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For participants only

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International Law Commission
Seventy-first session (second part)

Provisional summary record of the 3505th meeting

Held at the Palais des Nations, Geneva, on Thursday, 8 August 2019, at 10 a.m.

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Present:

<i>Chair:</i>	Mr. Šturma
<i>Members:</i>	Mr. Argüello Gómez
	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. Reinisch
	Mr. Ruda Santolaria
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	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.

Draft report of the Commission on the work of its seventy-first session *(continued)*

Chapter VI. Protection of the environment in relation to armed conflicts (continued)
([A/CN.4/L.930](#) and [A/CN.4/L.930/Add.1](#))

The Chair invited the Commission to resume its consideration of the portion of chapter VI of the draft report contained in document [A/CN.4/L.930/Add.1](#).

C. *Text of the draft principles on protection of the environment in relation to armed conflicts adopted by the Commission on first reading (continued)*

2. *Text of the draft principles and commentaries thereto (continued)*

Part One (Introduction) (continued)

Commentary (continued)

Paragraph (3) (continued)

Ms. Lehto (Special Rapporteur) recalled that, at the previous meeting ([A/CN.4/SR.3504](#)), it had been proposed that paragraph (3) should be deleted but that its first sentence should become the first sentence of paragraph (4).

Paragraph (3) was deleted on that understanding.

Paragraph (4)

Ms. Lehto (Special Rapporteur) said that unlike some of the other paragraphs of the general commentary, current paragraph (4) had not been provisionally adopted by the Commission at its sixty-eighth session. It had been included in order to address the concerns expressed in the plenary debate.

Mr. Park proposed that the words “and international organizations” should be inserted at the end of the current first sentence.

Mr. Ouazzani Chahdi said that, in the French version, the word “*contient*” in the current second sentence should be replaced with “*comporte*”.

Mr. Nolte said that, as a clear line could not always be drawn between those of the Commission’s topics that involved the pronouncement of principles of international law and those that involved its development, footnotes 1 and 2 should be merged, the text that they contained prefaced with the word “See” and the corresponding footnote marker placed at the end of the current first sentence of the body of the text. In that sentence, the word “progressive” should also be inserted before “development”.

Ms. Lehto (Special Rapporteur) said that the wording to which Mr. Park and Mr. Nolte had proposed amendments reflected the language used in the commentaries to the 2006 principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. In her view, the word “progressive” could be added, but the words “and international organizations” could not.

Sir Michael Wood proposed that the word “pronounce” in the current first sentence should be replaced with “set out”.

Paragraph (4), as amended, was adopted.

Ms. Lehto (Special Rapporteur) said that, in order to address a concern expressed by Ms. Escobar Hernández at the previous meeting, a new paragraph should be inserted immediately after current paragraph (4). That new paragraph would consist of a single sentence that read: “The draft principles were prepared bearing in mind the intersection between the international law relating to the environment and the law of armed conflict.”

The Chair said he took it that the Commission wished to insert the sentence proposed orally by the Special Rapporteur as a new paragraph.

It was so decided.

Paragraph (5)

Sir Michael Wood said that it seemed rather odd in a first reading text to state that a preamble to accompany the draft provisions would be formulated at the appropriate time. His suggestion would be either to delete the paragraph or to reformulate it so as to indicate that the Commission had yet to decide whether to formulate a preamble.

Ms. Lehto (Special Rapporteur) said that she would not object to the deletion of the paragraph on the understanding that she would not be prevented from proposing a preamble in the future.

Paragraph (5) was deleted on that understanding.

Paragraph (6)

Paragraph (6) was adopted.

Commentary to draft principle 1 (Scope)

Paragraph (1)

Mr. Nolte proposed that, in the third sentence, the words “quite early” should be replaced with “at the outset”.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Nolte said that the phrase “sets out the *ratione temporis*” in the first sentence was not grammatically correct. The phrase would have to appear as “sets out the *ratio temporis*”. A safer option might be to replace it with “sets out the temporal dimension”.

The Chair said that the formulation “scope *ratione temporis*” was another possibility.

Sir Michael Wood said that his proposal would be to replace the words “sets out the *ratione temporis*” with “concerns the application *ratione temporis*”. A similar replacement could be made in paragraph (3).

Mr. Nolte, supported by **Mr. Vázquez-Bermúdez**, said that the Chair’s proposed wording was the most appropriate, since it was not only a question of application.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Park said that some members of the Commission and some States in the Sixth Committee had expressed the view that the inclusion of situations of non-international armed conflict within the scope of the topic would be inappropriate. He therefore proposed that a new sentence should be added to the paragraph, to read: “However, a view was expressed about the appropriateness of including in the scope of the topic situations of non-international armed conflict, considering the paucity of relevant practice.”

The Chair said that it was the Commission’s usual practice to reflect such views in commentaries adopted on first reading.

Sir Michael Wood, referring to the second sentence, said he was not sure that it was true to say that no distinction at all was made in the project between international armed conflicts and non-international armed conflicts. There was in fact quite a lot of discussion in the commentaries about the application of some of the draft principles to non-international armed conflicts, as opposed to international armed conflicts. However, it was true to say that the term “armed conflict” covered both international armed conflicts and non-international armed conflicts.

Mr. Jalloh said that, although some States had expressed the view in the Sixth Committee that situations of non-international armed conflict fell outside the scope of the topic, others had taken the opposite position, namely that a strict distinction could not be drawn between situations of international armed conflict and those of non-international armed conflict. As far as he understood, a strict distinction of that kind had not been drawn in the commentaries. The Commission should nevertheless exercise caution on that point.

Ms. Lehto (Special Rapporteur) said that she was reluctant to insert the additional sentence proposed by Mr. Park, as the text of the paragraph under consideration had already been provisionally adopted in 2016. However, as she agreed that not all of the draft principles applied to situations of non-international armed conflict, she proposed that the word “generally” should be inserted between the word “is” and “made” in the last sentence.

Paragraph (3), as amended, was adopted.

Commentary to draft principle 2 (Purpose)

Paragraph (1)

Mr. Murphy said that a comma should be inserted after the words “during armed conflict” in the third sentence.

Ms. Lehto (Special Rapporteur) said that the last sentence, or at least the part of that sentence that followed the word “which”, should be deleted. That sentence had originally been included in order to address a concern that had been prevalent during the early years of the Commission’s work on the topic, namely that the Commission should avoid giving the impression that it intended to amend the existing law of armed conflict. However, now that a full set of draft principles had been prepared, she found that last sentence rather confusing.

Mr. Murphy said that it would make more sense to delete the entirety of the last sentence.

Paragraph (1), as amended by Mr. Murphy, was adopted.

Paragraph (2)

Mr. Murphy said that footnote 6 contained a reference to the second report of the former Special Rapporteur on the topic. The Commission’s commentaries to the draft provisions on a given topic did not usually include references to the reports of the special rapporteurs on that topic. He hoped that the Special Rapporteur would bear that point in mind for the purposes of the second reading.

Paragraph (2) was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Part Two (Principles of general application)

Commentary to draft principle 3 (Measures to enhance the protection of the environment)

Paragraph (1)

Mr. Nguyen proposed that, in the second sentence, the word “effective” should be inserted after “further” so as to emphasize that all measures taken by States should be effective.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (7)

Paragraphs (2) to (7) were adopted.

Paragraph (8)

Mr. Nolte said that the second sentence of the paragraph seemed to presuppose that the reference in article 36 of Protocol I additional to the Geneva Conventions of 1949 to “any other rule of international law” provided a mandate to go beyond merely studying whether the employment of a certain weapon would be contrary to the law of armed conflict. He therefore proposed that the word “goes” should be replaced with “may go”.

Paragraph (8), as amended, was adopted.

Paragraphs (9) to (14)

Paragraphs (9) to (14) were adopted.

*Commentary to draft principle 4 (Designation of protected zones)**Paragraphs (1) and (2)*

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Sir Michael Wood proposed that the words “formulated in the infancy of international environmental law” in the penultimate sentence should be replaced with “put forward at a relatively early stage in the development of international environmental law”.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Nolte proposed that the penultimate sentence should be deleted in order to avoid encouraging both overly expansive and overly restrictive interpretations of the term “major environmental and cultural importance”.

Mr. Grossman Guiloff said that another solution might be to replace the word “interpretation” in that sentence with “development”.

Mr. Nolte said that Mr. Grossman Guiloff’s suggestion addressed his concern.

Mr. Vázquez-Bermúdez said that the phrase “further development” might be even more appropriate, as the term “major environmental and cultural importance” already had a meaning.

Ms. Lehto (Special Rapporteur) said that she had not been a member of the Commission when the draft principle in question had been discussed. She saw no particular harm in retaining the sentence in question.

Mr. Nolte said that he had understood the word “development”, which had been suggested by Mr. Grossman Guiloff, as referring to the development of the areas in question rather than to that of the term “major environmental and cultural importance” itself. He therefore did not believe that the insertion of the word “further” would be appropriate.

Paragraph (4), as amended Mr. Grossman Guiloff, was adopted.

Paragraph (5)

Mr. Nolte said that, according to the first sentence, under international law, an agreement could not bind a third party without its consent. However, there were status agreements, for example those relating to the use of particular canals, that would have an effect on the rights of third States. He thus proposed that, in the first sentence, the words “in principle” should be inserted after “cannot”.

Sir Michael Wood proposed that the words “mandate of” should be deleted from the third sentence.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (13)

Sir Michael Wood said, on a general point, that it seemed slightly disproportionate to devote so many paragraphs of the commentary to a discussion of the word “cultural”. That point should perhaps be borne in mind when it came to the second reading.

Paragraphs (6) to (13) were adopted.

Commentary to draft principle 5 (Protection of the environment of indigenous peoples)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

Mr. Murphy proposed that, for greater clarity, the words “promote the continuation of” in the second sentence should be replaced with “protect”.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Mr. Nolte, referring to the first sentence, said that he wondered whether the word “otherwise” could be deleted from the phrase “unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous people concerned”, as it was unclear what function it performed in the sentence.

Ms. Lehto (Special Rapporteur) said that, as the phrase in question had been borrowed from article 30 (1) of the United Nations Declaration on the Rights of Indigenous Peoples, which was quoted in full in footnote 58, it should be retained.

Mr. Vázquez-Bermúdez said that he, too, was in favour of retaining the word “otherwise” in order to mirror the exact language of the United Nations Declaration on the Rights of Indigenous Peoples.

Paragraph (6) was adopted.

Paragraph (7)

Sir Michael Wood said that, for the sake of accuracy, in the last sentence, the words “their territories” should be replaced with “those territories”, which would refer back to phrase “the territories that indigenous peoples inhabit”, as used in the draft principle itself.

Mr. Grossman Guiloff said that, although he was not opposed to Sir Michael Wood’s proposal, the phrase “their territories” in no way implied a right to sovereignty or to self-determination on the part of indigenous peoples. If necessary, a statement excluding any such interpretation could be added to a footnote.

Mr. Vázquez-Bermúdez said that he, too, was in favour of retaining the phrase “their territories”.

Ms. Lehto (Special Rapporteur) said that, as Sir Michael Wood had raised a linguistic point, and Mr. Grossman Guiloff and Mr. Vázquez-Bermúdez a substantive one, she would be in favour of retaining the text as originally proposed.

Sir Michael Wood said that the expression “territories that indigenous peoples inhabit” was used in both draft principle 5, which had been carefully drafted, and in the second sentence of the paragraph of the commentary under consideration.

Mr. Petrič said that he was strongly in favour of retaining the phrase “their territories”. He had once worked on the situation of indigenous peoples in Colombia. The

territories that they owned had repeatedly been expropriated, although there was no doubt that Colombia had sovereignty over those territories. Indigenous peoples faced a heightened vulnerability in that regard in situations of armed conflict.

Mr. Zagaynov said that he agreed with Sir Michael Wood. It would be safer to mirror the language of the draft principle, as a possessive determiner could be interpreted as an indication of ownership. The use of the phrase “their territories” would in fact narrow the scope of the sentence, as some indigenous peoples inhabited territories that they did not own.

Mr. Jalloh said that he, too, was in favour of retaining the phrase “their territories”. The purpose of the paragraph was not merely to mirror the language of the draft principle, but also to explain that language. Footnotes 61 and 62 established the context in which the phrase “their territories” should be interpreted. The text as proposed by the Special Rapporteur did not prejudice the draft principle in any way.

Mr. Gómez-Robledo said that the paragraph should be adopted as proposed by the Special Rapporteur. It was based on applicable international law, which offered a broad enough framework for each State to be able to find an appropriate solution for its particular circumstances. That framework was clearly set out in the footnotes.

Ms. Lehto (Special Rapporteur) said that the paragraph under consideration had been provisionally adopted in 2018. The best solution might be to retain the text as originally proposed, particularly as the commentaries under consideration were being adopted on first reading.

Sir Michael Wood said that, in his view, it was unfortunate that the Commission was departing from the text of the draft principle.

Ms. Oral said that, in the International Labour Organization Indigenous and Tribal Peoples Convention, 1989 (No. 169), the phrase “their lands” was used to refer back to lands that indigenous and tribal peoples “occupy or otherwise use”. It could therefore be said that the wording proposed by the Special Rapporteur did not represent a departure from the language used at the international level.

Paragraph (7) was adopted.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were adopted.

Commentary to draft principle 6 (Agreements concerning the presence of military forces in relation to armed conflict)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Murphy proposed that the words “of the United States from Iraq” in the first sentence should be replaced with “from and temporary presence of United States forces in Iraq”.

Mr. Park said that the word “several” in the penultimate sentence should be deleted, as environmental protection was referred to throughout the text of the memorandum of special understanding between the United States and the Republic of Korea.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

Sir Michael Wood asked whether, in the second sentence, the word “on” in the phrase “including the prevention of pollution on facilities and areas” was intended to mean “within” or “from”.

Ms. Lehto (Special Rapporteur) said that she would check the language used in the memorandum of special understanding between the United States of America and the Republic of Korea, from which the wording was taken.

The Chair said that paragraph (6) would be left in abeyance until the Special Rapporteur had checked the wording.

Paragraph (6) was left in abeyance.

Paragraph (7)

Paragraph (7) was adopted.

*Commentary to draft principle 7 (Peace operations)**Paragraphs (1) and (2)*

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Sir Michael Wood said that, for the sake of readability, in the first sentence, the words “groups of” in the phrase “groups of multiple actors” should be deleted.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Mr. Nolte said that, in the first sentence, the phrase “growing recognition” should be replaced with “stronger recognition”, as it was impossible to predict whether the recognition would continue to grow in the future.

Mr. Murphy said that, for the sake of readability, in the first sentence, the words “to consider” should be replaced with “of” and the words “the need” should be inserted before “to take the necessary measures”.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

Mr. Nolte said that, in the first sentence, the word “actors” should be replaced with “States and international organizations” to reflect the wording of the draft principle. “Actors” were the subject of draft principle 8.

Paragraph (7), as amended, was adopted.

Paragraph (8)

Mr. Nolte said that, in the first sentence, which explained the distinction between draft principle 6 and draft principle 7, the phrase “and entails different obligations from those contained in the latter”, should be deleted because draft principle 6 did not contain obligations.

Paragraph (8), as amended, was adopted.

Paragraph (9)

Paragraph (9) was adopted with a minor drafting change.

*Commentary to draft principle 8 (Human displacement)**Paragraph (1)*

Mr. Park proposed that the words “, including both internationally and internally displaced persons,” should be inserted in the first sentence, after “those displaced by armed conflict”, as a clearer reflection of the discussions on the subject.

Ms. Lehto (Special Rapporteur) suggested that it might be preferable to address that concern by adding another sentence to the paragraph, to read: “The draft principle covers both internal and international displacement.”

Paragraph (1), as amended by the Special Rapporteur, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

Mr. Zagaynov said that the conflicts mentioned in the first sentence were just some of several referred to in the study by the International Law and Policy Institute. He therefore suggested that the final clause of that sentence, which contained the country-specific examples, should be deleted and that the sentence end with the words “in various conflicts”.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

Paragraph (7)

Mr. Murphy said that, in the third sentence, which concerned non-State actors and not international organizations, the term “development agencies” seemed to refer to international organizations, which was not appropriate. Those words should therefore be deleted.

Ms. Lehto (Special Rapporteur) suggested that the words “*inter alia*” could be inserted after “may include” to indicate that the list was non-exhaustive.

Paragraph (7), as amended by the Special Rapporteur, was adopted.

Paragraphs (8) to (11)

Paragraphs (8) to (11) were adopted.

*Commentary to draft principle 9 (State responsibility)**Paragraphs (1) and (2)*

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Sir Michael Wood said that, in the first sentence, the words “An act or omission of a State” should be replaced with “An act or omission attributable to a State”.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Park said that the words “private acts” at the end of the second sentence were very vague and should be replaced with wording from the reference in the relevant footnote: “persons forming part of its armed forces”.

Mr. Nolte said that the issue raised by Mr. Park could be resolved by inserting the word “their” before “private acts”; such wording would be in line with relevant international instruments. Referring to the third sentence, he wondered why it was indicated that only when a violation of Article 2, paragraph 4, of the Charter of the United Nations amounted to an act of aggression that it entailed responsibility for all damage thereby caused.

Mr. Murphy said that he would like to propose amended wording for the third sentence, to read: “As far as the law of the use of force is concerned, a violation of Article 2, paragraph 4, of the Charter of the United Nations entails responsibility for damage proximately caused by that violation, whether or not resulting from a violation of the law of armed conflict”. Then, at the beginning of footnote 127, the words “Eritrea-Ethiopia Claims Commission, Decision No. 7, 26 UNRIAA (2009), p. 631, para. 13” should be inserted after “See”. The reference in that footnote to the commentary of the International Committee of the Red Cross (ICRC) should be deleted; if it was retained, the number of the cited paragraph should be corrected.

Mr. Nolte said that he would welcome clarification on the use of the word “proximately”, which did not appear in the articles on responsibility of States for internationally wrongful acts.

Mr. Jalloh said that he supported Mr. Nolte’s amendment to Mr. Park’s proposal, as it was made clear in footnote 126 that the special rule also applied to private acts by members of the armed forces. Mr. Murphy’s proposed amendments improved the readability of the text and addressed the use of a qualifier that limited violations of Article 2 (4) of the Charter to acts of aggression. He was not in favour of introducing the doctrine of proximate cause, which was an extremely complex concept; he would prefer simply to say “caused by”.

Mr. Vázquez-Bermúdez said that he agreed with Mr. Murphy’s proposals, with the exception of the word “proximately”; the phrase “caused by” was sufficient.

Mr. Grossman Guiloff said that he agreed with Mr. Nolte and Mr. Murphy that there was no need to refer to an act of aggression. As to Mr. Murphy’s other proposals, he did not agree with the use of “proximately”. He would like to retain the footnote reference to the ICRC commentary, as it was a very authoritative source.

Ms. Lehto (Special Rapporteur) said that she agreed with Mr. Nolte’s proposal to insert “their” before “private acts”. She was grateful to Mr. Murphy for his proposed alternative wording. The word “proximate”, which appeared in the Eritrea-Ethiopia Claims Commission decision referenced by Mr. Murphy, could be included and explained in the footnote; she agreed that it would be advisable not to use it in the text of the paragraph. The paragraph reference to the ICRC commentary was incorrect; it should be paragraph 3650, which included the following text:

... the problem of the responsibility of States for acts of war does not only arise on the basis of respect for ‘jus in bello’. It also arises on the basis of ‘jus ad bellum’, which was not yet the case in practical terms at the time of the first World War. A State which resorts to war in violation of the principle of Article 2, paragraph 4, of the United Nations Charter may be held responsible for all damages caused by such a war, and not only for those resulting from unlawful acts committed in the sense of ‘jus in bello’.

The commentary was clearly a useful reference and should be included in addition to the Eritrea-Ethiopia Claims Commission reference proposed by Mr. Murphy.

Mr. Nolte said it was important not to create the impression that, in citing the term “proximate cause” in a qualitative way, the Commission understood the rules of State

responsibility to apply in that way. That concept, which played a role in one legal system, had slipped into the arbitral award and should not be amplified.

Mr. Murphy said that the rules on State responsibility addressed secondary rules, not primary rules. He had tried to capture the idea that, in the context of damage resulting from a *jus ad bellum* violation, it was clear from the jurisprudence that all damage flowing from a *jus ad bellum* violation was not to be awarded to the so-called aggressor State. “Proximate cause” was simply one way of formulating that idea; the United Nations Compensation Commission (UNCC) referred to “direct causation”. However, he would be prepared to omit “proximately”, so that the phrase would read: “the Charter of the United Nations entails responsibility for damage caused by that violation”. He was happy for a reference to paragraph 3650 of the ICRC commentary to be included in footnote 127.

Paragraph (4) was adopted with those amendments.

Paragraph (5)

Sir Michael Wood said that, for the sake of clarity, it would be helpful to reformulate the beginning of the second sentence to read: “The UNCC jurisdiction was based on Security Council resolution 687 (1991),”. In the first sentence, the words “under international law” could be deleted, since the important point was that the United Nations Claims Commission had been established pursuant to a Security Council resolution.

Mr. Murphy said that the word “armed” should be inserted before “conflict” in the first sentence.

Ms. Lehto (Special Rapporteur), supported by **Ms. Oral**, said that, while she agreed with the other proposed amendments, it was important to retain the phrase “under international law”, the usual wording in that context.

Sir Michael Wood said that, while he would not insist on the deletion of the phrase, it was misleading to say that environmental damage caused in armed conflict had been recognized as compensable under international law by UNCC, as UNCC had arrived at that position by applying Security Council resolution 687 (1991).

Mr. Murphy said that there were, in fact, UNCC panel decisions in which it was expressly stated that it was not international law that was being applied, but a Security Council decision, as implemented by UNCC.

The Chair said he took it that the Commission wished to adopt the paragraph, with the inclusion of the word “armed” in the first sentence, as proposed by Mr. Murphy, and the reformulation of the second sentence, as proposed by Sir Michael Wood.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

Mr. Nolte said that the word “recent” before “judgment” in the final sentence should be deleted.

Paragraph (6), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

Mr. Nolte said that the paragraph did not add anything to the text and should be deleted.

Ms. Lehto (Special Rapporteur) said that, in her view, it was necessary to include in the commentary a paragraph that referred to paragraph 2 of the draft principle. She

therefore proposed amending the current paragraph to read: “Paragraph 2 of draft principle 9 clarifies that the draft principles are without prejudice to the rules on the responsibility of States for internationally wrongful acts.”

Paragraph (9), as amended, was adopted.

Paragraph (10)

Paragraph (10) was adopted.

Commentary to draft principle 10 (Corporate due diligence)

Paragraph (1)

Sir Michael Wood said that, in order to reflect the language of the draft principle itself, in the last sentence of paragraph (1), the words “areas of” should be added before “armed conflict”.

Mr. Park suggested that the second and third sentences of paragraph (1), which seemed somewhat vague, should be replaced with the first sentence of paragraph (5).

Ms. Lehto (Special Rapporteur) said that it would be simpler to move paragraph (5) to the beginning of the commentary to draft principle 10.

Mr. Petrič suggested that, if such an approach was taken, the first sentence of paragraph (1) should be deleted.

Mr. Vázquez-Bermúdez, expressing the view that paragraph (1) was appropriate as drafted, with the amendment proposed by Sir Michael Wood, suggested that placing paragraph (5) between paragraphs (1) and (2) would be more logical and obviate the need for any further amendments to paragraph (1).

Ms. Lehto (Special Rapporteur) said that she would prefer paragraphs (1) to (4) to appear in their current order, as there was a connection running through all four. Paragraph (5), as a stand-alone paragraph, could easily be moved. If it was to be placed before paragraph (1), she agreed with Mr. Petrič that the beginning of paragraph (1) should be amended but suggested that it should be changed to read: “The concept of ‘corporate due diligence’ refers to a wide network...”

The Chair said he took it that the Commission agreed to amend paragraph (1) as proposed by Sir Michael Wood and the Special Rapporteur.

Paragraph (1), as amended, was adopted.

The Chair said he also took it that the Commission agreed to move paragraph (5) to the beginning of the commentary to draft principle 10, with paragraphs (1) to (4) renumbered accordingly, and to discuss amendments to the text of existing paragraph (5) in due course.

It was so decided.

Paragraph (2)

Mr. Murphy suggested that, in the first sentence, the words “Human Rights Council’s” should be inserted before “Guiding Principles”.

Ms. Lehto (Special Rapporteur) said that, as they were often known as the “United Nations Guiding Principles on Business and Human Rights”, she would prefer that wording.

The Chair said he took it that the Commission agreed to the Special Rapporteur’s suggestion.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

Mr. Park said that the second sentence of paragraph (5) was repeated as the first sentence of paragraph (11). He therefore proposed that it should be deleted from paragraph (5).

Ms. Lehto (Special Rapporteur) said that it was important to retain the sentence in paragraph (5) but that the identical sentence in paragraph (11) could be altered in due course. In the first sentence of paragraph (5), the words “including in relation to human health” should be inserted after “the protection of the environment” so as to align the text more closely with the draft principle itself.

Mr. Murase said that, in the third sentence, the word “proposed” should be deleted.

The Chair said he took it that the Commission agreed to amend paragraph (5) as proposed by the Special Rapporteur and Mr. Murase.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Mr. Murphy said that, in the second sentence, the words “and areas of armed conflict” should be corrected to “in areas of armed conflict” and the word “in” inserted before “post-armed conflict situations”.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Mr. Nolte said that it was the Commission’s practice, in its commentaries, to reflect the results of its deliberations rather than the process. To that end, the words “it was agreed that” should be deleted from the second sentence and the words “it was furthermore agreed that” from the third sentence. In the second sentence, the word “usually” should be inserted before “require” to reflect the wider debate on possible alternatives to legislative action. In the third sentence, the word “could” should be altered to “can”.

Sir Michael Wood suggested that, in the second sentence, the word “primarily” should be deleted, as legislative action alone was insufficient: legislation must be implemented. In the third sentence, he suggested that the word “could” should be altered to “may”, rather than “can”.

Paragraph (7), as amended, was adopted.

Paragraph (8)

Mr. Nolte, referring to the fourth sentence of the paragraph, said that the Commission should not leave it entirely up to States to interpret the notion “corporations and other business enterprises”, although they had some margin to do so. He suggested that the sentence should be deleted.

Ms. Lehto (Special Rapporteur) said that the sentence had been included as a result of discussions within the Drafting Committee, as reflected in the statement of its Chair.

Mr. Nolte, acknowledging that point, suggested that altering the word “ultimately” to “primarily” would take account of his concern. In the last sentence, in line with his earlier remarks concerning the Commission’s practice in its commentaries, he suggested that the words “the Commission settled in this regard on” and “which” should be deleted.

Paragraph (8), as amended, was adopted.

Paragraph (9)

In response to a request for clarification from **Sir Michael Wood**, **Ms. Lehto** (Special Rapporteur) suggested that, in the second sentence, the words “in paragraph (2)” should be inserted before “above”, as the due diligence frameworks in question were those referred to in the second sentence of what had originally been paragraph (1) of the commentary to draft principle 10.

Paragraph (9), as amended, was adopted.

Paragraph (10)

Paragraph (10) was adopted.

Paragraph (11)

Mr. Ouazzani Chahdi said that he wished to support Mr. Park's earlier remarks concerning the need to avoid duplication between paragraphs (5) and (11).

Ms. Lehto suggested that, to avoid having two identical sentences, the opening of the first sentence of paragraph (11) should be altered to read: "According to the second sentence of draft principle 10, the measures to be taken ..."

Paragraph (11), as amended, was adopted.

Paragraph (12)

Mr. Park said that the inclusion of the words "the Commission dropped", in the second sentence, was not in line with the Commission's usual practice, as previously highlighted by Mr. Nolte.

Mr. Nolte said that he shared Mr. Park's concern. He proposed that the paragraph should be left in abeyance to allow time for the paragraph to be reformulated.

Ms. Oral said that strong views had been expressed within the Drafting Committee on the issue covered by paragraph (12), particularly with regard to the word "equitable". The text should certainly reflect that fact, even if exactly how that should be done would require further discussion.

Ms. Lehto (Special Rapporteur) said that, in the first sentence, the words "by the Special Rapporteur" could be added after "as originally proposed" and that, in the second sentence, the word "dropped" could be altered to "decided not to retain". She would also be open to other suggestions; however, she was of the strong view that the content of the paragraph should be retained, in line with the statement of the Chair of the Drafting Committee on the topic.

Mr. Murphy said that the paragraph should be either redrafted to the effect suggested by Ms. Oral or deleted altogether. Moreover, the Commission should be careful not to give the impression that the meaning of the word "equitable" was unclear, as it was used in numerous other contexts.

The Chair suggested that discussion of the paragraph should be suspended to allow time for informal consultations.

It was so decided.

Paragraph (13)

Paragraph (13) was adopted.

Commentary to draft principle 11 (Corporate liability)

Paragraph (1)

Mr. Nolte suggested that, in the last sentence, the words "in a similar way" should be changed to "in the same way".

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Murphy proposed that, in the first sentence, the words "in judicial proceedings" should be deleted, as the issue of what law was applicable also arose in other contexts.

Mr. Nolte said that, in the third sentence, the words “there is also reason to recall” should be deleted.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Nolte suggested that, in the second sentence, the words “are interpreted” should be changed to “are to be applied”.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Nolte said that, in the first sentence, the words “it was agreed that” should be deleted.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Murphy suggested that, in footnote 183, the words “to pursue” should be altered to “in its”.

With that change to footnote 183, paragraph (5) was adopted.

Paragraphs (6) to (11)

Paragraphs (6) to (11) were adopted.

Paragraph (12)

Ms. Lehto (Special Rapporteur) said that the words “for the same reasons as draft principle 10” should be inserted at the end of the paragraph.

Paragraph (12), as amended, was adopted.

Part Three (Principles applicable during armed conflict)

Commentary to draft principle 12 (Martens Clause with respect to the protection of the environment in relation to armed conflict)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Murphy suggested that, in the second sentence, the words “the threat or use of” should be inserted between “to” and “nuclear weapons”.

Mr. Vázquez-Bermúdez suggested that, in the last sentence, a reference to general principles of law should be added after the references to treaty law and customary international law.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

Mr. Zagaynov said that, in the course of the Commission’s debates, some members had expressed doubt about extending the scope of the Martens clause; however, rather than amending the paragraph to reflect the fact that such a view had been expressed, he

suggested that reference might simply be made to the clause having originally been narrower in scope.

Ms. Lehto (Special Rapporteur) said that she agreed with Mr. Zagaynov's proposal. She requested that the paragraph should be left in abeyance so that appropriate wording could be found.

Mr. Murphy suggested that, in the last sentence, the words "United Nations" should be inserted before "Member States". For the sake of accuracy, footnote 216 should indicate that United States agency members of the International Union for Conservation of Nature (IUCN) had also not joined the consensus on adopting the recommendation cited.

Mr. Murase suggested that, as the Martens clause applied only during armed conflicts, the last sentence of the paragraph should end at the marker for footnote 216.

Ms. Lehto (Special Rapporteur) said that the sentence in question referred to the recommendation adopted by the World Conservation Congress, which was intended to apply during peacetime as well as during armed conflicts; therefore, the second part of the sentence should be retained.

Sir Michael Wood proposed that the Congress should be referred to in full as the "second IUCN World Conservation Congress", as it was the first time it was mentioned in the text. He supported the retention of the last part of the paragraph.

The Chair said he took it that the Commission agreed to suspend discussion of paragraph (5) pending informal consultations.

It was so decided.

Paragraph (6)

Mr. Nolte said that, in the third sentence, the word "growing" should be deleted.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Mr. Park said that, in his view, the statement in the final sentence that "principles of humanity" could be taken to refer more generally to humanitarian standards that were found not only in international humanitarian law but also in international human rights law was problematic and logically flawed. Principles of humanity were closely related to military necessity; in accordance with those principles, any suffering, injury or destruction not necessary to achieve the legitimate purpose of a conflict was prohibited. Based on that understanding, it was not clear to him how principles of humanity could be connected to international human rights law. Footnotes 221 and 222 did not adequately clarify the issue. He therefore proposed deleting the final sentence.

Mr. Nolte said that paragraph (7) was an important one that referred to a point that he and others had raised during the debate. He wished to propose amendments to better reflect the discussion and bring the text into line with the Commission's standard language. The second sentence could be reformulated to read: "It has even been questioned whether the environment can remain under the protection of 'the principles of humanity', given that the function of such principles is to specifically serve human beings." Since it had been agreed that the commentaries should not describe the Commission's decision-making process, he proposed that, in the third sentence, the words "the Commission nevertheless agreed that it was important to retain that reference to protect the integrity of the Martens Clause" should be replaced with "the Commission nevertheless retained the reference...". In the fourth sentence, the words "it was also agreed that" could be replaced with "indeed" and the word "memorably" could be deleted, as it was not in line with the Commission's usual style.

Mr. Murphy said that the idea of protecting the integrity of the Martens clause seemed somewhat unusual. He therefore proposed that the third sentence and the words "it was also agreed" at the beginning of the fourth sentence should be deleted. The existing fourth sentence could then be reformulated to read: "Nevertheless, that reference was

retained given that humanitarian and environmental concerns are not mutually exclusive ...”.

Mr. Vázquez-Bermúdez said that he supported Mr. Nolte’s proposal to avoid describing the Commission’s decision-making process. It was his understanding that the importance of protecting the integrity of the Martens clause had been discussed in the Drafting Committee and the plenary, but he would not object to the deletion of the third sentence if the Special Rapporteur so decided. The key point was the relationship between humanitarian and environmental concerns to which the Martens clause applied. In his view, the last sentence on principles of humanity was drafted in sufficiently flexible terms and should not prove problematic; he would therefore be in favour of retaining it.

Mr. Jalloh said that, while he understood Mr. Park’s concerns about the final sentence, it was his understanding that the sentence essentially recognized that the Martens clause applied primarily in the context of armed conflict, but that a connection was being made to human rights. He would be in favour of retaining the sentence, which, in his view, served a useful purpose in explaining the connection the Commission was seeking to make between the principles of humanity and humanitarian standards that could be found and be better articulated in the context of international human rights law. He agreed with Mr. Nolte that the paragraph could be reworded to better reflect the debate in the Drafting Committee, but his own preference would be for a more neutral formulation. A number of members had been of the view that the distinction that the Commission was trying to draw between human beings, as such, and the purpose of the principles reflected the view – as recognized by the International Court of Justice – that the environment was not an abstraction but represented the living space, the quality of life and the very health of human beings. He agreed that the word “memorably” could be deleted. He also supported Mr. Murphy’s proposals for the reformulation of the third and fourth sentences.

Ms. Lehto (Special Rapporteur) said that she could agree to Mr. Nolte’s proposed reformulation of the second sentence and Mr. Murphy’s proposal for the third and fourth sentences. With regard to Mr. Park’s proposal, her strong preference would be to retain the last sentence.

Mr. Nolte said that the reference to protecting the integrity of the Martens clause was important and should be retained.

Mr. Gómez-Robledo said that he wished to take the floor as he had been one of the members who had been against the inclusion of a reference to the Martens clause in the draft principles. In his view, the Commission was moving in the right direction and he was happy with the Special Rapporteur’s proposed wording. He did not share Mr. Nolte’s interpretation of the third sentence; in his view, the inclusion of a reference to “principles of humanity”, rather than to the Martens clause itself, served precisely to protect the integrity of the Martens clause, which was intended to address other situations. He would therefore support the Special Rapporteur’s more neutral formulation, which made it clear that there was disagreement within the Commission on the matter.

The Chair suggested that paragraph (7) should be held in abeyance to allow interested members and the Special Rapporteur to reach an agreement.

It was so decided.

Paragraph (8)

Mr. Park said that, at the beginning of the first sentence, the words “by the Special Rapporteur” should be added after “as originally proposed”.

Mr. Nolte said that, if more time were available, he would ask for the paragraph to be reformulated to reflect the Commission’s usual style. However, at the very least, Mr. Park’s proposal should be accepted. He would also propose replacing the word “deleted” with “not retained” in the second sentence.

Paragraph (8), as amended, was adopted.

Paragraph (9)

Mr. Murphy proposed that, for the sake of clarity and readability, the paragraph should be recast along the lines of the wording in paragraph (8) of the commentary to draft principle 18. It would read: “Draft principle 12 is located in Part Three containing draft principles applicable during an armed conflict. It also applies in situations of occupation.”

Paragraph (9), as amended, was adopted.

Commentary to draft principle 13 (General protection of the natural environment during armed conflict)

Paragraph (1)

Sir Michael Wood said that, on first reading, the question had been left open as to whether the Commission would refer to the “environment” or the “natural environment” in that specific part of the project. Perhaps a sentence should be formulated raising that issue.

Ms. Lehto (Special Rapporteur) said that that point was mentioned in paragraph (6) of the introduction to the draft principles.

Paragraph (1) was adopted with a minor editorial amendment.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

Sir Michael Wood proposed deleting the words “to date” at the end of the first sentence. He wondered whether a reference to law of armed conflict instruments might also be added to that sentence, which mentioned international environmental law and international human rights law instruments.

Ms. Lehto (Special Rapporteur) said that, in principle she would have no objection to the addition of such a reference, but she would first have to check the relevant footnote.

Paragraph (3) was held in abeyance.

Paragraph (4)

Mr. Nolte said that the word “the” was missing before “part of the law” in the second sentence. In the third sentence, the word “increasingly” could be replaced with “often”.

Paragraph (4), as amended, was adopted

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

Mr. Vázquez-Bermúdez said that, although the possible inclusion of express references in the draft principle itself to the content of article 55, on protection of the natural environment, of Additional Protocol I had been mentioned in the Drafting Committee, it had not been discussed in depth and should be taken into account on second reading.

Paragraph (6) was adopted.

Paragraph (7)

Sir Michael Wood said that the phrase “also adopts the use of the word” in the first sentence could be simplified to read “also uses the word”. In order to more accurately mirror the language of article 1 (4) of Additional Protocol I, the fourth sentence should refer to “conflicts in which peoples are fighting against colonial domination and alien

occupation and against racist regimes”. He proposed deleting the words “thus without the involvement of a State” at the end of the final sentence, since it was possible to have an armed conflict between organized armed groups within the territory of a State which might actually involve a State as well.

Paragraph (7), as amended, was adopted.

Paragraph (8)

Mr. Nolte proposed deleting the words “it must be kept in mind that” from the second sentence.

Paragraph (8), as amended, was adopted.

Paragraph (9)

Mr. Nolte proposed deleting the words “at the time of drafting” from the beginning of the third sentence. The third and fourth sentences should then be merged to read: “Concerns that this exclusion may weaken the text of the draft principles should be met by the general nature of the draft principles”. In his view, the fifth sentence, as currently drafted, was overly broad in the light of the principles that had now been adopted. It was not appropriate to make a general statement that the draft principles did not aim to reformulate existing rules and principles when the prohibition of pillage, for example, was, in fact, a reformulation of the existing law of pillage. He therefore proposed deleting the fifth sentence and the words “in addition” at the beginning of the sixth sentence.

Mr. Murphy said that Mr. Nolte’s proposal for the third and fourth sentences could perhaps be amended to read: “Concerns that this exclusion may weaken the text of the draft principles should be considered in light of the general nature of the draft principles.”

Ms. Lehto (Special Rapporteur) said that she supported the formulation proposed by Mr. Nolte and Mr. Murphy in respect of the third and fourth sentences and the deletion of the fifth sentence, although the prohibition of pillage was not a good example to support it, as in that case the provision was fully consistent with existing rules and had not been reformulated in any way.

Paragraph (9), as amended, was adopted.

Paragraph (10)

Sir Michael Wood said that the formulation of the first sentence was misleading, as it seemed to suggest that the environment was not a civilian object, whereas the whole basis for the proposition was that it was a civilian object, unless it became a military objective. He therefore proposed merging the first and second sentences to read: “Paragraph 3 of draft principle 13 is based on the fundamental rule that a distinction must be made between military objectives and civilian objects.” Alternatively, the first sentence could be retained but reformulated to quote the draft principle accurately: “Paragraph 3 of draft principle 13 provides that no part of the natural environment may be attacked, unless it has become a military objective.”

Ms. Lehto (Special Rapporteur) said that, as paragraph (10) dealt with an important substantive issue that had been agreed upon in 2016, she was reluctant to reopen the debate on it. However, she would be willing to try to find alternative language that retained the essential substance of the paragraph.

Paragraph (10) was held in abeyance.

Paragraphs (11) and (12)

Paragraphs (11) and (12) were adopted.

Paragraph (13)

Mr. Nolte said that, for the sake of consistency with amended paragraph (9), in the third sentence, the words “once again” and the phrase “and that they do not aim to

reformulate rules and principles already recognized by the law of armed conflict” should be deleted.

Paragraph (13) as amended, was adopted.

Paragraph (14)

Mr. Nolte proposed deleting the words “it can be seen that” and replacing the words “tries to strike” with “strikes” in the first sentence.

Paragraph (14), as amended, was adopted.

Commentary to draft principle 14 (Application of the law of armed conflict to the natural environment)

Paragraph (1)

Mr. Nolte proposed deleting the words “and not to reaffirm the law of armed conflict” at the end of the final sentence, since some of the draft principles did, in fact, seek to reaffirm the law of armed conflict.

Mr. Murphy said that, in that instance, the phrase referred not to the draft principles as a whole but to that particular draft principle; in his view, the proposition put forward was correct.

Ms. Lehto (Special Rapporteur) said that she would be in favour of retaining the last part of the final sentence in the light of the explanation given by Mr. Murphy.

Paragraph (1) was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraph (4)

Mr. Nolte said that, in the third sentence, it should be specified where exactly in the commentary to draft principle 13 the relevant explanation was given.

With that amendment, paragraph (4) was adopted.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

Paragraph (8)

Mr. Nolte said that, for the sake of consistency with the wording used thus far in the text, the words “the rules relating to proportionality are” in the first sentence should be replaced with “the principle of proportionality is”. The word “though” could be deleted in the second sentence.

Mr. Murphy said that the expression “rules relating to proportionality” also appeared in paragraph (7), which had just been adopted. If Mr. Nolte’s proposal for harmonization was accepted, there would be knock-on effects elsewhere, such as the second sentence of paragraph (8), which referred to “the rule”.

Ms. Lehto (Special Rapporteur) said that she agreed with Mr. Nolte that the “principle of proportionality” and the “rules relating to proportionality” were not exactly the same. One solution might be to refer to the “rules relating to the principle of proportionality” in paragraphs (7) and (8).

Mr. Nolte said that in the second sentence reference should be made to the “application of the principle” rather than to the “application of the rule”, as there was no one “rule”.

Mr. Murphy said that, if Mr. Nolte's proposed amendment in the second sentence was adopted, the reference should be to "the application of the principle of proportionality" rather than simply "the application of the principle".

Paragraph (8), as amended by Mr. Nolte and Mr. Murphy, was adopted.

Paragraphs (9) and (10)

Paragraphs (9) and (10) were adopted.

Paragraph (11)

Mr. Murphy said that the language in the first sentence should be aligned with the wording of rule 15 of the International Committee of the Red Cross study *Customary International Humanitarian Law* and refer to "all feasible precautions" rather than "necessary and active precautions".

Paragraph (11), as amended, was adopted.

Paragraph (12)

Paragraph (12) was adopted.

Commentary to draft principle 15 (Environmental considerations)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Ms. Lehto (Special Rapporteur) said that, for the sake of consistency with standard practice, the last sentence should be amended to read: "However, a view was expressed that it should not be retained."

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Nolte said that the word "the" should be added before "rules on military necessity" at the end of the fourth sentence.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Commentary to draft principle 16 (Prohibition of reprisals)

Paragraph (1)

Sir Michael Wood said that the expression "is a mirror image of" should be replaced with "is identical to".

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (9)

Paragraphs (2) to (9) were adopted.

Paragraph (10)

Mr. Nolte said that the unusually complicated and perhaps misleading formulation "was simply too precarious, as it" could be deleted so that the second sentence would read: "However, it was ultimately considered that any formulation other than the one adopted could be interpreted as weakening ...". The third sentence could also be streamlined to read:

“This would be an undesirable result, given the fundamental importance of the prohibition of reprisals to the law of armed conflict.”

Mr. Murphy said that Mr. Nolte should be careful not to unravel what was a very carefully crafted paragraph that attempted to address a very serious concern that several members had expressed with respect to that particular draft principle.

Mr. Nolte said that it had certainly not been his intention to unravel any compromise and he was sure that an alternative solution could be found.

The Chair proposed that paragraph (10) should be held in abeyance to allow interested members to agree on alternative wording.

It was so decided.

The meeting rose at 1 p.m.