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For participants only

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Provisional summary record of the 3466th meeting

Held at the Palais des Nations, Geneva, on Friday, 17 May 2019, at 10 a.m.

Contents


Protection of the environment in relation to armed conflicts (*continued*)

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Present:

<i>Chair:</i>	Mr. Šturma
<i>Members:</i>	Mr. Argüello Gómez
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guilloff
	Mr. Hassouna
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

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

Protection of the environment in relation to armed conflicts (agenda item 4) (*continued*)
(A/CN.4/728)

Mr. Park said that he welcomed the Special Rapporteur's second report and her efforts to identify and analyse relevant practice, jurisprudence and doctrine, especially in respect of responsibility and liability for environmental damage, which presented particular difficulties, even in peacetime, because of insufficient State practice.

The terms "responsibility" and "liability" were used frequently in the report, but without a clear definition or indication of scope. At first glance, it seemed that the Special Rapporteur was differentiating between the two terms, using "responsibility" to refer to conduct that violated *jus in bello* and *jus ad bellum*, and "liability" to refer to the obligation of compensation for conduct that did not violate *jus in bello*. On closer reading, however, the two terms seemed to be used interchangeably, as, for example, in paragraph 110, in which reference was made to both "liability of Iraq" and "responsibility of Iraq". In some titles of the report, the Special Rapporteur used the two terms in parallel, while in the French version of the report there was a subtle nuance in the usage of the two terms, with the term "liability" being translated differently depending on context. Noting that the Commission had distinguished the terms "responsibility" and "liability" in its previous work, he said that it should now, as a preliminary issue, clarify the relationship between both terms and, in particular, elucidate the exact meaning of "liability" as used in the second report and in the draft principles proposed by the Special Rapporteur in order to avoid further legal confusion.

With regard to draft principle 13 *ter*, while he agreed with the Special Rapporteur that the illegal extraction of natural resources could have severe and long-lasting impacts on the environment and might reduce biodiversity and contribute to the loss of ecosystems, he continued to hold the view that he had expressed in 2015 that issues related to the exploitation of natural resources had no direct bearing on the current topic and lay outside its scope. At that time, Mr. Forteau and other members had expressed similar views.

There were two reasons why he was opposed to addressing the question of natural resources in the context of the topic. First, the scope of the topic would necessarily be extended if it covered the concept of "pillaging". Second, at least three different issues relating to natural resources were presented in the report: the use of natural resources for financing conflict; natural resources as a source of, or reason for, conflict; and the exploitation of natural resources as a consequence of armed conflict. The causal links between natural resources and armed conflict were indeed rarely clear or straightforward. He was concerned that unnecessarily extending the scope of the discussion under draft principle 13 *ter* might adversely affect the effectiveness of the general principles on the protection of the environment in relation to armed conflicts.

Nonetheless, if the Commission decided to include the issue of natural resources within the scope of the topic, he would propose amending the draft principle. Noting that the term "pillaging", as used in article 47 of the Hague Convention respecting the Laws and Customs of War on Land of 1907, article 33 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), and article 8 (2) of the Rome Statute of the International Criminal Court, applied to all categories of property, whether private or public, including natural resources, he said that he would propose including the phrase "illegal exploitation of natural resources", as used in a number of relevant Security Council resolutions. He further proposed that the identity of the actors who committed pillage should be clarified. The amended draft principle would read:

Draft principle 13 *ter* (Pillaging)

Pillaging, which constitutes illegal exploitation of natural resources in armed conflict by State or non-State actors, is prohibited.

Regarding draft principle 14 *bis*, it was not clear why the issue of human displacement was considered in chapter II of the Special Rapporteur's report, which was entitled "Protection of natural resources in relation to armed conflict". If the Commission

wished to cover negative impacts on the environment arising from human displacement, such impacts would be related not only to the post-conflict phase, but also to situations of ongoing conflict. It was also unclear whether the draft principle was meant to encompass both internal and international displacement, given that the issue of “internal displacement” was still not regulated by any legally binding international instruments.

In his view, human displacement was one aspect of the so-called “human environment”, which the previous Special Rapporteur, Ms. Jacobsson, had proposed for inclusion in the topic and was dealt with in draft principle 6, on protection of the environment of indigenous peoples. However, he remained of the view that issues related to the “human environment” went beyond the scope of the topic. If such matters were considered under the current topic, the scope of the latter was likely to extend to the protection of civilian issues, which were already covered in the Fourth Geneva Convention and in the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts.

Noting that the Special Rapporteur had not drawn any conclusions about the international obligations of organized armed groups, he said that if the current topic were to take into account aspects of the progressive development of international law, he would like to propose a new draft principle on “Responsibility of organized armed groups”, worded to indicate that a non-State armed group might be held responsible for its own conduct under international law, especially for a breach of international humanitarian law, including in relation to the protection of the environment, committed by its forces. Alternatively, the text of the proposed new draft principle, which drew on the commentary to article 10 of the articles on responsibility of States for internationally wrongful acts, might be incorporated into draft principle 4 as a new paragraph 3.

He had some reservations about the subject matter of draft principle 6 *bis*, on corporate due diligence, as it would be difficult to clarify the burden of proof and the distribution of responsibility. Nonetheless, if the Commission were in favour of such a draft principle, he would propose deleting the reference to “human health”, as the topic under consideration should focus on the protection of the environment; accordingly, States’ obligation to take necessary legislative and other measures to ensure corporate due diligence should be limited to the environment. As for the second sentence of the draft principle, it was doubtful that there was sufficient State practice to support the notion that corporate due diligence included ensuring that natural resources were purchased and obtained in an equitable and environmentally sustainable manner. The section of the United States Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, referred to in paragraph 35 of the report, should be understood as the basic form of a sanctions mechanism applied by a State; it was not directly aimed at protecting the environment. He proposed that the second sentence of the draft principle should be deleted and suggested that the point made therein could be reflected in the relevant commentary.

Regarding draft principle 13 *quinquies*, he noted that, although the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises referred to corporate responsibility for environmental protection, they merely provided non-binding principles and standards for responsible business conduct in a global context. As for the *Wiwa v. Royal Dutch Petroleum Company* case cited in the report, its relevance was limited to its circumstances, namely severe damage to the local environment and economy resulting from oil drilling in the Ogoni region of Nigeria; ultimately the corporation had been deemed to be treated as a State actor for the purposes of the United States Alien Tort Statute. Moreover, similar cases might be regulated under the 2011 articles on responsibility of States for internationally wrongful acts, especially articles 5 and 7 thereof.

Nevertheless, if the Commission were in favour of such a draft principle, he would propose several amendments. In the first sentence of paragraph 1, the words “human health” should be deleted for the same reasons cited in respect of draft principle 6 *bis*. It was doubtful that the second sentence of paragraph 1 was supported by State practice; he would therefore suggest deleting it. As for the second paragraph, the first sentence was unnecessary, as the issue referred to therein could be resolved through application of the relevant rules embodied in the law of State responsibility. The second sentence dealt with an issue – whether parent companies could be held liable for acts of subsidiary corporations

under the doctrine of “piercing the corporate veil” – that appeared to be outside the framework of the topic at hand. He therefore proposed deleting paragraph 2 as a whole. If the Commission accepted his proposed amendments to draft principle 13 *quinquies*, that draft principle and draft principle 6 *bis* would contain very similar language, as both dealt with the role of the State to ensure corporate responsibility. Thus, he would propose merging the two amended draft principles into one draft principle entitled “Corporate responsibility”.

Noting the reference made by Mr. Murphy, at the Commission’s 3465th meeting, to the potentially negative effects arising from the extraterritorial application of national measures taken against corporations or in relation to corporations, he said that he recalled that, during its discussion of the topic “Protection of the atmosphere” at its previous session, the Commission had decided not to accept the proposition according to which a State could resort to extraterritorial application of its national law in certain situations. He wondered if the Commission would consider it necessary to provide a provision on the prohibition or the mitigation of extraterritorial effects with regard to the current topic.

With regard to draft principle 13 *quater*, on responsibility and liability, he noted that State responsibility, including the obligation of reparation, in particular compensation arising out of environmental damage caused by wrongful acts, could be adjudicated in accordance with the existing law of State responsibility. In that connection, paragraph 1 of draft principle 13 *quater*, which confirmed that the draft principles were without prejudice to the existing rules of international law on responsibility and liability of States, was significant. However, as mentioned by the Special Rapporteur in paragraph 116 of the report, the proposed draft principle was meant to cover ways of resolving instances of environmental damage caused by lawful military activities. The reference to both liability and responsibility in paragraph 1 appeared to indicate a desire to address such instances; however, liability for environmental damage caused by lawful military activities was not yet a universally accepted principle. In addition, as he had mentioned earlier in his statement, the Commission’s previous work on State responsibility and liability distinguished between responsibility arising out of actions that were wrongful acts and liability arising out of actions that were lawful. Therefore, he did not agree that liability and responsibility should be discussed together.

Although paragraph 2 of draft principle 13 *quater* found some support in State practice, he considered the paragraph unnecessary, as it might undermine the discretionary judgment of a State. If the paragraph were to remain, he would suggest that the language should be toned down.

The language of paragraph 3 of draft principle 13 *quater* appeared to be taken from paragraph 78 of the judgment of 2 February 2018 of the International Court of Justice in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*. However, since the final form of the Commission’s work on the present topic would be non-binding principles, he proposed that the word “shall” should be replaced with “should”, although related issues might in fact be resolved through application of the existing law of State responsibility.

In conclusion, he proposed retaining only paragraph 1 of proposed draft principle 13 *quater* and moving paragraphs 2 and 3 to the commentary to the draft principle. Another option would be to incorporate some of the language of paragraph 3 into paragraph 1, so that the latter paragraph would read: “The draft principles concerning damage to the environment for the purposes of reparation are without prejudice to the existing rules of international law on responsibility and liability of States.” Owing to the questions he had raised concerning the terms “responsibility” and “liability”, he would suggest that the Commission should consider deleting the term “liability”, depending on its actual meaning and scope.

Proposed draft principle 13 *bis*, which reflected the language of article I of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, was closely related to draft principle 9 (2), which had been provisionally adopted by the Commission. Therefore, he suggested that draft principle 13 *bis* might be moved to the commentary to draft principle 9. Such commentary could also

include a definition of environmental modification techniques based on article II of the aforementioned Convention; he endorsed the points made by Mr. Murphy the previous day in that regard.

Regarding draft principle 8 *bis*, there was no reason why the dictates of public conscience should not encompass environmental protection in modern international law. Originally introduced into the preamble to the Convention with Respect to the Laws and Customs of War on Land of 1899 and restated in the four Geneva Conventions, the Martens clause was a basic principle enshrined and recognized in international humanitarian law; moreover, it had an evolving aspect that made it applicable in new situations. He fully agreed with the Special Rapporteur that the Martens clause was of an overarching character and therefore relevant to all three phases of the conflict cycle. Although he had no specific comment to make concerning the wording of the proposed draft principle, which was nearly identical to that of guideline (7) of the guidelines for military manuals and instructions on the protection of the environment in times of armed conflict of the International Committee of the Red Cross, he suggested moving the draft principle to Part One, on general principles, immediately before or after draft principle 4, so that it declared that the Martens clause was also applicable in the general context of environmental protection in relation to armed conflict.

Regarding the use of terms, he supported the Special Rapporteur's decision not to deal with the definition of the term "environment" under the current topic; similar decisions had been taken in the context of other topics, such as "Law of the non-navigational uses of international watercourses" and "Law of transboundary aquifers". Nonetheless, it was important that the term "environment" should be used consistently within the context of the current topic and that, in that context, the distinction between "human environment" and "natural environment" should be clarified. As he had already mentioned, reference to the question of the "human environment" was likely to broaden the scope of the topic to include the protection of civilian issues, an area already covered in the Fourth Geneva Convention. He therefore insisted that the Commission's draft principles on the current topic should be limited to the "natural environment" in order to ensure a more concrete conclusion for the topic.

In conclusion, he supported the Special Rapporteur's suggestion that a complete set of draft principles together with the accompanying commentaries could be adopted on first reading at the Commission's current session.

Mr. Aurescu said that he wished to congratulate the Special Rapporteur on her second report and her interesting oral presentation thereof. He also wished to thank her for her remarkable outreach efforts to promote the Commission's work on the topic. He wished first to make some general comments before turning to the proposed draft principles.

With regard to chapter II of the report, he noted that, in addressing the issues of "illegal exploitation" and "overexploitation", it would have been helpful if the Special Rapporteur had explained the relationship or distinction between the two concepts and whether overexploitation was always illegal.

The notion of "pillage" was, in his view, not clearly explained. It was mentioned in the report that "as far as the law of armed conflict is concerned, the prohibition of pillage is an established rule of customary law recognized since the earliest codifications", and, further on, that "this interpretation was acknowledged by the International Court of Justice in its *Armed Activities* judgment, in which it found that Uganda was internationally responsible 'for acts of looting, plundering and exploitation of the [Democratic Republic of the Congo]'s natural resources'". It was not clear whether, for the purposes of the report, "pillage" was a generic or specific concept under customary international law.

Another, similar notion was that of "spoliation", which the Special Rapporteur treated as an element of "pillage". The notion was referred to in paragraph 26 of the report, in which it was stated that the African Charter on Human and Peoples' Rights prohibited pillage by providing that "in case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation". "Pillage" was again presented as a generic, rather than a specific, concept.

Lastly, in paragraph 38 of the report, the Special Rapporteur, touching upon yet another concept related to pillage, concluded that “the brief overview of the applicable rules above shows that there is a firm basis in the law of armed conflict for the prohibition of the worst forms of misappropriation of resources in armed conflict, which can be characterized as pillage”. It would perhaps have been better for the Special Rapporteur to have proposed a definition of “pillage” on the basis of the complex analysis of applicable rules, judgments of international courts and tribunals, and national guidelines that was presented in the report. The definition could have reflected all the related concepts referred to in the report, including “spoliation”, “looting” and “plundering”.

He appreciated the fact that the Special Rapporteur had included a section on the environmental effects of human displacement, which were of particular interest, bearing in mind the impact of sea-level rise with respect to international law in general and human displacement and access to natural resources in particular. The Special Rapporteur was to be commended for her short but comprehensive study of the matter.

Turning to chapter III of the report, he said that the section on armed non-State actors did not seem germane to the topic at hand. It dealt with the issue of the legal accountability of organized armed groups, but contained no reference to the protection of the environment in relation to armed conflicts. There were several references to international humanitarian law and human rights, but not enough to environmental matters. The brief mention of “environmental issues” in paragraph 54 of the report was, in his opinion, insufficient. The link between international humanitarian law and environmental issues should have been explored in detail.

In section A.2, on “individual criminal responsibility”, meanwhile, the Special Rapporteur carried out a meaningful analysis of the relationship between the criminal responsibility of individuals and the environmental impact of their actions. He fully supported the Special Rapporteur’s approach to the issue and her conclusion that the Rome Statute of the International Criminal Court had the potential “to address major environmental harm caused in conflict”. Some of the aspects discussed in the subsection were also of relevance to the notion of “pillage”.

Chapter III, section B, on corporate responsibility and liability, addressed diverse and complex issues such as due diligence, human rights and remedies. The concept of “attribution”, which was relevant to the notions of “responsibility” and “liability”, was not mentioned at all. Overall, the extensive information in chapter III of the report could have been presented in a more structured manner.

Regarding chapter IV, he noted that it was asserted, in paragraph 106, that “for State responsibility to arise, the act causing the harm must be attributable to the State and amount to a violation of its international obligation”. That conclusion did not appear to be in keeping with the Commission’s interpretation of the notion of “responsibility” in its articles on responsibility of States for internationally wrongful acts, in which there was no reference to injury or harm, and according to which the only condition needed for the responsibility of a State to be triggered was the existence of a breach of an international obligation. Consequently, a better formulation would perhaps have been: “for State responsibility to arise, the illegal act must be attributable to the State and amount to a violation of its international obligation”. That wording was consistent with the Commission’s previous work.

He was grateful that the Special Rapporteur touched on certain aspects that the articles on responsibility of States for internationally wrongful acts left unresolved. Paragraphs 116 and 117 of the report were very instructive in that regard. He acknowledged the points made by the Special Rapporteur that the differences between the articles on State responsibility and the regime proposed in the report were substantial, in other words that “environmental damage in armed conflict may also result from lawful military activities”, and temporal, in that “it may be problematic to regard the establishment of responsibility as a precondition for remediation, to be addressed only after the end of the conflict”. A more structured approach to the differences, or lack thereof, between the articles and the proposals outlined in the report would have been welcome.

Such an approach would have been particularly advisable given the Special Rapporteur's assertions that certain regimes could be regarded as *lex specialis* under the law of armed conflict, that the relevant provisions of the articles on responsibility of States for internationally wrongful acts remained untested and that the practice of international courts and tribunals was still evolving in that respect. The Special Rapporteur used those assertions to support her proposal for the inclusion of a special provision on State responsibility that focused on the protection of the environment in relation to armed conflicts.

A more structured and detailed methodology for chapter IV of the report would also have been preferable in the light of the conclusion in paragraph 132 that "as the present draft principles touch on questions of remediation and reparation, there may be reason to state that they are without prejudice to the rules of State responsibility or any claims that may be raised under such rules for environmental damage caused in conflict". The subsection on *ex gratia* payments and victim assistance, though interesting, did not seem relevant to the topic under consideration.

Turning to the proposed draft principles themselves, he said that, in line with his earlier comments, a new first paragraph should be inserted in proposed draft principle 13 *ter* providing a definition of the concept of "pillaging". The existing paragraph should be reworded to read: "Pillaging natural resources is prohibited."

In proposed draft principle 6 *bis*, the words "necessary legislative and other measures" should be replaced with the broader "all necessary measures". The second sentence should be deleted, as the inclusion of examples was not justified, in view of the scope of the report. The sentence could, however, be included in the commentary.

He had a number of comments and suggestions regarding proposed draft principle 14 *bis*. First, the phrase "other relevant actors" was unclear and should be replaced with more specific wording. Second, as was evident from paragraph 39 of the report, human displacement led to environmental degradation not only in the areas where displaced persons were located but also as a result of the actual movement of such persons from their homes to those areas. The text as it stood focused only on the areas where displaced persons were located. He therefore proposed that it should be amended to take account of environmental degradation caused by the process of relocation as such. Third, the reference to "providing relief for such persons and local communities" was unclear and seemingly unjustified, and should thus be deleted. Should it be retained, however, the reasons for its inclusion should be clarified, or, perhaps, the word "relief" should be replaced with a clearer one. Relief was an issue pertaining to State responsibility, which had already been addressed by the Commission in its articles on responsibility of States for internationally wrongful acts. The provision of relief or other assistance to displaced persons could perhaps be mentioned in proposed draft principle 13 *quater*, on State responsibility and liability.

Even though the notion of "attribution" was not analysed in the report, it was referred to in proposed draft principle 13 *quinquies*. With that in mind, an in-depth analysis of the notion would have been helpful. It would also have been useful for the Special Rapporteur to have analysed, in her report, the differences and possible links between the notion of "responsibility" as presented in proposed draft principle 13 *quinquies*, on the one hand, and in the articles on responsibility of States for internationally wrongful acts, on the other.

In both paragraphs of proposed draft principle 13 *quinquies*, the Special Rapporteur used the words "legislative and other measures", which should be replaced with "all necessary measures". In the last sentence of paragraph 1, the word "also" should be deleted. As currently drafted, the sentence inappropriately conflated aspects of State responsibility, which had already been addressed by the Commission in its articles on responsibility of States for internationally wrongful acts, and issues related to corporate responsibility.

The last sentence of paragraph 2 was quite convoluted, and seemed to suggest that the responsibility of parent companies was engaged with regard to ascertaining that their subsidiaries exercised due diligence and precaution. In fact, he believed that the purpose of the provision was to ensure that parent companies acted in such a manner that their subsidiaries exercised due diligence and precaution. Accordingly, a better formulation

would be: “Parent companies should ensure that their subsidiaries exercise due diligence and precaution”. Alternatively, the Commission could place the emphasis on responsibility by redrafting the sentence to read either “Parent companies are responsible for ensuring that their subsidiaries exercise due diligence and precaution” or “Responsibility can be attributed to a parent company which exercises *de facto* control over the operations of a subsidiary when its subsidiary does not exercise due diligence and precaution”.

Paragraph 1 of proposed draft principle 13 *quater* could raise complicated issues related to conflicts of norms. In other words, a case could arise in which both proposed draft principle 13 *quater* and a relevant provision of the Commission’s articles on responsibility of States for internationally wrongful acts were applicable. The manner in which the two norms would interact was unclear to him. If proposed draft principle 13 *quater* was *lex specialis*, in that it governed a specific aspect of international law, the inclusion of the “without prejudice” clause ran counter to the “special regime” concept. However, if no special regime was established, and the two norms were of equal force, proposed draft principle 13 *quater* could be interpreted as redundant, or even randomly applicable, and thus lead to “treaty shopping”. In any event, the issue required clarification.

In paragraph 2, he would replace the word “when” with “even if”, on the grounds that States should always take measures to ensure that damage did not remain unrepaired or uncompensated. The current wording suggested that States should act only when the source of environmental damage in armed conflict was unidentified, or reparation from the liable party was unavailable, which he believed was not in conformity with international law.

Proposed draft principle 13 *bis* could be simplified to read: “Military or any other hostile use of environmental modification techniques is prohibited.” The remaining elements of the existing text could be reflected in the commentary.

Concerning proposed draft principle 8 *bis*, he welcomed the idea of including the Martens clause in the draft principles. The wording of the clause could, however, be updated, for example by deleting the word “established”, which would bring it into line with the Commission’s more recent work.

Taking into account his comments and suggestions, he was in favour of referring all the proposed draft principles to the Drafting Committee.

Mr. Valencia-Ospina said that he wished to congratulate the Special Rapporteur on her excellent second report, which built on the previous work of the Commission and, in particular, of her predecessor, Ms. Marie Jacobsson, and thereby assuaged some of the concerns expressed by States and members of the Commission with regard to the draft principles that had already been adopted provisionally.

He agreed with the Special Rapporteur that the report could lay the basis for completing a first reading of the draft principles and commentaries by the end of the session. However, he considered that certain aspects, especially in the commentaries, required further work.

The Special Rapporteur was right to address the issue of the protection of the environment in non-international armed conflicts. The regime applicable to such conflicts posed a number of significant conceptual and analytical challenges that the Commission would need to overcome. It should be recalled, in that respect, that when the United Nations Environment Programme had referred the topic to the Commission in 2009, it had called for an urgent clarification of the scope of the rules applicable to non-international armed conflicts.

The Special Rapporteur did well to begin by analysing the exploitation of natural resources in armed conflicts. In her report, she concisely summarized the literature on the links between the environment, in particular natural resources, and armed conflict. To cite just one example, a recent study published in Colombia had looked at the manner in which some natural resources, including non-harmful, traditional products, contributed to financing and sustaining cycles of violence. In that regard, it was crucial for the Commission to refer not only to the link between natural resources and armed conflict but also to the emerging multilateral framework designed to regulate and mitigate the impact of that link.

The Special Rapporteur correctly analysed the efforts of the Security Council to prevent and punish the use of resources found in conflict areas. However, it would be appropriate, in the commentaries, for the Commission to mention also the relevant steps taken by the General Assembly. It was important to recall that, in its resolution 56/4 of 5 November 2001, the Assembly had declared 6 November each year as the International Day for Preventing the Exploitation of the Environment in War and Armed Conflict. The resolution, which had been proposed by Kuwait and adopted unanimously, reflected a growing consensus among States over the risks of exploiting resources to finance conflicts.

In that connection, he was in favour of proposed draft principle 13 *ter*, on the prohibition of pillage, but considered that, in the commentary thereto, the Commission should specify the scope of the concept of “pillage” and its relationship to similar concepts, in view of continuing terminological differences. For example, in English-language literature, it had been noted that it was difficult to distinguish between pillage and other, similar acts such as plunder, spoliation and looting. In her report, the Special Rapporteur used the terms interchangeably. In paragraph 245 of its judgment of 19 December 2005 in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the International Court of Justice had referred, in the French version, to “*le pillage et l’exploitation de ressources naturelles*” (“pillage and the exploitation of natural resources”), whereas, in the English text, it had referred to “the looting, plundering and exploitation of natural resources”. The term used in the Spanish version of the Special Rapporteur’s report, namely “*pillaje*” (“pillage”), was used in international humanitarian law, but not in international criminal law, given that, in the Elements of Crimes the International Criminal Court provided a definition of the “*crimen de guerra de saquear*” (“war crime of pillaging”).

Consequently, it would be helpful for the Commission to clarify, in the commentaries, the conceptual scope of the term “pillage” in the light of a dynamic interpretation of applicable international humanitarian law and international criminal law, so as to avoid discrepancies that might not necessarily stem from mistranslations. In so doing, it should take into account a similar proposal that he had made in 2018 regarding the notion of “situations of occupation”. In any event, the clarification would be an important addition to the commentaries that reflected the prohibition on the exploitation of natural resources in both international and non-international armed conflicts.

He welcomed the inclusion of proposed draft principle 14 *bis* and the arguments put forward to justify it. As noted by the Special Rapporteur, in certain international and non-international armed conflicts, human displacement could have substantial adverse environmental effects. To give an example, according to a recent report of the Office of the United Nations High Commissioner for Refugees (UNHCR), there were almost 7.7 million internally displaced persons in Colombia. The associated migratory flows had a major environmental impact, which could, in turn, lead to forced displacement. He therefore considered the inclusion of proposed draft principle 14 *bis* to be appropriate, as it reflected the increased attention that the international community was paying to the complex relationship between environmental degradation and forced displacement. The Commission should incorporate, in the commentaries, references to certain relevant international developments.

First, it should refer to its own draft articles on the protection of persons in the event of disasters. While the scope of the two topics was different, the reference, in proposed draft principle 14 *bis*, to “providing relief” to persons displaced by conflict and to local communities should be read in the light of the Commission’s previous work. It should be recalled that article 3 (a) of the draft articles established that, for the purposes of the draft articles, “‘disaster’ means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society”.

The fact that international humanitarian law was *lex specialis* during an armed conflict did not mean that it overrode other applicable rules. As was clearly explained in the commentary to article 18 of the draft articles on the protection of persons in the event of disasters, “the present draft articles would thus contribute to filling legal gaps in the protection of persons affected by disasters during an armed conflict while international

humanitarian law shall prevail in situations regulated by both the draft articles and international humanitarian law”.

The Commission should clarify, in the commentary to proposed draft principle 14 *bis*, that the relevant draft articles on the protection of persons in the event of disasters would be applicable only to those situations of displacement that, because of their magnitude, could be viewed as “complex emergencies” within the meaning of the draft articles.

It would also be a good idea to mention, in the commentaries, work from outside the Commission that had contributed to the progressive development of international law on disasters. For example, he welcomed the fact that the Special Rapporteur had referred, in her report, to the United Nations Environment Programme, UNHCR, the International Organization for Migration and the African Union. However, the picture painted by the Special Rapporteur would be incomplete unless the Commission included, in the commentaries, references to certain parallel developments that had occurred outside the framework of the United Nations.

In that respect, it should be recalled that the challenges posed by the relationship between displacement and the environment had not been ignored by States, as was evident from the 2011 Nansen Conference on Climate Change and Displacement in the 21st Century, during which States had adopted a set of principles “to guide responses to some of the urgent and complex challenges raised by displacement in the context of climate change and other environmental hazards”. On that basis, in 2012, Norway and Switzerland had launched the Nansen Initiative, which was a State-led consultative process intended to build consensus on how to address the issue of environmentally induced displacement. As part of the Initiative, several regional conferences had been organized between 2013 and 2015 with the aim of reaching multilateral agreements on the matter. In 2015, a global consultation had been held, during which 109 States had adopted the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change.

As a follow-up measure, the World Humanitarian Summit held in Istanbul, Turkey, in 2016 had launched the Platform on Disaster Displacement to disseminate and implement the Protection Agenda adopted by the Nansen Initiative. The Platform was a State-led process, but international and civil-society organizations took part in its deliberations. While it did not set out to formulate binding legal instruments, its work demonstrated States’ burgeoning interest in promoting the progressive development of international law on disasters. For that reason, the responses resulting from that process might make for enhanced understanding of draft principle 14 *bis*.

Developments within the United Nations system which might be of relevance to the commentary to draft principle 14 *bis* included the Task Force on Displacement, which had been set up at the twenty-first session of the Conference of the Parties to the United Nations Framework Convention on Climate Change and mandated to produce recommendations on integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change. In 2015, States had also adopted the Sendai Framework for Disaster Risk Reduction. The more recent Global Compact for Safe, Orderly and Regular Migration likewise included a section on the relationship between migration and environmental degradation. Although those developments focused on the environmental reasons for migration and not on the environmental effects of displacement, they were clear signs of a swelling multilateral dialogue between States on fostering regulation and cooperation in that field.

In view of the Special Rapporteur’s aim in the report of delving more deeply into questions relating to protection of the environment in non-international armed conflicts, it would be relevant for the commentary to draft principle 14 to reflect the fact that a growing number of States had sought to include environmental considerations in their transitional justice processes. Those endeavours might be an effective means not only of protecting the environment and preventing harm to it during any such conflict, but also of furthering its restoration after the conflict. In other words, draft principle 14 should look beyond peace processes and refer to transitional measures and mechanisms.

As the former United Nations Secretary-General, Kofi Annan, had noted in his report entitled “The rule of law and transitional justice in conflict and post-conflict societies” (S/2004/616), transitional justice covered “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation”. Although the initial underlying idea had been to promote justice for victims of human rights violations, the concept had gradually been extended to cover situations following non-international armed conflicts to the extent that it had come to be recognized as a fundamental part of *jus post bellum*. The heavy environmental impact of non-international armed conflicts had led to the adoption of transitional measures which sought not only to provide reparation for victims of serious violations of international humanitarian law and international human rights law but also to restore the environment. In other words, the view was taken that it would be difficult to protect the rights of victims to truth, justice, reparation and guarantees of non-recurrence if environmental restoration was not an inherent part of the transition process.

In the recent peace process in Colombia, for example, the mandates of classic transitional justice mechanisms included provisions relating to the protection and restoration of the environment. The Truth Commission’s mandate included looking into “the human and social impact of the conflict on society, including its impact on economic, social, cultural and environmental rights”. The Special Jurisdiction for Peace could impose restorative sanctions and order some actors in the conflict to participate in environmental protection programmes for reserve areas, in waste disposal programmes and in environmental recovery programmes for areas affected by illicit crops. Lastly, it was important to highlight that the now-defunct guerrilla group Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo (FARC-EP) had undertaken to participate in “programmes to repair environmental damage, e.g. reforestation”.

Although such practices were still emerging, they could be relevant in terms of the progressive development of the *jus post bellum* applicable to the protection of the environment after the end of a non-international armed conflict. He therefore suggested that the Commission should supplement the commentary to draft principle 14 to indicate that States should as appropriate include, among any transitional justice measures, steps to restore and protect the environment in the wake of a non-international armed conflict.

Draft principle 6 *bis* on corporate due diligence seemed to follow the general trend in the progressive development of international law concerning corporations and human rights, and the inclusion of the Martens clause in draft principle 8 *bis* would prevent interpretations which resulted in gaps in environmental protection. As far as draft principles 13 *quater* and *quinquies* were concerned, in order to avoid misunderstandings, the Commission should clarify in the commentary when a State or a corporation was to be held responsible or liable for environmental harm.

In conclusion, he said that he supported the referral of all the draft principles to the Drafting Committee.

Mr. Nguyen said that he wished to commend the Special Rapporteur on her report, which provided remarkable insight into a relatively new area of international law. It demonstrated the interlinkage of international humanitarian law, international human rights law and environmental law during and after armed conflicts and showed that the *lex specialis* applicable to armed conflicts did not exclude other branches of international law, such as those dealing with the obligations of corporations with regard to the natural resources and environment of the areas in which they traded. The report’s examination of the question of the responsibility and liability of each actor during and after armed conflicts had produced some useful conclusions based on case law and legal writings.

The lack of State practice had, however, led the Special Rapporteur to rely too heavily on cases which did not strictly fall within the scope of the topic. In fact, chapter III, section A.2, focused more on crimes than on liability. In addition, the uncertainty surrounding the definition of armed conflicts rendered some draft principles inapplicable. In some modern conflicts, the distinction drawn between international armed conflicts and non-international armed conflicts in the Hague Regulations respecting the Laws and

Customs of War on Land of 1907 and the Geneva Conventions of 1949 was hard to apply. For instance, the wars in Viet Nam and Syria were a mixture of both and were even considered to be proxy wars, meaning that external powers might be held mainly responsible for military action which had damaged the environment. In that connection, the findings of the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* had made it plain that the effective control of territory played a key role in determining who was responsible for protecting the environment in conflict areas. Moreover, the legitimacy of occupation must be considered before qualifying the exploitation of natural resources with a serious impact on the environment as illegal.

The Special Rapporteur should clarify terms such as the “illegal exploitation of natural resources in international armed conflicts and non-international armed conflicts” and “parties” to armed conflicts. The definition of armed conflict contained in the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas might serve as a reference and a starting point for attributing parties’ responsibility for any damage inflicted on the environment and natural resources. He wondered if it could be inferred from the definition of the illegal exploitation of natural resources provided in paragraph 21 of the report that non-State actors must abide by the national law of the State authority against which they were fighting, or that States could be held responsible for damage to the environment caused by the actions of non-State actors who were effectively occupying the conflict area. If States failed to ensure that non-State actors were held liable for their acts, would the host State or non-State actors then be responsible for an internationally wrongful act?

He personally thought that external powers or States should be held responsible for the illegal exploitation of natural resources and environmental damage by their corporations or companies which invested in conflict-affected areas or traded in resources from such areas. International and national law must therefore be developed to include provisions banning the exploitation of and trade in natural resources from conflict-affected and high-risk areas. The States in which transnational corporations were domiciled must ensure that the latter did not breach either the host State’s law or international law on armed conflicts. He agreed with Mr. Murphy and Mr. Park that the ambiguity of the terms “principles”, “responsibility” and liability” might blur the distinction between rules, guidance and policy.

As for the draft principles themselves, the wording of draft principle 6 *bis* should be consistent with that of the other draft principles in Part One and should stipulate that States, pursuant to their obligations under international law, must take not only the necessary legislative measures, but also the administrative, judicial and other measures required in order to effectively control the activities in conflict-affected or high-risk areas of corporations registered or with their seat or centre of activity within their jurisdiction, in order to mitigate any adverse consequences for human life and the environment. The sentence concerning trading “in an equitable and environmentally sustainable manner” was confusing and should be clarified in the commentary. A similar principle should be drafted to cover non-State actors.

Draft principle 13 *ter* should take into consideration the fact that the prohibition of pillage, which was a rule of customary international law and codified in several international conventions, was complementary to the principle of a State’s permanent sovereignty over its natural resources and that its purpose was not only to end pillage but also to prevent any illegal trade in and export of the plundered resources of an occupied State.

As displacement affected the life of local communities and the environment along the full length of the migration route, draft principle 14 *bis* must balance the twin objectives of protecting the human rights of migrants and the local population and of protecting the environment.

Turning to chapter III, on responsibility and liability of non-State actors, he noted that, although the International Law Association’s working definition of a non-State actor was fairly broad, the draft principles dealt only with corporate liability and that chapter

merely submitted that when armed non-State groups exercised territorial control and administered a territory, they should comply with the law of occupation.

He concurred with the Special Rapporteur's findings on State responsibility and liability in chapter IV, namely that State responsibility for environmental harm had not been a rule even in peacetime. The cumulative effect of environmental degradation made it difficult to establish the precise moment when any damage had occurred and the number of actors involved and therefore greatly complicated the determination of remedies and reparations. Varying levels of technical capacity for evaluating environmental damage and other factors such as political will or social awareness would even result in dissimilar amounts of reparation. The rules of State responsibility must therefore be applied on a case-by-case basis. The aim of repairing environmental damage must be not only to restore the environment itself but also to give psychological support to the local population who had to deal with the aftermath of the armed conflict.

As the Special Rapporteur showed in her report, the acknowledgement of a wrongful act in the form of *ex gratia* payments and victim assistance could not only contribute to environmental restoration but could also help to overcome enmity and resentment. However, paragraph 2 of draft principle 13 *quater* did not do justice to all the Special Rapporteur's arguments in that it referred only to cases where the source of environmental damage in an armed conflict was unidentified or reparation from the liable party unavailable. Information on environmental damage had to include data on the source and extent of the damage, as well as the material and psychological injury it had caused, any combination of contributory factors and the parties involved. In order to reflect that complex situation, the beginning of the first sentence of paragraph 2 should be recast to read "While the damage may not be determined or reparation from the liable party unavailable ...". He further drew attention to the absence of any provision on *ex gratia* payment or victim assistance as a means of repairing the environment and supporting victims.

Given the terrible and widespread damage which could be inflicted by environmental modification techniques not solely in the territory of States engaged in hostilities but on the international environment as a whole and given that non-State actors were capable of employing such techniques, the latter must be prohibited in international and non-international conflicts. In view of their particularly cruel and long-lasting impact on human welfare, the use of environmental modification weapons should also be classified as a crime against humanity and, it was to be hoped, the prohibition of military or any other hostile use of environmental modification techniques would in the future attain the status of a peremptory norm of general international law.

As environmental issues had a variety of political, scientific and legal implications, he supported the Special Rapporteur's recommendation to use the general term "environment" throughout the text for the sake of consistency, and also because it would include both natural and human environments. For that reason, it would be advisable to review the term "natural environment" in draft principles 9, 10 and 12, or to clarify its use in the commentaries.

He was in favour of referring the draft principles to the Drafting Committee.

The meeting rose at 11.55 a.m.