the decision to place France in the category of States which permitted provisional application in exceptional circumstances was, at the very least, questionable. While he tended to think that, since provisional application was not expressly prohibited under French law it was in fact authorized, as was also demonstrated by the State's practice, other authors held different positions and the French constitutional judge had never ruled on the matter. It therefore appeared difficult to reach a firm conclusion on that point. Similarly, the inclusion of Belgium in the same category did not correspond exactly to the information provided to the Sixth Committee by the representative of Belgium in November 2013. Consequently, the classification provided by the Special Rapporteur needed to be approached with great caution. Admittedly, the Special Rapporteur had mentioned in paragraph 26 of the report that some of the cases described in the cited legal publication did not always correspond to the information provided by States in their comments; however, if that were the case, it would have been better not to cite the conclusions of that work at all without having first compared them with other studies and, more importantly, practice.

He generally agreed with the Special Rapporteur's findings on the relationship of provisional application to other provisions of the 1969 Vienna Convention. However, the analysis provided was not exhaustive. In particular, it did not address the regime for suspension or termination of provisional application, except very elliptically in paragraphs 57 and 59 of the report. It was important to know the extent to which the provisional application of a treaty could be suspended or terminated, for example, in the event of a breach of the treaty by another party which was also applying it provisionally. In that regard, he noted that the Special Rapporteur had indicated that the question of the legal effects of the termination of provisional application, at least with respect to treaties granting individual rights, would be addressed in future reports. The Commission should also address the regime for the invalidity of treaties, which was certain to apply, probably *mutatis mutandis*, to treaties applied provisionally.

It seemed that the Special Rapporteur had been a little too quick to state in paragraph 58 that provisional application produced the same legal effects as any other international agreement and that those effects were definite and enforceable and could not subsequently be called into question in view of the provisional nature of the treaty's application. First, it was not clear that provisional application produced exactly the same effects as the entry into force of a treaty. Paragraph 4 of the syllabus for the topic "Provisional application of treaties" (A/66/10, Annex C) stated that four different opinions existed as to the legal effect of provisional application; consequently, the theory put forward by the Special Rapporteur could be accepted only if he demonstrated that it corresponded to prevailing practice and *opinio juris*. Moreover, it should be noted that, in paragraph 129 of the report, the Special Rapporteur had acknowledged that some States and legal advisers of international organizations did not consider provisionally applied treaties to be legally binding. While he personally agreed with the Special Rapporteur that they were legally binding, such a conclusion should be substantiated in order to be fully convincing.

Secondly, it seemed that there could be justification for considering that provisional application was binding with regard to the treaty, but that its effects would not necessarily be definitive once it had been terminated and when the treaty did not enter into force. While the Special Rapporteur's assertion that the legal effects of provisional application were definitive could be supported by drawing a parallel with the regime applicable to the consequences of the termination of a treaty — article 70 of the Vienna Convention provided that the termination of a treaty "does not affect any

right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination” — it was still necessary to demonstrate the applicability of that solution to provisional application, by means of an analysis of relevant practice. Moreover, the provision established with regard to the invalidity of a treaty, providing that only acts performed in good faith were binding on the parties, could instead be deemed to apply. Further analysis was therefore needed before any conclusions could be drawn on that point.

It was also somewhat dangerous to affirm, as the Special Rapporteur had done in paragraph 122 of the report, that the rules of the 1986 Vienna Convention had full effect, because they reflected norms of customary international law. The European Union, for example, had always maintained that the 1986 Vienna Convention did not reflect customary law. A detailed study would therefore be required before such an affirmation could be made.

He was not convinced that the outcome of the Commission’s work should take the form of draft guidelines. First, it was clear that at least some of the Special Rapporteur’s proposals were not guidelines as such but rather statements of law already in force. By formulating them as guidelines, there was a risk of suggesting that they did not in fact reflect existing law. Secondly, bearing in mind that the outcome of the Commission’s work on the topic of subsequent agreements and subsequent practice had been in the form of conclusions, it would be appropriate for the texts finally adopted on the current topic to be in the same form, since both topics had involved clarifying the meaning of articles of the Vienna Convention. Furthermore, it was regrettable that the Special Rapporteur had not explained, even briefly, the reasons that had led him to propose each of the six draft guidelines. In many cases it was difficult to understand why he had chosen one wording over another. In draft guideline 2, for example, it was not clear why the text departed from the wording of article 25 of the Vienna Convention, which specified that the agreement providing for provisional application must be adopted by the “negotiating States”. Either that clarification should be reintroduced or a second paragraph should be added to specify that other States could also enter into an agreement with the negotiating States to apply the treaty provisionally. The conditional clause at the end of draft guideline 1 concerning the internal law of the States or the rules of the international organizations should also be deleted as it did not figure in the Vienna Convention and did not in any way derive from contemporary treaty law.

Draft guidelines 2 and 3 contributed useful clarification; however, draft guideline 2 should specify that a resolution adopted by an international conference could only establish an agreement for the provisional application of a treaty if it was binding and enforceable. Draft guideline 4 was obscure, since the whole point of the topic was to establish precisely what the legal effects of provisional application were. Either the draft guideline should be deleted or a phrase should be added specifying that provisional application had legal effects “by virtue of the following draft conclusions” [*en vertu des projets de conclusions qui suivent*].

In draft guideline 5, it should be specified that the effect of the obligations deriving from provisional application depended primarily on what had been stipulated by the States that had agreed to the provisional application. Moreover, it was not true, as stated in paragraph 53 of the report, and implied in draft guideline 5, that the provisional application of a treaty presumed that the treaty was not in force. A State might decide to apply a treaty provisionally after the treaty was in force, if it was not in force for that State. It appeared that in draft guideline 5 the Special Rapporteur was referring to the subjective, rather than the objective, entry into force of the treaty; that distinction should therefore be made clear in the proposed text.

Based on the current state of the Special Rapporteur's research, he did not find draft guideline 6 acceptable. Some experts still believed that responsibility was not necessarily engaged in the event of non-compliance with a treaty applied provisionally. The new edition of the Handbook of Final Clauses prepared by the Treaty Section of the United Nations Office of Legal Affairs indicated, for example, that provisional application of a treaty was an option "open to a State that may wish to give effect to the treaty without incurring the legal commitments under it", which could be interpreted as meaning that provisional application authorized a State to apply a treaty without necessarily implying that it was bound to do so. In contrast, the judgment of the Court of Justice of the European Union of 28 April 2015 in *European Commission v. Council of the European Union* (Case C-28/12) implied that third States and businesses could benefit from the provisional application of agreements, which appeared to imply that those parties that applied a treaty provisionally were bound by such application. Given the nuanced nature of the question, a detailed study was warranted. Furthermore, the regime established in draft guideline 6 was incomplete, since some breaches of the treaty that were justified by lawful circumstances would in fact not engage the State's responsibility. It would therefore be worth considering redrafting that guideline in order to indicate, for example, that "the law of international responsibility shall apply in the event of a breach of a treaty applied provisionally, to the extent provided by the States who agreed to its provisional application" [*le droit de la responsabilité internationale s'applique aux cas de non-respect d'un traité appliqué provisoirement, dans la mesure prévue par les États ayant convenu de l'application provisoire*].

He recommended that all six draft guidelines submitted in the Special Rapporteur's third report should be referred to the Drafting Committee.

The meeting rose at 1 p.m.