Provisional

For participants only

16 June 2022

Original: English

International Law Commission
Seventy-third session (first part)

Provisional summary record of the 3576th meeting
Held at the Palais des Nations, Geneva, on Friday, 6 May 2022, at 11 a.m.

Contents

* Reissued for technical reasons on 2 March 2023.

Present:

Chair:	Mr. Tladi
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Saboia
	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) (*continued*) (A/CN.4/749 and A/CN.4/750)

Ms. Galvão Teles said that the Special Rapporteur's third report (A/CN.4/750) provided a solid basis for the second reading of the proposed draft principles, as it responded to the large number of comments received not only from Governments, but also from international and other organizations and civil society (A/CN.4/749). She agreed with the assessment offered by the International Committee of the Red Cross that the draft principles made "an important contribution to contemporary international law in line with the leading role played by the International Law Commission in its codification and progressive development".

She supported the general approach and methodology proposed, including the temporal approach and the interplay of different areas of international law, in particular the role of international environmental law and international human rights law, in complementing the law of armed conflict, which, where applicable, was *lex specialis*. That, she believed, represented the added value of the topic and the focus of the Commission. It was interesting to note the opinion expressed by many States that the draft principles would be applicable to both international and non-international armed conflicts, in view of the equally severe consequences they could have on the environment. There had, moreover, been a movement towards convergence of the legal rules applicable to the two types of conflicts.

As far as the normative nature of the draft principles was concerned, she agreed that a nuanced approach would sometimes be preferable, as it was not always possible to ensure absolute clarity; the commentaries could be used to that end. She also agreed with the Special Rapporteur's view, supported by many international and other relevant organizations, that, in addition to State practice, the practice of international organizations and non-State armed groups was also relevant.

Turning to specific draft principles, she said that, although situations of occupation had been encompassed in the previous wording of draft principle 1, the revised proposal made it clearer that the temporal scope of the draft principles – before, during or after armed conflict – did not exclude situations of occupation, which could be of a long-term nature.

On draft principle 2, the proposed inclusion of the expression "prevent, mitigate and remediate harm" was in line with comments made by States and the International Committee of the Red Cross. She agreed with the Special Rapporteur's proposed modification to draft principle 4, also in line with comments received, which clarified that the intention was to protect areas of major environmental importance and that the reference to cultural importance was not a cumulative requirement.

The proposed removal of the word "States" from draft principle 5 (1) was important, as it would ensure that the requirement to protect applied not only to States but also to non-State armed groups; that approach was justified by the fact that control over territory and people by such groups had been a recurrent phenomenon in non-international armed conflicts. She also supported the proposed modification to draft principle 8 to include the areas through which displaced persons transited, as such movements could contribute to environmental harm. She agreed with the proposed inclusion in draft principle 9 of a new paragraph 2, in the form of a "without prejudice" clause regarding the international responsibility of non-State actors, and of a brief overview of the relevant legal developments in the commentary.

The proposed changes to draft principles 10 and 11 clarified the scope of application of the principles and streamlined the text. She also agreed that the text of draft principles 13 to 16 should be streamlined by substituting the term "environment" for "natural environment", which was a dated expression.

In respect of draft principle 13, she considered that the word "general" was not necessary in the title. She strongly supported the Special Rapporteur's proposal to include a new paragraph 2, reflecting 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 she saw as one of the most important aspects of the set of draft principles. The wording concerned all weapons, and thus encompassed nuclear weapons, the use of which would be very likely to cause "widespread, long-term and severe damage" to the environment: nuclear weapons too should therefore be considered as prohibited. The commentary might be used to address the different positions expressed by some States and some members of the Commission regarding the customary law status of such a rule or its application to both international and non-international armed conflicts. The wording suggested by Mr. Šturma, along the lines of "in accordance with applicable international law" or "in accordance with the applicable rules of international law", could be explored. The new text would be in line with the view of the International Court of Justice expressed in paragraph 31 of its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*.

She agreed with the proposed deletion of draft principle 15 and the incorporation of the relevant parts of the related commentary into the commentary to draft principle 14. She was also in favour of using the expression "protected persons" instead of "population" in draft principles 20 and 21, as it was closer to the terminology used in the Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention) and was supported by States. She was of the view that the proposed changes to draft principle 22, from "Due diligence" to "Prevention of transboundary harm" in the title and the inclusion of the phrase "areas beyond national jurisdiction" in the text, brought clarity.

She welcomed the change to draft principle 23 proposed by the International Union for Conservation of Nature, to replace "damaged by the conflict" with "damaged in relation to the conflict"; but she did not support the Special Rapporteur's proposal to delete paragraph 2 of draft principle 24, which she considered to be an important safeguard clause for States and international organizations. The Drafting Committee might find alternative wording that would allow the safeguard to be retained.

She agreed that the preamble proposed by the Special Rapporteur would be a useful introduction to the draft principles and suggested that the Drafting Committee might work on the proposed text. She shared the Special Rapporteur's view that no new draft principles should be added to the text, nor a monitoring mechanism proposed; States might wish to take a policy decision on that matter.

Mr. Vázquez-Bermúdez said that he agreed with the Special Rapporteur's general comments, including those concerning the general applicability of both international human rights law and international environmental law to armed conflict, which had been confirmed by the International Court of Justice and the Commission itself. It was also clear that the law of armed conflict, where applicable, was *lex specialis*.

Furthermore, since most armed conflicts were complex in nature, limiting the application of the draft principles solely to States in the context of international armed conflicts would drastically reduce their effectiveness. The scope of the draft principles should be as broad as possible, ensuring that they were addressed not only to States, but also to international organizations and other non-State actors such as business enterprises.

Turning to the specific draft principles, he said he considered that the proposed addition in draft principle 1 of "including in situations of occupation", while not absolutely necessary, might help to reflect more clearly the scope of the draft principles, particularly as the principles laid out in Part Four referred to such situations expressly.

He supported the inclusion in draft principle 2 of the wording "to prevent, mitigate and remediate harm", which could likewise be included in draft principles 6, 7 and 8. Regarding draft principle 4, he agreed with the proposed reformulation as a basis for the designation, by agreement or otherwise, of areas of major environmental importance and areas of major cultural importance as protected zones, without excluding any overlap in meaning between the two, or requiring an overlap.

Draft principle 5 was particularly important and had received general support from States, international organizations and others. As the Office of the United Nations High Commissioner for Human Rights had noted, damage to the territories of indigenous peoples could affect their survival and well-being, as well as their way of life, livelihood and ancestral

traditions. The Czech Republic had suggested that the draft principle should also cover situations in which non-State actors exercised control over territories inhabited by indigenous peoples, and the International Committee of the Red Cross had further proposed the inclusion in the commentary of a clarification that non-State armed groups also had obligations in that regard under international humanitarian law. The Special Rapporteur had noted that control over territory and people by non-State armed groups had been a recurrent phenomenon in recent non-international armed conflicts; he agreed with her proposal to extend the draft principle to encompass such actors, and suggested also including a reference to international organizations. The express reference to States should thus be retained in paragraph 1, and reference to the other actors added. In paragraph 2, in view of the extensive duration of recent armed conflicts and the fact that it would be possible to adopt relevant measures while they were ongoing, he supported the proposed amendment to avoid restricting the adoption of measures to when the conflict was over.

He agreed with the proposed amendments to the title and text of draft principle 6, based on a suggestion by the United States of America, as they would improve the wording. He also supported the inclusion suggested by the United Kingdom of "the harm to the environment resulting from those operations" in draft principle 7. He welcomed the Special Rapporteur's proposed inclusion in draft principle 8 of areas through which persons displaced by armed conflict transited, as those areas were also affected by population displacements.

The proposed additions to draft principle 9 (2) encompassed the responsibility of non-State actors, an issue that the Commission had discussed when it had first addressed the topic and a concern also expressed by international organizations and States; it would thus have been remiss to omit a mention of the role of non-State actors. The proposed wording also established that the draft principles were without prejudice to developments in the rules of international responsibility for environmental damage caused in relation to armed conflict. As indicated in paragraph 95 of the third report, the International Criminal Court had received a proposal that "ecocide" should be included as a fifth category of crimes in the Rome Statute. The proposed new paragraph 2 was therefore necessary to ensure that such developments were reflected.

The terminology used in draft principles 10 and 11 should be consistent with that of the Guiding Principles on Business and Human Rights, which referred to "transnational corporations and other business enterprises". The proposed change to "Due diligence of business enterprises" and "Liability of business enterprises" would thus more appropriately reflect the comprehensive approach envisaged by the Special Rapporteur. As for the proposed addition of "high-risk area or an area affected by an armed conflict", he saw merit in extending draft principles 10 and 11 to encompass such areas, which might be experiencing weak governance or insecurity. The Organisation for Economic Co-operation and Development, in *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, described due diligence as a basis for "responsible global supply chain management of minerals from conflict-affected and high-risk areas" and as an "ongoing, proactive and reactive process". The inclusion of the term "high-risk areas" would emphasize the prevention of environmental damage.

Noting the Special Rapporteur's suggestion – in response to the comment by the Office of the United Nations High Commissioner for Human Rights that the phrase "operating in or from their territories" should be complemented with a mention of jurisdiction – to include a reference to jurisdiction in the commentary, he said that it would be preferable to include the term explicitly in the text, so as to avoid any uncertainty in the future.

He agreed with the suggestion that the term "environment" should be used throughout the text in place of "natural environment"; the latter term would limit the potential application of the draft principles, as a number of States had pointed out.

He supported the proposal to add a new paragraph 2 to draft principle 13 to reflect the wording of article 35 (3) of Protocol I Additional to the Geneva Conventions of 1949, which was intrinsically connected to the topic under consideration. Although some States had objected to the inclusion of such a reference, considering that the provisions of Protocol I had not achieved customary status, he considered that the importance of avoiding catastrophic damage was adequate justification. He also agreed with a number of States that the triple

threshold of "widespread, long-term and severe damage" had not been sufficiently clarified in the commentary.

In relation to draft principle 15, some States considered that the notion of "environmental considerations" was vague and imprecise; some also questioned the added value of the draft principle, which provided for only a weak form of protection. He supported the Special Rapporteur's suggestion that draft principle 15 should be deleted and the relevant parts of the commentary incorporated into the commentary to draft principle 14.

He agreed that the short preamble proposed by the Special Rapporteur would be helpful as a recognition of the relationship between the draft principles and previous relevant instruments; the draft articles on the law of transboundary aquifers, to which a preamble had been added, had demonstrated the utility of such an approach.

He recommended referring the full set of draft principles to the Drafting Committee.

Ms. Escobar Hernández said that, read together with the compilation of comments and observations received from States, international organizations and others, the Special Rapporteur's well-structured and comprehensive third report on protection of the environment in relation to armed conflicts provided a solid basis for the final stage of the Commission's work on the topic. The enormous effort made by the Special Rapporteur to address all those comments and observations transparently and meticulously was especially appreciated in view of the great importance of the topic, its implications for a wide range of actors and its cross-cutting nature. She agreed with the Special Rapporteur that a good number of the comments and observations received could be dealt with in the commentaries.

The purpose of the project was not – and never had been – to rewrite the regime for the protection of the environment during armed conflict. On the contrary, the environment and armed conflict were two stand-alone pillars around which the Commission's work revolved, and the protection of the environment occupied a central place in the relationship between them. It followed that two elements were essential to understanding the project: its all-encompassing temporal dimension, which covered the phases before, during and after armed conflict; and the normative interaction between the various areas of international law harnessed for the purpose of protection of the environment in relation to armed conflicts. The Special Rapporteur was to be commended for having taken due account of both elements in her third report.

Nevertheless, as had been demonstrated throughout the Commission's work on the topic, and as was clear from the draft currently before members, approaching the topic from that perspective and taking into account both those elements was no easy task and, moreover, not one that could be achieved in an absolute and mathematically precise manner. In her honest opinion, the first of those elements, namely the expansive temporal dimension, had not been dealt with entirely successfully. That could be seen in the very structure of the draft: despite the fact that one part was devoted to principles of general application, the clear intention being to reflect an integrated approach, there remained some temporal inconsistencies. That said, the integration of the temporal phases was evident in the text of the draft principles and the commentaries thereto and could perhaps be further strengthened.

The second of those elements, namely the integration of different areas of the international legal order and the interaction among them, had been dealt with much more successfully in the draft principles and, above all, in the commentaries. Irrespective of the extent to which certain categories of norms, in particular those relating to the law of armed conflict and international humanitarian law, were in evidence, other areas of international law, in particular international environmental law and international human rights law, were properly reflected and had in fact become increasingly prominent as the project had advanced. That was true of both the text of the draft principles and the commentaries thereto. In that connection, the Special Rapporteur was to be commended for her strenuous efforts to identify the applicable areas of law and the relationships between them; she had avoided a facile approach in which the law of armed conflict and international humanitarian law would be considered to constitute a normative whole that was always to be applied as *lex specialis*. That area of the international legal order was *lex specialis* only during armed conflict and, in any case, did not prevent the application of appropriate norms of other areas of international law which were more relevant before and after armed conflict.

Although the purpose of the project was to identify the principles applicable to armed conflicts, the Commission could not confine itself to rewriting well-established norms and principles. A project of that kind would have been of little interest. On the contrary, in its work on the topic, the Commission had followed its traditional approach of exercising its mandate in full, that is, of contributing to both the codification and the progressive development of international law. That complex way of dealing with the topic was in evidence throughout the draft principles and the commentaries thereto. It also explained the alternation between the words "shall" and "should" in the draft principles. The draft before the Commission was well balanced from the standpoint of the Commission's dual mandate, although it could be improved in the Drafting Committee. In any case, the draft had a clear normative dimension that was essential to a project aimed at setting out the principles applicable to the protection of the environment in relation to armed conflicts.

Those general comments on the draft were not theoretical but were of direct relevance to practical issues, including the terminology used. In her view, the terminological changes proposed by the Special Rapporteur struck a good balance with regard to the use of established terms in the areas of international environmental law, international humanitarian law and human rights. In particular, she supported the use of the expressions "the environment", "prevent, mitigate and remediate harm to the environment", "environmental harm", "protected persons" and "business enterprises".

With regard to draft principle 1, she supported the inclusion of an express reference to situations of occupation, which was justified by the fact that the actions of an Occupying Power could have a major impact on the environment.

Although she fully understood the rationale behind the Special Rapporteur's proposed changes to draft principle 4, and she was in favour of including a reference to areas of major environmental importance that were also of major cultural importance, she was not sure that the proposed formulation fully addressed the various comments made by States in that regard. In any case, that was an issue that could be addressed in the Drafting Committee.

The changes proposed by the Special Rapporteur to draft principle 5 would improve the text and address the concerns to which it had given rise. The inclusion of a draft principle on indigenous peoples was fully justified in view of their special relationship with the environment and their special vulnerability in situations of armed conflict. Other groups, including vulnerable minority groups, did not have the same relationship with the environment. For that reason, she did not support the proposals made by some commentators to replace the reference to indigenous peoples with a broader reference, for example to "ethnic groups". A change of that kind would completely alter the purpose and meaning of the draft principle and would undermine the very concept of indigenous peoples. Those comments notwithstanding, the need to extend protection to the areas that those other groups inhabited could be emphasized in the commentary.

She supported the Special Rapporteur's proposal for the inclusion in draft principle 8 of an express reference to the areas through which displaced persons transited, since, as noted in the comments and observations received, the movement of displaced persons as a direct or indirect result of armed conflict was without doubt one of the most serious causes of significant damage to the environment.

She agreed with the Special Rapporteur's proposal for the deletion of draft principle 9 (2), which could give rise to confusion if cast as a "without prejudice" clause. She could support the proposed new paragraph 2, which addressed the important issue of the international responsibility of non-State actors, including their individual criminal responsibility. Although the use of a "without prejudice" clause in the proposed new paragraph was clear enough, since the title of the provision was "State responsibility", it would be helpful to provide further clarification in the commentary so as to avoid any misunderstandings about the scope of such responsibility. The use of the expression "existing or evolving rules" seemed particularly apposite, since the Commission was dealing with an evolving area of international law, as shown by recent calls for the formulation of a definition of the crime of ecocide.

Although she agreed with the underlying reason for the proposed use of the expression "high-risk area" in draft principles 10 and 11, the expression itself was ambiguous in those

two draft principles. She understood it as a reference to areas in which there was a high risk of an outbreak of armed conflict or a high risk as a result of a previous armed conflict. Further clarification should be provided in the commentary, since the expression "high-risk area" could also be interpreted as a reference to areas that were inherently high-risk, irrespective of their relation to armed conflict.

With regard to draft principle 13, she agreed with the Special Rapporteur's proposal for a new paragraph 2. As the draft principle appeared in Part Three, which concerned the principles applicable during armed conflict, she had no objection to the incorporation of wording based on article 35 of Protocol I Additional to the Geneva Conventions of 1949. Although the debate on the customary nature of that norm could not be ignored, the support received from a large majority of States fully justified its inclusion in the draft. Nevertheless, it would be useful if the diversity of views on the matter could somehow be reflected in the commentaries.

The deletion of an express reference to military necessity from draft principle 14 was not controversial, particularly in view of the reasons given by the Special Rapporteur in the report. Although it was true that military necessity fell under the rules governing the conduct of armed conflicts, a reference to that principle in the text of the draft principle itself could give rise to misinterpretation, particularly in the light of recent events. The relationship between military necessity, on the one hand, and the principles of proportionality and humanity, on the other, and the reasons for excluding a reference to military necessity could be explained in the commentaries.

She supported the proposed deletion of draft principle 15, which was clearly redundant.

The proposed replacement of the word "after" with "in relation to" in draft principle 24 (1) would be a clear improvement. However, it would also affect the temporal phases to which the provision applied. For that reason, the draft principle could perhaps be moved to Part Two. Although she agreed with many of the reasons put forward for the proposed deletion of paragraph 2, she was not convinced that a saving clause of some kind could be dispensed with entirely. The possibility of including such a clause should be considered, as it touched on an issue of great interest to States. In any case, that issue could be addressed in the Drafting Committee.

She agreed with the Special Rapporteur that it was not feasible to propose new draft principles at the current stage of the Commission's work on the topic and that, where possible, it would be preferable to address the concerns expressed by States and others in the commentaries.

She could see merit in the idea of including a preamble. The inconsistency of the Commission's past practice in that regard was not an insurmountable obstacle. A preamble of the kind proposed by the Special Rapporteur could help to better define the conceptual and normative framework within which the draft principles were situated. Of course, the content and wording would need to be considered in the Drafting Committee.

Lastly, she agreed with the Special Rapporteur that a provision on a monitoring mechanism should not be included. Of course, the establishment of mechanisms to monitor compliance with international law always had an added value, but the draft principles were not the right place to put forward such a proposal. A monitoring mechanism had not been foreseen in the syllabus and was not consistent with the goal that the Commission was pursuing, namely to identify the principles applicable to the protection of the environment in relation to armed conflicts. In any case, it would be impossible to formulate a provision on a monitoring mechanism at the current, late stage of the Commission's work on the topic.

She supported the referral of the draft principles to the Drafting Committee.

Mr. Hmoud, speaking via video link, said that the rich detail included in the Special Rapporteur's third report enabled readers to form an objective assessment of the various proposals contained therein. He agreed with most of the changes proposed by the Special Rapporteur to the draft principles adopted on first reading and her suggestions for what to include in the commentaries.

At an early stage in its work on the topic, the Commission had decided that, to achieve the goal of enhancing the legal protection of the environment in relation to armed conflicts, the project should cover the phases before, during and after armed conflict. However, as the Commission's work had progressed, it had become clear that a precise delimitation of the rules applicable to each phase was not only difficult to achieve but might even weaken the protection of the environment in relation to armed conflicts or undermine the existing rules in that area. The draft principles had been drawn up with a view to facilitating as harmonious a process of interpretation and implementation as possible. The commentaries had an important role to play in avoiding any unintended consequences of the division of the draft principles in accordance with the three temporal phases of armed conflict.

A related point was the relationship between the law of armed conflict and other areas of international law, in particular international environmental law. In that regard, it was well established that the law of armed conflict was *lex specialis* during the conflict, while other rules of international law remained applicable to the extent that they did not conflict with international humanitarian law. In any event, as *lex generalis*, the draft principles did not purport to amend the existing rules of armed conflict, including the rules of international humanitarian law treaties or the rights and obligations arising therefrom.

The draft principles mostly reflected existing rules of international law, including those of international humanitarian law and international environmental law. Certain draft principles reflected an evolutive interpretation of those rules, which did not detract from their binding legal value. Others reflected the rules as they existed in international law. Some of the proposed draft principles, or parts thereof, contributed to the progressive development of international law, taking into account trends in the environmental protection regime and the interests of the international community as a whole in such protection. The environmental concerns of the international community, including in the context of armed conflict, had increased over the previous two decades, and the protection regime should be adapted or expanded accordingly. In any event, the language used in the draft principles and the explanations provided in the commentaries should serve to clarify which aspects were *lex lata* and which were *lex ferenda*.

The fact that the draft principles covered both international and non-international armed conflicts had been generally accepted both in the Commission and in the Sixth Committee. Most existing armed conflicts were non-international in nature, and the relevant practice might be mixed. Although the relevant treaty rules might not yet have achieved customary status, they were evolving; that was of particular relevance to the question of the applicability of the draft principles to all the phases of a conflict. In addition, it was important to bear in mind that the draft principles could also apply to non-State actors, in particular armed groups. He would nevertheless caution against placing excessive emphasis on the practice of non-State actors. A related challenge was the capacity of the parties to a conflict to comply with the obligations set out under the draft principles and to assume responsibility for their wrongful acts. The draft principles also needed to serve the purpose of promoting efforts by the various actors involved to protect the environment in relation to armed conflicts.

Protocol I Additional to the Geneva Conventions of 1949 made it clear that occupation certainly fell within the scope of the law of armed conflict, even after the cessation of hostilities. The environment of occupied territories was therefore entitled to the same legal protection as the environment in a theatre of war in an international armed conflict, and some obligations, such as those in respect of remnants of war, were identical. For that reason, draft principle 1 should definitely include a reference to situations of occupation and in the commentary should clarify to whom the rules applied during an occupation, as well as the various obligations of States, international organizations and non-State actors in occupied territory.

In draft principle 2, the phrase "measures to prevent, mitigate and remediate harm" captured the essence of protection. The term "restorative measures" encompassed long-term repair and would perhaps be more realistic than "remedial measures".

The wording of draft principle 3 implied that States were not required to take measures beyond their existing obligations under international law. However, if some rules proposed

as *lex ferenda* in the draft principles were to become part of international law, States would then be bound by the obligations flowing from such rules. The commentary should specify what individual or collective measures should be taken by States in the event of serious breaches of the rules of armed conflict.

In draft principle 4, the new wording proposed by the Special Rapporteur would preclude any misunderstanding that a protected zone had to be of cultural importance. Her statement that the draft principle was not intended to affect the regime of the Convention for the Protection of Cultural Property in the Event of Armed Conflict was welcome.

Draft principle 5 concerned the protection of indigenous peoples and not the environment as such and therefore lay outside the scope of the topic. Moreover, one particular group should not be singled out for special protection, as others might also have a special relationship with their environment and be particularly vulnerable to environmental damage.

The amendments to draft principle 6 proposed by the Special Rapporteur were sound. In draft principle 7, the word "should" would be preferable to "shall". Draft principle 8 was important, because there were many examples of human displacement due to severe environmental degradation caused by lengthy conflict, where the international community had done little to remedy the situation. The changes proposed by the Special Rapporteur were acceptable, but the draft principle should also embody a duty of cooperation between States, international organizations and other actors. While he had no objection to the addition of a saving clause in draft principle 9, it seemed unnecessary, because criminal responsibility and the responsibility of international organizations or armed groups for environmental damage would be unaffected by that clause. It would be advisable to retain the second paragraph, since its deletion might be interpreted as an intention to amend the rules on State responsibility under international law.

Draft principles 10 and 11 could be viewed as progressive development of international law and should reinforce the emerging norms governing the conduct of business enterprises and their direct liability under international law for environmental damage in conflict zones and occupied territories. In draft principle 10, the term "high-risk area" was unclear; in any case, such areas fell outside the scope of the topic. Although he did not object to the phrase "area affected by an armed conflict", it was less precise than "area of armed conflict". There was merit in explaining in the commentary that both of those principles applied to private military and security companies. Draft principle 11 did not have the effect of establishing extraterritorial jurisdiction, because a State should be able to exercise jurisdiction over a company incorporated under its laws or headquartered in it and also over such a company's subsidiaries abroad. However, there had to be a direct causal link between the enterprise's actions and the ensuing environmental harm in an area affected by armed conflict.

The commentary should make it plain that the deletion of the adjective "natural" in the text and titles of the draft principles in Part Three did nothing to alter the rules of the law of armed conflict in relation to the environment and that the rules pertaining to the natural environment therefore remained unaffected. As article 55 of Protocol I Additional to the Geneva Conventions of 1949 was part of customary international law, there was no reason to omit the second paragraph of draft principle 13 – even though it was not absolutely necessary, because a duty of care was implied in the first paragraph. Lawful self-defence could not be used as justification for evading responsibility for widespread, long-term and severe environmental damage, nor did it render lawful the use of weapons, including nuclear arms, or a method of warfare that caused such damage. The commentary could deal with the applicability of other fields of law, including *jus ad bellum*, and emphasize that *jus in bello* was the *lex specialis*. The view that the natural environment was a civilian object, as stated in paragraph 145 of the report, did not mean that it should enjoy the same protection as civilians.

In draft principle 14, while it would be reasonable to delete the words "military necessity", since it was implied by the reference to proportionality, the words "in attack" should be retained, since it was a term of art linked to the principles of distinction, proportionality or precaution in international humanitarian law. The phrase "with a view to its protection" should either be deleted or the commentary should make it plain that it was

not intended to qualify the application of the three principles during armed conflict. Draft principle 15 could be deleted because it overlapped with draft principle 14, but draft principle 16 should be retained as the prohibition of reprisals was an emerging rule of customary international law. The prohibition of pillage of natural resources during armed conflict and in situations of occupation was a well-established rule of customary international law. Hence there was a connection between draft principle 18, on pillage, and draft principle 21, on the sustainable use of natural resources in occupied territories.

He agreed with the Special Rapporteur that, in draft principles 20 and 21, the term "population of the occupied territory" should be replaced with "protected persons" to ensure consistency with the terminology of the Fourth Geneva Convention, which was the most pertinent instrument. The term "population of the occupied territory" covered only protected persons and not nationals of the Occupying Power who had been transferred to the occupied territories. Transferred persons did not enjoy the protection of international humanitarian law. It would indeed be wise to rephrase the second paragraph of draft principle 20 to ensure that "significant harm to the environment" and "the health and well-being of protected persons" were not read cumulatively. Draft principle 21 reflected the current interpretation of the rules of usufruct referred to in article 55 of the Hague Regulations of 1907, namely that any lawful use of natural resources by an Occupying Power had to be for the benefit of the protected persons in the occupied territory. In draft principle 22, it would be preferable to use the phrase "beyond the jurisdiction or control of the Occupying Power", as had been done on occasions in the past, rather than replacing "beyond the occupied territory" with "beyond national jurisdiction", because occupied territory did not come under the national jurisdiction of the Occupying Power.

He was not opposed to the inclusion of a preamble, but it seemed inappropriate to provide for a monitoring mechanism at the current stage of the Commission's work on the topic. He recommended referral of the draft principles to the Drafting Commission.

Mr. Ouazzani Chahdi said that, in the third report, it would have been helpful to cite the judgment of the International Court of Justice in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*. As there was some inconsistency between draft principles 14 and 15, it would be wise to delete draft principle 15. Some notions or expressions, such as those of "military necessity" and "in attack" should also be deleted from draft principle 14. Some clarification in that respect could perhaps be provided in the commentary.

He agreed with the proposal to include a reference to "situations of occupation" in draft principle 1, as it was deemed to be a specific form of international armed conflict in the Hague Regulations of 1907 and the Geneva Conventions of 1949. He also agreed that draft principle 2 should be reworded to refer to "measures to prevent, mitigate and remediate harm" and that draft principle 4 should be amended by adding the phrase "including where those areas are of major cultural importance", since it would then implicitly cover the ancestral lands of indigenous peoples. The proposed amendments to draft principles 5 and 6 were also acceptable. In draft principle 8, dealing with zones where displaced persons were located, the addition of the phrase "or through which they transit" was a good idea, and he agreed with the Special Rapporteur's reformulation of the second paragraph of draft principle 9.

In draft principle 13, replacing "natural environment" with "environment" would encompass the cultural and artistic heritage as well as historical sites which must be protected during armed conflicts. In that context, he recalled that one international instrument which supported such a broad definition of the environment was the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment. The 1972 Convention for the Protection of the World Cultural and Natural Heritage likewise sought to protect those sites in wartime by prohibiting their destruction. As for case law which could be cited as a basis for draft principle 13, the order of the International Court of Justice of 16 March 2022 concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* referred to the "destruction of buildings and infrastructure".

In Part Five, the recasting of draft principle 24 on sharing and granting access to information was a marked improvement. While there was no need for a preamble or for any new draft principles, it would be useful to define the notion of "environment" in the commentary. The draft principles should be referred to the Drafting Committee.

The Chair, speaking as a member of the Commission, said that he agreed with the general thrust of the Special Rapporteur's proposals and approach. For the sake of consistency, it would be better to use the wider term "environment" rather than "natural environment" throughout the text: it reflected developments in international humanitarian law over the past fifty years and was in line with the title of the draft principles.

It was right that the draft principles should cover international and non-international armed conflicts, as both could, and often did, damage the environment. While a general saving clause would be inappropriate for the reasons set out in the third report, there might be merit in including a "without prejudice" clause in certain provisions, along with an explanation in the respective commentary. It would also be good for the Commission to state explicitly that it had not considered the issue of *jus ad bellum* in the context of the draft principles. A failure to do so might suggest that the Commission had thought about the possibility of addressing that issue but had decided not to do so, even as part of the progressive development of international law.

He agreed with the proposal to insert the phrase "including in situations of occupation" in draft principle 1, although it was not absolutely necessary.

In draft principle 9, the original second paragraph could be deleted, as the first paragraph spelled out the main element of the rule regarding State responsibility. On the other hand, a special rule was needed to deal with the responsibility of non-State actors because the law in that area was unclear and evolving. While the responsibility of non-State actors and that of international organizations were certainly related, individual criminal responsibility was a different matter entirely and should be treated separately. He therefore considered that it was inadvisable to link together, in a single "without prejudice" clause, the responsibility of non-State actors, individual criminal responsibility and the responsibility of international organizations for environmental damage caused in relation to armed conflict.

While he supported the inclusion of a new paragraph in draft principle 13, he wondered whether it might not be better to use a more objective phrase such as "likely to cause" or "may be reasonably expected to cause". He was in favour of a preamble of no more than two or three paragraphs and supported referral of the draft principles to the Drafting Committee.

The meeting rose at 12.45 p.m.