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International Law Commission

Seventy-third session (first part)

Provisional summary record of the 3571st meeting

Held at the Palais des Nations, Geneva, on Thursday, 28 April 2022, at 11 a.m.

Contents

Present:

Chair:	Mr. Tladi
Members:	Mr. Al-Marri
	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Saboia
	Mr. Šturma
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 11 a.m.

Protection of the environment in relation to armed conflicts (agenda item 3) (A/CN.4/749 and A/CN.4/750)

Ms. Lehto (Special Rapporteur), introducing her third report on protection of the environment in relation to armed conflicts (A/CN.4/750), said that, in the almost three years since the Commission had last discussed the topic, new examples of armed conflict and related destruction and degradation of the environment had come to its attention and were a cause for deep concern. The ongoing international armed conflict in Ukraine had resulted in the seizure of nuclear facilities, the destruction of oil depots, large fires producing toxic pollution, attacks on protected wetlands and the loss of agricultural land to landmines and remnants of war. In Tigray, Ethiopia, the results of 30 years of environmental restoration were being threatened by the non-international armed conflict that had begun in November 2020, which had produced significant deforestation, as the collapse in the supply of fuel and electricity had led to an increase in the use of wood as a fuel source. The coronavirus disease (COVID-19) pandemic had served as further evidence of the connection between accelerated exploitation of natural resources and the outbreak of zoonotic diseases.

In general, the international community had become more aware of planetary environmental challenges such as climate change and biodiversity loss. The protection of the environment in relation to armed conflicts had been part of the broader debate on environmental security within the United Nations system and elsewhere. It was important to recognize that the environmental effects of armed conflicts were not only local. Research showed that 80 per cent of all major armed conflicts between 1950 and 2000 had taken place in biodiversity hotspots. At the same time, States were undertaking commitments to reduce military emissions significantly, and the right to a healthy and sustainable environment had been recognized worldwide. Several legal initiatives focused on the protection of water installations, assistance to victims or the criminalization of ecocide.

In 2020, the International Committee of the Red Cross (ICRC) had issued its updated guidelines on the protection of the natural environment in armed conflict, which were of direct relevance to the Commission's work on the topic and represented an important milestone in increasing understanding of how existing obligations under the law of armed conflict provided protection to the environment.

Since the inclusion of the topic in the Commission's programme of work in 2013, it had been under active consideration by the Commission on the basis of the three reports submitted by the first Special Rapporteur, former Commission member Marie G. Jacobsson, and most of the draft principles had been derived from those reports and debates. Her own two previous reports (A/CN.4/720 and A/CN.4/728) had contributed some additional themes to the discussion, resulting in 11 new draft principles (8–12, 18–22 and 26). The second reading would give the Commission a unique opportunity to look at the set of draft principles as a whole, in the light of the comments and observations received from States, international organizations and others.

The draft principles and commentaries thereto adopted on first reading in August 2019 had been commented on by 53 States in the Sixth Committee at the seventy-fourth session of the General Assembly. Twenty-three States and 10 international organizations had submitted written comments in response to the Commission's invitation. ICRC, the International Union for Conservation of Nature (IUCN) and the Environmental Law Institute had also submitted written comments, and a joint submission had been received from seven civil society organizations. Those comments were compiled in document A/CN.4/749.

The general comments received mainly focused on a limited number of issues. They did not question the relevance of the topic, and they widely endorsed the Commission's basic approach. At the same time, questions had been raised regarding the general application of the draft principles to different types of armed conflicts. Comments had been made regarding the normative nature of the draft principles and the need for more clarity in that regard.

Turning to Part One of the draft principles, she said that, in draft principle 1, the phrase "including in situations of occupation" should be added to the end of the sentence to better reflect the scope of the draft principles. In draft principle 2, she proposed an amendment that

would serve two purposes. First, it would address a problem identified in several comments, namely that by referring only to “minimizing” damage instead of avoiding it, the text seemed to limit the purpose of the draft principles unnecessarily and to overlook the provisions of the law of armed conflict that specifically addressed avoidance. A reference to prevention would cover both minimization and avoidance, a point that could be explained in the commentary. Secondly, in keeping with the general proposal originally suggested by the United Kingdom, she proposed that the phrase “to prevent, mitigate and remediate” should be used consistently in draft principles 2, 6, 7 and 8, all of which referred to measures to be taken to protect the environment in relation to armed conflicts.

Turning to Part Two, she said that, in draft principle 4, “Designation of protected zones”, the phrase “major environmental and cultural importance” had generated numerous comments and should be clarified. Her understanding, based on the commentary to the draft principle (A/74/10, chap. VI), was that the phrase did not mean that such protected zones must be both environmentally and culturally important. Since that was nevertheless a possible interpretation, she had proposed a minor change to the wording to better reflect the Commission’s intention; she had also proposed a similar change to draft principle 17.

With regard to draft principle 5, she suggested that the Commission should consider making paragraph 1 applicable to non-State actors, including non-State armed groups, given that such groups had exercised control over territory and people on numerous occasions in recent non-international armed conflicts. That suggestion was unlikely to create any problems, since paragraph 1 contained only a general reminder of the need to protect the territories of indigenous peoples in the event of an armed conflict. Paragraph 2, on the other hand, should continue to address only States, since it was based on specific State obligations. The proposed change in the opening phrase, from “After an armed conflict that has adversely affected” to the more general wording “When an armed conflict has adversely affected”, would reflect the continuing obligation of consultation and the fact that remedial measures needed to be taken not only after but also during an armed conflict, as had been recognized by the Commission. The change would furthermore be consistent with the general applicability of the draft principles to different types of armed conflicts.

In draft principles 6, 7 and 8, the words “prevent, mitigate and remediate” should be used, in line with her proposal for draft principle 2. With reference to draft principle 6, Israel and the United States of America had expressed the view that the phrase “agreements concerning the presence of military forces in relation to armed conflict” posed practical difficulties, given that there were hardly any such agreements. It therefore made sense to place the words “in relation to armed conflict” after the words “environmental protection” earlier in the sentence, as had been proposed by the United States. Those words would then be deleted from the title of the draft principle. The proposed change would not make the draft principle applicable to all agreements concerning the presence of military forces, as it would still contain the words “as appropriate”, indicating that it covered only those agreements in which it was appropriate to address the protection of the environment in relation to armed conflicts.

With regard to draft principle 7, the only proposed change was to replace the phrase “the negative environmental consequences thereof” with the phrase “the environmental harm resulting from those operations”. In draft principle 8, she proposed a more substantive change to extend the scope of the provision to areas crossed by displaced people, as had been proposed by Lebanon, Ukraine and the United Nations Environment Programme. Reference could also be made to the practice of the United Nations Compensation Commission in recognizing environmental harm in areas of transit as compensable.

Regarding draft principle 9, she proposed that paragraph 2 should be deleted and replaced with a different saving clause that made reference to existing or emerging rules pertaining to the international responsibility of non-State actors. That proposal represented an attempt to respond to numerous comments regarding the need to address the responsibility of a range of non-State actors, including non-State armed groups, individuals, international organizations and others. Such a paragraph, the commentary to which could refer to some of the relevant developments, would demonstrate that the Commission recognized the validity of those comments and the complexity of current armed conflicts, in particular non-international armed conflicts. The current paragraph 2 had originally been part of a different

draft principle that had not restated the basic principle of State responsibility for internationally wrongful acts but had included a provision that had later become draft principle 26. While paragraph 2 might have served a useful purpose in that context, its usefulness was less evident in the current one.

With regard to draft principles 10 and 11, given that the phrase "in an area of armed conflict or in a post-armed conflict situation" had been found to allow for different interpretations, she proposed that it should be replaced with the less ambiguous wording "an area affected by an armed conflict", in line with the relevant Organisation for Economic Co-operation and Development documents. The commentary could explain that the term was intended to cover armed conflicts, situations of occupation and post-armed conflict situations. She also proposed that, in draft principle 11, the phrase "corporations and other business enterprises" should be replaced with "business enterprises", echoing the United Nations Guiding Principles on Business and Human Rights. There did not appear to be any substantive difference between the two terms, but the second had the benefit of being simpler and more widely used. That change would also affect the titles of draft principles 10 and 11. Lastly, she proposed that the temporal scope of the two draft principles should be extended to cover "high-risk" situations. That term referred to pre-conflict situations and was a concept widely used in the relevant documents of reference.

Turning to Part Three, she said that, with regard to the choice between the terms "environment" and "natural environment" in draft principles 12–16, her view all along had been that the use of two different terms in the draft principles could only be a temporary solution. In light of the comments and observations received, it seemed obvious that the term "environment" should be used consistently throughout.

With reference to the many suggestions from States and international organizations that the text should include additional draft principles reflecting various provisions of the law of armed conflict, she noted that there were numerous provisions not currently mentioned in Part Three that were relevant to the protection of the environment. With one exception, however, she had not proposed any new provisions, primarily because doing so did not seem feasible at the current late stage of consideration of the topic, and because the updated guidelines issued recently by ICRC contained a comprehensive compilation of principles and rules of the law of armed conflict that provided protection to the environment.

Nevertheless, she proposed that the commentary to Part Three should include a new introduction that would refer to a broader set of rules and principles of the law of armed conflict and provide some clarifications regarding the applicability of international environmental law during an armed conflict. It would also add balance to the structure of the draft principles, given that the commentary already included an introduction to Part Four.

Apart from the proposed change in terminology from "natural environment" to "environment" in draft principles 13–16, she proposed that a new paragraph should be added to draft principle 13. It would reflect article 35 (3) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), which, apart from article 55 of Protocol I, was the only treaty-based rule of the law of armed conflict that provided direct protection to the environment. The provision would have value in setting an absolute limit to the environmental harm caused in the conduct of hostilities.

The reference to "military necessity" in draft principle 14 did not seem appropriate. As one of the two cardinal principles of the law of armed conflict underlying more specific rules, "military necessity", as France had aptly pointed out, was of a different order from the other principles mentioned in the text. She therefore proposed that it should be deleted. Secondly, she proposed that the words "in attack" after the word "precautions" should be deleted because the principle of precautions under the law of armed conflict covered other military operations as well as the choice of means and methods of attack. Those two changes would make draft principle 14 more consistent with the law of armed conflict.

Of all the States and organizations that had commented on draft principle 15, not one had regarded the draft principle as necessary. A number of States and ICRC had proposed that it should be deleted or merged with draft principle 14, as noted in paragraphs 174–176 of her report. Ireland and IUCN were in favour of retaining the provision, despite recognizing

its overlap with draft principle 14. The reasons given by ICRC for proposing its deletion were that draft principle 15 added no further protection beyond the principle of proportionality already included expressly in draft principle 14; raised a risk that the rule of proportionality would be applied to the environment with a caveat because the reference to "environmental considerations" was vague and subject to interpretation; and might fragment the international law governing proportionality as applied to the natural environment. After having considered the issue carefully, she suggested the deletion of the draft principle; however, it was important to retain those parts of the commentary to draft principle 15 that were relevant to draft principle 14.

Apart from the change in terminology from "natural environment" to "environment", no amendment was proposed to draft principle 16. As to draft principle 17, and apart from the amendment to the phrase "area of major environmental and cultural importance" already mentioned in relation to draft principle 4, she suggested that a reference to "additional agreed protections", as proposed by ICRC, should be added to address the concerns expressed about how that draft principle related to draft principles 4 and 13.

Concerning Part Four, with regard to draft principle 20, she reiterated her proposal that the words "General obligations" in the title should be changed to "General environmental obligations" to indicate that the provision was not intended to cover all such general obligations. As to paragraph 2, one issue raised in the comments was the fact that the phrase "significant harm to the environment of the occupied territory that is likely to prejudice the health and well-being" could be read as setting two cumulative conditions: that the harm must both be significant and prejudice health and well-being. Since that was not the Commission's intention, as explained in the commentary, she proposed that the phrase should be reformulated to read "significant harm to the environment of the occupied territory, including environmental harm that is likely to prejudice the health and well-being". Two further amendments to paragraph 2 would strengthen its legal basis by anchoring it more firmly in the law of occupation and international human rights law. First, she proposed that the word "population" should be replaced with "protected persons", which was an established term in the law of occupation. Secondly, the words "or to violate their rights" should be added at the end of the paragraph, so as to cover both human rights and the rights of protected persons under the law of occupation.

In draft principle 21, she proposed that the same change of terminology should be made from "population" to "protected persons", or alternatively "the protected population", given that the focus of draft principle 21 was not on individual rights but on the collective benefit derived from the use of natural resources.

As for draft principle 22, she proposed several changes that would better align it with the terminology used widely in international instruments and in the Commission's earlier work. The draft principle was a specific application of the general principle identified and articulated in the Commission's articles on prevention of transboundary harm from hazardous activities. While one result of the proposed changes would be the loss of the words "areas beyond the occupied territory", the underlying idea could be retained if the commentary explained that the reference to "other States" included the territorial State, in the event that only a part of its territory was occupied.

In Part Five, she proposed that the words "damaged by the conflict" in draft principle 23 should be changed to "damaged in relation to the conflict", given that armed conflicts generated both direct and indirect environmental effects that required remediation. In draft principle 24 (1), she proposed that the phrase "after an armed conflict" should be changed to "in relation to an armed conflict". A similar issue arose in several of the draft principles concerning obligations that might be applicable during an armed conflict. Limiting the scope of the provisions to the time after an armed conflict would exclude situations of occupation and would wrongly imply that remedial measures could only be taken after an armed conflict.

Paragraph 2 of draft principle 24, "Sharing and granting access to information", followed the wording used in the Convention on the Law of the Non-navigational Uses of International Watercourses and the draft articles on the law of transboundary aquifers. While she agreed that considerations of national defence and security were relevant in the context of the topic, she was also mindful of criticism expressed in the written comments received,

including with regard to the applicability of paragraph 2 to international organizations. The Commission should consider deleting paragraph 2, given that the applicable treaties contained very different conditions and limitations with regard to sharing and granting access to information. For example, many multilateral environmental agreements limited the categories of information that could be regarded as confidential. The Stockholm Convention on Persistent Organic Pollutants, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity and the Minamata Convention on Mercury provided that information on the health and safety of humans and the environment should not be regarded as confidential. Under the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), a request for information could be refused if disclosure would adversely affect international relations, national defence or public security or, *inter alia*, the confidentiality of commercial and industrial information, the confidentiality of personal data, or the environment to which such information related. The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement) mentioned exceptions for cases where disclosure would put at risk the life, safety or health of individuals; adversely affect national security, public safety or national defence; adversely affect the protection of the environment, including any endangered or threatened species; or create a risk of substantial harm to law enforcement or to the prevention, investigation and prosecution of crime.

Human rights treaties recognized the protection of national security and public order as grounds for restricting the rights to seek, receive and impart information but required that such restrictions should be provided for by law and be necessary. The Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (amended Protocol II) and the Protocol on Explosive Remnants of War (Protocol V) to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects permitted the withholding of information in certain specific circumstances if legitimate security interests so required. The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Convention) reminded States parties that they must not impose undue restrictions on the provision of such information for humanitarian purposes, and the Convention on Cluster Munitions contained similar provisions. Other examples could also be cited. While paragraph 2 of draft principle 24 could coexist with those standards, a better approach might be to rely on the limitations already in place, given that paragraph 1 referred to obligations under international law.

The changes proposed to draft principles 25 and 26 were a direct response to a number of comments pointing out that the phrases “is encouraged” and “are encouraged” were unclear and inappropriate, given that binding obligations existed with regard to remediation. Those comments were outlined in paragraphs 275–277 and 283–284 of her report. She therefore proposed that the phrase should be replaced with the more transparent term “should” and that existing obligations should be referred to in the commentaries to the two draft principles. In addition, she was willing to accommodate the proposals made on the extension of the scope of draft principle 26 to cover relevant international organizations, as noted in paragraph 286 of the report.

In draft principle 27, “Remnants of war”, she suggested the removal of the words “After an armed conflict” at the beginning of paragraph 1. While she fully accepted the Commission’s decision to divide the draft principles according to three temporal phases corresponding to the periods before, during and after an armed conflict, various States in the Sixth Committee, and the Commission itself, had acknowledged that the division was not set in stone. The most logical place for draft principle 27 was undoubtedly in Part Five, as its main potential for application would be in the aftermath of a conflict, but there was no need to specifically rule out its application in situations of occupation or even during an armed conflict. The division of the draft principles into different parts was a means of orientation, not an end in itself. The phrase “after an armed conflict” seemed to require a formal end to a conflict, which was problematic in view of the general trend towards protracted armed conflicts and the uncertainties related to the termination of an armed conflict. Furthermore, the phrase was open-ended and did not specify a particular time limit in the aftermath of a

conflict. The international obligations that had inspired the draft principle defined the time frame for the removal or rendering harmless of remnants of war in a much more specific way. Removing the words “after an armed conflict” and indicating that the measures were to be taken “as soon as possible” would provide better guidance to the parties to an armed conflict, while not putting an unreasonable burden on them. She also suggested that both paragraphs of the draft principle should refer to “toxic or hazardous remnants of war” instead of “toxic and hazardous remnants of war”. Given that something “toxic” was hazardous by definition, the phrase using “and” would cover only toxic remnants, leaving out remnants that were hazardous but not toxic. Such materials and remnants, in particular explosive remnants, could still pose a hazard to the environment. The category of “hazardous remnants” also covered a wider range of current and future threats to the environment resulting from the debris of war or military activities.

Proposals for new draft principles on the gender impact of conflict-related environmental damage and the protection of water resources and installations had been made; however, as the Commission was at a late stage of its consideration of the topic, she suggested that those issues should be addressed instead in the relevant commentaries. Concerning the proposed addition of a preamble, she recalled that in 2019 it had been specifically noted that such an addition could be made at the time of the second reading. A preamble could usefully serve as an introduction to the set of draft principles and would provide an opportunity to recall the broader connections of the topic. At the same time, any preamble should be concise and general and should not attempt to cover the specific themes and issues addressed in the draft principles.

Various elements for inclusion in a preamble were proposed in paragraph 311 of her report. The first preambular paragraph would refer to principle 24 of the Rio Declaration on Environment and Development. The first paragraph of the preamble to the Commission’s principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities similarly reaffirmed principles 13 and 16 of the Rio Declaration. The second proposed preambular paragraph, inspired in part by the judgment of the International Court of Justice in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, would recognize that the environmental consequences of armed conflicts might be severe, long-term and irreversible, and have the potential to exacerbate global environmental challenges such as climate change and biodiversity loss. The third preambular paragraph was based on a proposal by IUCN; the fourth was based on a proposal by the Economic and Social Commission for Asia and the Pacific (ESCAP). The fifth and sixth preambular paragraphs would refer to the scope and purpose of the draft principles.

Proposals had also been made regarding the establishment of a mechanism to monitor the implementation of the draft principles. While such a mechanism would be of undeniable benefit, she had concluded that the Commission might not be in the best position to propose the type of follow-up to be given to its outputs, beyond the formal recommendation always made to the General Assembly. In terms of the final form of the Commission’s work on the topic, she proposed that the designation “draft principles” should be retained. In closing, she said she hoped that the draft principles and elements of the proposed preamble would be referred to the Drafting Committee for consideration.

Mr. Park, while expressing sincere appreciation to the Special Rapporteur for her third report, said that, unlike reports on other topics, the report sometimes presented the comments and observations received from international and regional organizations, ICRC and non-governmental organizations (NGOs) before those received from States, as, for example, in paragraph 32. The normal procedure in United Nations documents was to cite comments received from States first, followed by those from international organizations, and finally those from NGOs. Moreover, some of the Special Rapporteur’s proposed modifications to the draft principles adopted on first reading were based on comments and observations made by non-State entities. For example, the proposal to extend the scope of draft principles 10 and 11 to include “high-risk” situations was based on a suggestion made by the Environmental Law Institute, but no specific suggestion had been made on that point by States. In the modern age, international organizations and civil society certainly had an active role to play in the debate; however, environmental NGOs generally insisted on higher standards of environmental protection than States. The proposed modifications that were

based on comments made by non-State entities, especially NGOs, might therefore be inconsistent with the expectations of States. The Commission should consider whether proactively reflecting the comments of non-State entities, in particular NGOs, in the draft principles at the second-reading stage, despite the absence of comments from States, was appropriate and desirable from the perspective of its mandate, and whether such an approach was evolutive and generally acceptable or was only acceptable on a case-by-case basis, depending on the legal nature of a particular topic.

In his view, the most controversial suggestion made by the Special Rapporteur was to delete the qualifier "natural" from the expression "natural environment", notably in Part Three of the draft principles. While some States, such as Belgium, the Nordic countries and Spain, had expressed a preference for the broader term "environment", others, including France and the United Kingdom, had insisted that the narrower term "natural environment" should be used. Some States, such as Israel, Switzerland and the United States, had indicated that their preference for the latter term was consistent with existing international humanitarian law. Given the divergent opinions among Commission members and in the Sixth Committee, the Commission had previously left open the question of which term to use in Part Three of the draft principles, although in 2019 the Special Rapporteur had recommended using "environment" throughout. He maintained his view that the term "natural environment" should be used, at least in Part Three, in order to ensure that the topic had a more concrete outcome. The term "environment" alone was too broad: without the qualifier, the scope of the topic would become uncertain, rendering interpretation difficult. The question of the human environment would then be raised, which was likely to overextend the scope of the Commission's work to include the protection of civilian persons, which was already covered by the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention). Moreover, as draft principles 13 and 16 were based on articles 35 (3) and 55 (1) and (2) of Protocol I Additional to the Geneva Conventions of 1949, the term "natural environment" should be retained. In addition, broadening the scope of the draft principles to cover the environment in general would not be consistent with the intentions of States. Spain had advocated the use of the term "environment", but had also stressed that the draft principles did not change or expand the scope of the rules of international law in force. A similar position had been expressed by France and Japan.

With regard to the proposed reference to "situations of occupation" in draft principle 1, the commentary to Part Four of the draft principles already noted that the draft principles contained in Parts Two, Three and Five applied *mutatis mutandis* to such situations. Concerning draft principle 4, some States had sought further clarification of the term "cultural", prompting the Special Rapporteur to propose new wording based on the comments made by the United Kingdom. However, he considered the element of "culture" to be too broad and obscure; it should be deleted, so that the focus remained on environmental aspects. In draft principle 7, the use of the mandatory verb "shall" had been opposed by most States, including Canada, Germany, Japan, the Netherlands and the United States, which had proposed the verb "should" in its place. The Commission should scrutinize the draft principle to determine whether it reflected *lex lata* or *lex ferenda* and whether it suggested an enhanced obligation beyond the existing one, and should adjust its wording accordingly.

The title of draft principle 9, "State responsibility", logically confined the application of that principle to States. That raised the issue of the responsibility of non-State actors for conflict-related environmental harm, including individual criminal responsibility, the responsibility of non-State armed groups and the responsibility of international organizations. Although the Special Rapporteur had proposed a new version of the saving clause in paragraph 2, that might not respond sufficiently to the calls by some States for the draft principles to address the responsibility and accountability of non-State armed groups in more detail. He would not comment on draft principles 10 and 11 at the current stage, but looked forward to the related discussions in the Drafting Committee.

In draft principle 13, he opposed the deletion of the word "natural" before "environment" but agreed with the Special Rapporteur's proposed addition of a new paragraph 2 that would reflect article 35 (5) of Protocol I. He disagreed, however, with her recommendation that the term "military necessity" should be deleted from draft principle 14, the current wording of which was the result of long debate in the Drafting Committee. The

deletion had been suggested by some States on the grounds that "military necessity" belonged to "a higher order of generality" than the other principles mentioned in the provision; he would prefer to retain it and to add a reference to the principle of humanity, if necessary. In both draft principles 13 and 14, replacing the term "natural environment" with "environment" would change their nature from *lex lata* to *lex ferenda*, and he was against such a step. The provisions of Part Three of the draft principles, in particular, were drawn from existing rules of international humanitarian law.

Draft principles 14 and 15 could logically be merged, as they were closely related, but not if the term "military necessity" was deleted from draft principle 14. Some States had expressed concern about the general formulation of draft principle 16, pointing out that the prohibition of reprisals against the natural environment was not part of customary international law. If the word "natural" was deleted, the scope of that draft principle would become even more uncertain. In draft principle 17 he did not consider it necessary to add the phrase "and shall benefit from any additional agreed protections"; that idea could be referred to in the commentary.

Draft principles 20, 21 and 22 seemed to be controversial among States. As several States had pointed out, there was no explicit reference to the environment in the law of occupation, and international humanitarian law contained only general obligations. Such comments should be considered carefully. He saw no reason to change "population" to the narrower term "protected persons" in draft principles 20 (2) and 21. The existing wording was aligned with article 55 (1) of Protocol I. If the mention of "protected persons" in paragraph (3) of the commentary to draft principle 21 might cause confusion with the same wording in article 4 of the Fourth Geneva Convention, the term could be deleted from the commentary. Considering the meaning in the sense of article 4, limiting the scope of those draft principles to protected persons who were not nationals of the occupying Power was unnecessary or even unsound with respect to protection of the environment. The Special Rapporteur's suggested change to the end of draft principle 22 would, in his view, sow confusion. Although the obligation to prevent transboundary harm covered situations in which a State exercised *de facto* jurisdiction, defining the precise boundaries of "other States or areas beyond national jurisdiction" in a situation of occupation would be more difficult than designating an "occupied territory" based on the concept of effective control.

With regard to draft principle 24, the Special Rapporteur had stated her intention to update and expand the already extensive commentary, which, as some States had pointed out, included all international legal documents on sharing and granting access to information, some of which were not directly related to the topic and were only applicable in peacetime. He suggested that the content of the commentary should be limited to relevant materials, with a focus on State practice.

Given the advanced stage of the work on the topic and the time that would be needed to discuss the proposed draft preamble in depth, he was sceptical about its inclusion but would not oppose it. He was also hesitant to support the interesting proposal on the establishment of a monitoring mechanism because the final outcome of the work on the topic was not intended to be a draft convention. Monitoring mechanisms were usually established within the framework of multilateral treaties.

The Special Rapporteur had made an outstanding contribution to the Commission's work on the topic, and he looked forward to the outcome of the discussions and to the adoption of the draft text on second reading.

Mr. Murase said that he wished to congratulate the Special Rapporteur for her third report on a topic of great relevance to the war of aggression that the Russian Federation was waging in Ukraine. It was terrifying to read news of attacks on nuclear facilities in the country, including the Chernobyl nuclear site. The attacks jeopardized the environment not only of Ukraine but of Europe as a whole and beyond. It had also been reported that the Russian Federation had destroyed a dam and was considering the use of chemical and other weapons, which might cause tremendous damage to the environment. Those actions were all clear violations of the law of armed conflict.

There was a great deal of similarity between the actions of the Russian Federation in Ukraine and those of Japan in Manchuria, in north-east China, in 1931. On 18 September of

that year, 80 centimetres of the track of the South Manchuria Railway had been blown up, with no human casualties. The Government of Japan had accused the Chinese army of planting the bomb and had declared that the Japanese army would retaliate in self-defence. Within weeks, the Japanese army had moved to occupy north-east China. In October 1932, the Lytton Commission of the League of Nations had determined that the claim of self-defence had been unfounded. After the Second World War, it had been revealed, in the proceedings before the International Military Tribunal for the Far East, that the bombing had been a false flag attack by Japan.

Two weeks after the bombing of the South Manchuria Railway, a courageous professor of international law at the University of Tokyo, Kisaburo Yokota, had written a newspaper article arguing that the actions of Japan could in no way be justified in international law on the ground of self-defence and that the intervention of the League of Nations must be respectfully accepted. As a result, he had been harassed and persecuted by the military government between 1931 and 1945. After the war, however, he had become a hero. He had been elected to the International Law Commission in 1956 and had later become Chief Justice of the Supreme Court of Japan. It was to be hoped that somebody in the Russian Federation would speak out in the name of international law, in the same way as Professor Yokota.

He believed that the Commission must address, wherever applicable, the flagrant violation of international law committed by the Russian Federation, regardless of the remarks made by Michael J. Matheson in the *American Journal of International Law* in 2003, which Mr. Argüello Gómez had quoted at the Commission's 3568th meeting. It was not a matter of "politicizing" the Commission's work; it was simply that the events in Ukraine and their legal implications could not be ignored. The Commission had not shown itself to be relevant with regard to a pressing concern of the international community as a whole, and its role would be further marginalized if it kept silent about Ukraine. Its *raison d'être* was being critically tested. It should therefore refer to the situation in Ukraine during its consideration of all pertinent topics.

Concerning the report under consideration, he wholeheartedly agreed with the basic stand taken by the Special Rapporteur, especially in draft principle 9, which contained a reference to "full reparation". At the Commission's seventy-first session, he had asked a question about the relationship between *jus ad bellum* and *jus in bello*, or, more specifically, the theory of selective application, or denial of application, of *jus in bello* for States that had violated *jus ad bellum*. While that theory remained controversial, the time had come for the Commission to decide on the matter. *Jus in bello* was based on the premise of equality of the parties, but the theory of selective application was diametrically opposed to the traditional notion of *jus in bello*. Thus, for example, because Iraq had violated *jus ad bellum* by invading Kuwait, the United Nations Compensation Commission had not applied the principle of equality of the parties in relation to Iraq, and the claimants had not had to prove the cause of the alleged environmental damage; that would have been unthinkable in ordinary litigation. The Compensation Commission had handled nearly 2.7 million claims in total.

If a similar body was established after the war in Ukraine, there would be strong calls from the international community to adopt the same scheme for Ukrainian claimants based on the theory of selective application. He was certain that the number of claims from Ukraine would be at least 20 times as high as the number from Kuwait. The issue should be mentioned in the commentary to draft principle 9, in connection with reparation and compensation, and in the commentary to draft principle 25, in connection with remedial measures.

He stood by the criticisms that he had expressed during the first reading (A/CN.4/SR.3467). First, the topic should be limited to situations of armed conflict. Undue expansion of the topic to cover peacetime protection of the environment would undermine the effectiveness of the instrument to be produced by the Commission. He agreed, in that regard, with the views expressed by the United States and others. Thus, for instance, he had doubts about introducing concepts such as due diligence and liability of business enterprises in draft principles 10 and 11, and sustainable use in draft principle 21.

Second, there were two types of occupation: belligerent occupation during an armed conflict and occupation after peace had been restored between the parties. The two situations

must be clearly differentiated, as highlighted by El Salvador and others. Accordingly, he did not agree with the proposal to add the sweeping phrase "including in situations of occupation" to draft principle 1.

Third, the Commission should clarify what was meant by the references to widespread, long-term and/or severe damage or effects in draft principles 13 (2) and 19. According to the "understandings" adopted by the then Conference of the Committee on Disarmament, for the purposes of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, the term "widespread" meant "encompassing an area on the scale of several hundred square kilometres", "long-lasting" meant "lasting for a period of months, or approximately a season", and "severe" meant "involving serious or significant disruption or harm to human life, natural and economic resources or other assets". The use of the conjunction "or" in article 1 of the Environmental Modification Convention meant that the threshold for the provision's application was not particularly high, since damage had to meet only one of those three criteria. However, that Convention should be cited with caution, because it related not to the law of armed conflict but to arms control or disarmament. The standards established therein were absolute, whereas standards under the law of armed conflict were relative in the sense that they were applied in proportion to military necessity.

The threshold of application in articles 35 (3) and 55 (1) of Protocol I Additional to the Geneva Conventions of 1949, which referred to "widespread, long-term and severe damage", was much higher than the threshold under the Environmental Modification Convention. The use of the conjunction "and" meant that all three elements had to be present. Furthermore, "long-term" was understood to mean "decades" under the Protocol, as opposed to "a period of months" or "a season" under the Convention. Thus, under the Protocol, it appeared that any weapon or means of warfare was permissible, with the possible exception of nuclear weapons, the effects of which lasted for decades, as had been the case for victims of the atomic bombings of Hiroshima and Nagasaki. It would be unrealistic and meaningless to maintain such a high threshold in the draft principles. Draft principle 13 (2) contained the Protocol I formula using "and", while draft principle 19 contained the Environmental Modification Convention formula using "or". The two provisions should be aligned and it should be made clear that the draft principles concerned armed conflict, not arms control. Incidentally, he wondered why the term "widespread" had been omitted from the newly proposed second preambular paragraph. The wording should be consistent.

In view of the events in Ukraine, he proposed that "nuclear facility zones" should be added to the "protected zones" referred to in draft principle 17. There was a strong desire within the international community to ensure the safety of nuclear facilities in armed conflict. Draft principle 4 could be deleted, as it overlapped with draft principle 17.

Lastly, he considered that the proposed third and fourth preambular paragraphs should be deleted, as they were not directly related to situations of armed conflict. If they were retained, the words "in relation to armed conflict" should be inserted at the end of each of those paragraphs. He supported the referral of all the draft principles and the draft preamble to the Drafting Committee.

Sir Michael Wood said that he wished to thank the Special Rapporteur for her third report, which offered a good basis for the Commission to conclude its second reading of the draft principles at the current session. It took some effort to read the report, as the observations of States and international organizations tended to get lost among the comments of a range of private bodies representing various interests. Indeed, the Special Rapporteur seemed to treat the comments of those "others" on an equal footing with the comments of States and international organizations, including ICRC. It was encouraging to see that States had generally responded positively to the Commission's work. That was very much to the credit of the former and current Special Rapporteurs on the topic, who had drawn on their knowledge, practical experience, contacts and wealth of common sense.

He agreed with the Special Rapporteur's suggested amendments to draft principles 1, 2, 4 to 8, 14, 17 and 20 to 28. The precise wording could be considered by the Drafting Committee. He also agreed with the Special Rapporteur's proposal to delete draft principle 15.

He had some difficulty with certain points made in the report. The first concerned what was said about the attitude of the United Kingdom towards draft principle 5. He had no doubt that the Government of the United Kingdom believed that indigenous peoples had a strong role to play in protecting the environment. Its suggestion to delete the draft principle was, in his view, primarily driven by a concern that the Commission was expanding into areas outside the scope of the topic, including the rights of indigenous peoples and the status of indigenous land. That, he assumed, was not the Commission's intention, and that fact could perhaps be made clear in the commentary.

He was not convinced by the changes proposed to draft principle 9, which greatly complicated the text and made the wording quite peculiar in places.

Draft principles 10 and 11 dealt with the complex questions of the due diligence and liability of business enterprises and provided that States should take certain measures in domestic law. While he saw merit in some of the Special Rapporteur's suggestions for redrafting, he hoped that she would be open to further changes. In particular, the opening words of the two provisions could be improved, as they might be overly prescriptive in requiring States to adopt legislation, even where legislation, as opposed to other forms of regulation, was unnecessary within a particular legal system. He found the Special Rapporteur's reasons for not changing that language unconvincing. In paragraph 110 of the report, she quoted from paragraph (7) of the first-reading commentary to draft principle 10, in which the Commission had gone no further than saying that "seeking to ensure corporate due diligence would usually require legislative action"; usually, but not always. The Commission should take into account, therefore, that some States might be able to achieve the objective without legislating, which could be laborious. It would not be difficult for the Drafting Committee to find suitable language.

He also wondered whether the terms "high-risk area" and "area affected by an armed conflict" in those draft principles were sufficiently clear. They had been used by other bodies, but in different contexts, and were not necessarily ideal for the Commission's purposes. He noted and welcomed the Special Rapporteur's suggestion in paragraph 109 of the report that the commentary should be further clarified to address the concern of France over the normative nature of draft principles 10 and 11.

Regarding the use of the term "environment" or "natural environment" in Part Three of the draft principles, as he had stated at the Commission's seventy-first session, the rules of the law of armed conflict concerning the protection of the environment dealt with the "natural environment", both in the relevant treaty provisions and in the ICRC study *Customary International Humanitarian Law*, which contained a chapter entitled "The Natural Environment". Insofar as those rules were reflected in Part Three, which was limited to "principles applicable during armed conflict", the Commission should avoid appearing to change the scope of the current rules of international humanitarian law, which had never been its intention.

The Commission should retain the expression "natural environment" in Part Three, since it could otherwise give the impression that it was making a significant change to some established rules of international humanitarian law. If a consensus were to emerge to proceed in the manner suggested by the Special Rapporteur, he would agree with the point she had made in her second report (A/CN.4/728) to the effect that an explanation would be needed to avoid any implication that the Commission was seeking to change the law of armed conflict. However, providing such an explanation would be difficult, as it could not be limited to Protocol I Additional to the Geneva Conventions of 1949. For example, it would also need to cover the customary international law of armed conflict. As the Special Rapporteur had explained in her second report, the word "environment" had various meanings depending on the context. That general point could also be made in the commentary, since it applied throughout the draft principles. In any event, like Mr. Park, he was not in favour of deleting the word "natural".

With regard to draft principle 13, specifically the Special Rapporteur's proposal to add a new paragraph 2, he disagreed with Mr. Park. He was strongly against the addition, for a number of reasons. First and foremost, it would be wrong, on second reading, for the Commission to reverse its previous decision on that sensitive matter without a strong basis

in the observations of States and without giving States an opportunity to react. The Special Rapporteur rightly explained, in paragraph 142 of her report, that she was not convinced that it was necessary or feasible to add much new substance to Part Three. In paragraph 143, however, she proposed that an exception should be made and that the new paragraph 2 should be added. He was not convinced by the explanation that the new paragraph would give effect to some "absolute limit to the environmental harm caused in the conduct of hostilities". Indeed, that explanation only added to his concerns. Hardly any States had called for such an addition, which could give rise to many difficulties, as was clear from the comments of a number of States. The scope of article 35 (3) of Protocol I and its status as customary international law were both highly controversial, as evidenced by the commentary to rule 45 of the ICRC study *Customary International Humanitarian Law*.

He noted that the Special Rapporteur did not propose any amendment to draft principle 16, even though several States had taken the view that the provision did not reflect customary international law. Attention had also been drawn to the reservations made to article 55 (2) of Protocol I. The suggestion to include the phrase "in accordance with the State's international obligations", which the Commission had used elsewhere, could be one solution. In her report, the Special Rapporteur recommended that the Commission should take into account, in the commentary, the comments received from States in relation to draft principle 16. Before making proposals to that effect, the Special Rapporteur would need to ensure that they reflected the current state of international law.

The adoption of the commentaries would, as always, be an important part of the Commission's work on the topic. He hoped that the Commission would receive the draft commentaries in sufficient time to consider them thoroughly and that they would be kept concise. Their purpose was to provide clarification on specific points in the draft principles where needed. He also hoped that they would refer only to materials that were authoritative. In her reports, the Special Rapporteur mentioned a large range of materials of widely differing authoritativeness, which she often cited without reference to States' positions on them. Reference to such materials in the final commentaries could detract from the authoritativeness of the draft principles themselves.

He agreed with the Special Rapporteur's recommendations in chapter III of the report. He would support the inclusion of a draft preamble along the lines suggested in paragraph 311 of the report, on condition that it did not become more complex and contentious, and so delay the Commission's work.

In chapter IV of the report, the Special Rapporteur stated that the draft principles were "a contribution to the progressive development and codification of international law, without, however, aiming at becoming a treaty". That was broadly accurate, though some provisions in the draft principles, which the Special Rapporteur herself regarded as merely recommendatory, might never be more than that. One example was draft principle 3 (2), which established that "States should take additional measures". Another example, highlighted by States, of a provision that was presumably not intended to contribute to the development of international law was the application to non-international armed conflict of rules developed in the context of international armed conflict. As the Special Rapporteur herself recognized, it was good to encourage States, as a matter of policy, to apply legal protections regardless of the type of armed conflict. Such encouragement should not, however, be seen as a "contribution" to the progressive development of the law, because it was not necessarily intended or likely to become law. Indeed, to suggest otherwise might discourage States from applying, as a matter of policy, the law of international armed conflict to non-international armed conflict.

More generally, the Commission needed to be alert to the understandable sensitivities of States if it appeared to go beyond its statutory object of promoting progressive development and codification, particularly where it put forward texts that were not intended to be negotiated further by States. The Commission should always bear in mind that the weight to be given to its output depended, above all, on how that output was received by States.

He supported the referral of all the draft principles and the draft preamble to the Drafting Committee for consideration in the light of the comments and observations made during the debate.

The meeting rose at 1 p.m.