

Document:-  
**A/CN.4/3321**

**Summary record of the 3321st meeting**

Topic:  
**<multiple topics>**

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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. Niehaus, 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

\* Resumed from the 3315th meeting.

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 *jus 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 *jus 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

to international organizations in draft principle I-3, he agreed with other colleagues that, in the first sentence, the word “encouraged” was not emphatic enough and should be replaced with a more specific legal term. Draft principle I-4 seemed to be a restatement of draft principle I-3; moreover, as Mr. Forteau had pointed out, peace operations did not form part of armed conflicts, except in very exceptional circumstances. He agreed with Mr. Petrič that draft principle III-1 was incomplete, inasmuch as it did not address issues of compensation and responsibility. The word “encouraged” should be replaced in both draft principles III-1 and III-2, for the reasons he had stated previously. As Mr. Hassouna had suggested, draft principles III-3 and III-4 should be merged; he also shared the view that the list of remnants of war currently contained in draft principle III-3, paragraph 1, should not be exhaustive. The issue of access to and sharing of information, covered in draft principle III-5, was of great importance but also great complexity. Further detail was needed in the text to ensure that the draft principle could be applied effectively in practice.

6. Draft principle IV-1, on the rights of indigenous peoples, had given rise to much debate and opposing points of view. Despite his strong support for the rights of indigenous peoples and condemnation of the horrific acts committed against them around the world during the colonial era, he wondered whether the current topic was the appropriate framework in which to address the abuses that indigenous communities had suffered and continued to suffer. The historical responsibility to put an end to such abuses was clear, but, although he found it difficult to say so, draft principle IV-1, as currently formulated, did not fit into the overall structure of the draft principles. He therefore suggested that it should be altered to read: “In the event of armed conflicts, States shall cooperate and consult with indigenous peoples living in their territories, so as to ensure respect at all times for their traditional knowledge and practices in relation to their lands and natural environment, as well as their free, prior and informed consent in connection with usage of their lands and territories that would have a major impact on the lands.”

7. With those comments, he expressed support for referring all the draft principles contained in the Special Rapporteur’s third report to the Drafting Committee.

8. Sir Michael WOOD said that he wished to thank the Special Rapporteur for her most interesting third report, which reflected a great deal of research. He welcomed the extensive bibliography, which could perhaps be made even more useful by dividing it into sections that corresponded to the various matters covered by the draft principles. He agreed with much of what had already been said in the course of the debate, particularly Mr. Forteau’s remarks on methodology. The third report was lengthy and detailed; however, it was not always easy to see which materials had led to which draft principle and which were there just for background.

9. Concerning the scope of the topic, he recalled that in 2015 the Drafting Committee had provisionally adopted a provision stating that the draft principles applied to the protection of the environment before, during or after an armed

conflict.<sup>361</sup> That seemed to include both international and non-international armed conflicts, and it was perhaps appropriate that the topic should do so. However, he shared the concern expressed by Mr. Kolodkin that the draft principles made no distinction between the two. It might be too simplistic to try to cover both types of armed conflict without taking into consideration the different rules that might apply and the different actors concerned. A future special rapporteur would need to analyse the matter further.

10. As to the nine draft principles proposed by the Special Rapporteur in her third report, it was important, though not at present particularly easy, to see them together with the draft principles already provisionally adopted by the Drafting Committee in 2015. It would therefore be helpful if the Committee were to have before it a document combining, in the correct order, the texts adopted in 2015 and those referred to it at the current session.

11. As Mr. Park and others had indicated, the Special Rapporteur had not included materials establishing that States must or should adopt the preventive measures envisaged in draft principle I-1. Paragraphs 187 to 238 of the third report contained brief descriptions of a number of cases, but it was difficult to see how draft principle I-1 related to them; he had some doubts therefore as to whether that draft principle should be referred to the Drafting Committee. Moreover, the relationship between that draft principle and the others in Part One was not entirely clear. If draft principles I-2, I-3 and I-4 were forms of application of draft principle I-1, that should be made clear. Like other members, he had serious doubts concerning draft principle I-3, which was explained only briefly in the third report, as it did not seem that status-of-forces and status-of-mission agreements were closely related to armed conflict. In draft principle I-4, the term “peace operations” ought perhaps to be defined for the purposes of the draft principles, or at least explained in the commentary.

12. Concerning draft principle III-1, he agreed with Mr. Forteau that a study of peace agreements between States could provide a basis for a better draft principle, but at present that information was not available to the Commission. Draft principle III-2, being simply a policy statement as Mr. Hmoud had suggested, could be referred to the Drafting Committee. However, some redrafting might be needed in paragraph 2, as the current wording, in particular the reference to “future operations”, seemed to suggest that the paragraph belonged to the preventive phase, not the post-conflict phase. The Drafting Committee would need to examine draft principles III-3 and III-4 very carefully, including the relationship between them, their addressees and whether the Commission should try to list remnants of war. He agreed with those who had said that more precision was required in draft principle III-5. As Mr. McRae had observed, States might not be in a position to grant access to information that was kept secret as a matter of national security. Although the draft principle added no new obligations to those already existing in international law, and might therefore be acceptable, it needed to specify to which phase of armed conflict it applied. Its position in Part Three of the draft principles suggested that it applied only in the post-conflict phase.

<sup>361</sup> *Yearbook ... 2015*, vol. II (Part Two), pp. 64–65, para. 134.

13. It was far from clear how draft principle IV-1 on the rights of indigenous peoples fit into the topic. Neither the short passage in the third report that touched on it nor the proposed draft principle itself related specifically to armed conflict. As had been said in earlier debates, the current topic was not the place to enter into the general question of the international law applicable to indigenous peoples. If such a draft principle were to be included, it should be based on a more rigorous analysis of specific issues concerning indigenous peoples, armed conflict and the protection of the environment. In the absence of that analysis, he found it hard to take a stance on the draft principle in question. Among other things, it could raise the issue of why the Commission was not providing guidelines on other particularly vulnerable groups that might also be affected by armed conflict.

14. The ambitious future programme of work set out in the concluding paragraphs of the third report showed that much remained to be done to complete a first reading of the draft principles. Covering liability and responsibility for environmental damage in relation to armed conflict, as suggested by some, might make the exercise much more prescriptive. Was there any reason to establish a *lex specialis* with respect to State responsibility? Could it not be assumed that the Commission's draft articles on the responsibility of States for internationally wrongful acts<sup>362</sup> applied in that area, as in most others? In any event, responsibility and liability should be considered, if at all, at the end of the topic when the overall shape of the draft principles had become clear. He agreed that the issue of protection of the environment during occupation, raised by Mr. Hmoud, was important, but it was not clear where it would fit into the overall scheme of the draft principles.

15. He again welcomed the Special Rapporteur's consultations with international and regional organizations and strongly agreed with her about the need for States to continue to provide examples of relevant national legislation and case law.

16. He would be happy for the draft principles to be referred to the Drafting Committee, with the possible exception of draft principles I-1 and IV-1.

17. Mr. WAKO said that he wished to congratulate the Special Rapporteur for presenting her third report within the time frame that she had proposed in her preliminary report in 2014.<sup>363</sup> While he agreed with Mr. Forteau that it would be preferable for the Commission to have before it an average of four or five proposed draft texts in any given report, the Special Rapporteur's decision to put forward nine draft principles in the present report was understandable given the time that she had dedicated to the topic and the fact that she was not seeking re-election. Although the Special Rapporteur had engaged in extensive research and consultations with a wide range of bodies, much more remained to be done in an area that was evolving quickly.

18. Only 40 years previously, in 1976, the Convention on the prohibition of military or any other hostile use of environmental modification techniques had been adopted, followed one year later by the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). As recognized by the Special Rapporteur, the provisions of the two instruments, which had been the first to provide expressly for the protection of the environment in armed conflicts, reflected the interests and environmental concerns of the international community at that time.

19. International environmental law had been in its infancy in 1976, but environmental concerns could no longer be disregarded. Although it was not possible to identify evidence of relevant customary international law, there was evidence of a growing awareness and clear ambition on the part of States and international organizations to take environmental considerations into account when planning and conducting military operations in peacetime. The fact that environmental degradation had an impact on the enjoyment of human rights did not necessarily mean that there existed a rule of customary international law establishing an individual human right to a clean environment.

20. Rapid progress was being made, however, with Africa arguably taking the lead. The African Charter on Human and Peoples' Rights provided that all peoples had the right to a general satisfactory environment favourable to their development. In Kenya, the 2010 Constitution established, *inter alia*, that every person had the right to a clean and healthy environment, that the State should eliminate processes and activities that were likely to endanger the environment and that any person or group of persons could apply to a court for redress in relation to violations of the right to a clean and healthy environment, without having to demonstrate that they had *locus standi* in the matter. The Commission was therefore dealing with progressive international law. It was a pity, in that regard, that many Member States were not cooperating by providing information on environmental legislation, measures and policies.

21. The proposed draft principles reflected emerging trends in the area of environmental law. Care should be taken, however, not to address wider environmental issues but to remain within the scope of the topic. The topic was complex in that it dealt with the intersection between the law of armed conflict, environmental law, international human rights law and international humanitarian law. It was therefore tempting to produce draft principles relating to general environmental law rather than environmental law in the context of armed conflict, and to address the law as applied in peacetime rather than the law as applied during or after an armed conflict. One challenge that the Commission faced was to ensure that the draft principles fell within the scope of the topic.

22. There were a number of other challenges related to the draft principles. First, the Special Rapporteur had said in her preliminary report that the third report was likely to contain a limited number of guidelines, conclusions or recommendations. Ultimately, however, she had

<sup>362</sup> 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.

<sup>363</sup> *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/674.

formulated draft principles. In that connection, he agreed with Mr. Candioti that the Commission needed to decide on a consistent approach to the use of terms for draft texts.

23. Second, the Commission had agreed at the outset that the working definition of armed conflict would be wider than the one that it had used in other reports in order to encompass situations where an armed conflict took place without the involvement of a State. In that way, it would ensure that non-international armed conflicts were covered. In the proposed draft principles, however, the Special Rapporteur did not appear to have distinguished between international and non-international armed conflicts, or between State and non-State actors. In the introduction to her third report, the Special Rapporteur had stated that, in future reports, it might be worth addressing the responsibility and practice of non-State actors and organized armed groups in international armed conflicts. That raised the question of whether the draft principles would have to be amended once that issue had been addressed, whether consideration of the draft principles should be put on hold until that time and whether the report should be split into two parts, one dealing with international armed conflicts and the other with non-international armed conflicts.

24. Third, he agreed with Mr. Peter that, although the Special Rapporteur had placed draft principle IV-1 against the background of indigenous peoples, their land, the environment and the principle of free, prior and informed consent, that background was too narrow and weak to support such an important theme. He also agreed that the Special Rapporteur's third report had not done justice to the subject matter before arriving at the draft principle – which was probably why several members of the Commission had stated that the draft principle fell outside the scope of the topic – and that there was a wealth of materials available that could have been used to justify the inclusion of a slightly modified version of draft principle IV-1.

25. It was clear from the response of other members to the third report that the topic should remain on the Commission's programme of work. His Christian beliefs underpinned his views of the origin and importance of international human rights and environmental law. In the future, the Commission would be remembered above all else for its contribution to the protection of human rights and the environment. The Commission had to find someone to assume the Special Rapporteur's mandate. That person should be fully committed to the protection of the environment and should regard the completion of the mandate not just as a duty but as a calling.

26. In conclusion, he recommended that all the draft principles be referred to the Drafting Committee, which should also recommend the way forward for dealing with the topic.

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

27. Mr. VALENCIA-OSPINA, after thanking the Special Rapporteur for her third report, said that he wished to touch on two main issues, the clarification of which would benefit the Commission's future work. The first

was the distinction between the natural environment and the human environment, while the second concerned the temporal delimitation of the second and third phases of the topic, namely during and after armed conflict.

28. With regard to the first issue, the Commission's treatment of the topic during its previous sessions had left the impression that the focus of its work was on the protection of the natural environment, without any consideration being given to the natural environment's pecuniary value or usefulness to humans. In a 2009 report by UNEP entitled *Protecting the Environment During Armed Conflict: an Inventory and Analysis of International Law*,<sup>364</sup> which had ultimately led to the Commission taking up the topic, a distinction was drawn between the environment, which had an intrinsic value, and natural resources, which were in some way useful or exhaustible. In the section of the draft principles on the use of terms that had been discussed by the Commission in 2015, the environment was defined as including "natural resources, both abiotic and biotic",<sup>365</sup> but no reference was made to its usefulness.

29. Surprisingly, the Special Rapporteur's third report focused predominantly on the environment as a useful natural resource, insofar as it was exhaustible and valuable, and on the environment as the "human environment". The shift in focus was noticeable throughout the third report, but particularly in the section devoted to legal cases and judgments, where the Special Rapporteur mainly assessed cases in which the environment was characterized by its economic value. The cases concerned the illegal exploitation of natural resources, individual or collective deprivation of property and the loss of usability of land. The same was true of the Special Rapporteur's analysis of the work of compensation commissions, with the notable exception of the United Nations Compensation Commission, which had awarded compensation for "pure environmental damages".

30. A number of the cases mentioned related to the specific connection between indigenous people and the land they inhabited. The third report contained a section and a proposed draft principle devoted to indigenous people. Although he fully supported the rights of indigenous people, as established in, for example, the United Nations Declaration on the Rights of Indigenous Peoples,<sup>366</sup> he agreed with several previous speakers that the present topic was not the right place to discuss and reiterate those rights, which were founded on human rights considerations and were relevant to the protection of the environment only insofar as the environment might be of value to indigenous people. The third report did not demonstrate any particular relevance of such rights in relation to armed conflict, and draft principle IV-1, on the rights of indigenous peoples, did not go beyond restating rights that had already been established in more directly pertinent international law instruments.

<sup>364</sup> D. Jensen and S. Halle (eds.), *Protecting the Environment during Armed Conflict: an Inventory and Analysis of International Law*, Nairobi, UNEP, 2009.

<sup>365</sup> See *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/685 (second report on the protection of the environment in relation to armed conflicts), annex I, p. 176.

<sup>366</sup> General Assembly resolution 61/295 of 13 September 2007, annex.

31. The same applied to the issue of access to and sharing of information, as addressed in the third report. The attempt to justify access to information as a human right was not relevant to the focus of the topic, namely environmental protection. Draft principle III-5, which dealt with the issue, provided that “States and international organizations shall grant access to and share information in accordance with their obligations under international law”. Such a formulation did not appear to be an example of either codification or the progressive development of international law. On the one hand, no concrete information was given about the nature of the obligations referred to in the draft principle and, on the other, there was no mention of anything novel being elaborated.

32. The third report also seemed to be the wrong place to address demining and the protection of human beings, which bore no apparent connection to the protection of the environment as such. The “human environment”, in particular, was already widely protected in international law, both in peacetime and during armed conflict. Examples of that protection included article 1, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights and, in the context of armed conflict, the criminalization of the deliberate destruction of the natural basis of livelihood.

33. The scope of the topic should not be confined to reiterating existing protection for useful parts of the environment. Rather, in line with the Commission’s work on the topic during its previous sessions, it should cover the protection of the environment irrespective of its usefulness or economic value. He agreed with the comments submitted by Switzerland, which were summarized in paragraphs 85 to 90 of the third report. In contrast to some other States, Switzerland highlighted the distinction between the protection of objects indispensable to the survival of the civilian population, on the one hand, and the protection of the environment, on the other.

34. As to the temporal delimitation of the second and third phases, he shared the sense of unease expressed by several other members of the Commission. The Special Rapporteur had divided the work on the topic mainly on a temporal basis, distinguishing three phases – before, during and after an armed conflict – but she had left the division between those phases rather open. At the same time, she made the predominantly applicable law dependent on the respective phase. For instance, in relation to the second phase, she based her work on the assumption that during, but only during, an armed conflict, international humanitarian law applied as *lex specialis*. The same could not be true of the other phases, where no armed conflict was present to trigger the application of international humanitarian law.

35. It seemed counterintuitive that the Special Rapporteur had chosen to commence her consideration of the rules of particular relevance applicable in post-conflict situations with an assessment of the Commission’s previous work on the effects of armed conflict on treaties. An armed conflict that had ended fell outside the scope of the draft articles adopted in 2011,<sup>367</sup> in which “armed

conflict” was taken to mean “a situation in which there was resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups”. There was thus a need to distinguish clearly between the temporal phases and to identify the laws applicable to each one.

36. He shared a concern expressed regarding the Special Rapporteur’s treatment of peacekeeping missions under a United Nations mandate. The basic principles of United Nations peacekeeping missions fundamentally distinguished them from armed conflict as defined for the purposes of the topic. Such missions did not involve the use of force by States. The inclusion of peacekeeping within the scope of the topic could therefore endanger the viability and usefulness of United Nations peacekeeping efforts as a whole.

37. In conclusion, he supported the referral of the draft principles to the Drafting Committee, with the possible exception of draft principle IV-1 and on the understanding that the main focus of the topic would be on the protection of the environment.

38. Mr. EL-MURTADI SULEIMAN GOUIDER said that the excellent work of the Special Rapporteur, particularly the copious references that she had provided, would serve as a very good basis for the work of whoever took over her role. Given the increasing frequency of non-international conflicts in the world and their impact on the environment, the second, armed conflict phase should be accorded more importance than the other phases. It was, however, impossible to establish frameworks that were completely watertight, and opinions on their application differed, particularly with regard to the protection of indigenous peoples and natural resources.

39. In her third report, the Special Rapporteur examined a series of examples of general international practice with regard to armed conflicts and their consequences since the Stockholm Declaration.<sup>368</sup> However, it had proved difficult to glean information from African States and organizations. The Special Rapporteur had emphasized the need for more contact and consultation in future work and it would be useful if the Commission were to reiterate the call to States to provide more information on their practice.

40. It might be useful for resolutions of the Security Council on protection of the environment and natural resources in armed conflict to recall the negative aspects of specific situations in which the Council had permitted military intervention. The adoption of such decisions had not prevented further conflicts from taking place, and the environment and natural resources had become the silent victims. Despite the existence of national legislation to protect the environment, armed conflict was often accompanied by a weakening of the State apparatus and environmental laws, while those who sought to defend the

<sup>367</sup> 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.

<sup>368</sup> *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I.

environment were prevented from making their voices heard. Long-term environmental considerations had become secondary to short-term concerns. The challenge to the international community was therefore to demonstrate that the provisions of the law and commitments to protect civilians and the environment could be applied in practice, regardless of short-term political considerations.

41. He hoped that whoever took over from the Special Rapporteur would be able to address certain important points raised in the current report, such as the protection of the environment during occupation and the responsibilities of non-State actors in non-international armed conflicts. There was also a need for more discussion and contact with the relevant organizations and greater efforts to elicit more information about the views and practice of States.

42. The draft principles set out in the annex to the third report would certainly help the Drafting Committee in its work. The interdependence of the different phases of the topic would favour an exhaustive and all-embracing approach to the draft principles. In conclusion, he wished the Special Rapporteur every success in the future.

43. Ms. ESCOBAR HERNÁNDEZ said that she wished to thank the Special Rapporteur for her third report, which addressed the post-conflict phase in a detailed and systematic manner, as well as some aspects of the pre-conflict phase. It provided the Commission with a relatively complete picture of the subject, which was particularly important given that the Commission was approaching the end of the quinquennium and that it would not be able to benefit from the Special Rapporteur's comprehensive understanding of the topic during the next quinquennium. She welcomed the inclusion in the third report of portions devoted to the discussions in both the Commission and the Sixth Committee and to the written contributions by Member States, since they served as a frame of reference for the remainder of the report. Annex II was also worthy of note, as the inclusion of a select bibliography would provide a solid basis for the future work of the Commission and the Special Rapporteur's successor.

44. The system used by the Special Rapporteur to address some of the subjects in the third report was somewhat difficult to follow. That was particularly true of chapter II of the third report, in which reference was made interchangeably to both the pre-conflict and post-conflict phases, even though the section was entitled "Rules of particular relevance applicable in post-conflict situations". However, the Special Rapporteur had helped to clarify some matters in her oral presentation.

45. Although the wealth of practice analysed in the third report was of interest and relevance, elements of practice were at times presented in a somewhat general and abstract way and it was not always easy to draw a direct connection between the practice mentioned and the topic or the draft principle which it served to substantiate. It might be useful, therefore, if the Special Rapporteur were to select the practice most directly relevant to each draft principle for inclusion in the respective commentaries, thus making more explicit the contribution of each element to the specific draft principle concerned.

46. As she had mentioned at the previous session, the use of the term "principle" raised a number of issues with respect to its exact meaning, nature and legal effects. At the current session, the question had arisen in the context of the Commission's methods of work and the need to make a clear distinction between draft articles, draft principles and draft guidelines. In her view, the relationship between the three categories had to be understood in terms of a descending order of prescriptive content. The appropriate term should thus be selected according to the degree of prescriptiveness the Commission wished to attribute to each of its topics. The issue could perhaps be discussed in the next quinquennium under working methods, particularly because of the increasingly varied formats in which topics and titles were presented.

47. As to the draft principles, although she agreed with the content of draft principle I-1, it was necessary to clarify both the content and the ultimate aim of the measures mentioned therein, since it was not clear whether the adjective "preventive" referred to all the measures mentioned – legislative, administrative, judicial and others – or to a specific category thereof. The draft principle should be included in the pre-conflict phase only if the word "preventive" was intended as a general term. If that were not the case, the measures could be included in any of the phases and so should come under an introductory section. Furthermore, the title "Implementation and enforcement" did not bear any relation to the content of the draft article and should be changed, something that the Drafting Committee would be well placed to do.

48. With respect to draft principle I-3, she did not entirely agree with other members of the Commission that it dealt with a subject that was unrelated to the topic at hand, particularly in the light of the examples given in the third report. Although the status-of-forces and status-of-mission agreements mentioned in the draft principle might not directly address situations of armed conflict, the possibility of the addressees of those agreements being involved in a conflict or some form of military engagement that had an impact on the environment could not be ruled out. In any event, the final sentence of the draft principle should be deleted, since the phrase "preventive measures, impact assessments, restoration and clean-up measures" might lead to confusion as to the temporal phase referred to by the draft principle. A description of provisions that could be included in such agreements would be better placed in the commentary.

49. She shared the concern expressed by some members about the inclusion of draft principle I-4 in the section dealing with the pre-conflict phase. Although the substantive content of the text was acceptable as a starting point and in line with recent developments in peacekeeping operations, the express reference to the need to take measures to "prevent, mitigate and remediate the negative environmental consequences" gave the draft principle a cross-cutting, intertemporal dimension. It would therefore be preferable to include it as a general principle applicable to all the phases, perhaps in Part Four.

50. While the idea underlying draft principle III-1 was acceptable, it would be useful to revise the wording of the text to make the scope of the recommendation more

specific, in both substantive and subjective terms. Specifically, the term “encouraged”, the generic reference to “armed conflict” without any further qualification and the potential impact of the recommendation on non-State actors involved in a non-international conflict were some points that needed to be taken into account in the revised wording.

51. The second paragraph of draft principle III-2 could be deleted, since the taking into account of environmental considerations in peace operations had already been addressed in draft principle I-4. Both draft principle III-3 and draft principle III-4 were acceptable overall. However, draft principle III-3, paragraph 1, should be amended to indicate the addressees of the obligation set out therein and, in the Spanish version, to use terminology that would be more readily understood by those unfamiliar with the subject.

52. Draft principle III-5 combined two distinct elements – access to information and sharing of information – that ought to be addressed separately. Furthermore, the principle was defined too broadly, as a State or an international organization might have good reason, such as security, for not granting access to or for not sharing certain information. The scope of the draft principle should therefore be modified with that in mind. Lastly, the draft principle was general in nature and could be applied to any of the phases; it would be better placed in Part Four.

53. At the two previous sessions, she had stated that the issue of indigenous peoples should be taken into account in the present topic, since their connection to the land and the preservation of their traditional means of livelihood required special protection of the environment, including in relation to armed conflict, as was recognized, in particular, in articles 29 and 30 of the United Nations Declaration on the Rights of Indigenous Peoples. She was therefore pleased to see the subject addressed in draft principle IV-1. It was appropriate to include the draft principle in a separate part of the project – which, in her opinion, should be entitled “General principles” – since the question of indigenous peoples covered all three phases of the topic. However, she agreed with others that the wording of the draft principle, particularly in paragraph 1, was too general and abstract and failed to clearly establish the connection between indigenous peoples and protection of the environment in relation to armed conflicts. However, paragraph 2 better reflected that connection. In any event, the draft principle could be revised by the Drafting Committee, which could also consider adding a reference to the need for States and international organizations to take account of the special position of indigenous peoples in all projects, studies and plans related to the environment and armed conflict that might affect them. Lastly, in response to the comment by Mr. Peter that the practice considered by the Special Rapporteur was limited to certain regions and did not reflect the fact that indigenous peoples were present in all continents, she was of the view that the material selected by the Special Rapporteur reflected the practice available. However, it would be helpful to include a reference to the global dimension of indigenous issues in the commentaries.

54. She wished to conclude by noting the outstanding contribution that Ms. Jacobsson had made to the work of

the Commission in general and as Special Rapporteur on protection of the environment in relation to armed conflicts in particular. She would be sorely missed.

55. Mr. AL-MARRI said that he commended the Special Rapporteur on the excellent work she had done in producing her third report, which brought particular focus to a topic of major concern to the international community as a whole. In her report, the Special Rapporteur had affirmed that environmental issues were a common factor that brought States together, whether in peacetime or during armed conflict. The nine draft principles proposed in the third report, some of which were binding and others optional, had been prepared very thoroughly; they should all be submitted to the Drafting Committee. The draft principles focused on the three temporal phases – before, during and after armed conflict – and dealt, *inter alia*, with the rights of indigenous peoples in relation to armed conflicts. He agreed with the Special Rapporteur that there was no need to refer to the applicability of the conventions under which States had undertaken to protect the environment during armed conflict. He also agreed that the work could be presented in the form of discrete topics within the overall subject of protection of the environment in relation to armed conflicts. The involvement of parties to the conflict should be examined in the light of the law of armed conflict and the law of occupation. The Commission should also examine the means available for dispute settlement and for establishing liability for environmental damage; reference could be made in that context to relevant previous work of the Commission. The Commission should also consider protection of the environment in situations of armed conflict between non-State actors, with particular reference to the situations in Afghanistan, Iraq and the Syrian Arab Republic.

56. Mr. VÁZQUEZ-BERMÚDEZ said that he wished to commend the Special Rapporteur on her well-researched third report, which examined practice, case law, writings and treaties, as well as material from a wide variety of primary sources, including the official websites of States and international organizations. The third report also included a most useful bibliography.

57. He was in favour of giving the topic the broadest possible scope, covering all three phases of armed conflicts, and of basing it on consideration of the international legal system as a whole, rather than on any particular branch of international law, since international humanitarian law, the *lex specialis* in situations of armed conflict, might well overlap with rules drawn from international environmental law, international humanitarian law, international human rights standards and international criminal law. In order to protect the environment in relation to armed conflicts, it was therefore vital to identify which standards and principles of international law applied to the various phases of those conflicts.

58. He agreed with the substance of the nine draft principles proposed by the Special Rapporteur in her third report. Chapter II of the report showed that the Commission’s draft articles on the effects of armed conflicts on treaties were of relevance to the topic under consideration, especially draft article 3 establishing the general principle that the existence of an armed conflict did not



*ipso facto* terminate or suspend the operation of treaties. Furthermore, it made it clear that the annex to the draft articles, which contained an indicative list of categories of treaties that would remain in operation in whole or in part during an armed conflict, expressly included treaties relating to the protection of the environment. The references to the commentaries to those draft articles were also helpful.

59. He agreed with Mr. McRae that, in order to reflect the standard-setting nature of the draft principles, States should not be “encouraged to” engage in a specified form of conduct, but should be told that they must or should do something, the word “should” being more appropriate when the provision in question largely constituted progressive development.

60. He was pleased that the Special Rapporteur had devoted draft principle IV-1 to the rights of indigenous peoples in the context of the protection of the environment in relation to armed conflicts, as that signified recognition that various branches of international law could have areas in common. While protection of the environment was obviously important everywhere, it had to be acknowledged that, as Mr. Saboia had explained, in some parts of the world, indigenous peoples had a special relationship with the environment. The destruction of their land would have grave consequences for the cultural and physical survival of those peoples and their land therefore deserved special protection before, during and after an armed conflict. In that connection, he drew attention to the contents of articles 29 and 30 of the United Nations Declaration on the Rights of Indigenous Peoples and to articles XIX and XXX of the American Declaration on the Rights of Indigenous Peoples,<sup>369</sup> which had been adopted on 15 June 2016 after many years of negotiation. The wording of draft principle IV-1 should be brought more into line with the context of the topic and could echo that of the American Declaration on the Rights of Indigenous Peoples.

61. As far as draft principle I-1 was concerned, the Special Rapporteur had referred to practice and case law in order to underscore how important it was that States adopted national legislation to enhance the protection of the environment in relation to armed conflicts, in conformity with international law. However, like Mr. McRae, he considered that draft principle I-1 should not necessarily be confined to preventive measures, since it was also relevant to the post-conflict phase. Although draft principle I-3 on status-of-forces and status-of-mission agreements was only indirectly related to armed conflicts, there was indeed a growing tendency to incorporate into such agreements provisions on environmental responsibilities that might help to forestall damage to, or promote the restoration of, the environment. Draft principle I-4 on peace operations also reflected the more frequent practice of States and international organizations, such as the United Nations, to take steps to prevent, mitigate and remedy harm to the environment.

62. Some redrafting of the draft principles in Part Three was required. In draft principles III-3 and III-4, it would be wise to clarify in what way remnants of war on land and at sea could harm the environment and to provide for cooperation between States and between States and international organizations.

63. He was in favour of referring the nine draft principles to the Drafting Committee for fine-tuning in accordance with the comments and suggestions made during the debates in plenary meetings.

64. In its future programme of work, the Commission should take account of developments in international law stemming from State practice, *opinio juris*, case law and treaties. It should likewise give more in-depth consideration to the protection of the environment during occupation, to the responsibility of State and non-State actors, to non-international armed conflicts and to compensation and reparation. The future Special Rapporteur must continue to consult international organizations such as UNEP, UNESCO and the ICRC.

65. Lastly, he paid tribute to the current Special Rapporteur, whose guidance and leadership had enabled the Commission to forge ahead and to make a substantive and very useful contribution to the progressive development and codification of international law in such an important area.

66. Mr. KAMTO said that the substantial amount of research done by the current Special Rapporteur would undoubtedly prove most useful for the next special rapporteur on the topic. Like Mr. Forteau, Mr. Park and Mr. Šturma, he was, however, puzzled by the apparent extension of the scope of the topic to encompass the protection of the rights of indigenous peoples, investment agreements, the protection of the cultural heritage and the type of weapons used in armed conflicts. The division of the subject matter into three phases of equal importance might be partly responsible for that situation, because no strict temporal limits had been set for the first and last stages. The first phase should be restricted to events which were immediately and closely bound up with the beginning of the armed conflict, otherwise too much attention would be paid to the prevention of environmental damage, which was a quite different matter, possibly warranting separate consideration. Similarly, the third phase should be confined to the direct impact of armed conflicts on the environment. The issue of marine wrecks had already been covered in other legal instruments.

67. Second, the shift from the protection of the environment towards the protection of human rights considerably altered the scope and nature of the rules and principles being formulated. No one was opposed to the protection of indigenous peoples but, for the purposes of the topic under consideration, in draft principle IV-1 the Commission should focus not on their rights but on special protection for their environment.

68. He endorsed the views of earlier speakers who had held that several of the draft principles were unsupported by the reasoning in the third report and that much of the case law cited therein had no bearing on the subject

<sup>369</sup> Resolution 2888 (XLVI-O/16) of the Organization of American States, reproduced in *Organization of American States General Assembly, Forty-sixth Regular Session, Santo Domingo, Dominican Republic, June 13–15, 2016, Proceedings*, vol. I (OEA/Ser.P/XLVI-O.2).

matter. Draft principle I-1 was not borne out by the analyses in the report and was worded too broadly. He wondered why draft principle I-2 was missing. By not setting out the basis for draft principle I-3, the Special Rapporteur gave the impression that it constituted more a personal wish than a principle deriving from practice or existing international instruments. The same was true of draft principles I-4 and III-1. The latter drew no distinction between international and non-international armed conflicts. In practice, the reference to the “restoration and protection of the environment damaged by the armed conflict” might amount to no more than pious wishes, since it was hard to see what national armed groups who had participated in the conflict could do to implement that provision. Draft principle III-3 was very loosely worded. The first paragraph did not specify who was to carry out the activities in question and it was unrealistic to demand the clearance, removal and destruction of all mines without delay. The second paragraph referred to “the parties” – presumably the parties to the armed conflict, in other words the States parties to an armed conflict – which meant that it excluded non-international armed conflicts, despite the fact that they formed the majority of current armed conflicts.

69. He was in favour of referring the draft principles, apart from draft principles I-1, I-3, I-4, III-1 and III-3, to the Drafting Committee.

70. For 10 years, he had admired the Special Rapporteur’s elegance of mind and her tenacity in seeking progress in topics related to women’s rights and the rights of certain categories of vulnerable persons. He wished her every success in the future.

71. Mr. CANDIOTI said that he wished to thank the Special Rapporteur for her third report, which contained a detailed account of many aspects of the protection of the environment in relation to armed conflicts, along with a wealth of information on State practice, treaty law, international and municipal case law and *opinio juris*, as well as a very useful bibliography. She had adopted a highly professional approach to what was an extremely difficult subject. She had made a very valuable contribution to the Commission’s consideration of the topic and had provided ample material for further urgently needed work by the international community on it. Her three-phase approach had been a wise choice. All the rules and recommendations contained in the draft principles proposed in her third report would promote the development of the topic. He was sure that the Drafting Committee would pay due heed to the various suggestions that had been made with a view to improving their wording.

72. The use of the term “principle” did not diminish the relevance of the Special Rapporteur’s proposals. The Commission should, however, ensure that the final form of the provisions was consistent with their content. It should not confuse principles, in other words general basic rules or standards for the codification or progressive development of international law, with recommendations concerning advisable or desirable conduct.

73. The Commission had received a mandate from the General Assembly to codify and progressively develop the law on the protection of the environment in relation to

armed conflicts. It should therefore press on with the good work already done in order to fulfil that mandate.

74. Lastly, he paid tribute to the Special Rapporteur’s commitment to the rule of law in the international community. He also wished her every success in the future.

*The meeting rose at 12.50 p.m.*

## 3322nd MEETING

*Monday, 18 July 2016, at 3 p.m.*

*Chairperson:* Mr. Pedro COMISSÁRIO AFONSO

*Present:* Mr. Al-Marri, Mr. Caflisch, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kitichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

### *Jus cogens (continued)\* (A/CN.4/689, Part II, sect. H, A/CN.4/693)*

[Agenda item 10]

#### FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)\*

1. The CHAIRPERSON invited the Commission to resume its consideration of the first report of the Special Rapporteur on *jus cogens* (A/CN.4/693).

2. Mr. PETRIČ said that he wished to congratulate the Special Rapporteur on his excellent first report and on his oral presentation on *jus cogens*, a topic that was important and stimulating on a theoretical level. The report contained an interesting summary of the main past and contemporary views and conflicting opinions elicited by *jus cogens*, a detailed analysis of the legal nature of the concept and the controversies over its theoretical basis, and three draft conclusions. He endorsed the Special Rapporteur’s approach and shared most of the views expressed in his first report. While he agreed that the purpose of the work was to identify *jus cogens* and its effects, not to resolve theoretical debates, he believed that the Commission could not truly understand the role of *jus cogens* in the contemporary international community or expand on the definition of the concept established in articles 53 and 64 of the 1969 Vienna Convention unless it analysed the nature and peremptory character of *jus cogens*, its hierarchical position in international law and various other theoretical aspects. He therefore commended the ambitious approach adopted by the Special Rapporteur, who had not ignored the thorny issue of the theoretical basis of *jus cogens*.

\* Resumed from the 3317th meeting.