

Document:-
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Summary record of the 3320th meeting

Topic:
Protection of the environment in relation to armed conflicts

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third report, the Special Rapporteur had not done justice to the subject matter before arriving at the draft principle. The failure to fortify arguments in the area of indigenous rights gave people the opportunity to say that the plight of indigenous people in conflict situations was irrelevant, which was not the case.

42. Turning to the draft principles set out in the third report, he expressed support for their content but suggested that their presentation should be simplified by adopting a straightforward, consecutive numbering system, as used in the Special Rapporteur's second report,³⁵⁰ with subheadings on the principles applicable during armed conflict and those applicable after armed conflict. Thought might be given to reformulating, for stylistic reasons, the opening phrases of both paragraphs of draft principle III-3; however, that might be a matter for the Drafting Committee. While, in principle, he welcomed the brave and innovative inclusion of draft principle IV-1, he stressed that respect for the traditional knowledge and practices of indigenous peoples in relation to their lands and natural environment was not enough. Protection was also needed; paragraph 1 of the draft principle should be reworded accordingly. In paragraph 2 of that draft principle, which dealt with the issue of free, prior and informed consent, the words "that would have a major impact on the lands" should be deleted, as such a proviso opened the door to violations. Debate would centre on whether a particular usage would have a major impact, which was an unnecessary debate that indigenous peoples were likely to lose.

43. The importance of the present and previous reports on the topic could not be underestimated. Protection of the environment was a subject that even those involved in conflict often forgot to discuss or to think about during and after conflicts. Discussions on compensation tended to focus on equipment destroyed and human fatalities rather than on environmental destruction, which could be permanent. Even judges and arbitrators were not sensitive to the issue, sometimes insisting on higher standards of proof and even higher levels of loss in the case of environmental damage, as with the Eritrea–Ethiopia Claims Commission. It was forgotten that damage to the environment could be incremental over time. He therefore congratulated the Special Rapporteur on her work and expressed great regret that, with her membership of the Commission coming to an end, work on the topic might never be completed. It was to be hoped that her efforts would not be wasted and that someone else would take on the burden before the work already done was overtaken by events or by developments in science and law.

44. In conclusion, he recommended that all the draft principles be referred to the Drafting Committee, which, in addition to its usual duties, should streamline them for ease of reading and reference.

The meeting rose at 11.20 a.m.

3320th MEETING

Thursday, 14 July 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Later: Mr. Gilberto Vergne SABOIA (Vice-Chairperson)

Present: Mr. Al-Marri, Mr. Cafilisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, 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 members of the Commission to continue their consideration of the third report of the Special Rapporteur on protection of the environment in relation to armed conflicts (A/CN.4/700).
2. Mr. KITTICHAISAREE said that he would make some general remarks on the report under consideration before commenting on some of the draft principles proposed therein.
3. First, with regard to the progressive development of customary international law, he recalled that, as the Special Rapporteur noted in paragraph 33 of her third report, some members of the Commission had observed in 2015 that "it should be considered to what extent the final outcome of the work on the topic could constitute progressive development and contribute to the development of *lex ferenda*". He was of the view that the commentary should include an explanation of which draft principles were part of such progressive development. For example, as the Special Rapporteur also noted in paragraph 49 of her third report, for some States and members of the Commission, the prohibition of reprisals was part of customary international law, at least as far as international armed conflicts were concerned. Yet, as noted in paragraph 45 of the report under consideration, several States, including Israel, Singapore, the United Kingdom and the United States, had expressed concern in the Sixth Committee that the draft principles went beyond customary international law on that point. In that regard, he agreed with the comment made by Mr. Candioti at the 3318th meeting on the need for the Commission to decide how it would like its work on the topic to be perceived. He personally would like the Commission to take an ambitious approach to the scope of application of the draft principles in order to protect the environment to the maximum extent possible in case of armed conflict. At the same time, it was crucial that the Special Rapporteur, and the Commission as

³⁵⁰ *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/685 (second report).

a whole, ensure that such protection was based on international law, customary or otherwise. For example, further research was needed to determine whether, in the light of current *opinio juris* and State practice, the word “should” or the word “shall” should be used in draft principle I-1.

4. Second, with regard to the victims of environmental damage caused by armed conflicts, he welcomed the contribution provided by the Federated States of Micronesia, set out in paragraphs 55 to 70 of the third report, which was important insofar as it broadened the group of States providing input to the work of the Commission. The Commission should take account of the viewpoints of those victims in further work on the topic and the development of its draft principles. It would have been desirable in that regard for the Special Rapporteur to have directly consulted victims, for example the Government of Kuwait on the environmental impact of the invasion of that country by Iraq and those who had suffered the consequences of the atomic bombs that had destroyed Hiroshima and Nagasaki.

5. Third, it was stated in paragraph 91 of the third report that Slovenia had ratified all the key instruments of international humanitarian law and the international law of armed conflict. Although it was a minor point, the Commission would recall that, in the 2015 report on the topic by the Chairperson of the Drafting Committee,³⁵¹ it had been decided that the expression “law of armed conflict” should be used instead of “international humanitarian law”, in light of the broader connotation of the former and to ensure consistency with the terms used in the draft articles on the effects of armed conflicts on treaties adopted by the Commission in 2011,³⁵² to which the present topic was related. The Commission would, however, also recall that, with regard to the protection of persons in the event of disasters, the Drafting Committee had decided to use the expression “international humanitarian law” instead of “international law of armed conflict”, as international humanitarian law concerned the issues raised by that topic more directly, whereas the expression “international law of armed conflict” referred to the law of armed conflict as a whole. Thus, the Commission might wish to reconsider the use of one or other expression, especially as some States, for example Switzerland and the United Kingdom (in paragraphs 85 and 95 of the third report, respectively), used the expression “international humanitarian law” instead of “international law of armed conflict” in their comments.

6. Fourth, in paragraph 110 of her third report, the Special Rapporteur mentioned “liability conventions”, which explicitly exempted liability for damage caused by acts of war or armed conflict, and stated that “[t]he fact that such liability is exempted cannot lead to the automatic conclusion that the application of the conventions *per se* [is] limited to peacetime”. Yet the relevant provisions of those conventions concerned *force majeure*, unforeseen occurrences and acts of war, which generally excluded the civil liability of actors engaged in the activities covered by

those conventions, and they could therefore not be cited as evidence of State practice with regard to the protection of the environment in relation to armed conflicts. Moreover, as the Special Rapporteur noted in paragraph 10 of her third report, work on the topic was based on the assumption that the law of armed conflict was *lex specialis*, and therefore the rules of *lex generalis*, while not excluded *ipso facto*, were deemed not to apply.

7. Fifth, in paragraph 111 of her third report, the Special Rapporteur should have indicated more clearly that sovereign immunity and the other exemption clauses mentioned in that paragraph concerned only the immunity of warships and government ships from enforcement actions by a State other than the flag State. Immunity and impunity were not synonymous in that regard, as the flag State of those ships remained liable for damage that they caused to the environment of another State.

8. Sixth, as for the international investment agreements discussed in paragraphs 115 to 120 of the third report, he agreed with Mr. Park that they were hardly relevant to work on the topic.

9. Seventh, like Mr. Šturma, he was concerned by the Special Rapporteur’s reference, in paragraph 149 of her third report, to the unknown notion of “international tort law”. Did the Special Rapporteur mean international law on the responsibility of States for internationally wrongful acts, on which the Commission had completed its work in 2001?³⁵³

10. In paragraph 164 of her third report, the Special Rapporteur mentioned Security Council resolutions concerning specific non-State actors. In his view, it would be advisable to analyse the resolutions of international organizations and State practice concerning the destruction of the environment by non-State actors before, during or even after an armed conflict. One example was Security Council resolution 2199 (2015), which had been adopted on 12 February 2015 under Chapter VII of the Charter of the United Nations and had frequently been cited by UNESCO, though not in the Special Rapporteur’s third report, in which, in the paragraphs on cultural heritage, the Security Council:

15. *Condemns* the destruction of cultural heritage in Iraq and Syria particularly by [Islamic State in Iraq and the Levant (ISIL)] and [Al-Nusra Front], whether such destruction is incidental or deliberate, including targeted destruction of religious sites and objects;

16. *Notes with concern* that ISIL, [Al-Nusra Front] and other individuals, groups, undertakings and entities associated with Al-Qaida, are generating income from engaging directly or indirectly in the looting and smuggling of cultural heritage items from archaeological sites, museums, libraries, archives, and other sites in Iraq and Syria, which is being used to support their recruitment efforts and strengthen their operational capability to organize and carry out terrorist attacks;

17. *Reaffirms* its decision in paragraph 7 of resolution 1483 (2003) and *decides* that all Member States shall take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious

³⁵¹ See *Yearbook ... 2015*, vol. I, 3281st meeting, p. 286, para. 8.

³⁵² The draft articles on the effects of armed conflict on treaties and the commentaries thereto adopted by the Commission at its sixty-third session are reproduced in *Yearbook ... 2011*, vol. II (Part Two), pp. 107 *et seq.*, paras. 100–101. See also General Assembly resolution 66/99 of 9 December 2011, annex.

³⁵³ The draft articles on the responsibility of States for internationally wrongful acts and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011, including by prohibiting cross-border trade in such items, thereby allowing for their eventual safe return to the Iraqi and Syrian people and *calls upon* the United Nations Educational, Scientific, and Cultural Organization, [the International Criminal Police Organization (INTERPOL)], and other international organizations, as appropriate, to assist in the implementation of this paragraph.

11. Eighth, another example was provided by the condemnation of the destruction of items of cultural heritage by ISIL in General Assembly resolution 69/281 of 28 May 2015, entitled “Saving the cultural heritage of Iraq”. That resolution, which cited Security Council resolution 2199 (2015), was relevant to the topic under consideration in many respects. First, the General Assembly provided an exhaustive list of the international legal instruments relating to the protection of cultural heritage in relation to armed conflicts. Second, it dealt with many issues that were directly linked to the topic under consideration. For example, it considered that the destruction and looting carried out by ISIL of the cultural heritage of Iraq, the rising incidence of intentional attacks against and threats to the cultural heritage of countries affected by armed conflict and the damage caused to cultural property by indiscriminate attacks and the organized looting of and trafficking in cultural objects were “used as a tactic of war in order to spread terror and hatred, fan conflict and impose violent extremist ideologies”. In addition, it stated that the indiscriminate destruction of the cultural heritage of Iraq, including religious sites or objects, was incompatible with international humanitarian law. It also stated that attacks intentionally directed against buildings dedicated to religion, education, art, science or charitable purposes, or historic monuments, might amount to war crimes, noted that it was important to hold perpetrators to account and required all States to take appropriate action to that end within their jurisdiction in accordance with applicable international law.

12. Ninth, like some of the members who had already taken the floor, he was of the view that the case law referred to by the Special Rapporteur in paragraphs 196 to 212 of her third report, in particular that of regional human rights courts and domestic courts, did not sufficiently substantiate the conclusions that she was trying to reach. Like Mr. Park and Mr. Šturma, he considered that the cases on which the Special Rapporteur based her third report mainly concerned property rights and mostly reflected negative practice with regard to the protection of the environment. Not only was that case law rather discouraging, but, in paragraphs 216 to 218 and in paragraph 224 of her report, the Special Rapporteur also seemed to jump to conclusions without providing adequate explanations and, more generally, without properly explaining the reasoning that had led the courts concerned to reject the majority of the claims for compensation for environmental damage that she cited or how that failure could have been avoided.

13. Tenth, in paragraphs 213 to 218 of her third report, the Special Rapporteur discussed the situation between the Marshall Islands and the United States. That situation could not be used to demonstrate State practice in the era of the sovereign equality of States and in a world in which all human beings were now equal before the law, both international and domestic. It would have been incompatible with most of the provisions of the 1948 Universal

Declaration of Human Rights³⁵⁴ and several of the provisions of the International Covenant on Civil and Political Rights, among other instruments. Moreover, the compensation provided *ex gratia*, or without any legal obligation, by the United States of America to the Federated States of Micronesia for environmental damage caused during the Second World War, which was discussed in paragraph 70 of the third report, should be treated as past history belonging to the time when the citizens of the world were not all treated equally. As the Federated States of Micronesia had rightly stated (see the statement quoted in paragraph 67 of the third report), the flag State of a warship, or the State that owned it, was required to remedy the environmental damage caused by that ship. It was on obligations of that type, which reflected the modern law of responsibility under the United Nations Convention on the Law of the Sea, that the Commission should base its work.

14. With regard to the draft principles proposed by the Special Rapporteur, and draft principle IV-1 on the rights of indigenous peoples first of all, he shared the opinion of the Federated States of Micronesia, as reported in paragraph 57 of the third report, that the link between the protection of the environment and the safeguarding of cultural heritage, in particular the cultural heritage of indigenous peoples, had been demonstrated and should be reflected in the draft principles. Yet, as Mr. Peter had noted at the previous meeting, the Special Rapporteur’s treatment of that important issue in paragraphs 121 to 128 of her third report was not sufficiently developed. The Special Rapporteur could have carried out a more detailed analysis of the case law cited in paragraphs 196 to 202 to substantiate draft principle IV-1. For that reason, he did not endorse draft principle IV-1 as it currently stood, his view being that it was not entirely relevant to the topic.

15. The first paragraph of that draft principle was a general recognition of the link between indigenous peoples and their lands and was formulated from a human rights perspective and in conceptual terms that did not explain why it was necessary to address the issue from the perspective of the protection of the environment in relation to armed conflicts.

16. The second paragraph was even more problematic, and it was not clear whether the Special Rapporteur was dealing with preventive measures when she referred to the obligation of States to consult indigenous peoples and seek their consent in connection with the usage of their lands and territories. If that was the case, lands occupied by indigenous peoples could be declared “protected zones” under draft principles I-(x) and II-4, which had been provisionally adopted by the Commission in 2015,³⁵⁵ namely areas of major cultural importance to be protected against any attack, as long as they did not contain a military objective. Rule 43 of the customary rules of humanitarian law compiled by the ICRC,³⁵⁶ which concerned the application of general principles on the conduct of hostilities to the natural environment, was also relevant in that regard.

³⁵⁴ General Assembly resolution 217 (III) A of 10 December 1948.

³⁵⁵ *Yearbook ... 2015*, vol. II (Part Two), pp. 64–65, para. 134.

³⁵⁶ J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. I, *Rules*, Cambridge, Cambridge University Press, 2005, pp. 143–146.

17. Moreover, draft principle IV-1 did not indicate which State was bound by the obligation referred to in the second paragraph. The absence of any reference to other belligerent States could give the impression that the principle applied only to non-international armed conflicts. In any case, one might ask whether it was realistic to require a State that was a party to an international armed conflict to cooperate with indigenous peoples living in another State and consult them before launching an attack against that other State. Like Mr. Šturma, he was of the view that it should be presumed that, in both international and non-international armed conflicts, indigenous peoples did not participate directly in the hostilities. As part of the civilian population, they should be protected under the relevant rules of international humanitarian law. In that regard, the principle of distinction became particularly fundamental, as it applied equally to the lands of indigenous peoples, as long as they did not contain a military objective.

18. With regard to draft principle III-1 on peace agreements, he was grateful to the Special Rapporteur for her efforts to address the issue, but the proposed draft principle gave rise to two reservations. First, it was necessary to make clear that the parties could not, by means of a peace agreement, exonerate from individual criminal responsibility persons who committed war crimes by causing damage to the environment. The case law of international courts and tribunals, for example the International Tribunal for the Former Yugoslavia in the *Tadić* case and the International Criminal Court in *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, considered that damage could be caused to the environment in the commission of an international crime. In his view, it followed that such an important issue could not be overlooked. Second, it was also essential to provide for remedies for victims in that draft principle.

19. Lastly, he firmly endorsed draft principles III-3 and III-4 on remnants of war and remnants of war at sea, respectively. Nevertheless, he wished to note that, in paragraph 259 of her third report, the Special Rapporteur wrote that it had in the past been “legal and justifiable” to conclude that the law of warfare did not require States to remove chemical weapons or munitions dumped at sea, but she regrettably did not explain how and to what extent current international law, in particular international environmental law and the international law of the sea, might have changed the state of law described in the paragraph.

20. In conclusion, he said that he was in favour of referring to the Drafting Committee all the draft principles in annex I of the third report, apart from draft principle IV-1, which, in his view, should be substantially reworked, and draft principle III-1, which should be reformulated to indicate that individual criminal responsibility was not excluded and that the victims of armed conflicts were entitled to remedies. He stressed that the Commission should maintain the current momentum of work on the topic under consideration and that, as the Special Rapporteur did not intend to seek a new term, it was crucial that the Commission, in its new composition, appoint her replacement as soon as possible in 2017 in order to continue her excellent work.

Mr. Saboia, Second Vice-Chairperson, took the Chair.

21. Mr. HASSOUNA said that the content of the third report clearly demonstrated that the topic under consideration lay at the intersection of various international law regimes in which similar concepts and principles had been established. In her approach to the topic, the Special Rapporteur had succeeded in analysing and coordinating those principles in order to apply them to the three temporal phases of the protection of the environment in relation to armed conflicts. With regard to the information sought by the Commission on the specific issues on which comments from States would be of particular interest, the report indicated that the Commission had received responses from only eight States. By commenting on their national experience in the sphere of the protection of the environment in relation to armed conflicts, those States had certainly contributed to a better understanding of the issues raised by the topic. The responses of Lebanon and the Federated States of Micronesia were particularly illuminating in that regard, and, as few responses had been received, the Commission should reiterate its request in its report on the work of the current session.

22. Furthermore, he commended the Special Rapporteur for having consulted, when preparing her third report, international organizations and bodies, such as the United Nations, UNEP, UNESCO and the ICRC, as well as regional organizations. It was certainly helpful to know the best practices and opinions of organizations that worked at the intersection of such different areas of international law.

23. With regard to terminology, some of the key terms used in the draft principles should be reviewed to ensure their consistency and uniformity. For example, in the English text, the use of the terms “environment” and “natural environment” should be standardized: the former term was used in all the proposed draft principles apart from draft principles I-1 and IV-1.

24. Furthermore, the verb “shall” was used in some draft principles and “should” in others. While the verb “shall” clearly referred to an obligation, the word “should” seemed to denote a preference of the international community. The latter verb had been used in that manner in other draft principles adopted by the Commission, for example the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.³⁵⁷ The Commission had stated in the commentaries to those principles that, while they were “not intended to give rise to legally binding obligations, they demonstrate aspirations and preferences of the international community”.³⁵⁸ The verb “encourage”, which appeared in several of the draft principles, was the weakest term that could be used, and it rarely influenced the position of the parties concerned. All those variations in the use of terms should be taken into account in the formulation of the draft principles.

³⁵⁷ The draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2006*, vol. II (Part Two), pp. 58 *et seq.*, paras. 66–67. See also General Assembly resolution 61/36 of 4 December 2006, annex.

³⁵⁸ *Yearbook ... 2006*, vol. II (Part Two), p. 73 (para. (5) of the commentary to draft principle 3).

25. With regard to the draft principles proposed in the report under consideration, draft principle I-1 seemed too general and too broad. Clarification should be provided regarding the preventive measures required to strengthen the protection of the natural environment in relation to an armed conflict and the temporal phase in which they would be taken.

26. Concerning draft principle I-3, the phrase “are encouraged to” should be replaced with “should”, and the term “status-of-forces and status-of-mission agreements” should be replaced with “special agreements”, so as not to restrict unnecessarily the types of agreement covered. Also, it should be made clear in the commentary to that principle that the list of preventive measures for which it provided was not exhaustive and consisted of mere examples.

27. As for draft principle I-4, an explanation should be given of why it concerned “organizations” involved in peace operations instead of “international organizations”, as was the case in draft principles I-3 and III-2 to III-5. Furthermore, in that context, the word “should” would be preferable to “shall”.

28. It would also be preferable, in draft principle III-1 on peace agreements and draft principle III-2 on post-conflict environmental assessments and reviews, to replace the words “are encouraged to” with “should”. In addition, draft principle III-2, paragraph 2, should be incorporated into draft principle I-4 to ensure that all issues relating to peace operations were dealt with in the same provision.

29. In draft principle III-3 on remnants of war, the list in the first paragraph should be non-exhaustive, given the multitude of other products and substances – chemicals, waste products, oil and so forth – that could have a devastating effect on the environment. In that connection, it was interesting to note that many of the treaties and international agreements covering remnants of war dealt mainly with mines and other explosive devices, while the example given in the third report of oil leaks from the wrecks of the military ships littering the seabed of the Federated States of Micronesia showed clearly that environmental threats had multiple origins. Moreover, it was noted in the first paragraph that all mines and other devices should be removed after the cessation of active hostilities, but it had not been specified whose obligation it was to remove and destroy those devices. It should thus be explicitly indicated which actors, other than States, were responsible for dealing with remnants of war. The obligation to provide technical and material assistance for the removal of remnants of war, which was set out in draft principle III-3, paragraph 2, was important, but it would benefit from being reformulated in more precise terms.

30. Draft principles III-3 and III-4 could be merged into a single draft principle in which remnants of war on land and remnants of war at sea were each dealt with in a separate paragraph. In draft principle III-4, paragraph 1, the references to public health and to the safety of seafarers could be deleted, as neither notion was directly related to the protection of the natural environment. The type of information that was to be collected in surveys and the actors to whom access to that information should be

granted should be specified in the commentary to draft principle III-4, paragraph 2.

31. As for draft principle III-5 on access to and sharing of information, it would be advisable to indicate which actors should be granted access to information and the type of information that should be shared. The time at which information should be shared should also be specified.

32. As it was currently formulated, draft principle IV-1 on the rights of indigenous peoples was much too broad in scope and should be refocused on the need to protect the lands and environment of indigenous peoples. Subject to those comments, he recommended referring all the draft principles to the Drafting Committee.

33. With regard to chapter III of the third report, which covered the Special Rapporteur’s final remarks and the future programme of work, he noted that the general conclusions that the Special Rapporteur drew from her three reports,³⁵⁹ in particular with regard to the legal rules applicable to the protection of the environment in relation to armed conflicts and the role of States and international organizations in the application and development of those rules, were important and could have been developed in greater detail. The new membership of the Commission would decide how to continue work on the topic and which issues should be examined as part of it. In that regard, it would be wise, as the Special Rapporteur recommended, to study the protection of the environment during occupation, the responsibility of non-State actors and organized armed groups and non-international armed conflicts. Other important issues, such as compensation and reparation for damage caused to the environment and the impact of the use of specific weapons on the environment, should also be considered, and the case law of international courts and tribunals would provide a great deal of useful information in that regard.

34. In conclusion, he wished to recall that, in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice had stated:

29. The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.

30. However, the Court is of the view that the issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict. ...

Lastly, he congratulated the Special Rapporteur on her excellent work on a topic of major contemporary significance for the world and, more generally, for her great

³⁵⁹ For the preliminary report, see *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/674; and for the second report, see *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/685.

contribution to the work of the Commission over the previous 10 years, and he wished her every success in her future endeavours.

35. Mr. McRAE congratulated the Special Rapporteur on her third report, which contained a wealth of information on the way in which obligations to protect the environment had developed and on their scope of application. In the report, the Special Rapporteur had focused her analysis on post-conflict issues, but she had also dealt with some preventive measures.

36. The challenge posed by the topic was to link the obligations relating to environmental protection to the specific context of each phase of the conflict – before, during and after – in a manner consistent with the international law regulating armed conflict. In one sense, it involved establishing links between areas that had previously not been explicitly linked. In that regard, the Special Rapporteur provided many references to illustrate the way in which concerns for the protection of the environment had come to the fore in areas where such concerns had not been evident in the past. However, it would be advisable for the Special Rapporteur to clarify the link between existing practice or principles and the proposed draft principles in order to make the draft principles more easily understandable and more acceptable to the Commission and to States.

37. With regard to the effects of armed conflicts on treaties, Mr. Caffisch had given a very illuminating analysis of the circumstances in which treaties continued to apply during an armed conflict. That analysis made it possible to understand a very important aspect of the topic, namely that, if environmental treaties continued to apply in times of armed conflict, they could thus continue to impose obligations relating to the environment in the post-conflict period.

38. However, it was not always clear whether all the obligations stemming from a treaty that continued to apply after the onset of a conflict remained in force. The Special Rapporteur took the example of friendship, commerce and navigation treaties, which were considered, at least the dispute settlement provisions thereof, to remain in force in times of armed conflict. She also offered an interesting analysis of how provisions relating to environmental protection had progressively been incorporated into investment treaties, the modern-day equivalent of friendship, commerce and navigation treaties.

39. Nonetheless, would obligations under investment treaties between the parties to an armed conflict continue during the course of that conflict? Historically, armed conflicts had always been an opportunity to detain and expropriate at will. That could not be the case today, but one might nevertheless ask whether provisions relating to environmental protection continued to apply and whether the relevant obligations provided for in an investment treaty could be covered by a security exception. It might be interesting to attempt to answer those questions, but the Commission would then be going beyond the scope of the topic. In his view, the reference to investment agreements served not to illustrate the existence of agreements providing for environmental

protection in the event of armed conflict, but to show that the issue of environmental protection was now being incorporated into areas or agreements from which it had previously been absent. As a further demonstration of the increasing prominence of environmental protection, the Special Rapporteur referred to many examples from case law relevant to the protection of the environment in relation to internal armed conflicts rather than international armed conflicts. Of course, those examples could give rise to interesting analogies, but the draft principles proposed by the Special Rapporteur could not apply to internal conflicts, as they presupposed the existence of two parties that could assume obligations or whose conduct could be regulated by the principles in question. The case law analysed by the Special Rapporteur thus offered an interesting perspective, but it did not make it possible to demonstrate that States had obligations in terms of the protection of the environment in case of armed conflict.

40. Some members of the Commission had expressed doubts regarding the proposal to include a draft principle on indigenous peoples among draft principles on the protection of the environment in relation to armed conflicts. Their doubts were perhaps due to the fact that the Special Rapporteur had not explained in sufficient detail why she had made that proposal. When environmental protection measures were taken after a conflict, they were likely to be focused mainly on the land, as that was where remnants of war, namely chemical and other weapons, explosive ordnance and other devices mentioned in draft principle III-3, which polluted and threatened the life and health of persons, were to be found. It was in that context that the interests of indigenous peoples acquired their full importance. The special relationship that indigenous peoples had with the natural environment, in particular the land, was what underpinned their rights. Activities aimed at remedying the effects of armed conflict on the environment – on land and, in some cases, at sea – could lead States to intervene in areas over which indigenous peoples had rights or for the restoration of which their expertise could be utilized. Indigenous peoples could thus be affected directly by the environmental impact of armed conflicts and the measures taken to remedy the damage caused, which was why it was necessary to call on their traditional knowledge, consult them and cooperate with them, as provided for in draft principle IV-1. The rights of indigenous peoples were acquiring greater recognition in international law, and if there was one area in which their rights should be recognized, it was that of the protection of the environment in post-conflict situations. Draft principle IV-1 proposed by the Special Rapporteur was a step in that direction, and he endorsed it, even if he thought that it should be included as a principle applicable in the post-conflict period.

41. Turning to the consideration of the draft principles themselves, Mr. McRae said that he was of the view that they were a set of sensible provisions capable of guiding the actors involved in the protection of the environment in relation to armed conflicts in their conduct. With regard to draft principle I-1, he did not see why the adoption of legislative, administrative and judicial measures should be limited only to prevention, as such measures were surely also necessary in dealing with post-conflict situations.

42. Concerning draft principle I-3, he noted that, while in the past it had not been common to include provisions on environmental protection in status-of-forces agreements, the situation had since changed, as shown by the examples given by the Special Rapporteur in her third report. However, he was of the view that it was not enough, in a provision intended to become a principle, to “encourage” States to include provisions of that type in their status-of-forces agreements and that it was necessary to indicate what they “should” do. The same observation could be made about other draft principles, such as draft principle II-1, and highlighted the point made by Mr. Candioti, who had urged the Commission to take a clear and consistent position with regard to the respective characteristics of draft guidelines, draft principles and draft conclusions, as opposed to draft articles. It was a matter that must be addressed by the Commission in its new composition.

43. The link between draft principles III-3 and III-4 on remnants of war and remnants of war at sea, respectively, should be clarified: it was necessary to know whether draft principle III-3 was a general provision that applied both to remnants of war on land and remnants of war at sea or whether it applied only to the former, in which case its title should be changed. Moreover, the obligations set out were different: draft principle III-3 provided that remnants of war should be removed, whereas nothing of the sort was said in draft principle III-4, which dealt only with the cooperation required to neutralize the threat that remnants of war at sea might pose. Yet there was no doubt that remnants of war at sea, some of which had been underwater for decades and had been polluting the environment with inevitable consequences for public health, should also be removed. In that regard, Mr. Hassouna’s proposal to merge the two draft principles could be a solution. Noting the example of a landing craft of the United States whose remnants could still be seen off the island of Betio, in the Pacific, some 50 years after the end of the battle in which it had run aground, he nevertheless wondered whether it was in fact realistic to require States to remove remnants of war “without delay”, as provided for in draft principle III-3.

44. Draft principle III-5 called for some clarifications. If the obligation to share information was a perfectly legitimate corollary to the obligation to cooperate, it was excessive to require States to “grant access” to information, without further specification. Governments regulated access to information and made many exceptions in the interests of, for example, State secrecy or national security. The disputes filed with the WTO or investment tribunals showed the difficulties faced by States in that regard. The draft principle should thus be reformulated so as to take due account of those constraints and avoid giving the impression that it was seeking to require States to grant unlimited access to their information.

45. Returning to the draft principle on the rights of indigenous peoples, he reiterated that it should be included among the principles applicable in the post-conflict period and that it should be explicitly linked to the obligation of States to remedy the environmental consequences of armed conflicts. He supported the referral of all the draft principles to the Drafting Committee and

hoped that his comments would be taken into account. Lastly, he wished to join his colleagues in paying tribute to Ms. Jacobsson for her remarkable work, both as the Special Rapporteur for the topic under consideration and as a member of the Commission. Whatever the subject under consideration, Ms. Jacobsson had always striven, with determination and civility in equal measure, to promote respect for fundamental principles, such as gender equality, human rights and the protection of the individual, and environmental protection, and to uphold in the Commission such important values as collegiality and the ability to compromise.

46. The CHAIRPERSON, speaking as a member of the Commission, said that he wished to offer his warm congratulations to the Special Rapporteur on her excellent third report in which she undertook, on the basis of a great deal of research and many references to literature, case law and State practice, to determine how, in situations of international and non-international armed conflict, the law on protection of the environment could continue to apply in parallel with the law of armed conflict and how that protection could be strengthened. The report was focused primarily on the identification of rules of particular relevance applicable to post-conflict situations, although it contained a draft principle on preventive measures and another on the rights of indigenous peoples that should be applicable before, during and after a conflict.

47. Rather than entering into a detailed analysis of the methodology used by the Special Rapporteur and the structure of her third report, he would make some general comments before returning to certain points that had been of particular interest to him. Chapter I, section C, dealt with the debate on the second report of the Special Rapporteur that had taken place in the Sixth Committee in 2015. The intensity of those discussions showed the great interest that the topic attracted among States as well as its complexity and the difficulty of defining its scope.

48. Chapter I, section D, which dealt with the responses of States to the request for information on specific issues on which comments would be of particular interest to the Commission, showed that the responses had been relatively numerous, which was unusual, and substantive, and that they had been received from a wide range of States, including Lebanon, the Federated States of Micronesia, the Netherlands, Paraguay, Slovenia, Spain, Switzerland and the United Kingdom. The response from the Federated States of Micronesia was particularly interesting. It explained that it had “a long history of being theatres of war and staging grounds for military activities, particularly in the prelude to and during the Second World War. Wrecks of military ships and aircraft, as well as hulking weaponry and unexploded ordnance, litter the land and sea of the Federated States of Micronesia.” It supported the temporal approach used by the Special Rapporteur and noted that the obligations of belligerents under international law in relation to the protection of the environment spanned all three phases addressed in the report. With regard to weapons, it endorsed the preference of the Special Rapporteur not to focus on specific weapons on the understanding that the Commission’s consideration of the topic encompassed “any and all types of weapons that may be utilized in an armed conflict”. As for the rights of

indigenous peoples, it noted “the need for the Commission to consider the connections between the protection of the environment and the safeguarding of cultural heritage, particularly that of indigenous peoples”.

49. Paragraphs 79 to 83 of the third report dealt with the documentation provided by Lebanon on the pollution that the destruction of oil storage tanks at the Jiyeh electric power plant by the Israeli Air Force had caused to its coastline and parts of the coast of the Syrian Arab Republic in 2006. The damage had been estimated at more than US\$ 850 million, but no compensation seemed to have been paid by the State responsible.

50. Emphasis should be placed on the information provided by those countries, as it expressed the point of view of victims of armed conflicts. For the inhabitants of the Federated States of Micronesia in particular, who had been witnesses and victims of the destructive power of weapons, both during and before and after conflicts, the study of the topic was an opportunity finally to make their voices heard.

51. At the previous meeting, Mr. Peter had strongly defended the retention of principle IV-1 on the rights of indigenous peoples and made comments on how it could be better formulated. He himself fully endorsed Mr. Peter’s position. The relationship between indigenous peoples and the land that they occupied was an integral part of their culture and way of life and made them vulnerable to external interference. Most indigenous peoples, such as the tribes of the Amazon, had lived off the forest, and preserved it, for generations. Mr. Peter was right to note that, while they differed in terms of culture, indigenous peoples existed on most continents. If the third report devoted more attention to the indigenous peoples of Latin America, it was perhaps because the Inter-American Court of Human Rights had ruled on several cases of internal conflict in Central America, Colombia and elsewhere in the region, and its case law was thus extensive. However, efforts should be made to ensure that the provision to be retained encompassed indigenous peoples of all continents and emphasized their special vulnerability to armed conflicts and the often unique role that they played in the preservation of the environment.

52. In her final remarks, the Special Rapporteur concluded from her three reports that there existed a substantial collection of legal rules that enhanced the protection of the environment in relation to armed conflicts, but that the various parts of that collection seemed to work in parallel streams and that there were no existing tools to encourage States, international organizations and other relevant actors to utilize all the rules that were already applicable. She nevertheless noted that there was a clear link between the law applicable before the outbreak of an armed conflict and the law applicable after an armed conflict and that new rules concerning armed conflicts could be developed with a view to protecting the environment. He was thus more optimistic than Mr. Peter and was convinced that, although the members of the Commission all regretted that Ms. Jacobsson would soon leave the Commission, her pioneering work would not be abandoned and would be continued by another member. In conclusion, he recommended that the draft principles be referred to the

Drafting Committee and once again thanked Ms. Jacobsson for her outstanding third report and her valuable contribution to the work of the Commission.

53. Mr. FORTEAU said that, first of all, he wished to thank Ms. Jacobsson sincerely for her third report on the protection of the environment in relation to armed conflicts, as the effort that she had made to gather the relevant elements of practice and case law was substantial and commendable. Moreover, the care taken in the compilation of a detailed bibliography, which contained titles in several languages, should also be commended.

54. The third report was very long, probably too long, and contained nine new draft principles, which did not seem reasonable. The Commission’s methods of work, which underpinned the quality and authority of its work, required that every draft text examined be accompanied by a detailed analysis of practice, precedent and doctrine, and it would doubtless have been more reasonable in that regard to submit only four or five draft texts at the current session, all the more so because the topic under consideration was a very specialized one, and the proposals made by the Special Rapporteur could not be fully understood without further reading on both the law of armed conflict and environmental law. An excessive number of proposed texts complicated, indeed discouraged, the preliminary reading and analytical work required for any intervention in plenary. More generally, with regard to the recent development of the Commission’s methods of work, he stressed that it was already difficult to produce quality work when nine different topics on very diverse and increasingly specialized themes were included on the agenda for a single session of the Commission, as was the case in 2016, and that it became frankly impossible if, for each topic, a large number of draft texts were proposed. It also severely complicated the task of Member States, which had only two months in which to formulate their comments on the Commission’s annual report. He had already called for moderation during the first part of the current session, and it seemed to him necessary to do so again. In June 2016, 59 draft texts – guidelines, conclusions or principles – had been adopted by the Commission, and, the previous week, 12 new draft texts had been submitted, which was a rather daunting prospect.

55. He said that he would limit himself to a few general remarks, largely on matters of method, without going into detail on each of the proposed draft principles. With regard to method, it was very difficult, as Mr. Šturma and other members had noted, to understand the bases on which most of the proposed draft principles rested. The Special Rapporteur should have explained, in a pedagogical manner, the elements of practice and of case law substantiating each draft principle. She had done so for some of the draft texts, but regrettably not for all of them, in particular draft principle I-1, about which Mr. Hmoud, Mr. Kittichaisaree and Mr. Šturma had been justifiably critical. It also seemed that the Special Rapporteur had been selective in the elements of practice used, which had doubtless resulted from the fact that the excessive number of draft principles that she was proposing had made it impossible for her to conduct an exhaustive review for each of them. Mr. Peter had made the same point with regard to draft principle IV-1 on indigenous peoples: his comments

also applied to draft principle III-1 on peace agreements, for which only a few examples of agreement, concluded exclusively between a State and a non-State actor, had been analysed. Yet, to determine the state of international law on the issue, it would surely have been necessary to analyse in full the practice of peace agreements, including inter-State agreements. Moreover, the practice set out in paragraphs 167 to 173 of the third report to justify draft principle I-4 on peace operations was very cursory, and additional research was warranted. Once again, every draft text adopted should be based on an exhaustive analysis of the most relevant elements of practice, as the authority of the Commission's work was at stake.

56. Still on the question of method, the Special Rapporteur's very broad definition of the topic left him confused. As other members had noted, several of the draft principles did not really fall within the scope of the topic, in particular draft principle I-3 on status-of-forces and status-of-mission agreements. Mr. Murase had explained clearly why such agreements did not concern armed conflicts directly, but the same went for draft principle IV-1 on the rights of indigenous peoples. Despite his impassioned plea in favour of that draft principle, Mr. Peter had not convinced him that the issue fell within the scope of the topic. One might also wonder whether draft principle I-4 on peace operations fell within the scope of the topic either as, in principle, peace operations put in place by the United Nations were not part as such of armed conflicts, save for the very exceptional cases in which they were given an offensive mandate. Mr. Šturma and other members had also rightly noted that draft principle III-3 concerned weapons more than the environment. At the very least, the draft principle should be brought into line with principle III-4, and its relation to the environment should be mentioned explicitly. Also, as Mr. Hassouna and Mr. Šturma had noted, its scope of application should be expanded to include all remnants of war and not only explosive ordnance, which required further research on the issue. Furthermore, the third report dealt with developments in case law relating to property law, which were not directly linked to the topic.

57. More fundamentally, he had doubts regarding the possibility of transposing purely and simply, without further consideration, environmental law applicable in peacetime to situations of armed conflict. He had taken note of the Special Rapporteur's argument, namely that it was simply impossible to determine whether every treaty relating to environmental law was applicable to armed conflicts. He had also taken note of the statement by Mr. Cafisch, who had recalled the solutions adopted by the Commission in 2011 in the context of its work on the effects of armed conflicts on treaties. However, the issue at stake was not whether all environmental treaties applied to armed conflicts or how their termination or suspension should be decided in case of armed conflict. What was necessary was to determine, not in general, but for every draft principle proposed by the Special Rapporteur, whether the relevant rules of environmental law applicable in peacetime were applicable to armed conflict as they stood. In his view, it was an essential prerequisite to any consideration of the topic. The term "applicable" here had both a formal meaning – did the rules in question apply? – and a more substantive one – was

it possible, realistic or reasonable to transpose the application of peacetime rules to armed conflicts, and should they be adapted to that specific situation? To take only one example, it seemed very difficult to transpose the obligation relating to access to and sharing of information as it stood – without any modification – to armed conflicts. From that standpoint, the comments made by Mr. Park on draft principle III-5 seemed perfectly fair and legitimate. In its advisory opinion of 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice had taken a cautious approach on that point. In paragraph 30 of its opinion, the Court did not state that treaties relating to the protection of the environment were applicable in their entirety to armed conflicts, but asked only "whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict". That showed that there could be a middle ground between, on the one hand, the "total" application of those treaties and, on the other, their "total" non-application to situations of armed conflict, and it was that middle ground that the Commission should define in the context of the topic. In his view, that involved examining, for each theme and each draft principle, the extent to and conditions under which the environmental law applicable in peacetime could apply to armed conflicts. The Special Rapporteur made an attempt to do so in paragraphs 100 to 112 of her third report, which was certainly welcome, but insufficient. Furthermore, she did not draw any conclusion from that analysis in her third report, even though it was a priority issue. It should be remembered that those who drafted conventions on the environment had not necessarily had armed conflicts in mind, which was why it was essential to carry out that analysis. That preparatory work remained to be done for some of the draft principles proposed by the Special Rapporteur, in particular draft principles I-1, III-2 and III-5.

58. Thus, at the current stage of work, he was not really in favour of referring all the draft principles to the Drafting Commission, as a selection needed to be made, as several members had noted. Of course, the few general comments that he had made did not detract from the breadth of the Special Rapporteur's work. On the contrary, the wealth and diversity of the perspectives opened up by her third report showed the complexity of the topic and the consequent need for extensive research.

59. Mr. PETRIČ said that he wished to commend the excellent quality of the Special Rapporteur's third report and her presentation of it, as well as all her work on the topic of the protection of the environment in relation to armed conflicts. As the Special Rapporteur had said that she would not be seeking re-election, he also wished to thank her for her contribution to the Commission, her friendly cooperation and her unfailing commitment to the respect and protection of human rights and dignity, the development of humanitarian law and environmental protection over the previous 10 years.

60. Turning to the third report itself, he noted that it was based on very extensive and very useful documentation directly or indirectly linked to the topic of the protection of the environment in relation to armed conflicts. The report also had other particularly interesting elements, notably the bibliography, the summary of the debate held

in the Sixth Committee and, even if they were few and sometimes not germane to the topic, the responses of States to the request for information on the specific issues identified by the Commission as being of particular interest to it. The Special Rapporteur's third report thus provided a firm grounding on which to examine the issues addressed. The approach adopted, which was based on a distinction between the three temporal phases of armed conflict, was particularly useful, and the Special Rapporteur's insistence on the interconnection between several aspects of each of those three phases was especially welcome. That being said, he was of the view that the Commission should continue to concentrate on the issue of the protection of the environment.

61. The report under consideration, the research on which it was based and the draft principles that it contained mainly concerned international armed conflicts. Although he had no particular objection in that regard, he wished to note that the majority of contemporary armed conflicts were internal armed conflicts, a trend that would probably hold true in the future. The Commission could thus not overlook that aspect, as Mr. Park had rightly noted, and, in that context, he shared the views that Mr. Park had expressed in his intervention. With regard to methodology, some of the very extensive documentation on which the third report was based was not relevant to the proposed draft principles. That being said, he fully endorsed the Special Rapporteur's statement, in paragraph 266 of her third report, that "the three reports ... indicate that there exists a substantive collection of legal rules that enhances environmental protection in relation to armed conflict". In the context of her work, the Special Rapporteur had consulted the most relevant international organizations, as well as NGOs and some international bodies, which only added to the usefulness and authority of the report and, while a definitive decision had apparently not been made with regard to the form that the outcome of the work would take, it seemed that the development of guidelines was the most appropriate solution.

62. Turning to the proposed draft principles, he said that draft principle I-1 (Implementation and enforcement), the content of which he endorsed, stated clearly that it was the protection of the environment in relation to armed conflicts, including internal armed conflicts, that was at the heart of the Commission's work. With regard to draft principle I-3 (Status-of-forces and status-of-mission agreements), he shared Mr. Murase's views. Those particular instruments, which largely governed matters of civil and criminal jurisdiction in peacetime, were hardly relevant to the protection of the environment in relation to armed conflicts. In any case, if that draft text were to be retained, the word "agreements" should be replaced with the words "special agreements", as they came in various types, in particular during the post-conflict phase. However, it should be added that, with status-of-forces and status-of-mission agreements in relation to environmental law, the Commission was moving in an entirely new direction. In paragraph 161 of her third report, the Special Rapporteur herself acknowledged that those agreements rarely contained environmental clauses. There was thus reason to doubt that international law was sufficiently developed in that regard to justify the inclusion of those agreements within the scope of the topic.

63. With regard to draft principle I-4 (Peace operations), he endorsed Mr. Šturma's proposal to replace the word "shall" with "should", as the obligation in question was an obligation of means rather than an obligation of result. The word "all" should also be deleted, as its meaning remained unclear. That being said, the draft principle was useful and important and was in line with a broader trend under way at the United Nations, in particular the Secretary-General's initiative entitled "Greening the Blue". Incidentally, it should be noted that, in 2011, on the occasion of the International Day for Preventing the Exploitation of the Environment in War and Armed Conflict, the Secretary-General had stated that, "[g]iven their critical role in supporting countries emerging from conflict, United Nations peacekeeping operations are well-placed to positively influence how the environment is protected and natural resources are managed".³⁶⁰

64. He approved of draft principle III-1 (Peace agreements), even though it did not address the issue of compensation and attribution of responsibilities, which was crucial. However, he understood that it would be addressed at a later stage of the work. If not, the principle would be incomplete and could even cause confusion. In any case, he fully endorsed the Special Rapporteur's argument that States should be encouraged to include environmental aspects in every peace agreement or other agreement for the termination of a conflict (armistice agreements, for example). Draft principle III-2 was also broadly acceptable, even if its temporal aspect was insufficiently clear. Furthermore, the security of personnel tasked with conducting environmental impact studies after a conflict should always be guaranteed, given the imminent dangers that also existed in post-conflict situations. In his view, it should be reflected in one way or another in the draft text.

65. As for draft principles III-3 (Remnants of war) and III-4 (Remnants of war at sea), he could not see why the word "war" had been used in their titles instead of the words "armed conflict". In addition, it should be clearly stated which party was required to remove those remnants. Furthermore, as Mr. Šturma had noted, draft principle III-3, which included several examples of remnants of war, was simultaneously too narrow and too broad. The word "shall" should also be replaced with "should" in those two draft principles. As for specific remnants of war, for example mines, which continued every year to claim thousands of victims around the world, it was important that the parties to an armed conflict be required to keep the documents and maps indicating the location of mines so that, once the conflict had ended, those devices could be removed or destroyed. It should be noted that, regrettably, more than 20 years after the end of hostilities, some regions of Bosnia and Herzegovina and Croatia had still not been demined for want of information on the locations of those devices, and the same was true of other regions in the world. It would thus be preferable not to limit the obligation in question to the post-conflict phase only. In international law, responsibilities relating to remnants of war on land, which largely meant mines, focused mainly on the protection of civilians rather than on the protection of the environment.

³⁶⁰ See UNEP, *Greening the Blue Helmets: Environment, Natural Resources and UN Peacekeeping Operations*, Nairobi, 2012, back cover.

66. In draft principle III-5 (Access to and sharing of information), the word “shall” should also be replaced with “should”. The wording proposed for that draft principle did not take account of the temporal aspect, which was nevertheless important, as issues of access to and sharing of information were framed very differently in each of the temporal phases of armed conflict.

67. Draft principle IV-1 had given rise to interesting exchanges, and he agreed with several members that it did not fall within the scope of the topic, even if the protection of the rights of indigenous peoples certainly constituted an obligation of international law. No reference was made to armed conflict in that draft principle, and the Special Rapporteur dealt with indigenous peoples only in a general manner in her third report, without establishing the link to armed conflict and without explaining which specific obligations stemmed from international law as far as the environment of those peoples during the conflict or post-conflict phases was concerned. A large part of the content of the third report and the draft principles proposed therein seemed to have more to do with the progressive development of international law than with its codification, and it seemed to go a little too far in some cases. The Drafting Committee would have to decide how far it was possible to go without risk, basing its work on State practice, case law and doctrine in order to develop relevant and clear legal principles, in particular with regard to the draft principle on indigenous peoples. In conclusion, he proposed that all the proposed draft principles be referred to the Drafting Committee.

68. Mr. KOLODKIN said that Ms. Jacobsson’s extensive work was extremely important and promising for the future, and he hoped that the next special rapporteur would devote as much effort to the study of the topic and would have as much enthusiasm. He wished to share with the Commission a few remarks on aspects of the topic that, in his view, warranted further consideration and called for a more cautious approach.

69. First, the scope of application and limits of the topic should be further defined. It should be specified whether the draft principles concerned the natural environment, which was his preference, or the environment in general, in which case the concept of human habitat should be brought in, which would complicate the issue considerably. A distinction should also be drawn, for the post-conflict phase in particular, between international armed conflicts and non-international armed conflicts. Indeed, even if the dividing line between the humanitarian law applicable to international conflicts and that applicable to internal conflicts was increasingly blurred, it could not be said that the rules of international law relating to the protection of the environment were applicable in the same way after international and internal conflicts. Yet some of the draft principles relating to post-conflict situations in the third part were formulated without drawing a distinction between the two types of conflict and were addressed to all parties. Neither was he convinced that a sufficiently precise definition had been given of the beginning of the pre-conflict situation, to which the proposed principles applied, and the end of the post-conflict situation. Furthermore, as other members of the Commission had noted, it might be asked whether it was appropriate, in the context

of the topic under consideration, to deal with issues such as investment agreements, status-of-forces agreements and the rights of indigenous peoples.

70. With regard to draft principle I-3, he was of the view that, as Mr. Murase, among others, had noted, status-of-forces agreements often bore no relation to armed conflicts, such that they did not fall within the scope of the topic and that the draft principle was not appropriate in the context.

71. With regard to draft principle III-1 on peace agreements, which contained recommendations to be implemented by all parties to international or internal conflicts in post-conflict situations, he doubted that all those parties could be placed on an equal footing without distinction, in particular as peace agreements concluded after internal conflicts governed very specific situations. First, one of the parties might no longer exist. Second, did the fact of addressing the same recommendations on the content of a peace agreement to both the legitimate and illegitimate parties to an internal conflict not confer a certain legitimacy on parties that had none? Third, why was it obligatory for a peace agreement to be signed after an internal armed conflict? Fourth, if an internal armed conflict had no cross-border consequences or consequences with effects *erga omnes*, why should the protection of the environment be subject to international settlement? Given those comments, in his view, either the parties addressed in draft principle III-1 should be limited only to States or the scope of application of the principle should be restricted to the post-conflict stage of international armed conflicts.

72. Draft principle III-2 gave rise to similar remarks, as one might ask whether States were able or willing to launch a very general appeal for cooperation to the former parties to all internal conflicts, even if it concerned only environmental issues, as the scope for that type of cooperation seemed to have to be examined on a case-by-case basis. As for draft principle III-3, paragraph 2, it imposed obligations on all the parties to an armed conflict, whatever its nature, with the result that the comments on draft principles III-1 and III-2 applied *mutatis mutandis*.

73. With regard to the title of draft principle III-3, he noted, to add to the comments made by other members of the Commission, that the priority objective at the end of any armed conflict was to meet basic human needs and that the removal of remnants of war was a basic priority when the objective was to guarantee human security. Given that, to carry out such an operation, the existence of resources had to be taken into account, an unconditional obligation, such as that proposed by the Special Rapporteur, was not necessarily based on general international law or with regard to State practice.

74. As for draft principle III-4, with regard to which Mr. McRae had raised the possibility of including an obligation to remove remnants of war at sea, he was not sure that it would be straightforward to establish such an obligation, and further in-depth research on the matter would be necessary. In any case, in his view, the question of whether it was appropriate to include a provision on responsibility for the presence of remnants of war or the

failure to remove them should be considered with caution. It was notable that, after the Second World War, the Allies had dumped dangerous chemical weapons and chemical agents produced in Germany at the bottom of the sea. As those agents had not been prohibited under international law at the time, and the Allies had disposed of them in their own interests and, in his view, also in the general interest, it might be asked which entity should take responsibility for those acts, the damage caused to the environment or the failure to remove the agents, as it was unclear on what basis a particular country could be held responsible for that damage, not to mention that, according to experts, it was not known whether it would not be more damaging to the environment to remove those products than to leave them in place. In that context, the issue of responsibility could certainly not be decided easily.

75. Draft principle III-5 seemed to concern post-conflict situations, but the opening clause gave the impression that it was an obligation relating to conduct in times of armed conflict, and, as he had said already, it was in his view unrealistic to provide for such an obligation during an armed conflict.

76. In conclusion, although the analysis of the draft principles seemed to him a very delicate exercise, as the boundaries between the points considered were very blurred, he was in favour of referring all the draft principles to the Drafting Committee, apart from draft principles I-3 and IV-1. He thanked Ms. Jacobsson for her hard work and hoped that her report would serve as a source of inspiration for future work on the topic.

The meeting rose at 12.45 p.m.

3321st MEETING

Friday, 15 July 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Later: Mr. Gilberto Vergne SABOIA (Vice-Chairperson)

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

Organization of the work of the session (*continued*)*

[Agenda item 1]

1. The CHAIRPERSON said that the Bureau had not yet been able to finalize all aspects of the draft programme

of work. It would be submitted to the Commission as soon as possible. In the meantime, a plenary meeting would be held at 3 p.m. on Monday, 18 July 2016 to allow the Commission to continue its consideration of the topic of *ius cogens*. The Special Rapporteur on that topic would sum up the discussion the following day, after which the Special Rapporteur on the topic of protection of the environment in relation to armed conflicts would sum up the debate on that topic. Then, if time remained, the Drafting Committee on the topic of *ius cogens* would meet.

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*)

2. The CHAIRPERSON invited the Commission to resume its consideration of the third report of the Special Rapporteur on protection of the environment in relation to armed conflicts (A/CN.4/700).

3. Mr. NIEHAUS said that he wished to thank the Special Rapporteur for her excellent third report on a complex topic that was of great relevance to the contemporary world. The report covered a great deal of material and presented a particularly useful analysis of the discussion of the topic in the Sixth Committee.

4. He reiterated the support he had expressed previously for the Special Rapporteur's decision to divide the topic into three phases – before, during and after an armed conflict. However, as other members had commented, it would have been useful for the third report to set out more clearly the rules that applied during each of the three phases. The content and conclusions of the report under consideration, the main focus of which was to identify rules applicable in the third phase, only partially reflected the methodology followed. For the sake of greater clarity, it should have concentrated on the most important aspects of the topic, leaving aside matters of less relevance, such as the international investment agreements covered in paragraphs 115 to 120. The extensive references to the jurisprudence of regional human rights courts in paragraphs 196 to 212 did not seem to form a clear foundation for the conclusions that the Special Rapporteur sought to draw. Rather than facilitating understanding of the topic, the amount of information presented at times obscured it. The more specific a report, the easier it was for the Commission to analyse it and reach a positive outcome. While on the subject of clarity, he wished to endorse Mr. Candiotti's call for uniform, coherent and consistent terminology, the absence of which in recent years had generated confusion. Resolving terminological issues should not be the preserve of the Drafting Committee, given the detrimental effects that poor use of terminology could have on the Commission's work.

5. Turning to the draft principles, he expressed support for draft principle I-1 but suggested that it be reformulated to clarify that States had an obligation to take steps to protect the environment in relation to armed conflicts. While he welcomed the inclusion of a reference

* Resumed from the 3315th meeting.