

Document:-  
**A/CN.4/3342**

**Summary record of the 3342nd meeting**

Topic:  
**<multiple topics>**

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107. Mr. MURASE (Special Rapporteur) said that his third report (A/CN.4/692) had discussed both aspects of equity, and the commentary harked back to the debate in plenary meetings and in the Drafting Committee.

108. Sir Michael WOOD suggested the deletion of the words “of equity” in the third sentence.

109. Mr. PETRIČ said that he was firmly in favour of the idea of paying attention to the special situation and needs of developing countries, which formed the subject of the preamble. However, paragraph (1) spoke of intra-generational equity and intergenerational equity and referred to the first annual meeting of the International Labour Organization, held at Washington, D.C. in 1919, at which local industrial conditions, not equity or developing countries, had been discussed. As it stood, paragraph (1) was therefore going too far, although in a spirit of cooperation he would not oppose its adoption.

110. Mr. MURASE (Special Rapporteur) said that he had explained the relevance of the Washington meeting to the notion of equity in his third report. Taking into account all the amendments proposed, he said that a revised version of paragraph (1) might read:

“The fourth preambular paragraph has been inserted in relation to considerations of equity, in particular regarding the special situation and needs of developing countries. One of the first attempts to incorporate such a principle was the first annual meeting of the International Labour Organization in Washington, D.C., in 1919, at which delegations from Africa and Asia succeeded in ensuring the adoption of differential labour standards. Another example is the Generalized System of Preferences elaborated under the United Nations Conference on Trade and Development in the 1970s, as reflected in article 23 of the Commission’s 1978 draft articles on most-favoured-nation clauses.”

*The revised version of paragraph (1) was adopted.*

Paragraph (2)

111. Mr. TLADI suggested that two additional instruments which contained the idea that developing countries deserved special consideration in the context of environmental protection should be included in paragraph (2). He proposed the insertion of a sentence at the end of the paragraph which would read: “The principle is similarly reflected in article 3 of the United Nations Framework Convention on Climate Change and article 2 of the Paris Agreement under the United Nations Framework Convention on Climate Change”. It could be followed by the first sentence of paragraph (4).

112. Sir Michael WOOD, referring to the third sentence, said that the quotation of Principle 6 of the Rio Declaration on Environment and Development<sup>507</sup> should be corrected: it highlighted “[t]he special situation and needs of developing countries”, not the “special needs of developing countries”.

<sup>507</sup> *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, vol. I: *Resolutions adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution I, annex I.

113. Mr. MURPHY said that there seemed to be a disconnect between the third sentence, which referred to Principle 7 of the Rio Declaration on Environment and Development, and paragraph (3). The simplest solution might be to delete the reference to Principle 7.

114. Mr. MURASE (Special Rapporteur) agreed to the correction of the quotation of Principle 6, the deletion of the reference to Principle 7 and the insertion proposed by Mr. Tladi.

115. Sir Michael WOOD said that, like Mr. Tladi, he thought that the first sentence of paragraph (4) should be transposed to paragraph (2).

116. Mr. MURASE (Special Rapporteur) said that he would prefer to keep paragraph (4) as it stood.

117. The CHAIRPERSON suggested that the Commission should pursue its discussion of paragraph (2) at the next meeting.

*It was so decided.*

*The meeting rose at 1.05 p.m.*

## 3342nd MEETING

*Tuesday, 9 August 2016, at 3 p.m.*

*Chairperson:* Mr. Pedro COMISSÁRIO AFONSO

*Present:* Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Hassouna, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kitichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

## *Jus cogens (concluded)\** (A/CN.4/689, Part II, sect. H, A/CN.4/693)

[Agenda item 10]

### REPORT OF THE DRAFTING COMMITTEE

1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to present the interim report of the Drafting Committee on the topic “*Jus cogens*”.

2. Mr. ŠTURMA (Chairperson of the Drafting Committee), introducing the eighth report of the Drafting Committee for the sixty-eighth session of the Commission, said that, following the referral to the Drafting Committee of draft conclusions 1 and 3 on 19 July 2016,<sup>508</sup> the Com-

\* Resumed from the 3323rd meeting.

<sup>508</sup> See the 3323rd meeting, above, para. 83.

mittee had held three meetings on the topic, on 19, 22 and 26 July 2016, respectively. It should be recalled that, while summing up the plenary debate on the topic at the current session, the Special Rapporteur had recommended that the draft conclusions remain before the Drafting Committee pending the submission of further proposals in that regard. The purpose of his statement was therefore simply to inform the Commission of the progress made thus far by the Drafting Committee.

3. The Drafting Committee had proceeded on the basis of the proposals made by the Special Rapporteur in his first report (A/CN.4/693) and had provisionally adopted a text for draft conclusion 1. It had then considered the Special Rapporteur's proposal for draft conclusion 3, which had been renumbered as 2, and had provisionally adopted a text for paragraph 1 of that draft conclusion. It had, however, been unable to conclude its consideration of paragraph 2 of the Special Rapporteur's proposal owing to a lack of time.

4. The Drafting Committee had also examined proposals to change the title of the topic as a whole, and various options had been considered. One of the Committee's concerns had been that the title should follow the Commission's established practice regarding the use of Latin. The Committee had, however, been aware that the question was for the plenary Commission to decide, and it should be recalled that the Special Rapporteur had indicated his intention to consider the issue of the title of the topic in his next report and, possibly, to make a recommendation in that regard.

5. Draft conclusion 1 dealt with the scope of the draft conclusions being developed by the Commission and read: "The present draft conclusions concern the identification and legal effects of peremptory norms of general international law (*jus cogens*)". The Drafting Committee had worked on the basis of the proposal put forward by the Special Rapporteur in his first report. The opening phrase, "The present draft conclusions concern", was the Commission's standard formulation for provisions on scope.

6. The Drafting Committee had settled on the term "identification", which was used in the title adopted for the topic "Identification of customary international law". There had been a proposal to replace the word "identification" with "determination", but the Committee had decided not to accept it, on the grounds that the term "determination" implied the existence of an authoritative determination of the norms in question. It also considered that the term "identification" was more appropriate because it suggested an element of deduction.

7. The words "legal effects" had replaced "legal consequences", as the Drafting Committee was of the view that the concept of "legal effects" had a broader scope and conveyed the idea that the norms in question produced specific legal effects. Other proposals included referring to the "nature" of *jus cogens* and to its "existence and content". The proposals had not, however, garnered sufficient support within the Committee, which took the view that the process of identification was broad and necessarily involved an assessment of the nature and content of *jus cogens*. It was thereby understood that the

draft conclusions would cover both the identification of *jus cogens*, which was based on the law of treaties, and its legal effects, which had to be ascertained outside the law of treaties, including in the law on the responsibility of States for internationally wrongful acts. The Drafting Committee had also simplified the text initially proposed by the Special Rapporteur by replacing the words "flowing from" with "of".

8. The Drafting Committee had also considered a proposal to state simply that "[t]he present draft conclusions concern peremptory norms of general international law (*jus cogens*)", which would not have limited the scope of the draft conclusions. However, it had preferred to specify what the draft conclusions set out to do. At the same time, it was understood that the wording of the draft conclusion meant that the scope of the project was broad.

9. The Drafting Committee had also considered the reference to *jus cogens* itself. Aside from the issue of the title of the topic as a whole, the matter had also been raised in connection with draft conclusion 1. The Drafting Committee had settled on the formulation found in the 1969 Vienna Convention, namely "peremptory norm[s] of general international law (*jus cogens*)". There had been a proposal to place the reference to "*(jus cogens)*" after the words "peremptory norms", rather than after the phrase "peremptory norms of general international law", but the Drafting Committee had decided that such a deviation from the wording of the 1969 Vienna Convention and from the Commission's own past practice, most recently in its work on reservations to treaties, would be difficult to justify.

10. Although the draft conclusion had been adopted with the adjective "general", the use of the term was without prejudice to the possibility of the existence of regional *jus cogens*, an issue to be considered by the Special Rapporteur in a future report. Another suggestion, which had not been adopted, had been to place the adjective "general" in square brackets. Following a proposal made by the Special Rapporteur during the introduction of his first report in the plenary, the Drafting Committee had also replaced the word "rules" with "norms", which was the term used in the 1969 Vienna Convention.

11. The title of the draft conclusion, "Scope", had been proposed by the Special Rapporteur and was the term that tended to be used in similar provisions adopted by the Commission on other topics.

12. The Drafting Committee had then considered the text proposed by the Special Rapporteur in his first report for draft conclusion 3, which it had ultimately renumbered as 2, paragraph 1 of which read: "1. A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

13. With regard to paragraph 1, the Drafting Committee had decided, on the basis of suggestions made in the plenary, to reformulate the provision in order to track the language of the second sentence of article 53 of the 1969

Vienna Convention. It considered that, at that early stage of the work on the topic, the adoption of a definition of *jus cogens* that differed from the one found in the Convention would be difficult to justify.

14. Earlier versions had begun with the words “International law recognizes that” and “For the purposes of the present draft conclusions”, but had not found favour with the Drafting Committee.

15. The main issue discussed had been whether the Drafting Committee could modify the language of the 1969 Vienna Convention, in particular by deleting the words “of States” in the formula “international community of States as a whole”, as proposed by some members. In their view, including the words “of States” did not accord with the approach recently taken by the Commission in its work on other topics, which also took into account the practice of international organizations and other actors. Another concern had been that the words “of States” were based on a conception of the international community that had prevailed at the time of the United Nations Conference on the Law of Treaties but no longer reflected reality.

16. However, the Drafting Committee had not accepted that proposal, on the grounds that reconceiving the idea of “international community” would represent a significant departure from the 1969 Vienna Convention and from the Commission’s previous work on *jus cogens*, including prior understandings on the language employed in the context of *jus cogens* and in connection with *erga omnes* obligations. The prevailing view of the Drafting Committee had been that the Commission’s approach to the issue had not changed since the 1960s and that the meaning given to the phrase “international community of States as a whole” at the 1969 United Nations Conference on the Law of Treaties still applied. Furthermore, as the topic under consideration concerned a source of international law, acceptance and recognition by States remained central to the concept of *jus cogens*. The Drafting Committee thus considered that the deletion of the words “of States” was inadvisable, especially since the work was at an early stage and the Special Rapporteur had not carried out the in-depth research and analysis that would have enabled the plenary Commission to offer clear guidance on the matter.

17. A further possibility considered by the Drafting Committee had been to address the modification of a peremptory norm by a subsequent norm of general international law having the same character, as contemplated in article 53, in a separate draft conclusion. The Drafting Committee had decided against doing so, however, as that was a key element of the definition in the 1969 Vienna Convention and was also accepted under customary international law.

18. The Special Rapporteur’s proposal included a paragraph 2 containing descriptive elements of *jus cogens* and indicating its purpose. Owing to a lack of time, the Drafting Committee had been able to have only an initial exchange of views on the paragraph. At the following session, it would consider, among other options, the possibility of turning paragraph 2, or a new version thereof, into one or more separate draft conclusions. For the record,

it should be noted that paragraph 1 had been accepted by some members on the understanding that the content of paragraph 2 would appear in the draft conclusions in some form.

19. As the draft conclusion had not been finalized, the Drafting Committee had not been able to adopt a title, and would do so at the following session.

20. Before concluding his report, he wished to pay tribute to the Special Rapporteur, Mr. Dire Tladi, whose knowledge of the topic, guidance and cooperation had greatly facilitated the work of the Drafting Committee. He also wished to thank the members of the Committee for their active participation in, and helpful contribution to, the work undertaken at the current session. He also thanked the secretariat for its valuable assistance and said that the text of the Drafting Committee’s report would be posted on the Commission’s website.

### **Protection of the environment in relation to armed conflicts (*concluded*)\* (A/CN.4/689, Part II, sect. E, A/CN.4/700, A/CN.4/L.870/Rev.1, A/CN.4/L.876)**

[Agenda item 7]

#### **REPORT OF THE DRAFTING COMMITTEE (*concluded*)\***

21. The CHAIRPERSON invited the Chairperson of the Drafting Committee to present the interim report of the Drafting Committee on the topic “Protection of the environment in relation to armed conflicts”.

22. Mr. ŠTURMA (Chairperson of the Drafting Committee), introducing the ninth report of the Drafting Committee for the sixty-eighth session of the Commission, said that it was the Committee’s second report on the topic of the protection of the environment in relation to armed conflicts (A/CN.4/L.876) and contained the text of draft principles 4, 6, 7, 8, 14, 15, 16, 17 and 18, which had been provisionally adopted by the Drafting Committee at the current session. It should be recalled that draft principles 1, 2, 5, 8, 9, 10, 11 and 12, which had been technically revised by the Drafting Committee during the current session (A/CN.4/L.870/Rev.1), had been adopted by the Commission at its 3337th meeting, held on 5 August 2016.

23. He wished to pay tribute to the Special Rapporteur, Ms. Marie G. Jacobsson, whose mastery of the topic, guidance and cooperation had greatly facilitated the work of the Drafting Committee. He also thanked the members of the Committee, who had participated actively in its work, and the secretariat, for the invaluable assistance that it had provided.

24. Before introducing the draft principles, he wished to draw members’ attention to the fact that they had been renumbered in accordance with the numbering system decided upon for the draft principles that had been adopted previously. Draft principle 4, which the Special Rapporteur had initially proposed as draft principle I-1 entitled “Implementation and enforcement”, had been

\* Resumed from the 3337th meeting.

placed in Part One, entitled “General principles”, with the title “Measures to enhance the protection of the environment”. Originally consisting of one paragraph, it had been divided into two in order to better reflect the fact that its provisions did not have the same normative status. Its purpose was to ensure that States took effective measures to enhance the protection of the environment in relation to armed conflicts. It had intentionally been drafted in general terms to cover a wide range of legislative, policy-oriented and other measures.

25. Paragraph 1 of draft principle 4 read: “States shall, pursuant to their obligations under international law, take effective legislative, administrative, judicial and other measures to enhance the protection of the environment in relation to armed conflict”. It served to remind States that they needed to take measures to enhance the protection of the environment in relation to armed conflict in order to fulfil their international obligations. Since the reference was to measures that States were obliged to take in any event, the use of the modal verb “shall” had been deemed appropriate, while the words “all necessary steps”, which were unclear, had been deleted. To clarify the scope of paragraph 1, the term “pursuant to their obligations” had been inserted in the first line to emphasize the need for States to comply with their obligations, rather than the need to ensure that the measures to be taken were in conformity with international law, as indicated by the original wording. Lastly, the Drafting Committee had decided that the words “take effective ... measures” better reflected the content of States’ obligations under international law than the words “take ... steps to adopt”.

26. Paragraph 2 read: “In addition, States should take further measures, as appropriate, to enhance the protection of the environment in relation to armed conflict”. The aim was to encourage States to take additional measures, even if they were under no legal obligation to do so. Such measures might include, for example, legislating beyond their obligations or developing programmes, guidelines or codes of practice intended to enhance the protection of the environment in relation to armed conflict. Since the paragraph was less prescriptive than paragraph 1, the word “should” was used.

27. It had been recognized that the measures contemplated in the draft principle were not limited to preventive measures to be adopted in the pre-conflict phase, but were equally relevant to the other phases covered by the topic, namely the phases during and after an armed conflict. Consequently, the word “preventive” had been deleted. The adjective “natural” had been deleted, as the expression “natural environment” was used only in the draft principles that were applicable during an armed conflict. That decision was, however, without prejudice to possible future discussions on whether it would be preferable to speak of “environment” or “natural environment” in all or some of the draft principles. The various measures provided for in the paragraph, and their respective normative status, would be explained in the commentary.

28. Like draft principle 4, draft principle 6, which had formerly been draft principle IV-1, on the rights of indigenous peoples, appeared in Part One, on general principles. It was entitled “Protection of the environment

of indigenous peoples” and comprised two paragraphs, as originally proposed by the Special Rapporteur. Paragraph 1 read: “States should take appropriate measures, in the event of an armed conflict, to protect the environment of the territories that indigenous peoples inhabit.” As indicated by the Special Rapporteur in her third report (A/CN.4/700), the special relationship between indigenous peoples and the natural environment had been recognized, protected and upheld in State practice and international jurisprudence, and in instruments such as the ILO Convention (No. 169) concerning indigenous and tribal peoples in independent countries and the United Nations Declaration on the Rights of Indigenous Peoples.<sup>509</sup> The purpose of paragraph 1 was to recall that measures of protection ought to be taken by States in the event of an armed conflict. Since such protection was not temporally limited and applied generally in the event of an armed conflict, the Drafting Committee had considered it appropriate to place the draft principle under part one, on general principles. Existing instruments defined the scope of application *ratione loci* of that protection in different ways. Moreover, the rights of indigenous peoples over certain lands or territories might be subject to different legal regimes in different States. The Drafting Committee had chosen to follow the wording of article 7 of the Convention, which referred to the environment of the territories that indigenous peoples inhabited, on the understanding that the terminological differences that existed in that regard would be explained in the commentary.

29. Paragraph 2 read: “After an armed conflict that has adversely affected the environment of the territories that indigenous peoples inhabit, States should undertake effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and in particular through their own representative institutions, for the purpose of taking remedial measures.” Its purpose was to facilitate the adoption of remedial measures in the event that an armed conflict adversely affected the environment of the territories that indigenous peoples inhabited. In such instances, States were to engage in effective consultations and cooperation with the indigenous peoples concerned. The Special Rapporteur had underlined those two dimensions in her original text. At her suggestion, the Drafting Committee had added, in paragraph 2, a reference to the fact that such consultations and cooperation should be undertaken through appropriate procedures and, in particular, through indigenous peoples’ own representative institutions. That clarification had been made to acknowledge the fact that the procedures for consultation and cooperation, and the modes of representation of indigenous peoples, varied from one State to another.

30. Draft principle 7, formerly draft principle I-3 entitled “Status-of-forces and status-of-mission agreements”, had also been placed in Part One, on general principles. It read: “States and international organizations should, as appropriate, include provisions on environmental protection in agreements concerning the presence of military forces in relation to armed conflict. Such provisions may include preventive measures, impact assessments, restoration and clean-up measures.”

<sup>509</sup> General Assembly resolution 61/295 of 13 September 2007, annex.

31. The draft principle reflected an emerging trend whereby provisions on environmental protection were included in agreements concerning the presence of military forces concluded by States and international organizations with host States. In the Special Rapporteur's original proposal, the issue had been addressed in the specific context of status-of-forces and status-of-mission agreements. Provisions on environmental protection could, of course, be found in such agreements, but that was not usually the case, since the agreements in question did not address the conduct of forces and did not all concern situations of armed conflict. The Drafting Committee had therefore decided to recast the provision in more general terms and to refer instead to "agreements concerning the presence of military forces in relation to armed conflict", which encompassed agreements whose specific designation and purpose could vary, and that might, in some circumstances, include status-of-forces and status-of-mission agreements. The words "in relation to armed conflict" had been added to emphasize the direct link between the agreements and situations of armed conflict, and to make clear that the draft principle did not cover all military activities. Furthermore, given the urgency with which agreements of that kind were sometimes concluded, the Drafting Committee considered that some flexibility was needed, and accordingly had added the words "as appropriate", which reflected both the specific situations in which such agreements were concluded and the fact that environmental protection provisions could be more relevant in some circumstances than in others. While recognizing that the draft principle did not correspond to any specific international obligation, the Drafting Committee nevertheless wanted to signal the desirability of including such provisions in the agreements concluded by States and international organizations. For the sake of consistency, the term "should", which appeared in other draft principles, had been used. For clarity, the words "environmental regulations and responsibilities", which had been included in the original proposal, had been changed to "environmental protection", which should be understood as encompassing measures related to both regulations and responsibilities. The second sentence, which remained as originally proposed, described the measures that the environmental protection provisions could address. The commentary, which would cite other examples, would specify that the list was not exhaustive. Lastly, in light of the changes made to the text of the draft principle, the title had been changed to "Agreements concerning the presence of military forces in relation to armed conflict".

32. Draft principle 8, formerly draft principle I-4, concerned peace operations and had been placed in Part One, on general principles. It read: "States and international organizations involved in peace operations in relation to armed conflict shall consider the impact of such operations on the environment and take appropriate measures to prevent, mitigate and remediate the negative environmental consequences thereof." The provision reflected the growing recognition, on the part of States and international organizations, of the need to consider the impact of peace operations on the environment and to take measures to prevent, mitigate and remediate any negative consequences. It focused on activities that could negatively affect the environment during a peace operation undertaken in relation to an armed conflict.

33. Given that there was no definition of the term "peace operations" and that the term was used by the United Nations to denote all sorts of operations, it had been recognized that such operations were to be understood from an equally broad perspective in the context of the draft principle, and were not all directly linked to an armed conflict. Consequently, the Drafting Committee had inserted the words "in relation to armed conflict" after "peace operations". Several proposals had been made with the aim of specifying that the draft principle related to multilateral operations, but, since the general understanding of "peace operations" was that they concerned operations of that kind, the Drafting Committee had not seen fit to mention it expressly in the draft principle. The commentary would elaborate on the different kinds of operations encompassed by the term.

34. The modal verb "shall", which appeared in the text originally proposed by the Special Rapporteur, had been retained, in light of the vast practice that existed in that field, in particular within the United Nations. However, as that practice was based mainly on general policy considerations and did not reflect any existing legal obligation, the Drafting Committee had deemed it appropriate to make the provision less prescriptive by opting for the verb "consider". In addition, it had replaced the term "all necessary measures" with "appropriate measures" to reflect the fact that most of the practice related to the need to consider the impact of peace operations on the environment, rather than the need to take measures to prevent, mitigate and remediate the negative environmental consequences of those operations. It would be clarified in the commentary that the measures in question would depend on the context of the operation, in particular whether they related to the phase before, during or after a conflict. It would also be indicated that, in line with the Drafting Committee's understanding, the draft principle, by referring to preventive measures, also encompassed the reviews undertaken of concluded operations for the purposes of determining the negative environmental consequences that they might have had and of preventing future operations from having similar consequences. The word "international" had been added before "organizations" for the sake of consistency with the other draft principles. The title of the draft principle had been kept as "Peace operations", as originally proposed.

35. Draft principle 14, which the Special Rapporteur had initially proposed under the title "Draft principle III-1—Peace agreements", had been placed in Part Three of the draft principles, entitled "Principles applicable after an armed conflict". It had originally consisted of only one paragraph; the Drafting Committee had decided to add a second one on the facilitating role of various actors in peace processes to reflect the views expressed in the plenary debate. The purpose of the draft principle was to demonstrate that environmental considerations were being taken into consideration to a greater extent in the context of contemporary peace processes, including through the regulation of environmental matters in peace agreements.

36. Paragraph 1 provided that "[p]arties to an armed conflict should, as part of the peace process, including where appropriate in peace agreements, address matters relating to the restoration and protection of the

environment damaged by the conflict”. The formulation highlighted the purpose of the draft principle, namely to address the peace process as a whole instead of focusing on peace agreements, as originally proposed. It had been acknowledged that not every armed conflict resulted in a peace agreement and that the successful completion of a peace process involved several steps and the adoption of various instruments. The conclusion of peace agreements, which might take place several years after the cessation of hostilities, if at all, represented only one aspect of the process. For that reason, and to avoid any temporal lacunae, the expression “as part of the peace process” had been employed. It had also been decided to add the phrase “including where appropriate in peace agreements”, in order not to lose sight of the importance of peace agreements in that context. The expression “where appropriate” signalled that, depending on the circumstances, if a peace agreement was concluded, it should address environmental considerations.

37. The term “parties” indicated that the draft principle addressed not only States parties to an armed conflict but also non-State actors. Moreover, the draft principles covered both international and non-international armed conflicts.

38. The Drafting Committee considered it important to strengthen the normative value of the obligation, while also recognizing that it did not correspond to any existing legal obligation. The words “are encouraged” had thus been replaced with “should”, which had also made it possible to harmonize the text with the other draft principles, as had the addition of the term “armed” before “conflict” to clarify the scope of the draft principle. Finally, the Drafting Committee considered that, in the last phrase, “address” would be a more appropriate verb than “settle”, which had originally been proposed and might be understood to include dispute settlement, a topic which the draft principle was not intended to cover.

39. During the plenary debate, several members had proposed that the draft principle emphasize the need to include, in peace agreements, questions concerning the allocation of responsibility and the payment of compensation for damage caused to the environment. However, it had also been underlined that the appropriateness of dealing with such questions in a peace process depended heavily on the circumstances surrounding the conflict. Since the questions of responsibility and compensation might be relevant for several draft principles, it had been decided that they could be considered separately, once the Commission had agreed on all the draft principles. The commentary would nevertheless clarify the matter and specify that the draft principle was without prejudice to the allocation of responsibility and questions of compensation.

40. Paragraph 2 established that “[r]elevant international organizations should, where appropriate, play a facilitating role in this regard”. The aim was to reflect the important role that international organizations could play in facilitating a peace process and ensuring that environmental considerations were taken into account. The Drafting Committee had decided to refer to “[r]elevant international organizations” to signal, in particular, that not all organizations were suited to playing that role. In

addition, the expression “where appropriate” indicated that the involvement of international organizations was not always required, or even wanted, by the parties.

41. Finally, “Peace agreements”, the title that had originally been proposed for draft principle 14, had been replaced with “Peace processes” to reflect the broad scope of application of the draft principle.

42. Draft principle 15, which the Special Rapporteur had initially proposed under the title “Draft principle III-2—Post-conflict environmental assessments and reviews”, had also been placed in Part Three of the draft principles, entitled “Principles applicable after an armed conflict”. It had consisted of two paragraphs, but the Drafting Committee had decided to retain only one, as it considered that the elements mentioned in the second paragraph, which concerned reviews of the impact of peace operations conducted for the purpose of preventing any negative environmental consequences in the context of future operations, pertained to draft principle 8 on peace operations, which had already been adopted.

43. Draft principle 15 read: “Cooperation among relevant actors, including international organizations, is encouraged with respect to post-armed conflict environmental assessments and remedial measures.” It was the result of substantial changes that had been made to take into account the concerns expressed during the plenary debate and to ensure greater clarity. Its purpose was to encourage relevant actors to cooperate in order to ensure that, in post-conflict situations, environmental assessments could be carried out and remedial measures could be taken.

44. The concerns raised during the plenary debate with regard to the stakeholders referred to in the draft principle had been reiterated in the Drafting Committee. While it had been recognized that the aim of the draft principle was to cover both State and non-State actors, the expression “States and former parties” in the original version of the draft principle had not seemed clear and had raised a temporal problem. In order to address those concerns while maintaining a broad scope, the Drafting Committee had decided to use the passive voice and to replace the expression “States and former parties” with “[r]elevant actors”, which indicated that a wide range of actors, including international organizations and non-State actors, had a role to play with regard to environmental assessments and remedial measures. The words “are encouraged”, as proposed by the Special Rapporteur, were considered appropriate given the scarcity of practice in that field, and had thus been retained.

45. Some concerns had been raised that “environmental assessments” might be confused with “environmental impact assessments”, which were to be undertaken as preventive measures, but it had been acknowledged that the term used in the original version of the draft principle was a term of art and could be retained. The commentary would clarify the distinction between the two concepts and explain the exact meaning of the term “environmental assessments” in the context of the draft principle. In order to align the text with the other draft principles, in particular draft principle 2, the Drafting Committee had

decided to replace the word “recovery” with “remedial”. Lastly, the title of draft principle 15 had been modified slightly from the original version to take into account the modifications made in the body of the text, and had become “Post-armed conflict environmental assessments and remedial measures”.

46. The Special Rapporteur had initially proposed that draft principle 16 be entitled “Draft principle III-3 – Remnants of war” and should be placed in the part dealing with the post-conflict phase. The Drafting Committee had worked on the basis of a revised proposal by the Special Rapporteur that had sought to take into account comments made during the plenary debate. While the original title proposed by the Special Rapporteur had been retained, the draft principle as provisionally adopted contained three paragraphs.

47. Paragraph 1 read: “After an armed conflict, parties to the conflict shall seek to remove or render harmless toxic and hazardous remnants of war under their jurisdiction or control that are causing or risk causing damage to the environment. Such measures shall be taken subject to the applicable rules of international law.”

48. The original version had included the expression “Without delay after the cessation of active hostilities”, which had been problematic. The Drafting Committee had decided to retain the clearer expression “After an armed conflict”, which had appeared in the revised version of the draft principle.

49. In its current form, paragraph 1 defined the scope of application *ratione personae* of the draft principle as being the “parties to the conflict”, unlike the original text, which had not spelled out explicitly to whom the obligation was addressed.

50. The obligation set out in paragraph 1 (“seek to remove or render harmless toxic and hazardous remnants of war”) was cast in more general terms than the original proposal, paragraph 1 of which now formed part of paragraph 3. Given that the second sentence provided that such measures should be taken “subject to the applicable rules of international law”, it had been decided that the commentary would clarify the meaning of the phrases “toxic and hazardous remnants of war” and “remove or render harmless” in the context of those applicable rules. The Drafting Committee considered that the verb “seek”, which denoted an obligation of conduct, was preferable to the verb “attempt”, which had been used in the revised proposal and gave the impression that the obligation was optional.

51. The Drafting Committee had also discussed the meaning to be given to the expression “under their jurisdiction or control”. The reference was intended to cover areas that were under the *de jure* and *de facto* control of the parties. The draft principle was formulated in general terms to cover all remnants of war, whether on land or at sea.

52. Paragraph 2 had barely been changed. It read: “The parties shall also endeavour to reach agreement, among themselves and, where appropriate, with other States and with international organizations, on technical and material

assistance, including, in appropriate circumstances, the undertaking of joint operations to remove or render harmless such toxic and hazardous remnants of war.”

53. The Drafting Committee had decided to remove the expression “At all times necessary”, which it had deemed not useful and liable to give rise to confusion regarding the three phases covered by the topic. The obligation to “endeavour to reach agreement ... on the provision of technical and material assistance” had been tempered by the removal of the words “the provision of” to allow a certain degree of flexibility with regard to the various arrangements that might arise.

54. Paragraph 3 contained some elements from paragraph 1 as originally proposed by the Special Rapporteur and formed a “without prejudice” clause. It read: “Paragraphs 1 and 2 are without prejudice to any rights or obligations under international law to clear, remove, destroy or maintain minefields, mined areas, mines, booby-traps, explosive ordnance and other devices.” It meant that existing obligations under the various legal regimes would continue to prevail.

55. The Drafting Committee had decided to delete the expression “without delay after the cessation of active hostilities”, which had appeared in the revised proposal, as it had legal implications regarding the termination of hostilities and complicated the work of the parties.

56. Draft principle 17, formerly draft principle III-4, entitled “Remnants of war at sea”, had been placed in the part dealing with the principles applicable after an armed conflict. While its title had not changed, it had originally comprised two paragraphs, the second of which had been deleted on the understanding that the issues raised therein would be addressed in the context of access to and sharing of information, as proposed by the Special Rapporteur. Accordingly, it read: “States and relevant international organizations should cooperate to ensure that remnants of war at sea do not constitute a danger to the environment.”

57. While draft principle 16 concerned remnants of war, draft principle 17 dealt more specifically with remnants of war at sea, including their long-lasting effects on marine environments. It applied to “States and relevant international organizations”. The Drafting Committee had wondered whether it should mention the “parties to the conflict”, as in draft principle 16, but had decided not to do so on the grounds that, in that particular case, the parties to the conflict might no longer exist, or the affected area might belong to, or fall under the jurisdiction of, a State that had not been a party to the conflict when it had taken place. The draft principle therefore needed to apply more generally to “States”. The Drafting Committee had also discussed whether, as in draft principle 16, the scope of application should be limited to remnants of war “under [the] jurisdiction or control” of States. Given the nature of the regime under the law of the sea, it had not seen fit to do so.

58. Since the draft principle dealt with very specific issues, the Drafting Committee had decided to limit its scope of application to “relevant” international organizations. It had also elected to use the word “should”, which



was less prescriptive, given that practice in the area in question was not yet firmly established. The reference to “at sea” had been added in the text of the draft principle for the sake of clarity. Moreover, the Drafting Committee had decided to delete the phrase “public health or the safety of seafarers” to limit the scope of the draft principle to the topic under consideration, it being understood that the effects of remnants of war on public health and the safety of seafarers would be addressed in the commentary.

59. Draft principle 18, formerly draft principle III-5 entitled “Access to and sharing of information”, now comprised two paragraphs, as the Drafting Committee had adopted an additional paragraph proposed by the Special Rapporteur in light of the plenary debate, and was retitled “Sharing and granting access to information”.

60. Although it was closely linked to the duty to cooperate, it was worded in such a way as to focus on sharing and granting access to information. It had been reformulated in order to apply more explicitly to the post-conflict phase, with the temporal scope being highlighted through the reference to “remedial measures”, which were to be taken “after an armed conflict”.

61. Different points of view had been expressed within the Drafting Committee regarding the subjects of the obligation set out in draft principle 18. After considering the appropriateness of referring exclusively to the parties to the conflict, the Drafting Committee had decided it was preferable to refer generally to States, as States that were not parties to a conflict might have information useful for the taking of remedial measures that could be provided to other States or to international organizations. Moreover, remedial measures could be taken long after the end of a conflict. The members of the Drafting Committee were also of the opinion that the obligation set out in the draft principle applied only to States, and that non-State actors that might be parties to an armed conflict were excluded from the scope of paragraph 1. They had also decided to retain the reference to international organizations, which had already appeared in the original wording, and to add the qualifier “relevant”. International organizations commonly played a role in armed conflicts, notably through peacekeeping operations, and might provide information to facilitate the taking of remedial measures.

62. States or international organizations could share such information or grant access to it. While the term “share” referred to the direct exchange of information among States and international organizations, the words “grant access” essentially denoted the act of allowing individuals to access such information. The expression “in accordance with their obligations under international law” referred to treaties setting out obligations that were relevant in the context of the protection of the environment in relation to armed conflicts. Those obligations, including the duty to keep a record of the placement of landmines, might be important for the purpose of taking remedial measures after an armed conflict.

63. Paragraph 2 contained a new provision proposed by the Special Rapporteur in light of the plenary debate. Inspired by previous work of the Commission, in particular on the topics “Law of the non-navigational uses

of international watercourses”<sup>510</sup> and “Shared natural resources (law of transboundary aquifers)”,<sup>511</sup> it provided for an exception to the obligation set out in paragraph 1. That exception, which applied to situations in which the information in question was vital to the national defence or security of the State or international organization concerned, was not unqualified. Indeed, the second sentence limited its scope by providing that, within the limits necessary for the protection of such information, States and international organizations should do their utmost to cooperate in good faith with a view to providing as much information as possible under the circumstances.

64. To conclude, he noted that, at that stage, the Commission was not being requested to take a decision on the draft principles, which had been presented to it for information purposes only. It was the wish of the Drafting Committee that the Commission provisionally adopt the draft principles at a later stage, once the relevant commentaries had been submitted to it.

65. The CHAIRPERSON thanked the Chairperson of the Drafting Committee and said he took it that the Commission wished to take note of the draft principles on the protection of the environment in relation to armed conflicts (A/CN.4/L.876).

*It was so decided.*

66. Mr. KAMTO asked how the Commission intended to pursue its consideration of the topic after the departure of the Special Rapporteur, who would leave office at the end of the current session. Were there any plans to reopen the debate on the draft principles, and would the new special rapporteur prepare the commentary to the draft principles as they stood or contribute his or her own perspective?

67. Ms. JACOBSSON (Special Rapporteur) said that it would be for the newly elected membership of the Commission to decide how to proceed. She had, however, drawn up a set of informal draft commentaries that she would send to the secretariat to facilitate the work of the new special rapporteur.

68. Mr. CANDIOTI said that he wished to congratulate the Chairperson of the Drafting Committee, the Drafting Committee itself and the Special Rapporteur on their work. He noted that draft principle 3 was missing from document A/CN.4/L.870/Rev.1, with ellipsis points marking the spot where it should be. Did that mean that the draft principle had not yet been formulated?

69. It was explained in a footnote that the ellipses denoted that the insertion of another draft principle in that place was anticipated. The footnote should be more specific, in particular by indicating that the draft principle, which had not yet been formulated, would concern the use of terms.

<sup>510</sup> The draft articles on the law of the non-navigational uses of international watercourses adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 1994*, vol. II (Part Two), pp. 89 *et seq.*, para. 222.

<sup>511</sup> The draft articles on the law of transboundary aquifers adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2008*, vol. II (Part Two), pp. 19 *et seq.*, paras. 53–54. See also General Assembly resolution 63/124 of 11 December 2008, annex.

70. Mr. LLEWELLYN (Secretary to the Commission) said that the draft principle had not been referred to the Drafting Committee, which was why there was no mention of either a draft principle 3 or the use of terms.

71. Ms. JACOBSSON (Special Rapporteur) said that she had asked that the draft principle on the use of terms should not be referred to the Drafting Committee. The Commission was to revisit the issue at a later stage, as indicated by the Chairperson of the Drafting Committee in his previous report.

72. Mr. CANDIOTI said that he wished to draw attention to the numbering of the draft principles, which no longer appeared to follow a logical sequence when a draft principle was not referred to the Drafting Committee. The text in question jumped from draft principle 2 to draft principle 4. He doubted whether it was advisable to proceed in that manner. During the consideration of the topic “*Jus cogens*”, a decision had been taken not to refer draft conclusion 2 to the Drafting Committee, and draft conclusion 3 had then become draft conclusion 2. Perhaps the Commission should systematically take that approach.

73. Ms. JACOBSSON (Special Rapporteur) said that she understood Mr. Candiotti’s point of view. However, given that the paragraphs had already been renumbered twice, she would be very reluctant to renumber them yet again. She would prefer to leave the issue to the discretion of her successor.

74. Mr. TLADI said that he did not think that the Commission could decide on the matter at that stage, since the draft principles were still before the Drafting Committee. It would be preferable for the Drafting Committee to return to the issue at the following session, when it considered the draft principles.

75. Ms. JACOBSSON (Special Rapporteur) said that draft principle 3 had not been referred to the Drafting Committee. It would be for the newly elected membership of the Commission to decide whether it wished to include a draft principle on definitions or the use of terms. It would therefore be preferable not to make any changes for the time being.

76. The CHAIRPERSON asked how the informal draft commentaries prepared by the Special Rapporteur would be submitted to the newly elected membership of the Commission.

77. Ms. JACOBSSON (Special Rapporteur) said that she planned to send the draft commentaries to the secretariat. It would not be an official document, but merely food for thought, which the newly elected membership of the Commission and the new special rapporteur would be free to take into account or to discard. She nevertheless hoped that it would prove useful.

78. Mr. CANDIOTI said that the outcome of the work carried out by Ms. Jacobsson and the Drafting Committee should be included, at least in a footnote, in the Commission’s annual report.

**Provisional application of treaties (concluded)\* (A/CN.4/689, Part II, sect. G, A/CN.4/699 and Add.1, A/CN.4/L.877)**

[Agenda item 5]

REPORT OF THE DRAFTING COMMITTEE

79. The CHAIRPERSON invited the Chairperson of the Drafting Committee to present the interim report of the Drafting Committee on the topic “Provisional application of treaties”.

80. Mr. ŠTURMA (Chairperson of the Drafting Committee) said that the Committee had held eight meetings on the topic “Provisional application of treaties”, on 5, 11, 12, 13, 26 and 27 July 2016, with the primary focus being to complete the consideration of the draft guidelines referred to the Drafting Committee in 2015. At the Commission’s 2015 session, the Chairperson of the Drafting Committee, Mr. Mathias Forteau, had introduced draft guidelines 1 to 3 as provisionally adopted by the Drafting Committee.<sup>512</sup>

81. At the current session, a further five draft guidelines had been provisionally adopted by the Drafting Committee. The entire set of draft guidelines, namely draft guidelines 1 to 3, provisionally adopted in 2015, and draft guidelines 4, 6, 7, 8 and 9, provisionally adopted at the current session, appeared in the report of the Drafting Committee (A/CN.4/L.877).

82. The Drafting Committee had decided to defer its consideration of draft guideline 5 to the following session. The Special Rapporteur had proposed a new version of that text which dealt with the possibility of provisionally applying a treaty by means of a unilateral declaration.

83. Draft guideline 4, entitled “Form”, concerned the forms of agreement on the basis of which a treaty, or part of a treaty, could be provisionally applied, other than when the treaty itself so provided. Accordingly, it expanded on the phrase “in some other manner it has been so agreed” at the end of draft guideline 3, which was drawn from article 25, paragraph 1 (b), of the 1969 Vienna Convention. Two categories were envisaged. Under the first subparagraph, provisional application could take place by means of a “separate agreement”, while the second subparagraph established that provisional application could take place through “any other means or arrangements”, of which some examples were provided. After considering the possibility of incorporating the content of the draft guideline into a second paragraph of draft guideline 3 or into the commentary, the Drafting Committee had decided to retain a separate draft guideline.

84. That provision had started out as the draft guideline 2 proposed by the Special Rapporteur in his third report<sup>513</sup> and considered by the Commission at its sixty-

\* Resumed from the 3329th meeting.

<sup>512</sup> See *Yearbook ... 2015*, vol. I, 3284th meeting, pp. 304–306, paras. 14–27.

<sup>513</sup> See *ibid.*, vol. II (Part One), document A/CN.4/687, p. 73, para. 131.

seventh session, held in 2015. The Drafting Committee had worked on the basis of a series of revisions proposed by the Special Rapporteur at Committee meetings during the previous and current sessions, taking into account the views expressed in the Commission's debates in 2015 and the suggestions made by Committee members. The Committee had focused on aligning the proposed text with the provisions adopted provisionally in 2015, particularly draft guideline 3, in order to minimize any overlap, and with the wording of article 25 of the 1969 Vienna Convention. The opening phrase "In addition to the case where the treaty so provides" was a direct reference to the wording of draft guideline 3, while the phrase "the treaty so provides" tracked the language of article 25 of the Convention.

85. Subparagraph (a) envisaged the scenario of provisional application by means of an agreement separate from the treaty itself. The word "agreement" referred to an instrument, including in the form of a treaty, which was distinct from the underlying agreement, expressing the mutual consent of the parties to apply the treaty provisionally. The Drafting Committee had preferred the word "agreement", which it had deemed more flexible and comprehensive than the word "instrument".

86. Subparagraph (b) envisaged the possibility that provisional application could also be agreed through "means or arrangements" other than a separate instrument, which broadened the range of possibilities for reaching an agreement to apply a treaty provisionally and confirmed the inherent flexibility of provisional application. By way of illustration, the second part of the subparagraph gave two examples drawn from recent practice: a resolution adopted by an international organization or at an intergovernmental conference. Other examples would be cited in the commentary, and might include declarations by States.

87. Draft guideline 6, which was entitled "Commencement of provisional application" and dealt with the temporal aspect of provisional application, was based on the draft guideline 3 proposed by the Special Rapporteur in his third report.<sup>514</sup> The Drafting Committee had worked on the basis of a revised proposal by the Special Rapporteur, which took into account the various proposals made during the plenary debate in 2015, and which the Drafting Committee had subsequently refined and modelled on article 24, paragraph 1, of the 1969 Vienna Convention, on entry into force.

88. The first part of the sentence made it plain that throughout the draft guidelines, provisional application concerned a treaty or a part of a treaty, unless otherwise stipulated.

89. The second part of the sentence had two components. The first was the expression "pending its entry into force", which had been added in order to align the text with that of draft guideline 3, thereby referring to the understanding reached in 2015 that the words "entry into force" denoted both the entry into force of the treaty and entry into force for the State. The Drafting Committee had preferred that solution, which, it thought, offered greater

clarity than leaving the matter to the general rule in draft guideline 3 and including a separate draft guideline on the scope *ratione personae* of the draft guidelines specifying between which entities, States or international organizations a treaty could be provisionally applied.

90. The second component referred not only to States but also to international organizations, in keeping with the Drafting Committee's position that the draft guidelines should encompass both treaties between States and international organizations, and treaties between international organizations. The deliberately general wording "between" States or international organizations was meant to cover a variety of possible scenarios, including, for example, provisional application between a State for which the treaty had entered into force and another State or an international organization for which the treaty had not entered into force.

91. The phrase "takes effect on such date, and in accordance with such conditions and procedures" addressed the triggering of provisional application. After considering the use of the verb "commences", the Drafting Committee had decided to align the text with that of the 1969 Vienna Convention, which, in article 68, used the term "takes effect". It referred to the legal effect in relation to the State that elected to apply the treaty provisionally. An earlier version of the draft guideline had expressly mentioned the various modes of expressing consent to be bound by a treaty, along the lines of article 11 of the Convention. The Committee, judging that this would make the text cumbersome, had preferred to revert to the simpler structure of article 24, paragraph 1, of the Convention, on the understanding that the provision no longer dealt only with the temporal aspect of provisional application but also covered, in part, the legal effects of that application, without prejudice to the adoption of a further provision on the legal effects of provisional application as draft guideline 7.

92. The phrase "as the treaty provides or as are otherwise agreed" made clear that the agreement to apply a treaty provisionally was based on an underlying treaty or a separate agreement to permit provisional application, and, accordingly, was subject to the conditions and procedures established in that treaty or separate agreement.

93. The origins of draft guideline 7, entitled "Legal effects of provisional application", lay in the draft guideline 4 proposed by the Special Rapporteur in his third report.<sup>515</sup> The Drafting Committee had proceeded on the basis of a revised proposal by the Special Rapporteur that included a number of additional paragraphs covering several aspects raised in the plenary debate in 2015, but had ultimately decided to adopt a provision comprising a single paragraph, after reflecting on the two types of "legal effects" that might be envisaged: the legal effects of the agreement to apply the treaty provisionally and the substantive legal effects of the treaty being applied provisionally. Its view was that the "legal effects" dealt with by the draft guideline should be limited to those stemming from the substantive obligations arising from the treaty or the part of the treaty that was being applied provisionally.

<sup>514</sup> *Ibid.*

<sup>515</sup> *Ibid.*

A treaty that was being applied provisionally would be deemed to bind the parties applying it provisionally as soon as the provisional application commenced. Accordingly, the draft guideline did not refer to the legal effects of the agreement on provisional application.

94. The basic rule set out in the first part of the draft guideline was that the provisional application of a treaty or a part thereof produced the same legal effects as if the treaty were in force between the States or international organizations concerned. Accordingly, that was the presumption that must be made when, as was frequently the case, a treaty or separate agreement was silent on the legal effects of provisional application.

95. That idea was, however, qualified by the concluding phrase “unless the treaty provides otherwise or it is otherwise agreed”, which confirmed that this basic rule was not absolute and was subject to the treaty or separate agreement, which might provide otherwise. The Drafting Committee felt that the provision as a whole reflected existing State practice.

96. The formulation of the draft guideline had then been aligned with that of the draft guidelines adopted previously and with the 1969 Vienna Convention. The opening phrase “The provisional application of a treaty or a part of a treaty” echoed the wording at the beginning of draft guideline 6. The verb “produces”, which already appeared in guideline 2.6.13 of the Guide to Practice on Reservations to Treaties,<sup>516</sup> had been preferred to “creates”, the term initially chosen. Similarly, a decision had been taken to replace the expression “rights and duties” with “legal effects”, given that rights and obligations were not always created and that it all depended on the treaty. The Drafting Committee had also decided against a proposal to specify that the draft guideline concerned legal effects “under international law”, deeming it unnecessary on the ground that, as was customary, the Commission’s work dealt exclusively with international law.

97. The Drafting Committee had also decided not to replace the adjective “same”, to qualify the legal effects, with the term “full”, which appeared in the relevant case law, out of concern that the latter term was less clear in the context of the draft guidelines. The phrase “as if the treaty were in force”, which was central to the draft guideline, alluded to the effects that the treaty would produce if it were in force for the State or international organization in question. The phrase “between the States or international organizations concerned” had been inserted in order to align the provision with draft guideline 6. The concluding phrase, “unless the treaty provides otherwise or it is otherwise agreed”, set out the condition on which the general rule was based.

98. In response to a proposal made in the plenary debate in 2015, the Special Rapporteur had proposed the addition of a paragraph to the draft guideline to clarify that the provisional application of a treaty could not result in the modification of its content. However, the Drafting Committee was of the view that the comprehensive new

wording adopted in 2016 was a sufficient safeguard in that respect and that it was implicit in the draft guideline that the act of applying the treaty provisionally did not affect the rights and obligations of other States. The draft guideline should not, however, be understood as limiting the freedom of States to amend or modify the treaty.

99. As indicated by its title, “Responsibility for breach”, draft guideline 8 dealt with the question of responsibility for the breach of an obligation arising under a treaty or a part of a treaty that was being applied provisionally. The Drafting Committee had again proceeded on the basis of a text proposed by the Special Rapporteur, which had itself been based on the revised version of draft guideline 6 as presented in the third report.<sup>517</sup> The new text proposed by the Special Rapporteur had taken into account several proposals made during the plenary debate in 2015 and comprised two paragraphs, the first dealing with the consequences of the breach of an obligation to apply a treaty provisionally, and the second with the termination or suspension of a treaty as a consequence of a breach.

100. The Drafting Committee had first considered whether it was necessary to have a provision on responsibility, since the 1969 Vienna Convention did not contain such a clause. The prevailing view had been that the scope of the draft guidelines was not necessarily limited to that of the Convention and that it was therefore useful to devote a draft guideline to a key legal consequence of the provisional application of a treaty.

101. The Drafting Committee had focused on the content of the first paragraph and, as it had done with draft guideline 7, had reoriented it to deal with the breach of an obligation arising under a treaty or a part thereof that was being applied provisionally, as opposed to the breach of an agreement to apply the treaty provisionally. The agreement or arrangement to apply the treaty provisionally was not covered by draft guideline 8, but was regulated by the general regime of the law of treaties, as would be explained in the commentary.

102. The Drafting Committee had rejected a proposal to insert the opening phrase “Unless the treaty otherwise provides or the negotiating States have otherwise agreed”, which appeared in some of the draft guidelines adopted at the current session, for fear that it might have unintended consequences for the law of international responsibility.

103. The Drafting Committee had also considered the advisability of referring to an obligation arising under “part of” a treaty, since the view had been expressed that, by definition, such an obligation arose under the treaty itself. However, the Committee had decided to retain the reference in order to make it clear that, when a part of a treaty was applied provisionally, only that part was susceptible to a breach within the meaning of the draft guideline.

104. The wording of the draft guideline had been aligned with the text of the 2001 articles on the responsibility of

<sup>516</sup> See *Yearbook ... 2011*, vol. II (Part Three) and Corr.1–2, pp. 167–169.

<sup>517</sup> See *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/687, p. 73, para. 131.

States for internationally wrongful acts.<sup>518</sup> For example, the phrase “obligation arising under” and the verb “entails” had been drawn from the 2001 articles, while the concluding phrase “in accordance with the applicable rules of international law” was a reference to, *inter alia*, those articles. There had been a proposal, in that regard, to refer to the responsibility of “a State”, thereby drawing a distinction between States and international organizations, based on the recognition that the 1986 Vienna Convention had not been as widely accepted as the 1969 Vienna Convention. However, the Drafting Committee had decided to leave the matter open and to allow it to be regulated by “the applicable rules of international law”.

105. As to the second paragraph proposed by the Special Rapporteur, on the termination or suspension of a treaty as a consequence of its breach, the Drafting Committee’s preliminary view had been that the matter was distinct from the question of responsibility and should be dealt with on its own, possibly in a separate draft guideline, on the basis of a further report by the Special Rapporteur on other methods by which provisional application could be terminated. It had thus deferred its decision until the following session. It had also deemed it more logical to place the draft guideline, which had initially followed what had become draft guideline 9, after draft guideline 7 on legal effects.

106. For draft guideline 9, entitled “Termination upon notification of intention not to become a party”, the Drafting Committee had worked on the basis of a revised proposal by the Special Rapporteur that had drawn on draft guideline 5 proposed in the third report.<sup>519</sup> The various proposals by the Special Rapporteur had envisaged the termination of provisional application in two scenarios: when the treaty entered into force for the State concerned and when the intention not to become a party to the treaty was communicated to the other parties concerned. The Drafting Committee had decided to narrow the scope of the draft guideline to the latter scenario by tracking the wording of article 25, paragraph 2, of the 1969 Vienna Convention, but with an additional reference to international organizations and to the provisional application of a part of a treaty.

107. Regarding the termination of provisional application by means of the entry into force of the treaty itself, the Drafting Committee had noted that this eventuality was implicitly covered in draft guideline 6 through the phrase “pending its entry into force”. The complexity of the problem stemmed from the need to capture the multitude of legal arrangements that might exist between the State or international organization provisionally applying the treaty for which the latter had entered into force and other States or international organizations that were provisionally applying the treaty, a situation that was not provided for in article 25, paragraph 2, of the 1986 Vienna Convention. One solution could have been to introduce, in the *chapeau* of the draft guideline, the phrase “pending its

entry into force between the States or international organizations concerned”, which was found in draft guideline 6. Another proposal had been to indicate in the commentary that, in accordance with draft guideline 6, provisional application continued until the treaty entered into force for the State applying it provisionally in relation to the other States applying it provisionally.

108. The Drafting Committee had therefore considered whether it was best to include an express provision in the draft guideline or to explain in the commentary that this eventuality was implicitly covered. In the end, it had opted for the latter solution, not least because of the difficulty of capturing the various legal relations that might exist and be affected, in one way or another, by the entry into force of the treaty for one of the States or international organizations applying it provisionally. A mere statement that provisional application was “terminated” by entry into force would not fully capture all the possible outcomes in such situations.

109. After considering various solutions, including the possibility of dealing with the question in a separate paragraph, the Drafting Committee had settled on a text that tracked the wording of article 25, paragraph 2, of the 1986 Vienna Convention. That decision was, however, without prejudice to the possibility that the Commission might consider other methods for the termination of provisional application based on a corresponding study of the practice of States and international organizations by the Special Rapporteur, particularly bearing in mind that article 29 of the 1978 Vienna Convention envisaged a number of grounds for the termination of provisional application.

110. The Drafting Committee also indicated which States or international organizations should be notified of the intention to terminate with the phrase “notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally”.

111. In addition, the Committee had decided against the adoption of a proposal to insert a safeguard clause on unilateral termination, which would have reproduced *mutatis mutandis* article 56, paragraph 2, of the 1986 Vienna Convention concerning unilateral denunciation, because it did not wish to undermine the flexibility offered by article 25 of the Convention.

112. In conclusion, he recommended that the Commission take note of the draft guidelines on the provisional application of treaties as set out in document A/CN.4/L.877, on the understanding that they would be referred back to the Drafting Committee at the following session so that it could consider the ones that it had been unable to consider at the current session – namely draft guideline 5, the outstanding issue with regard to draft guideline 8 and draft guideline 10 on internal law and the observation of provisional application of all or part of a treaty, which had been proposed in the fourth report of the Special Rapporteur (A/CN.4/699) and referred to it on 27 July, but which it had not had time to finish considering – together with any further draft guidelines that might be referred to it at the following session. The Commission should be in a position, at its sixty-ninth session, to adopt the draft guidelines and a full set of commentaries.

<sup>518</sup> The draft articles on the responsibility of States for internationally wrongful acts and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

<sup>519</sup> See *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/687, p. 73, para. 131.

## Draft report of the International Law Commission on the work of its sixty-eighth session (*continued*)

### CHAPTER VIII. *Protection of the atmosphere (continued)* (A/CN.4/L.886 and Add.1)

113. The CHAIRPERSON invited the Commission to resume its consideration of the part of chapter VIII of the draft report contained in document A/CN.4/L.886/Add.1, paragraph by paragraph.

#### C. *Text of the draft guidelines on the protection of the atmosphere, together with preambular paragraphs, provisionally adopted so far by the Commission (continued)*

#### 2. *TEXT OF THE DRAFT GUIDELINES, TOGETHER WITH A PREAMBULAR PARAGRAPH, AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-EIGHTH SESSION (continued)*

##### *Commentary to the preamble (concluded)*

##### Paragraph (2) (*concluded*)

114. Mr. MURASE (Special Rapporteur) read out a new version of the third sentence of paragraph (2), the text of which had been distributed to the members (non-symbol document distributed in the meeting room, in English only), which he had drawn up in light of the proposals made at a previous meeting. It read: "Principle 6 of the Rio Declaration on Environment and Development highlights 'the special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable'. The principle is similarly reflected in article 3 of the 1992 United Nations Framework Convention on Climate Change and article 2 of the 2015 Paris Agreement under the United Nations Framework Convention on Climate Change."

*Paragraph (2), as amended, was adopted.*

##### Paragraph (3)

*Paragraph (3) was deleted.*

##### Paragraph (4)

115. Mr. MURASE (Special Rapporteur) said that paragraph (4) and the following paragraphs would be renumbered in the final version of the draft text.

116. Mr. TLADI said that the last sentence of the paragraph should be deleted, as it no longer belonged in the draft text following the deletion of paragraph (3).

*Paragraph (4), as amended, was adopted.*

*The commentary to the preamble, as amended, was adopted.*

##### *Commentary to guideline 3 (Obligation to protect the atmosphere)*

##### Paragraph (1)

117. Sir Michael WOOD, in response to a comment by Mr. Murphy, proposed that the words "whole scheme of the" in the first sentence be replaced with "present" and that "relate analogously" in the third sentence be replaced with "seek to apply".

118. Mr. KITTICHAISAREE, noting that four draft guidelines were mentioned in the paragraph, asked which

of them were meant by the reference to "These three draft guidelines" in the third sentence.

119. Mr. MURASE (Special Rapporteur) said that the words referred to draft guidelines 4, 5 and 6, which were mentioned in the second sentence.

120. Mr. CANDIOTI said that, to remove the ambiguity noted by Mr. Kittichaisaree, the full stop between the second and third sentences should be replaced with a semicolon.

*Paragraph (1), as amended, was adopted.*

##### Paragraph (2)

121. Sir Michael WOOD proposed that the words "seemingly broad scope of the" and "specifically" in the first sentence be deleted.

122. Mr. TLADI proposed that the word "channelling" in the penultimate sentence be replaced with "which reflected".

123. Mr. MURPHY asked for clarification from the Special Rapporteur regarding the phrase "while differentiating the kinds of obligations pertaining to each" in the first sentence.

124. Mr. MURASE (Special Rapporteur) said that the obligations laid down in the conventions dealing with atmospheric pollution and atmospheric degradation, respectively, were slightly different, and that the purpose of the phrase in question was to underline that point.

125. Sir Michael WOOD said that, to convey that idea more clearly, the verbs "prevent, reduce or control" in draft guideline 3 should be incorporated into the sentence, which should be amended to read: "The draft guideline seeks to delimit the obligation to protect the atmosphere to preventing, reducing and controlling atmospheric pollution and atmospheric degradation, thus differentiating the kinds of obligations pertaining to each."

*Paragraph (2), as amended, was adopted.*

##### Paragraph (3)

*Paragraph (3) was adopted.*

##### Paragraph (4)

126. Mr. PARK said that he doubted whether the second sentence faithfully and objectively reflected the debates within the Commission, and recalled that consideration of the issue of *erga omnes* obligations was still pending, as the Chairperson of the Drafting Committee had said when he had presented his report. He also had doubts as to the advisability of referring to the responsibility of States for internationally wrongful acts in that paragraph. For those reasons, it would be preferable to retain only the first sentence.

127. Following an exchange of views in which Mr. KITTICHAISAREE, Mr. MURPHY, Mr. NOLTE and Mr. SABOIA took part, Sir Michael WOOD proposed that the full stop at the end of the first sentence be replaced with a comma, that the start of the second sentence up to

the words “*erga omnes*” be deleted and that the end of that sentence be shortened and recast to read: “in the sense of article 48 of the articles on the responsibility of States for internationally wrongful acts, a matter on which there are different views”. A new footnote could be inserted at the end of the sentence, to which the reference to the work cited in the last sentence of the footnote to the paragraph could be moved.

128. Mr. MURPHY said that the authors cited in that part of the above-mentioned footnote might not necessarily hold diverging views on the issue of State responsibility, and that this point should be checked before the footnote was inserted.

129. Mr. MURASE (Special Rapporteur) said that he supported Sir Michael’s proposed amendment. As to the footnote in question, the draft text already contained enough references to sources and there was no need for the reference cited in the last sentence, which he would prefer to delete.

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

130. Mr. TLADI proposed that the second and seventh sentences be aligned with the wording of the draft guideline by replacing the word “ensure” in both sentences with “take appropriate measures to ensure”. He noted that the word “actual” was used before “adverse effects” in the fifth sentence, while the word “significant” appeared in the rest of the paragraph, and in paragraph (3), which had just been adopted, the adjective “deleterious” was employed. It would be wise to harmonize the text in order to remove those inconsistencies.

131. Mr. NOLTE proposed that, in the third sentence, the words “in which case” be replaced with “since”.

132. The CHAIRPERSON suggested that the Commission adopt the paragraph with the changes proposed by Mr. Nolte and Mr. Tladi, on the understanding that the Special Rapporteur would subsequently harmonize the text in light of Mr. Tladi’s remarks.

Paragraph (6)

133. Mr. NOLTE proposed that the words “that could” in the first sentence be replaced with “to”.

134. Sir Michael WOOD, noting that the aim of the paragraph was to comment on and explain the phrase “prevent, reduce or control”, said that the reference to the Paris Agreement under the United Nations Framework Convention on Climate Change, though interesting in itself, did not belong in the paragraph, and that the last sentence should be deleted.

*Paragraph (6), as amended, was adopted.*

Paragraph (7)

135. Mr. TLADI said that the case mentioned in the antepenultimate footnote to the paragraph should be cited more faithfully by replacing the word “becom[ing]” with “has now become”. He would leave it to the Special Rapporteur to adapt the text on the basis of that remark.

136. Mr. PARK asked what was meant by the pronoun “it” in the fourth sentence, and said that he was not sure whether the cases cited in the third to fifth footnotes to the paragraph really illustrated its content.

137. Mr. NOLTE proposed the deletion of the word “the” before “international courts and tribunals” in the fourth sentence. He failed to see the connection between the content of the paragraph and the Paris Agreement under the United Nations Framework Convention on Climate Change, to which reference was made from the fifth sentence onward.

138. Sir Michael WOOD said that, if the last three sentences of the paragraph, concerning the Paris Agreement under the United Nations Framework Convention on Climate Change, were retained, it would be necessary to review and amend them by placing the passages of the Agreement that were quoted verbatim between quotation marks and altering the wording accordingly.

139. Mr. MURASE (Special Rapporteur) said that the pronoun “it” referred to the expression “the basis of this obligation” in the previous sentence and that, in order to dispel any ambiguity, those words could be repeated in the fourth sentence. All the cases cited in the footnotes mentioned by Mr. Park dealt with the basis of the obligation to prevent significant adverse effects.

140. Mr. MURPHY said that the alternative wording proposed by the Special Rapporteur did not solve the problem, since the second part of the fourth sentence, beginning with the words “the obligation nonetheless may not be deemed fully established”, concerned the application of the obligation, not its basis. Moreover, like Mr. Nolte, he did not see the connection between the Paris Agreement under the United Nations Framework Convention on Climate Change and the subject matter of the paragraph, and would prefer to delete the last three sentences.

141. The CHAIRPERSON suggested that the adoption of the paragraph be suspended to enable the Special Rapporteur to draft a new text reflecting the comments and proposals that had been made. The Commission would adopt the new version and the remaining paragraphs of the draft text at a subsequent meeting.

*The meeting rose at 6.05 p.m.*

## 3343rd MEETING

*Wednesday, 10 August 2016, at 10 a.m.*

*Chairperson:* Mr. Pedro COMISSÁRIO AFONSO

*Present:* Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Hassouna, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kitichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.