Provisional

**For participants only**

16 June 2022

Original: English

# International Law Commission

**Seventy-third session (first part)**

**Provisional summary record of the 3577th meeting**

Held at the Palais des Nations, Geneva, on Tuesday, 10 May 2022, at 11 a.m.

## Contents

***Present***:

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

***Secretariat***:

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| 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. Lehto** (Special Rapporteur), summing up the debate on her third report on protection of the environment in relation to armed conflicts (A/CN.4/750), said that she wished to thank the other members of the Commission for contributing to what had been a rich and interesting discussion. She was pleased to note that her proposed changes to the set of draft principles adopted on first reading had generally been well received. While considerable work remained to be done in the Drafting Committee, the Commission had a solid basis for the completion of its work on the topic on second reading at the current session.

She would begin by addressing a few general issues before responding to some of the specific points and suggestions made in relation to the draft principles and the changes proposed in the report. Although it would not be possible to respond to all the comments, she had taken careful note of everything that had been said in the course of the debate, including with regard to the commentaries.

The first general issue concerned the Commission's 2019 decision to invite "Governments, international organizations and others" to submit written comments on the draft principles and commentaries adopted on first reading. As a result of that decision, the Commission had received comments from 23 States, 10 international organizations and two other organizations, namely the International Committee of the Red Cross (ICRC) and the Environmental Law Institute, in addition to a joint submission by seven civil society organizations. The interest of those different actors in the Commission's work and their willingness to share their views, experience and expertise should be welcomed and appreciated.

Mr. Grossman Guiloff had said that the number of States from which or on whose behalf written comments had been received was indicative of serious structural issues and highlighted the need for capacity-building to increase participation. She shared that concern. Even though 23 was not a particularly low number of State comments to receive on one of the Commission's topics, and that number rose to more than 50 if statements made in the Sixth Committee were included, she fully agreed that there was a structural problem that could be alleviated, to some extent, through capacity-building. The problem only underlined the importance of the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law as a core activity of the Organization. Mr. Jalloh's suggestion to hold an interactive meeting of the Commission and the Sixth Committee on the matter also merited attention. All members recognized that interaction with States was the foundation of the Commission's work.

The international organizations that had responded to the Commission's invitation had submitted comments that were relevant to the topic and reflected their respective areas of expertise. The comments were particularly valuable because several of the draft principles addressed international organizations and built on their practice. The United Nations Environment Programme (UNEP), ICRC and the Environmental Law Institute had been specifically mentioned in the Commission's invitation because of the special role that they had played in initiating the topic. It was in the interests of States for the Commission to offer an output that built on the best available expertise. The joint civil society submission also reflected the expertise of the seven organizations concerned in their particular fields of activity. She agreed with Mr. Jalloh that, in light of the different comments, it could perhaps be said that the Commission had in its work found the right balance between reality and utopia, though only time would tell.

Like Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Hassouna and Mr. Jalloh, she viewed all the comments received as valuable and relevant to the Commission's work. Mr. Hmoud had noted that the information contained in the report enabled readers to form an objective assessment of the proposed draft principles. Mr. Jalloh, meanwhile, had recalled that the Commission's statute established that it should "consult with any international or national organizations, official or non-official, on any subject entrusted to it if it believes that

such a procedure might aid it in the performance of its functions"; in the past, the Commission had done so in its consideration of several topics.

Specific concerns had nevertheless been expressed over the treatment of those contributions in the report. Mr. Park had asked why the comments of non-State entities were sometimes cited before those of States. Sir Michael Wood had made a similar point. Her answer was that she had tried to present the comments in a logical order so as to make the report readable in spite of the amount of information that it contained. After all, a Special Rapporteur's report was not an institutional product.

Mr. Park had also expressed concern about the few instances in which she made a recommendation based on a proposal from "international organizations and others". In relation to the proposed preamble, he had asked whether a Special Rapporteur could formulate a new proposal based on comments made by non-governmental organizations (NGOs) even when no comments had been submitted by States. She wished to make three observations in response.

First, adding a preamble to the draft principles was not a new idea, as it had already been mentioned by the previous Special Rapporteur on the topic and again during the first reading. It was also not correct to characterize either the Economic and Social Commission for Asia and the Pacific or the International Union for Conservation of Nature (IUCN) as an NGO. The membership of IUCN included States and government agencies, in addition to NGOs, indigenous peoples' organizations, scientific and academic institutions and business associations.

Second, and more generally, it would be dangerous to say that the Commission could make changes at the second-reading stage only if they were based on comments from States. Why, in that case, would the Commission invite international organizations and others to comment?

Third, there was nothing preventing the Commission from using its own judgment or, as Sir Michael Wood often said, from having second thoughts during the second reading. The primary objective of the second reading must be to improve the text.

A related concern had been expressed by Mr. Rajput, who had drawn attention to numbers that, in his view, indicated a serious imbalance. According to Mr. Rajput, the vast majority of her recommendations were based on proposals by "others", some of which had been supported by a few States, while only four were based on suggestions by States. She wished to point out that, aside from the proposals concerning draft principle 1, the temporal scope of draft principle 5, the mention of high-risk areas in draft principles 10 and 11, and draft principle 23, all her recommended changes to the draft principles were based on, or reflected and responded to, comments by States. She was also at a loss to understand Mr. Rajput's reference to proposals based on comments made by others and supported by a few States, given that all comments were independent contributions. Was a comment made by a State less of a "State comment" if the same point had been made by an international organization? The methodology by which Mr. Rajput had reached those conclusions was not clear to her. In any event, she hoped that her explanation would alleviate the concerns of Mr. Šturma, who had reminded the Commission of the need to be "attentive to the comments of Governments" rather than the "noble intentions" of some environmental NGOs.

The second general issue was the proposal to integrate a *jus ad bellum* perspective into the work on the topic or to indicate, in a "without prejudice" clause, that the Commission had not considered the issue. Mr. Murase had referred to "the theory of selective application, or denial of application, of *jus in bello* for States that had violated *jus ad bellum*" and had urged the Commission to make a decision in that regard. Mr. Forteau had pointed to a serious imbalance stemming from how few references there were to *jus ad bellum* in the draft principles and the commentaries adopted on first reading (A/74/10, chap. VI). Lastly, Mr. Tladi had suggested the inclusion of a saving clause, for instance in the commentary to draft principle 1, to explicitly exclude *jus ad bellum* from the scope of the draft principles.

She agreed that *jus ad bellum* violations generated international responsibility for environmental damage, as was noted in the commentary to draft principle 9, but she also agreed that there was room to strengthen the commentary in that regard, including with a

reference to the recent International Court of Justice order on provisional measures in *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*. She further agreed that article 15 of the Commission's articles on the effects of armed conflicts on treaties, which had also been mentioned by Mr. Forteau, was relevant to the topic and could be referred to in the commentaries, together with article 14. In her opinion, it would be most appropriate to do so in the proposed introduction to Part Three in the commentary, which would include a section on the application of international environmental law during armed conflict. As the Commission members might recall, article 15 established that an aggressor State could not invoke an armed conflict that resulted from the act of aggression as a ground for suspending treaty obligations, while article 14 provided that a State exercising its right of self-defence was entitled to do so.

As for Mr. Murase's suggestion concerning the selective application of *jus in bello*, she recalled that the Commission had had an opportunity to address the issue in 2018, during the debate on her first report (A/CN.4/720). At that time, some members had questioned the applicability of the law of occupation to situations that resulted from the unlawful use of force. In her response to those members, she had defended the principle of equal application of the law of armed conflict, which had a firm basis in both treaty law and customary international humanitarian law. As a result of the debate, it was stated in the introduction to Part Four in the commentary to the draft principles, as adopted on first reading, that "in accordance with the fundamental distinction between *jus ad bellum* and *jus in bello*, the law of occupation applies equally to all occupations, whether or not they result from a use of force that is lawful in the sense of *jus ad bellum*".

While she did not think that the debate on the issue should be reopened at the second-reading stage, she wished to draw attention to a provision of the law of armed conflict that privileged a State acting in self-defence, namely article 54 (5) of Protocol I Additional to the Geneva Conventions of 1949, which concerned the so-called "scorched-earth policy" applied in defence of a national territory against invasion. The provision, which was regarded as customary international law, stated that: "In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 [to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population] may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity." That rule, which also had a bearing on the environment, could be cited in the commentary. Nevertheless, the main thrust had to be the protection of the environment, not the few exceptions allowed for States acting in self-defence.

Whether or not there was a need for a "without prejudice" clause in the commentary, bearing in mind the existing references to *jus ad bellum* and those that might be added, was a matter that could best be discussed during the second part of the Commission's current session, once the revised commentaries had been circulated.

Mr. Forteau had furthermore raised the question of the role of international environmental law in the project. In particular, he had expressed a wish for more clarity as to how and to what extent international environmental law applied in armed conflicts. That issue was also related to the status of the law of armed conflict as *lex specialis* in armed conflicts, to which several other members had made reference.

In that context, she wished to recall that her first report contained an analysis of the relevance of international environmental law in situations of occupation, while her third report indicated her intention to include in the commentaries an introduction to Part Three, which could contain a section on the application of international environmental law during armed conflict. Such a section could include a reference to certain principles of international environmental law that were understood to apply throughout an armed conflict, some comments on the role of multilateral environmental agreements in armed conflicts and references to State practice in applying and invoking environmental treaties during armed conflict.

As for the concept of *lex specialis*, she agreed with Mr. Forteau and others that most rules of the law of armed conflict were not rules of total exclusion but allowed the concurrent

application of other rules of international law. The rules of the law of armed conflict and those other rules could thus complement and inform each other's application.

A further general issue concerned the use of terms, which was relevant to several provisions in Part Three. A total of 14 Commission members had expressed a preference for using the term "environment" throughout the draft principles. Ms. Galvão Teles had argued that the concept of "natural environment" was dated and incomplete. Ms. Oral, meanwhile, had cited the 2020 ICRC guidelines on the protection of the natural environment in armed conflict, which stated that: "The notion of the 'natural environment' for the purposes of [international humanitarian law] is not defined in Additional Protocol I or its negotiating history, and there are different views on its precise meaning." In other words, the term did not provide additional clarity.

Five members had expressed a preference for the term "natural environment". Sir Michael Wood and Mr. Rajput had voiced concern about giving the impression that the Commission was proposing to change the existing law of armed conflict, while Mr. Park and Mr. Murphy were concerned about not taking the views of States into account. On the first issue, she believed that it could and should be stated in the commentaries that the use of the term "environment" was not intended to affect either articles 35 (3) and 55 (1) of Protocol I or customary international humanitarian law. As far as she was aware, ICRC viewed such a clarification as sufficient to safeguard existing law. Regarding the other issue, Mr. Murphy had said that, if the argument for using the term "environment" was based not on reactions by States but on a simple desire for a broader term, that was not a solid basis for making such a change on second reading. She wished to point out that her decision not to change the recommendation that she had made during the first reading had been based on explicit comments by no fewer than 12 States: Belgium, Denmark, Finland, Iceland, Italy, Malaysia, Morocco, Norway, Portugal, Spain, the Sudan and Sweden. Algeria and Lebanon had expressed a general preference for harmonizing the terminology.

Two States, namely France and the United Kingdom, had expressly indicated their preference for the term "natural environment". Mr. Park and Mr. Murphy had argued that other States that had not commented on the issue could nevertheless be counted as favouring the term "natural environment" and that States that had expressed a clear preference for the term "environment", such as Spain, did not in fact mean what they had stated. To her knowledge, it was not the Commission's practice to ignore explicit comments made by States or to replace them with assumptions derived from State comments on other issues.

The last general issue concerned the contribution of the draft principles and the commentaries thereto to the progressive development and codification of international law in accordance with the Commission's mandate. Sir Michael Wood had questioned whether the draft principles represented such a contribution, stating that while it was "broadly accurate" to say that they did, the Special Rapporteur herself regarded certain provisions as merely recommendatory. He had also expressed concern that the Commission could seem 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. If he had been alluding to paragraph (3) of the introduction to the draft principles in the commentary, according to which the draft principles included "those that can be seen to reflect customary international law, and those of a more recommendatory nature", she wished to point out that it stated only the obvious, in accordance with the Commission's mandate, as noted in paragraph 26 of her third report. Several States, including the Netherlands, Spain and the United States of America, had indicated in their written comments that they understood the reference to "recommendatory nature" to mean "recommendations for progressive development". Reference could also be made to the Commission's 2006 principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, the commentary to which stated that the Commission's focus had been on formulating "a coherent set of standards of conduct and practice". She was not aware that those principles could have been considered to fall outside the scope of the Commission's mandate. The Commission itself had certainly not been of that opinion, having stated, again in the commentary, that the principles were "intended to contribute to the process of development of international law".

It was also not clear that voluntary measures could never contribute to the progressive development of international law. As Mr. Hassouna had said in reference to draft principle 6, although the provision was recommendatory in nature, it would pave the way for progressive development through the inclusion of environmental provisions in the agreements mentioned therein.

To conclude her general comments, she noted that the realities of war were not only military. Environmental damage caused in relation to armed conflicts could be long term and irreparable and contribute to global environmental threats. It was particularly important to keep that in mind given that the title of the topic was "Protection of the environment in relation to armed conflicts".

Turning to individual draft principles, she noted that the proposed amendment to draft principle 1 had been widely supported, with 15 members having voiced their agreement. Nevertheless, some doubts had been expressed about the wording. Mr. Murphy, Mr. Park and Mr. Rajput had pointed out that the amendment could be interpreted as extending the period of occupation to the time before conflict. She wished to propose alternative wording that she hoped would address those concerns: "The present draft principles apply to the protection of the environment before an armed conflict, during an armed conflict, including in situations of occupation, and after an armed conflict." While she had noted Mr. Jalloh's drafting suggestion to add the words "irrespective of classification", that change would render the provision more categorical than the explanation given in the commentary and thus somewhat misleading.

The proposal to use consistent language in draft principles 2, 6, 7 and 8 had also enjoyed wide support. Mr. Hassouna had suggested that situations of occupation should also be mentioned in draft principle 2. She was grateful for his suggestion because it had made her realize that the words "during armed conflict" were unnecessary, as the draft principle already contained a reference to all temporal phases in the phrase "in relation to armed conflict". She therefore proposed that the words "during armed conflict" should be deleted.

She had not proposed any change to draft principle 3 in her third report but noted that Mr. Forteau, Mr. Rajput and Mr. Saboia had commented on the notion of "enhancing". She believed that the word "enhance" accurately expressed the purpose of the draft principles. However, the French translation might indeed have to be changed, as Mr. Forteau had suggested.

Her proposed clarification of draft principle 4 had been widely supported, although Mr. Murase had suggested the deletion of the provision. Ms. Escobar Hernández had expressed uncertainty over whether the proposed wording would fully respond to the doubts and comments of States. Mr. Park had suggested deleting the reference to culture, and Ms. Oral had suggested deleting the qualifier "major". Mr. Cissé had proposed new wording, also without the qualifier "major" but with a reference to areas of environmental importance recognized as such. Lastly, Mr. Rajput had suggested referring to "areas of major environmental and related cultural importance". For the time being, she maintained the proposal made in her third report. She recognized the merits of having a debate on the wording in the Drafting Committee but did not think that cultural importance should be included as a definitional element.

The amendments proposed to the temporal and personal scope of draft principle 5 had received broad support. She supported the suggestion by Mr. Vázquez-Bermúdez to explicitly mention States and other relevant actors in paragraph 1, as it would better align the provision with the other draft principles than the wording proposed in her report. A suggestion to replace the word "should" with "shall" had been made by Mr. Jalloh and also by Mr. Grossman Guiloff, who had referred to a consistent line of jurisprudence of the Inter-American Court of Human Rights, which might have been reflected in the commentary only partially. She was grateful to him for his comments. Mr. Jalloh and Ms. Oral had suggested using more inclusive wording in reference to the lands of indigenous peoples, while Mr. Saboia had supported the existing formulation. There had been no other comments on the matter, which seemed to indicate that there was no strong wish to change the wording. Mr. Nguyen had suggested referring to "ethnic minorities" rather than indigenous peoples, while Ms. Escobar Hernández had said that doing so would not be appropriate. That issue was

addressed in paragraph 61 of her third report. In her view, it would not be possible to broaden the scope of the provision to cover ethnic minorities without detracting from its basic purpose.

Mr. Rajput had expressed some doubts regarding the provision as a whole, and Mr. Hmoud had argued that it fell outside the scope of the topic. She wished to note that, while the world's indigenous peoples accounted for less than 5 per cent of the total human population, they held tenure over 25 per cent of the world's land surface and their lands represented about 80 per cent of global biodiversity. She therefore did not agree that the provision concerned the protection of indigenous peoples as such more than the protection of the environment.

A number of members had declared themselves amenable to the proposed change to draft principle 6; among them, Mr. Rajput had expressed a preference for retaining the title as adopted on first reading, but that would make the title inconsistent with the provision itself, which was hardly desirable. Mr. Grossman Guiloff had suggested using "shall" instead of "should", arguing that the obligation set out in the draft principle was customary.

The linguistic improvement suggested to draft principle 7 did not appear problematic. Critical comments had mostly concerned a change she had not proposed. Several members had suggested changing "shall" to "should", with another expressing the view that the question merited further reflection. The draft principle had been phrased in mandatory terms in 2016 and adopted as such on first reading in 2019. The additional affirmative practice that had accumulated since then, together with practice not previously taken into account, would seem to support the current wording. In her third report, she had referred to the Security Council's consistent practice of requesting peace operations to consider their environmental impact, which related to the first part of the draft principle. The wording of the relevant resolutions was mandatory. Furthermore, the States members of the North Atlantic Treaty Organization had undertaken to significantly reduce greenhouse gas emissions from military activities, in line with their obligations under the Paris Agreement on climate change.

Draft principle 8 had drawn numerous comments from members, all but one of whom had expressed support for the provision, including the proposed amendment concerning areas crossed by displaced people. The amendments suggested to draft principle 9 had likewise been widely supported. Mr. Reinisch had agreed with the suggested deletion of the previous version of paragraph 2 and the inclusion in the commentary of an overview of relevant developments regarding the responsibility of non-State actors. Sir Michael Wood and Mr. Murphy had suggested deleting the draft principle, partly on the grounds that paragraph 1 merely restated a basic rule of the law of State responsibility. The added value of the draft principle, however, lay in its recognition of the compensability of pure environmental damage. The recent compensation judgment of the International Court of Justice in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, to which Mr. Forteau had referred, confirmed that the principle of full reparation required compensation for damage caused to the environment in and of itself, including in a situation of armed conflict.

With regard to Mr. Jalloh's suggestion of a separate provision on individual criminal responsibility and Mr. Rajput's related proposal concerning the responsibility of non-State actors, she inclined to the view that including an independent provision would give rise to a number of questions requiring a response, such as how the proposed text would relate to States' binding obligations to investigate and prosecute grave breaches of the Geneva Conventions of 12 August 1949 and serious violations of international humanitarian law or existing obligations under human rights law; whether "environmental damage" would need to be defined; and whether other considerations should be taken into account. The debate on such questions might be extensive. Mr. Rajput's suggestion was complicated by the lack of any international legal definition of non-State actors. The work required would be difficult to accommodate at the current second-reading stage. If, as Mr. Tladi had said, individual criminal responsibility should be treated separately, perhaps the proposed paragraph 2 of draft principle 9 could be split into two or more subparagraphs.

Regarding draft principles 10 and 11, the change from "corporations or other business enterprises" to the simpler term "business enterprises" did not seem to be controversial.

While some doubts had been expressed regarding the term “areas affected by an armed conflict”, it had also enjoyed wide support. Sir Michael Wood, supported by Mr. Vázquez-Bermúdez, had suggested adding a mention of jurisdiction to the phrase “in or from their territories”. Mr. Forteau had considered the phrase “in or from their territories” unclear and asked about its applicability to situations of occupation. Whether to add a mention only of jurisdiction, which she believed should be done, or of both jurisdiction and control could be discussed in the Drafting Committee.

The element of those two draft principles that had generated the most comments was the proposed reference to high-risk areas. In her view, that element, rather than falling outside the scope of the topic, as some had said, would adequately define the conditions of a pre-conflict situation. However, noting the discontent expressed by several members, she wished to withdraw her proposal. Finally, Sir Michael Wood and Mr. Murphy had suggested that the opening words, “States should take appropriate legislative and other measures”, should be made more flexible. No other comment had been made on the issue, but it could be raised in the Drafting Committee.

Mr. Forteau had noted that the appropriate place for draft principle 13 might be in Part Two of the draft principles. Ms. Oral had suggested deleting the words “in particular, the law of armed conflict”. Those proposals could possibly be combined. Ms. Galvão Teles had further suggested removing the word “general” from the title. The proposed new paragraph 2 had been supported by eight members, one of whom, supported by another, had suggested an amendment; however, three members had expressed strong objections to the proposed paragraph. In her view, the paragraph was not intended to refer to specific weapons, or even to weapons at all: it could include actions such as setting fire to oilfields, as had happened during the Iraqi invasion of Kuwait. Moreover, irrespective of whether the proposed new paragraph was included in draft principle 13, the prohibition to which it referred already existed in Protocol I Additional to the Geneva Conventions of 1949 and, arguably, in customary international law, though the latter view was not uncontested. Not including it in a set of principles specifically addressing the protection of the environment in relation to armed conflicts would nevertheless cast a shadow on the existing prohibition. The reservations and declarations of States regarding that prohibition should be duly reflected in the commentary. As the issue would benefit from further discussion before being tackled by the Drafting Committee, she suggested that interested members should hold an informal exchange of views in advance.

The proposed amendments to draft principle 14 had been supported by several members, but Mr. Park opposed the deletion of the reference to military necessity and Mr. Hmoud the deletion of the words “in attack” after the word “precautions”, while Mr. Šturma objected to both deletions. While military necessity was an important principle of the law of armed conflict, it differed from proportionality or precaution, as had been pointed out by France, the United States and ICRC, among others, and it operated through specific rules, not independently. She had proposed the deletion of the words “in attack” because the scope of application of the principle of precaution was not limited to attacks under the law of armed conflict, but also covered other military operations and the choice of means and methods of attack. Whether or not to delete those references was therefore not a question of interpretation or preference, but a matter of making the draft principle more consistent with the law of armed conflict.

While the proposed deletion of draft principle 15 seemed to enjoy general support, Mr. Reinisch had raised the question of whether, taken together with the deletion of the principle of military necessity from draft principle 14, it might have unintended consequences; Mr. Park had made a similar point. The principle of military necessity and the principle of humanity, as the two cardinal principles underlying more specific rules in the law of armed conflict, could well be explained in the commentary to draft principle 14. The relevant parts of the commentary to draft principle 15 were related to the principle of proportionality, not military necessity, and could thus be moved into the commentary to draft principle 14 without creating confusion.

While she had not proposed any change to draft principle 16, “Prohibition of reprisals”, she had suggested that the legal status of that prohibition should be further clarified in the commentary, to the extent possible. Sir Michael Wood and Mr. Murphy had suggested

that reference should be made, either in the text of the draft principle or in the commentary, to the fact that different States had different obligations in that regard. In 2015, the Commission had been unable to agree on wording, ultimately considering that any formulation other than the one adopted could be interpreted as weakening the existing rule under the law of armed conflict. She therefore hoped that the issue could be settled in the context of the commentary.

Two new issues had been raised in relation to draft principle 17. Mr. Murase and Ms. Oral had proposed the inclusion of nuclear facilities as protected zones. In her view, that issue could be addressed in the commentary in the introduction to Part Three of the draft principles, given that the law of armed conflict contained relevant provisions, including article 56 of Protocol I. Mr. Forteau and Mr. Cissé had sought clarification regarding the relationship between draft principle 17 and areas protected under multilateral environmental agreements; Mr. Cissé had also made a drafting suggestion, including a reference to areas of environmental and cultural importance recognized as such. Ms. Oral, Mr. Cissé and Mr. Ouazzani Chahdi had expressed a desire for more clarity regarding the relationship between draft principle 17 and draft principles 3, 4 and 13. The proposed additional phrase "and shall benefit from any additional agreed protections" could be taken to refer to those provisions, together with other relevant international obligations, and would therefore be useful in the text of the draft principle and not only in the commentary, as had been proposed by Mr. Park.

The comments made on draft principles 18 and 19 related to the commentary rather than the provisions themselves. Of the amendments proposed to draft principle 20, only the term "protected persons" had proved controversial: some members supported it, while others had expressed a preference for the word "population". The question of replacing the reference to "the population of the occupied territory" with wording that was more consistent with the law of occupation concerned both draft principle 20 and draft principle 21. Mr. Hmoud had referred to nationals of an occupying Power transferred to the occupied territory, as distinct from protected persons; in current occupations, that was unfortunately not a hypothetical scenario. She therefore hoped that the term "protected persons" could be used in draft principle 20. Draft principle 21, however, could refer to the "protected population", given that it focused not on individual rights but on the collective benefit derived from the use of natural resources.

Ms. Oral's suggestion to mention post-occupation environmental effects in draft principle 20 (1) was in line with a proposal made by Lebanon; in her third report, she had suggested that the issue should be addressed in the commentary. Mr. Forteau had sought clarification regarding the meaning of the references to "applicable international law" in that paragraph and to the "law … of the occupied territory" in paragraph 3. Paragraph (9) of the commentary to draft principle 20 already indicated that the term "law and institutions" was intended to cover the relevant international obligations of the occupied State. The "duty of vigilance" of the occupying Power, also referred to by Mr. Forteau, was discussed in her first and third reports; she agreed that it should be mentioned in the commentary.

Concerning draft principle 21, two drafting proposals had been made. Mr. Cissé's suggestion, which was intended to remove the phrase "is permitted", appeared not to alter the substance of the existing text, which she understood to refer to the legal limits of the occupying Power's right to administer and use the natural resources of the occupied territory, as defined by the concept of usufruct and other relevant rules of international law. Ms. Oral had suggested that the draft principle should refer to preventing, rather than minimizing, environmental harm. The Special Rapporteur was not fully convinced of the need for either amendment, but they could be taken up in the Drafting Committee.

Her proposed changes to draft principle 22 had been supported by several members, but two had suggested alternatives to the wording "beyond national jurisdiction"; however, that phrase was a term of art that was used in several international instruments to refer to areas beyond any State's national jurisdiction, such as the high seas, the Antarctic and the atmosphere. Mr. Cissé had rightly highlighted the close connection between protecting the environment of an occupied territory and preventing transboundary effects, as harmful activities that might create such effects could take place within an occupied territory.

The minor change proposed to draft principle 23 had been supported by Mr. Hassouna, Mr. Reinisch, Ms. Oral, Mr. Saboia and Ms. Galvão Teles. Mr. Rajput had expressed concern that the proposed change would fail to reflect the difficulties of post-conflict peacebuilding efforts, but natural resource governance and environmental protection had long been recognized, both by States and by international organizations, as a critical part of peace processes and peacebuilding.

The amendment proposed to paragraph 1 of draft principle 24 had been supported by Mr. Park, Sir Michael Wood, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Reinisch, Ms. Oral, Mr. Saboia, Ms. Escobar Hernández and Mr. Ouazzani Chahdi. Ms. Escobar Hernández had suggested that the location of the draft principle, once amended, could be reconsidered, while Mr. Park and Mr. Rajput had suggested changing "shall" to "should"; however, the word "shall" in that paragraph related to the phrase "in accordance with their obligations under international law" at the end of the sentence. As discussed in her third report, the formulation was appropriate in a situation in which there were treaty obligations but no corresponding customary rule. There had also been some support for the proposed deletion of paragraph 2 of the draft principle. Mr. Grossman Guiloff and Ms. Escobar Hernández had emphasized that, if it was deleted, both the saving clause and the duty of cooperation should be reflected in the commentary. Mr. Rajput and Ms. Galvão Teles had objected to the deletion of paragraph 2, the latter considering that a saving clause, even if differently formulated, should be included. She had elaborated on that issue in her introductory statement at the 3571st meeting; as she had noted at that time, she doubted whether all relevant considerations could be reflected in a general saving clause.

Draft principle 25 had been supported by several members. As all the comments made concerned the commentary, there appeared to be no objection to the text of the provision. Similar support had been expressed for draft principles 26 and 27. Regarding the former, Mr. Grossman Guiloff had suggested adding the word "timely" to the text, while Mr. Forteau had expressed concern about the provision's implications for State responsibility; the same concern had been expressed by Greece and Lebanon. In response, she had already suggested in her report that a reference to draft principle 9 should be added to the commentary. The relevant statements of the International Court of Justice in its recent compensation judgment in *Armed Activities on the Territory of the Congo* would also be relevant.

With regard to draft principle 27, Mr. Nguyen had remarked on the applicability of the provision to remnants of war in outer space. It seemed clear that the law of armed conflict applied to any armed conflict in outer space, and ICRC had expressed the view that the principles of international humanitarian law applied also to kinetic operations against space objects and non-kinetic operations that would disable space objects; fortunately, the issue remained hypothetical. Attacks against space objects could contaminate not only the extraterrestrial environment but also terrestrial water, soil or subsoil, if contaminated fragments fell to Earth. The issue also related to draft principle 19, as the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques referred to the prevention of widespread, long-lasting or severe damage to the space environment. Such issues could possibly be reflected in the commentary. She had not suggested any changes to draft principle 28, in respect of which there had been very few comments, but Mr. Forteau's suggestion to replace "should" with "shall", in the light of the obligations laid down in articles 192 and 194 of the United Nations Convention on the Law of the Sea, was valid, at least for cases where the origin of remnants at sea was known.

Regarding her proposal that the Commission should add a preamble to the draft principles, most comments had centred on whether it would be appropriate and feasible to do so at the second-reading stage. The proposal had been supported by ten members, but four others had expressed doubts. Mr. Vázquez-Bermúdez had referred to the preamble to the draft articles on the law of transboundary aquifers, which had been added on second reading; as for feasibility, the pace of work in the Drafting Committee would be the deciding factor. Only Mr. Murase had commented on the substance of the proposed preamble, suggesting that the phrase "in relation to armed conflicts" should be added to the third and fourth paragraphs. In her view, however, the general statements in the two paragraphs remained valid in all circumstances, both in times of peace and in armed conflict.

She was grateful to the Commission members for the rich and constructive debate that had taken place and looked forward to continuing the deliberations within the Drafting Committee in the same spirit.

**Organization of the work of the session** (agenda item 1) (*continued*)

**Mr. Park** (Chair of the Drafting Committee) said that, for the topic "Protection of the environment in relation to armed conflicts", the Drafting Committee was composed of Ms. Escobar Hernández, Mr. Forteau, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Hmoud, Mr. Jalloh, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Rajput, Mr. Ruda Santolaria, Mr. Saboia, Mr. Vázquez-Bermúdez and Sir Michael Wood, together with Ms. Lehto (Special Rapporteur) and Mr. Šturma (Rapporteur), *ex officio*.

For the topic "Succession of States in respect of State responsibility", the Drafting Committee was composed of Mr. Argüello Gómez, Mr. Jalloh, Mr. Murphy, Mr. Nguyen, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria and Sir Michael Wood, together with Mr. Šturma (Special Rapporteur and Rapporteur), *ex officio*.

*The meeting rose at 12.20 p.m.*