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Summary record of the 3318th meeting

Topic:
Protection of the environment in relation to armed conflicts

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3318th MEETING

Tuesday, 12 July 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Al-Marri, Mr. Cafilisch, Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood.

Protection of the environment in relation to armed conflicts³²⁸ (A/CN.4/689, Part II, sect. E,³²⁹ A/CN.4/700,³³⁰ A/CN.4/L.870/Rev.1,³³¹ A/CN.4/L.876³³²)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the Special Rapporteur on protection of the environment in relation to armed conflicts to introduce her third report (A/CN.4/700).

2. Ms. JACOBSSON (Special Rapporteur) said that she wished to begin by thanking the Commission's secretariat, which, under the excellent leadership of Mr. Llewellyn, had done its utmost to support and facilitate her work, thereby also benefiting the Commission as a whole. She was particularly grateful for its sound advice, support and encouragement during the preparation of the three reports. Its experience, positive approach, diligence and efforts to ensure the translation and issuance of the third report had been crucial.

3. As the report she was introducing would be her last report to the Commission, which she would leave at the end of the year, she wished to take the opportunity both to look back at what had been achieved and to look ahead. Since the inclusion of the topic on the Commission's programme of work in 2013, she had presented three reports, in 2014, 2015 and 2016, respectively. She had followed the workplan proposed in each of them, making adjustments following consultations in the Commission. The topic had been addressed in "temporal phases". The first

³²⁸ At its sixty-seventh session (2015), the Commission took note of the draft introductory provisions and draft principles I-(x) to II-5, provisionally adopted by the Drafting Committee. See *Yearbook ... 2015*, vol. II (Part Two), pp. 64–65, para. 134.

³²⁹ Available from the Commission's website, documents of the sixty-eighth session.

³³⁰ Reproduced in *Yearbook ... 2016*, vol. II (Part One).

³³¹ Available from the Commission's website, documents of the sixty-eighth session. Document A/CN.4/L.870/Rev.1 reproduces the text of the draft principles provisionally adopted in 2015 (see *Yearbook ... 2015*, vol. II (Part Two), pp. 64–65, para. 134) and technically revised and renumbered during the present session by the Drafting Committee.

³³² Available from the Commission's website, documents of the sixty-eighth session.

report dealt with the law applicable prior to the outbreak of armed conflict,³³³ the second with the law applicable during armed conflict³³⁴ and the third mainly with the law applicable in post-conflict situations. Nevertheless, she recalled once again that there were no clear boundaries between those various phases and that the reports should be read together in order to form a clear idea of the work done thus far.

4. In the three reports that she had submitted, she had tried to give an overview of the law applicable before, during and after an armed conflict, in order to close the circle of the three temporal phases. In total, 14 draft principles had been developed, as well as provisions on the scope and purpose of the principles and the use of terms. The proposed principles ranged from preventive measures of a legislative nature to remedial measures.

5. It was her sincere hope that the Commission would decide to appoint a new Special Rapporteur from among its new membership to conclude the examination of the topic. During the years in which she had worked in the area, the interest that it attracted had been growing and had become ever more apparent. As recently as May 2016, the United Nations Environment Assembly had adopted a resolution on protection of the environment in areas affected by armed conflict,³³⁵ stressing the critical importance of protecting the environment at all times and calling on Member States to implement applicable international law. The work of the Commission was mentioned explicitly, and the Executive Director of the United Nations Environment Programme (UNEP) was requested to continue interaction with the Commission. The resolution was the first of its kind since the adoption of the resolutions on protection of the environment in times of armed conflict in the early 1990s. The main difference between the early 1990s and 2016 concerned State practice. In 2016, environmental concerns, whether in times of peace or in times of armed conflict, were mainstream. States, inter-governmental organizations and civil society organizations might disagree as to how best to achieve the goal of environmental protection, but it would be difficult to find a single State that claimed that environmental concerns, including their legal aspects, were irrelevant.

6. Before introducing the third report, she pointed out that the English version, into which the corrections that she had made at a late stage had not been incorporated, as they had into the French and Spanish versions, contained a number of typographical and other errors, which would be corrected in due course. A decision would be taken shortly on whether to do so by issuing a formal corrigendum or simply by sending an e-mail to the members of the Commission. Although she had no knowledge of the other official languages of the United Nations, any errors, including translation errors, in the Arabic, Chinese or Russian versions could of course be brought to her attention. One point should be highlighted, as it might appear

³³³ *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/674 (preliminary report).

³³⁴ *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/685 (second report).

³³⁵ United Nations Environment Assembly resolution 2/15 of 27 May 2016 (UNEP/EA.2/Res.15). Available from: www.unep.org/environmentassembly/proceedings-report-resolutions-and-decisions-unea-2.

to be an error, but was not. Paragraph 227 repeated a quotation given in paragraph 224, but the references in the two paragraphs were different. The reason was that, when the United Nations Compensation Commission had dealt with part one of the fourth instalment of “F4” claims, it had referred to its previous work on the second instalment of “F4” claims. The third report thus reflected the work of the Compensation Commission and did not contain an error on that point.

7. As she had done during the preparation of her previous reports, she had continued to consult other entities, such as UNEP, whose support had been crucial. Her discussions with staff of the United Nations Department of Peacekeeping Operations and the United Nations Department of Field Support had also been very fruitful. Representatives of the ICRC had continued to support her work, as had academics and members of NGOs. The pledge made by the Nordic States and national Red Cross societies on the protection of the environment during armed conflicts at the 2011 International Conference of the Red Cross and Red Crescent had culminated in an important report by the International Law and Policy Institute³³⁶ and a meeting of experts held in September 2015, which had been hosted by the Finnish Ministry for Foreign Affairs, among others. In addition, a new international seminar held at United Nations Headquarters in New York in the autumn of 2015, which had been open to all delegations accredited to the United Nations, had brought together speakers and guests with practical experience and theoretical knowledge of the topic. The interest shown by a number of States that were directly affected by remnants of war at sea had been considerable. The Special Rapporteur had also had the opportunity to visit some of the affected regions. Regrettably, and despite efforts to do so, it had been difficult to establish contact and hold consultations with regional bodies and affected States in Africa, the site of many non-international armed conflicts.

8. With regard to the purpose and content of the report under consideration, it should be recalled that the preliminary (first) report provided an introductory overview of the rules and principles applicable to a potential armed conflict (peacetime obligations). The second report identified existing rules of armed conflict that were directly relevant to the protection of the environment in relation to armed conflicts. It contained a proposed “preamble” and draft principles, which had been submitted to the Drafting Committee for consideration. The Drafting Committee had provisionally adopted them with some modifications, which the Commission had noted.

9. The third report followed the plan that she had put forward and was intended primarily to identify rules applicable in post-conflict situations. She had obviously not conducted a comprehensive review of international law in general, but had instead focused on the legal aspects of the environmental consequences of remnants of war and other environmental challenges. The report also contained proposals on post-conflict measures, access to and sharing

of information, and post-conflict environmental assessments and reviews. In order to “close the temporal circle”, which was one of the aims of the third report, it also dealt with preventive measures, as only one draft principle thus far had been proposed with regard to that phase.

10. The report under consideration thus consisted of three chapters. The first, which gave a general overview and presented recent developments in the area, summarized the consultations held in the Commission the previous year, reflected the views expressed by States in the Sixth Committee in 2015 and contained a review of the responses from States to the Commission’s request for information. The second chapter, which dealt with the rules applicable in post-conflict situations, began with general observations on areas of law (peacetime agreements) that were of particular relevance to the topic, focusing in particular on international investment agreements and the rights of indigenous peoples; it also described the practice of States in terms of peace agreements and status-of-forces and status-of-mission agreements. It contained a section on the practice of international organizations, which emphasized the work of UNEP, and a large section on legal cases and judgments, which built on a similar section in the second report.

11. An important, and substantive, section of the third report dealt with access to and sharing of information and the obligation to cooperate. It pertained to all three temporal phases because legal instruments intended to guarantee access to and sharing of information were increasingly important, as they were essential for preventing, mitigating and responding to environmental threats. Particularly important treaties, such as the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters and the 1991 Convention on environmental impact assessment in a transboundary context, were considered, and examples of other relevant treaties, such as the Convention on biological diversity, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the Minamata Convention on Mercury, were given, as were examples of soft-law instruments, including the texts that had come out of the 2012 United Nations Conference on Sustainable Development. The legal importance of access to environmental information during military operations and peacekeeping missions was also considered. Lastly, the third chapter of the report contained a brief analysis of the three stages of the work done thus far and proposals for the future programme of work.

12. In total, nine additional draft principles were proposed and could be found in annex I to the third report. Draft principle I-1 on implementation and enforcement was intended to cover wider ground than the protection of the environment during an armed conflict between two or more parties. Effective legislative, judicial and other preventive measures should address all three phases (before, during and after an armed conflict). They ranged from legislation reflecting obligations under the law of armed conflict, such as the obligation to ensure that means and methods of warfare were legally evaluated before they were tested or used, to procedural mechanisms allowing cases to be brought before domestic or relevant

³³⁶ International Law and Policy Institute, *Protection of the Environment in Times of Armed Conflict: Report from the Expert Meeting on the Protection of the Environment in times of Armed Conflict, Helsinki, 14–15 September 2015*, available from: ceobs.org/wp-content/uploads/2018/03/20160108-Helsinki-expert-workshop-report-.pdf.

international courts and tribunals. The draft principle was relatively short and general. It would be particularly interesting to hear the views of Commission members with regard to whether the principle should be expanded or whether it was sufficient to refer to further examples in the commentary. Draft principle I-3 on status-of-forces and status-of-mission agreements reflected a new but clear trend among States and international organizations towards addressing environmental challenges in such agreements. Draft principle I-4 on peace operations reflected the fact that States and international organizations such as the United Nations, the African Union, the European Union and NATO increasingly took account of the environmental impacts of such operations and took necessary measures to prevent, mitigate and remediate their negative consequences. The third report amply confirmed that trend.

13. As noted in annex I, part three of the draft principles concerned the principles applicable after an armed conflict. It began with draft principle III-1 on peace agreements. In her third report, the Special Rapporteur noted and described an important development in recent peace agreements, namely the fact that they increasingly regulated environmental issues. Indeed, for her, that development had been an interesting discovery during her research for the third report. Draft principle III-2 on post-conflict environmental assessments and reviews was crucial, as it highlighted the importance of cooperation between States and former parties to an armed conflict. It encouraged cooperation both by the former parties to a conflict (whether or not they were States) and by States that had not been involved in the conflict. The aim was to ensure that environmental assessments and recovery measures could be carried out rather than to identify any particular wrongdoer. Draft principle III-2, paragraph 2, described the steps to be taken at the conclusion of peace operations, such as reviews of their effects. To some extent, such reviews were already conducted, but they varied in quality and scope. The aim was to ensure that mistakes were not repeated and that lessons were learned.

14. Draft principles III-3 and III-4 addressed remnants of war in general and remnants of war at sea in particular. Draft principle III-3 was general in nature and largely reflected obligations under the law of warfare. While it did not go beyond existing law, it emphasized the need to act without delay. Furthermore, it encouraged the conclusion of agreements on technical and material assistance, as well as the undertaking of joint operations. Its aim was essentially to ensure that the threats posed by remnants of war, which were dangerous to humans and the lands on which they lived, were eliminated and that those lands were restored to a normal, safe state. Draft principle III-4 dealt with remnants of war at sea in particular and was intended to reflect the growing concern of States and international organizations with regard to their detrimental effects. Neither draft principle III-3 nor draft principle III-4 was limited to so-called “military” or “explosive” remnants; they were both intended to cover all types of remnants of war that represented a threat to the environment. Military or explosive remnants of war at sea were not explicitly regulated in the context of the law of armed conflict. That was one reason that remnants of war at sea should be governed by a specific principle. The

other reason was the difference in legal status between various maritime areas: some came under the sovereignty of the coastal State, others might be subject to the well-defined jurisdiction of that State and others still might lie beyond the exclusive jurisdiction of any coastal State. Remnants of war at sea might be found in areas that were not under the coastal State’s jurisdiction or control or, owing to the development of the law of the sea (extended maritime areas), might be within the coastal State’s jurisdiction, even if the coastal State had not been a party to the conflict at the time the remnants had been left in the area in question. The coastal State might not even have existed at the time. It followed that international cooperation on areas of common interest was necessary. The issue had increasingly been addressed both at the regional level, as in the case of areas in the Pacific Ocean or the Baltic Sea, and at the international level, for example in the United Nations. The measures taken were described in the third report. Many affected States did not have the resources to survey maritime areas, and other States and international organizations should endeavour to do so and to make the information collected freely available. In order for cooperation to function, access to and sharing of information were crucial. An increasing number of multilateral treaties addressed the issue and established obligations for States to make information available. They were clearly applicable in post-conflict situations and represented an interesting development of law.

15. Part four of the draft principles, which was provisionally entitled “Additional principles”, contained only one draft principle, but others would be added, and she would revert to that point later on. Proposed draft principle IV-1, entitled “Rights of indigenous peoples”, was intended to reflect and highlight the current legal status and rights of indigenous peoples, as established both in international and regional treaties and in case law. Indigenous peoples and communities were most often negatively affected by armed conflicts, not least as their particularly close connection with the land made them more vulnerable in times of armed conflict and its aftermath, as had been noted by members of the Commission and by representatives of Member States in the Sixth Committee.

16. She recalled that, the previous year, the Drafting Committee had provisionally adopted draft texts relating to part two of the draft principles, namely those applicable during armed conflict.³³⁷ Additionally, one draft principle on the designation of protected zones had been provisionally adopted for inclusion in part one. Entitled “Draft principle I-(x) (Designation of protected zones)”, it required States to designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones.³³⁸

17. As a specific comment on the various chapters of the third report, she wished to explain why certain aspects had been omitted and could be considered in a future report. The third report dealt principally with the applicability of peacetime agreements that were particularly relevant in post-conflict situations. She had not found any convincing reason to examine all existing environmental

³³⁷ *Yearbook ... 2015*, vol. II (Part Two), pp. 64–65, para. 134.

³³⁸ *Ibid.*

treaties to determine whether they continued to apply in situations of armed conflict, as had been suggested by one Commission member and two representatives of States. The task of analysing all environmental treaties in force, which numbered between 500 and 1,000, would actually prevent the examination of the topic from moving forward, as it would take time and the Commission would probably be unable to agree on whether and to what extent they applied in situations of armed conflict. For that reason, among others, such an analysis had not been done when the Commission had considered the effects of armed conflicts on treaties. It also went without saying that the question of whether environmental treaties were applicable before and after an armed conflict was of little or no concern, as they were applicable.

18. The third report thus focused on a number of conventions of particular relevance to the topic, such as the Convention for the protection of the world cultural and natural heritage, the Convention on of international importance especially as waterfowl habitat, the African Convention on the Conservation of Nature and Natural Resources and the Convention on the Law of the Non-Navigational Uses of International Watercourses. They had been selected not at random, but because the previous work of the Commission, the statements and contributions of States and commentators had identified them as being of particular relevance to pre- or post-conflict situations. In that context, it was also important, in her view, to examine liability conventions that explicitly exempted damage caused by acts of war or armed conflict, contained sovereign immunity clauses or provided for the right to suspend a convention in case of war or other hostilities. She had chosen to examine such conventions even though it could not necessarily be concluded that the application of the conventions *per se* was limited to peacetime. International investment agreements (including bilateral investment treaties) were also considered, as they could serve as examples of “treaties of friendship, commerce and navigation and agreements concerning private rights”, one of the categories listed in the annex to the draft articles on the effects of armed conflicts on treaties.³³⁹

19. The section of the third report entitled “Legal cases and judgments” covered international, regional and, to a lesser extent, national case law. It also covered some international dispute settlement procedures of a legal or semi-legal nature, such as the United Nations Compensation Commission. As she had noted in previous reports, the case law rarely dealt with environmental damage unconnected with damage to natural resources and property. The reason was that environmental claims without any connection to natural resources or property were highly unlikely to be successful. The same was true of claims related to situations of occupation. The case law relating to indigenous peoples’ rights was of particular relevance, as it strongly emphasized the connection between their land and their survival, as well as their human rights. It was also interesting to note that courts or entities that considered claims and awarded compensation had recognized the need for baseline data and measurements, which highlighted the importance of information-sharing and cooperation.

20. As it was her last year in the Commission and the end of her term as Special Rapporteur, she would take the opportunity to share some thoughts on what, in her view, should be done to complete the examination of the topic. With regard to occupation, she once again stressed that there was a close connection between the destruction of land and private property rights, which warranted further examination. Her original intention had been to address the issue in the third report, but, as the report already exceeded the recommended length for such documents, it had been difficult to include such an important aspect. As the law of occupation was part of the law of armed conflict, it could be addressed separately, should the Commission and the future Special Rapporteur so wish. The protection of the environment during the various phases of occupation (belligerent and non-belligerent occupation) could be dealt with without repercussions for the work already done by the Commission. In addition, compensation for a breach of the law of occupation could be linked to both a breach of a *jus ad bellum* rule and a breach of a rule connected to the obligation of the occupying Power. There was case law to build on, and some of it was reflected in her reports.

21. She had also intended to address the Martens clause – or the principle of humanity, as it was referred to by some commentators – in her third report, as she was of the view that it had implications that went beyond situations of armed conflict (irrespective of its application) and that its implications for protection of the environment in relation to armed conflicts could be dealt with in a “preamble”. However, she had not done so, one reason being that the Martens clause and the principle of humanity were general in nature and therefore also relevant to the analysis of the pre- and post-conflict phases. “Considerations of humanity”, which clearly fell within the realm of the Martens clause, were sometimes mentioned by international courts, albeit often in a general manner. The question of whether the Martens clause was identical to the principle of humanity and of relevance to the topic could be explored in future reports. In that regard, the Commission’s work on the protection of persons in the event of disasters should be taken into account.

22. The draft principles – those provisionally adopted at the previous session and those proposed during the current year – did not include reference to the settlement of disputes, liability (compensation) or disclaimers, and those issues would have to be considered at the next stage of the Commission’s work. With regard to future work, the responsibility and practice of non-State actors and organized armed groups in non-international armed conflicts also warranted consideration. Even though it was extremely difficult to obtain information, it would perhaps be easier for the Commission to investigate now that it had three reports defining the context.

23. It would also be worthwhile to include a few paragraphs in the preamble to introduce the draft principles, and it would make sense to include a clear reference to the Commission’s work on the effects of armed conflicts on treaties. There were other aspects that could also sensibly be included in the preamble, but she would not refer to them in her statement. The Commission had yet to decide whether to include a provision on the use of terms. With

³³⁹ *Yearbook ... 2011*, vol. II (Part Two), p. 119.

regard to the outcome of the work, divergent views had been expressed in the Commission and in the Sixth Committee. She wished to reiterate that, should there be a need to continue with enhanced progressive development or codification as a result of the work undertaken, a decision would need to be taken by the Commission, or by States, at a subsequent stage. She strongly encouraged continued consultations with other entities, such as the ICRC, the United Nations, UNEP and the United Nations Educational, Scientific and Cultural Organization (UNESCO), as well as with regional organizations. Their engagement had been considerable and a *sine qua non* for the outcome of the Commission's work. States had also been an important source of information, as they had responded to the Commission's questions concerning the situations in which the rules of international environmental law, including regional and bilateral treaties, had continued to apply during and after an international or non-international armed conflict and had referred to examples of national legislation relevant to the topic and case law in which international or domestic environmental law had been applied. While the information provided by States did not always correspond exactly to the Commission's questions, it had always been valuable.

24. In conclusion, she proposed that the Commission refer the nine draft principles to the Drafting Committee and looked forward to hearing the views and proposals of members on the report under consideration.

25. Mr. MURASE said that, with regard to phase I (Part One of the draft principles), the Commission had already adopted a principle on the designation of protected zones, and the Special Rapporteur was now proposing three further draft principles. He had no objection to draft principle I-1, as it was formulated as an exhortation using the word "should". However, he was puzzled by draft principle I-3 on status-of-forces and status-of-mission agreements. Such agreements usually dealt with the legal issues associated with the military bases and personnel of the stationed forces, such as entry into and exit from the country concerned, tax liabilities, postal services and, most importantly, civil and criminal jurisdiction over members of the stationed forces; they did not concern the conduct of the stationed forces, as was envisaged in the proposed draft principle. The environmental stewardship agreement³⁴⁰ supplementing the status-of-forces agreement between Japan and the United States of America,³⁴¹ referred to in paragraph 161 and the penultimate footnote thereto of the third report, was intended simply to prevent spills and leaks of oil and chemicals

³⁴⁰ Agreement between the United States of America and Japan on Cooperation in the Field of Environmental Stewardship relating to the United States Armed Forces in Japan, Supplementary to the Agreement under Article VI of the Treaty of Mutual Cooperation and Security between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, signed at Washington, D.C., on 28 September 2015, *Treaties and Other International Acts Series*, Washington, D.C., U.S. Government Printing Office, No. 15-928.

³⁴¹ Agreement Under Article VI of the Treaty of Mutual Cooperation and Security between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, signed at Washington, D.C., on 19 January 1960, *United States Treaties and Other International Agreements*, Washington, D.C., U.S. Government Printing Office, vol. 11, Part 2 (1961), TIAS No. 4510.

from United States bases in Japan, not to regulate the conduct of United States forces in the unlikely event of an armed conflict between Japan and the United States. Status-of-forces and status-of-mission agreements should therefore not be mentioned in draft principle I-3, and, if the provision was to be retained, the words "in their status-of-forces or status-of-mission agreements" in the first sentence should be replaced with "in special agreements".

26. Draft principle I-4 did not present any problems, although it would be advisable to replace the words "to prevent, mitigate and remediate" with the words "to prevent, reduce and control", which were used in the draft guidelines on the protection of the atmosphere.³⁴²

27. The problems addressed under phase I should be strictly limited to those that fell within the scope of the existing law of armed conflict. In that regard, article 36, "New weapons", 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) offered an example of such a limitation, providing that, in the study, development, acquisition or adoption of a new weapon, means or method of warfare, each State party was under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by the Protocol or by any other rule of international law applicable to the State party. Of course, the Commission did not intend to deal with the question of specific weapons, which was beyond its expertise, but that limitation suggested that its recommendations with regard to phase I might have to be restricted to the acknowledgement that States should carefully test new weapons and prepare adequate military manuals in anticipation of future armed conflicts.

28. With regard to part three of the draft principles, the difficulty of identifying the law applicable to the post-conflict phase (phase III) was well known. While the principles applicable during armed conflict (phase II) were well established in the law of armed conflict, the principles applicable during phase III were sometimes difficult to identify. As the Geneva Conventions for the protection of war victims (Geneva Conventions of 1949) and the 1977 Additional Protocols thereto ceased to apply after the "general close of military operations", environmental treaties and rules were supposed to be fully restored after the conflict, as *lex specialis* ceased to apply.

29. With regard to draft principle III-1, the Special Rapporteur stated, in paragraph 154 of her third report, that provisions on environmental protection were common in agreements that aimed to end non-international armed conflicts, but he was not sure that the principle was also applicable to international armed conflicts, as peace treaties were no longer commonly concluded in such cases, and those that were concluded did not contain provisions on environmental protection. Contemporary State practice showed that belligerent States tended to conclude armistice agreements to end active hostilities. Such agreements did

³⁴² See draft guideline 3 (document A/CN.4/L.875, available from the Commission's website, documents of the sixty-eighth session), adopted at the 3315th meeting on 5 July 2016 (3315th meeting, above, para. 52).

not normally contain provisions on environmental protection. As the difference between non-international armed conflicts and international armed conflicts was striking in that regard, the term “non-international armed conflict” should be used in draft principle III-1 in order to clarify its scope *ratione materiae*.

30. With regard to draft principle III-2, it was unclear at which point in time post-conflict environmental assessments should be conducted. Draft principle III-2, paragraph 2, seemed to apply “at the conclusion of peace operations”, but draft principle III-2, paragraph 1, did not specify a particular point in time. If amicable relations had not been restored by a peace agreement or treaty, former belligerent parties could hardly be expected to “cooperate” with each other. After an international armed conflict, as a result of the general close of military operations and the consequent withdrawal of forces, the belligerent parties were unilaterally obliged to protect the environment within each State, as that environment was exclusively under their respective jurisdictions or control. Although the environment could be protected in that manner, tension between former belligerents continued after the conclusion of armistice agreements, and peace treaties were not necessarily concluded immediately after the general close of military operations. Filling that temporal gap was one of the challenges of the Commission’s work on the topic.

31. Draft principles III-3 and III-4 on remnants of war and remnants of war at sea, respectively, were good principles for which the Special Rapporteur was to be commended. However, he wondered to whom the first paragraph of draft principle III-3 was addressed, as it was drafted in the passive voice, and it was not clear which party to an international armed conflict had primary responsibility for removing remnants of war. That difficulty had not escaped the Special Rapporteur, who suggested in paragraph 251 of her third report that, in an international armed conflict, a party that had used explosive ordnance often did not have control over the enemy territory after the cessation of hostilities, yet the party with the primary responsibility was required to remove explosive remnants of war in order to apply the principle effectively. In that respect, article 5 of the 1907 Convention VIII relative to the Laying of Automatic Submarine Contact Mines stipulated that, in principle, each party should remove its own mines, and when one party could not remove them, owing to their location, the Convention stipulated that their position must be notified to the other party by the party that had laid them. While draft principle III-3, paragraph 2, required the parties to seek agreement, it did not assign responsibilities, and there was a need to specify clearly which party had primary responsibility for removing the remnants of war. A duty to notify should thus be incorporated into the draft principle.

32. The former parties to an armed conflict did, of course, sometimes cooperate. He was not sure that he understood the opening clause of draft principle III-3, paragraph 2, “At all times necessary”, which seemed to him to mean “At all times necessary after the cessation of active hostilities”.

33. As for remnants of war, mention should be made of the recent practice of Japan with regard to the chemical weapons abandoned by the Japanese military in the territory of China during the Second World War. In response to a request made by China in 1990, Japan had made efforts to destroy those weapons. In accordance with article I, paragraph 3, of the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, Japan had undertaken to destroy them, and it had been agreed that, under the provisions of the Convention, China would provide appropriate cooperation in its capacity as the territorial State. In 1999, the two Governments had signed a memorandum on the destruction of abandoned chemical weapons³⁴³ and, on the basis of that instrument, Japan had conducted investigations and excavation and recovery operations in cooperation with China. The Japanese military had brought the chemical weapons into China in the 1940s, but their removal had not begun until 50 years later. The example showed that, in the absence of amicable relations between former belligerents, the removal of remnants of war was very difficult and could take a long time, whereas draft principle III-3, paragraph 1, provided for their removal “[w]ithout delay after the cessation of active hostilities”.

34. As for draft principle III-5, he agreed with the Special Rapporteur’s statement in paragraph 134 of her report that “the access to and sharing of information on the territory of a foreign State rests on the consent of that State”. Article 5 of The Hague Convention VIII relative to the Laying of Automatic Submarine Contact Mines provided for a duty to notify rather than for access to information. As States were required to take precautionary measures during an armed conflict, it was hardly difficult for parties to an international armed conflict that had laid mines to notify the other parties of their location after the cessation of active hostilities; in that regard, the duty to notify could be considered to derive from “the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States”, set forth by the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* (para. 29).

35. The content of the obligation aside, draft principle III-5 on access to and sharing of information should also include a temporal qualification, and he proposed that the words “in relation to armed conflicts” be replaced with “in post-conflict situations”, as the hostility between belligerents during an armed conflict prevented them from fulfilling their duty to cooperate. Furthermore, the phrase “in accordance with their obligations under international law”, which was a little too open-ended, might be replaced with the words “in accordance with their obligations under draft principles III-3 and III-4 above”.

36. Mr. KITTICHAISAREE said that the Special Rapporteur also should have consulted victims of armed conflicts directly to establish whether, on the basis of her third report, the draft principles proposed were sufficiently

³⁴³ For more information on this memorandum, see the website of the Ministry of Foreign Affairs of Japan: www.mofa.go.jp/announce/announce/1999/7/730.html.

practical and inclusive and whether they covered all relevant issues. In paragraphs 219 to 231 of her third report, the Special Rapporteur mentioned the work of the United Nations Compensation Commission set up to compensate victims of the damage caused by the invasion and occupation of Kuwait by Iraq. However, she had not sought the views of the Government of Kuwait, the State that had been the direct victim of the armed attack. Equally, he had expected Mr. Murase to mention the environmental impact of the atomic bombs dropped on Hiroshima and Nagasaki and wished to know whether, in Mr. Murase's view, the draft principles proposed by the Special Rapporteur were adequate to deal with the situation created by the atomic bombings of those two Japanese cities.

37. Mr. MURASE said that the Special Rapporteur was the person to whom the question should be put. In any event, the destruction of Hiroshima and Nagasaki had been extensively discussed and had been the subject of a historic 1963 decision of the District Court of Tokyo in the *Ryuichi Shimoda et al. v. The State* case. However, in his view, those examples should not be mentioned in the draft principles.

38. Mr. CANDIOTI said he would be grateful if Mr. Murase would clarify his comment on the use of the word "should" in draft principle I-1.

39. Mr. MURASE said that he had wanted to stress that States did not have an obligation to take the measures referred to in that draft principle.

40. Mr. CANDIOTI, thanking Mr. Murase, said that he wished to make a comment in relation to the Commission's working methods. The Commission seemed to be using the words "principle", "guideline" and "conclusion" interchangeably, but they had very different meanings. For example, a provision that defined the object or scope of application of a draft text could not be referred to as a conclusion or guideline. He feared that the Commission was confusing concepts and terms and believed that the Planning Group should examine the matter.

41. Mr. PARK said that he appreciated the Special Rapporteur's third report, which dealt mainly with the principles applicable in post-conflict situations but also addressed principles relating to prevention and was based on an in-depth analysis of rules of particular relevance, the practice of States and international organizations, and case law. Annex II contained an extensive bibliography, which would be of great use to researchers interested in the topic.

42. He would first make some general comments on the scope of the draft and methodology and would then comment on the nine draft principles proposed by the Special Rapporteur. With regard to scope, he would focus in his comments on four points, namely armed conflict, the environment, stakeholders and specific weapons. He recalled that, while the topic had two main axes, armed conflict and environment, he had at previous sessions attempted in vain to convince the Commission that the scope of the topic should be limited to situations of international armed conflict or, at the very least, that a distinction should be drawn between international armed conflicts and non-international armed conflicts, principally because the

stakeholders on whom it was incumbent to protect the environment were different in each case. Of course, both State armed forces and, in the case of non-international armed conflicts, non-State armed groups, were bound to respect the applicable customary rules of international humanitarian law, but it was difficult to urge non-State armed groups to respect or take appropriate measures before, during and after a conflict.

43. Furthermore, the scope of the term "environment" remained vague. At the previous session, he had noted that the discussion should focus on the "natural" environment and not on the "human" environment, which fell within the scope of human rights, and that the exploitation of natural resources was not directly related to the topic. However, the Special Rapporteur maintained that it was "difficult to make a distinction between the protection of the environment as such and the protection of natural objects in the natural environment and natural resources" and referred to a number of cases relating to compensation for pecuniary damage, in particular in paragraphs 194 to 205 of the third report, which gave the impression that the "environment" encompassed the cultural and human environment. He feared that such an approach might obscure the very point of the topic.

44. The stakeholders should also be specified, as the proposed draft principles were addressed not only to States, but also to international organizations and other non-State actors. He was aware that there were three different phases – before, during and after an armed conflict – and that both States and non-State actors should be involved in the protection of the environment during each of those three phases, in particular the prevention and post-conflict phases. Moreover, as the Commission had proposed at its 2015 session that consideration should be given to the issue of how international organizations could contribute to the legal protection of the environment,³⁴⁴ an examination of their obligations was both necessary and inevitable. Nevertheless, it was important to ensure a certain consistency in the formulation of the principles.

45. With regard to the examination of "specific weapons and the effects of such weapons" on the environment, he asked how far the issue should be taken. As the Special Rapporteur noted in paragraph 41 of her third report, States held divergent views on whether it should be addressed within the scope of the topic. Some States – Israel and the United Kingdom – had recommended its exclusion, whereas others – Austria, the Islamic Republic of Iran, and Mexico – were in favour of its examination and had highlighted the importance of considering the consequences of the use of nuclear weapons, which was why the third report included several paragraphs on compensation claims arising from the nuclear tests conducted by the United States in the Marshall Islands. In her third report, the Special Rapporteur also addressed specific weapons in relation to remnants of war, although the Commission had not yet reached a consensus on whether such weapons and the consequences of their use fell within the scope of the topic.

46. At its sixty-sixth session, the Commission had held a substantial debate on the issue of weapons.

³⁴⁴ See *Yearbook ... 2015*, vol. II (Part Two), p. 69, para. 163.

In paragraph 13 of her second report, examined at the sixty-seventh session, the Special Rapporteur stated explicitly that chemical and biological weapons would not be addressed as part of the topic. In that regard, he had objected that it might prove impossible to limit the scope of the discussion as proposed, at least for chemical weapons, as the Convention on the prohibition of military or any other hostile use of environmental modification techniques was a clear example of an instrument intended to protect the environment in relation to armed conflicts.

47. With regard to methodology, he wished to revisit some of the legal issues raised in the chapter of the third report devoted to rules of particular relevance applicable in post-conflict situations, namely post-conflict liability, international investment agreements, indigenous peoples, and access to and sharing of information and the obligation to cooperate. With regard to post-conflict liability, he was not sure that he understood the Special Rapporteur's intention, as sovereign immunity and the civil liability of operators were dealt with together, despite having different legal characteristics. In particular, operators such as shipowners or operators of nuclear power stations were victims of armed conflicts; they were not perpetrators who intentionally destroyed the environment.

48. With regard to paragraph 110 of the third report, in which the Special Rapporteur noted that a number of liability conventions explicitly exempted damage caused by acts of war or armed conflict and that the fact that such liability was exempted could not lead to the automatic conclusion that the application of the conventions *per se* was limited to peacetime, he noted that the "exemption clause" contained in almost all liability conventions meant simply that operators were not liable for damage occurring in certain situations, such as armed conflict, civil war or even natural disaster. Nevertheless, *ratione temporis*, those international conventions applied both in peacetime and in wartime.

49. Concerning international investment agreements, the Special Rapporteur stressed that a large number of such agreements contained explicit provisions on environmental protection and that they continued to apply in times of armed conflict. Yet the topic was somewhat different; the crux of the matter was the destruction of the environment by the belligerent parties during an armed conflict. He could not, therefore, see the relevance of investment agreements to the topic, even if some of their provisions might "provide additional incentives for States to protect the environment in peacetime and in times of armed conflict".

50. With regard to the protection of indigenous peoples, the relevant jurisprudence of regional human rights courts on indigenous peoples and their special relationship with the land was analysed in a later part of the third report (paras. 198 to 201) than draft principle IV-1, which was dealt with in paragraphs 121 to 129. In any event, he doubted that the issue was relevant to "armed conflicts".

51. Lastly, whereas the Special Rapporteur presented the sharing of information as an essential aspect of the protection of the environment in times of armed conflict and considered that, like access to information, it was closely linked to the duty to cooperate, in his view the

sharing of information in relation to armed conflicts was above all a matter of reciprocity between States. It was also unclear exactly when States were obligated to share information, but he would return to that point later on.

52. Turning to the draft principles, he said that, with regard to draft principle I-1 on the obligation to take preventive measures, the examples of case law given in the explanation of the draft principle did not really substantiate its purpose. Indeed, the cases referred to in paragraphs 187 to 237 dealt primarily with compensation and reparation, including when it had not been awarded, as in *Vietnam Association for Victims of Agent Orange/Dioxin et al. v. Dow Chemical Co. et al.* and *Corrie v. Caterpillar, Inc.*, for example. To substantiate the draft principle, the Special Rapporteur should refer to cases in which States had been expressly obligated, or encouraged, to take effective measures to enhance the protection of the natural environment in relation to an armed conflict in line with international law or in which a State had been found to have violated international law by failing to put in place domestic preventive measures.

53. With regard to draft principle I-3, the preventive measure for which it provided was necessary, in his view, as it would prevent environmental pollution by military bases. He recalled that he had noted in 2014 that provisions on environmental pollution by United States military bases had been incorporated into the subsidiary agreements of the status-of-forces agreement between the Republic of Korea and the United States³⁴⁵ in 2001. The two countries had also concluded a memorandum of special understandings on environmental protection. However, it was important not only to encourage States and international organizations to include provisions on environmental regulation and responsibilities in their status-of-forces and status-of-mission agreements, but also to ensure that those provisions and the specific measures for which they provided were compatible with the basic principles of international environmental law. In that regard, to complement the preventive measures, impact assessments, restoration and clean-up measures mentioned in draft principle I-3, he proposed that the "polluter pays" principle, which established that the cost of pollution was to be borne by the polluter, also be mentioned.

54. He did not object to the content of draft principle I-4, but was not convinced that it belonged in Part One on preventive measures, since the draft principle as currently worded dealt with the general obligations of peace operations, which applied not only during the prevention phase, but also during the execution phase and after the conflict. As noted by the Special Rapporteur, the environmental impact of an international peace operation stretched from the planning phase through the entire operational phase and beyond and, owing to the presence of multiple actors, the cumulative effect on a fragile environment could be

³⁴⁵ Agreement Under Article IV of the Mutual Defense Treaty between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, signed at Seoul, on 9 July 1966, *Treaties and Other International Acts Series*, vol. 6127, Washington, D.C., U.S. Government Printing Office. The 2001 amendments are available from: www.usfk.mil/Portals/105/Documents/SOFA/A08_Amendments.to.Agreed.Minutes.pdf.

considerable. If the principle was to be considered a responsibility incumbent on peace operations and applicable to all stages of armed conflict, it would be better either to identify the obligation associated with each phase or to include the principle in a section entitled “General obligations”.

55. Moving on to the five draft principles in Part Three (Draft principles applicable after an armed conflict), he said that he had no specific comments to make on draft principle III-1 on peace agreements and thanked the Special Rapporteur for the additional information that she had provided on modern peace agreements in relation to non-international armed conflicts. While he had no comments to make on draft principle III-2, he would be in favour of merging draft principles III-3 (Remnants of war) and III-4 (Remnants of war at sea) into a single text. Given the vast range of remnants of war that might be found in the future, it would be preferable to describe the principle rather than to list examples, as proposed in draft principle III-3, paragraph 1. The actors responsible for taking the measures provided for with regard to remnants of war should also be specified. It was not realistic to expect non-State actors that had been involved in a non-international armed conflict to contribute to post-conflict environmental protection and take measures to that end. The responsible actors that should cooperate were States with effective jurisdiction and international organizations.

56. In view of those considerations, he proposed that the principle be framed more broadly, using a slightly modified version of draft principle III-4, paragraph 1, such as: “States and international organizations shall cooperate to ensure that remnants of war do not constitute a danger to the environment and public health.”

57. Draft principle III-5 on access to and sharing of information was worded differently from the other draft principles, as it began with the words “In order to enhance the protection of the environment in relation to armed conflicts”. That provision raised some questions, in particular with regard to its scope *ratione temporis* and *ratione materiae*.

58. First, the draft principle did not specify when States were to share information. It was included in Part Three, which concerned the principles applicable after an armed conflict, but its wording gave the impression that it also applied to other phases, whereas, in practice, it could not be applied during the conflict. Furthermore, it did not mention the nature or scope of the information to be shared.

59. Second, in paragraph 143, the Special Rapporteur stated that having access to relevant information on the environment was also necessary to justify how a military decision that had been made complied with the obligations under the rule of military necessity. The statement was in fact difficult to understand: was the intention to urge States to take responsibility for damage to the environment once the military operation had ended? If the draft principle was intended also to apply during the armed conflict, as the current wording suggested, one might ask whether it actually could be applied in practice and whether there was sufficient State practice to support the notion that the sharing of information was necessary from the standpoint of the principle of military necessity.

60. Third, he was not convinced that access to and sharing of information concerning the environment in relation to armed conflict could be made obligatory for States. It was difficult to extract such a principle from the analysis of the examples given. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, for example, required States parties to make environmental information available to the public within the framework of national legislation. However, that could not be construed as an obligation on States to make information available to other States. Equally, article 31 of the Convention on the Law of the Non-Navigational Uses of International Watercourses, which was referred to in paragraph 148 of the third report, required States to “cooperate in good faith”, but also stipulated explicitly that “[n]othing in the present Convention obliges a watercourse State to provide data or information vital to its national defence or security”. Moreover, the “sharing of information” depended on the level of reciprocity between States. Lastly, the principle on access to and sharing of information was based on rules applicable in peacetime. In view of those considerations, he proposed that the draft principle be amended to read: “States and international organizations should facilitate access to information and share information in accordance with international law, in order to contribute to the prevention and reparation of damage to the environment after armed conflict.”

61. With regard to draft principle IV-1 on the rights of indigenous peoples, he recalled that he had already expressed reservations regarding the need to address the issue as part of the topic. The issue of indigenous peoples, in particular their special relationship with the land, was relevant to the protection of their human rights. The consideration of the issue inevitably widened the scope of the discussion, to the detriment of the core of the topic.

62. To conclude, he wished to make two comments. The first concerned the issue of compensation and/or reparation, as, when reading the third report, he had wondered why the Special Rapporteur had not proposed a draft principle on the subject. As noted in paragraph 265, on the topic of remnants of war at sea, States did not want to address the issue of remnants of war in terms of responsibility. However, in paragraphs 194 to 235 of her third report, the Special Rapporteur referred to a number of cases in which compensation or reparation had been granted and from which common elements could be extracted. Whether the lacuna was intentional or not, he thought that the issue of compensation and reparation during the third (post-conflict) phase should not be excluded from further work. The second comment concerned the future programme of work. In paragraph 269, the Special Rapporteur noted that certain issues – environmental protection during the different phases of occupation, the responsibility of non-State actors and organized armed groups and non-international armed conflicts – warranted further work. He, too, believed that those issues should be examined in greater detail, despite constraints that could exist in that regard. As for environmental protection during the different phases of occupation, it would indeed be useful to study the issue in greater depth, as it would then be possible to identify the responsibilities associated with each phase, which were not clear in the current draft.

For example, draft principle I-4 on peace operations concerned all phases of armed conflict, but had been included in the part that dealt with preventive measures.

The meeting rose at 11.40 a.m.

3319th MEETING

Wednesday, 13 July 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Al-Marri, Mr. Cafilisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood.

Protection of the environment in relation to armed conflicts (*continued*) (A/CN.4/689, Part II, sect. E, A/CN.4/700, A/CN.4/L.870/Rev.1, A/CN.4/L.876)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the third report of the Special Rapporteur on the topic of the protection of the environment in relation to armed conflicts (A/CN.4/700).
2. Mr. HMOUD said that he wished to thank the Special Rapporteur for her well-researched, comprehensive third report. The background material that it contained put issues relating to the protection of the environment in the pre-conflict and post-conflict phases into a proper perspective. That would help the Commission and the Drafting Committee to decide whether the draft principles reflected existing international law on the subject, or provided a basis for its development.
3. The Special Rapporteur's task in creating a nexus between the available material and the proposed principles in the pre- and post-conflict phases was not an easy one. Some States and other relevant actors remained uncertain as to which aspects of environmental protection were already subject to international law and which needed further development. Furthermore, there were areas of international law that already regulated certain aspects that might relate indirectly to environmental protection. It was, therefore, important for the Commission to identify the principles that applied, or should apply, to environmental protection before and after a conflict, as well as those that applied throughout all three phases of a conflict.
4. As far as the methodology of the third report was concerned, he agreed that the practice of traditional subjects

of international law, including relevant international organizations and agencies, such as UNEP, formed the appropriate basis of principles designed to enhance the protection of the environment in the pre- and post-conflict phases. Liability and responsibility for environmental damage relating to armed conflict – issues that were not dealt with in the current report – should be tackled in the future; at that point, it would be necessary to examine the reports of the United Nations Compensation Commission, along with international and national jurisprudence concerning damage assessment, the causal link between a breach of international law and environmental damage, contributing factors and forms of reparation. In fact, the relationship between certain obligations arising from the draft principles and the determination of responsibility and liability was a key aspect of post-conflict environmental protection, as shown by the numerous references to it in the third report.

5. Another issue that was not addressed in the third report was the protection of the environment during occupation. However, it should be emphasized that the principles of the law of armed conflict and the law on the use of force as they related to environmental protection remained applicable during occupation, even after the cessation of hostilities. For that reason, Part Two of the draft principles also applied to occupation.

6. While the identification of legal principles in environmental treaties that continued to operate during an armed conflict lay outside the scope of the third report, in the future it might be relevant to ascertain which peacetime treaty principles continued to apply in parallel with the law of armed conflict. According to the report, bilateral investment treaties were presumed to continue operating during an armed conflict as they related to private rights. However, the underpinning for environmental protection in relation to armed conflict was more of a public or common interest for the international community, thus not an issue of private rights. Therefore, the content of the environmental protection clauses contained in bilateral investment treaties should be the determining factor in whether the treaty as a whole was presumed to continue to operate.

7. Several aspects of draft principle I-1, on implementation and enforcement, needed to be discussed. The third report did not elaborate on the type of preventive measures which a State should take to enhance the protection of the environment in relation to armed conflict, and most of the case law referred to in paragraphs 187 to 237 had no bearing on the content of that draft principle. It was a moot point whether the draft principle might require States to criminalize damage to the environment in relation to armed conflict in their national legislation, something that would obviously amount to the progressive development of international law. As it stood, the draft principle potentially encompassed a wide range of civilian and administrative preventive measures, examples of which would have to be discussed in future commentaries. It was also important to clarify the phases of the conflict to which the draft principle referred, since the phrase “in relation to armed conflict” gave no indication in that regard. The title of the draft principle, “Implementation and enforcement”, was inconsistent with its