

Provisional

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Provisional summary record of the 3464th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 15 May 2019, at 3 p.m.

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Protection of the environment in relation to armed conflicts (*continued*)

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Present:

Chair: Mr. Šturma

Members: Mr. Aurescu
Ms. Escobar Hernández
Ms. Galvão Teles
Mr. Gómez-Robledo
Mr. Grossman Guiloff
Mr. Hmoud
Mr. Huang
Mr. Jalloh
Mr. Laraba
Ms. Lehto
Mr. Murase
Mr. Murphy
Mr. Nguyen
Mr. Nolte
Mr. Ouazzani Chahdi
Mr. Park
Mr. Petrič
Mr. Rajput
Mr. Ruda Santolaria
Mr. Saboia
Mr. Tladi
Mr. Valencia-Ospina
Sir Michael Wood
Mr. Zagaynov

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 3.05 p.m.

Protection of the environment in relation to armed conflicts (agenda item 4) (*continued*)
(A/CN.4/728)

Ms. Lehto (Special Rapporteur), introducing her second report on the topic “Protection of the environment in relation to armed conflicts” (A/CN.4/728), said that she wished to begin by providing an update on outreach activities and other events related to the topic. She had presented the topic at the fifty-seventh annual session of the Asian-African Legal Consultative Organization in Tokyo in October 2018 and at a symposium celebrating the seventieth anniversary of the Commission, organized by Florida International University. A workshop to discuss different aspects of the protection of the environment in relation to armed conflicts had been organized at United Nations Headquarters as a side event during International Law Week in 2018, in cooperation with the United Nations Environment Programme (UNEP), the Environmental Law Institute and Lund University. In March 2019, the University of Hamburg and Lund University had organized a two-day workshop entitled “Protection of the environment in relation to armed conflict – Beyond the ILC”. Also in March that year, the University of Southern Denmark, together with the Ministry of Foreign Affairs of Denmark, had organized a seminar on the general work of the Commission, which had also touched on the topic.

Two further events were scheduled to take place in Geneva during the second part of the Commission’s current session: a seminar devoted to the issue of the environment and armed conflict, organized by the Geneva Graduate Institute of International and Development Studies, and a panel discussion on environmental law, including in relation to armed conflicts, which would take place within the framework of the first International Law Seminar Alumni Network Conference. Other related events scheduled to take place later that year included the First International Conference on Environmental Peacebuilding, to be held in Irvine, California.

Other relevant activities included an Arria formula meeting of the United Nations Security Council on the protection of the environment in armed conflicts on 7 November 2018, which had been hosted by the Permanent Mission of Kuwait. The United Nations Environment Assembly, which had already adopted two resolutions related to armed conflicts in 2016 and 2017, had adopted language on conflict debris and minerals in 2019. States had agreed, *inter alia*, to improve data collection on environmental risks from conflicts. Environmental security themes had featured in several resolutions.

Lastly, the International Committee of the Red Cross (ICRC) was finalizing the revised guidelines for military manuals and instructions on the protection of the environment in times of armed conflict, which would be published later that year. Protection of the environment would also be highlighted at the Thirty-third International Conference of the Red Cross and Red Crescent in December 2019.

Turning to her second report, she said that it had two general objectives. First, it addressed the remaining broad issues that the 2017 Working Group had identified as being in need of elaboration. Second, it dealt with certain gaps and with two questions that had been left pending in 2016. It was, in that sense, and the same could be said of her work on the topic as a whole, complementary in nature.

The first remaining broad issue concerned the protection of the environment in non-international armed conflicts, in particular how the international rules and practices concerning natural resources might enhance the protection of the environment during and after such conflicts. Chapter II of the report addressed two specific areas of concern: the illegal exploitation of natural resources and the unintended environmental effects of human displacement. Needless to say, those problems were not exclusive to non-international armed conflicts, nor did they provide a basis for a comprehensive consideration of environmental issues relevant to such conflicts. At the same time, they were representative of problems that had been prevalent in current non-international armed conflicts and that had caused severe stress to the environment.

Reference could be made in that regard to research based on the post-conflict environmental assessments conducted since the 1990s by UNEP, the United Nations

Development Programme (UNDP) and the World Bank. That research had identified that both the use of extractive industries to fuel conflict and human displacement were among the most important pathways leading to direct environmental damage in conflict. The United Nations Environment Assembly had also recognized the pertinence of both issues for the protection of the environment.

The second remaining broad issue, which had been recurrently termed as “responsibility and liability, including the responsibility of non-State actors”, was dealt with in chapter III, which discussed the responsibility of non-State armed groups and individual criminal responsibility, as well as corporate responsibility. The question of the responsibility of non-State actors was viewed mainly in the context of the illegal exploitation of natural resources, for which chapter II provided the necessary background. Her intention in that chapter had been not to downplay the importance of environmental destruction caused by hostilities, whether in international or non-international conflicts. As for the latter, the recent UNEP environmental assessment concerning areas in Iraq affected by Islamic State in Iraq and the Levant was clear in that connection. It should nevertheless be recalled that the destruction of the environment during hostilities had already been addressed in the existing draft principles.

Chapter IV addressed certain issues of State responsibility, including reparation for environmental damage, as well as *ex gratia* payments and victim assistance. Given the broad nature of the protection of the environment in non-international armed conflicts and issues of responsibility and liability, their consideration within the confines of a single report was necessarily selective. The report was even more selective when it came to the proposed draft principles. That selectivity was less of a choice than a necessity that had been dictated by two considerations. First, it followed from an attempt to keep the number of new draft principles manageable in view of the time constraints under which the Commission worked, and also from a wish to complete the first reading of the draft principles at the current session. Second, it reflected the need to find sufficient support for the proposed draft principles in either established law or recognized best practice.

Her earlier reference to “gaps” related to the need to consolidate the set of draft principles through addressing specific proposals that had been made in the Commission regarding new draft principles. Two such proposals were presented in chapter V: one regarding the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (Environmental Modification Convention), and the other regarding the Martens clause. Chapter V also dealt with the two issues that had been left pending in 2016: the definition of the environment and the use of terms.

Introducing the main chapters, she said that the introductory section of chapter II referred to the severe environmental impacts of illegal resource extraction during and after a conflict, as well as to the established link between conflict and deforestation. It was pointed out that illegal mining could seriously impair the environment, pollute air, water and soil, and displace communities. While active hostilities during an armed conflict might cause extensive destruction to forests and woodlands, equally significant deforestation resulted from illegal logging during and after conflict.

The main focus of chapter II, section A, was the normative frameworks that had been developed to address the above-mentioned problems. The brief overview of the applicable rules of international law in section A showed that there was a firm basis in the law of armed conflict, as well as in international criminal law, for the prohibition of the worst forms of misappropriation of resources in armed conflict, which could be characterized as pillage.

The prohibition of pillage had been enshrined in the Fourth Geneva Convention, as well as in Additional Protocol II of 8 June 1977, and was therefore applicable in both international and non-international armed conflicts. Furthermore, it had been widely incorporated into national legislation, as well as into military manuals. There was also a considerable amount of case law from both the Second World War and modern international criminal tribunals confirming the criminal nature of pillage. It was generally agreed that the prohibition covered both organized pillage and isolated acts of indiscipline and also applied to all categories of property, whether public or private, including therefore

natural resources. That interpretation had been acknowledged by the International Court of Justice in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, in which it had found that Uganda was internationally responsible “for acts of looting, plundering and exploitation of ... natural resources” committed by members of the Ugandan armed forces in the territory of the Democratic Republic of the Congo. Post-conflict environmental assessments contained ample evidence of the devastating environmental impacts, both direct and indirect, of such exploitation.

For all those reasons, the prohibition of pillage was deemed to be a useful addition to Part Two, which contained draft principles reflecting those rules of the law of armed conflict that had direct relevance to the protection of the environment. Proposed draft principle 13 *ter* would be located at the end of Part Two of the draft principles.

The particular challenges related to the extraction of minerals and the exploitation of other high-value natural resources in areas of armed conflict and in post-conflict situations had also been addressed by way of non-binding standard-setting initiatives, including those intended to ensure that natural resources were purchased and obtained in a responsible manner.

Chapter II, section A, gave a brief overview of some such initiatives by the United Nations Security Council, the Organization for Economic Cooperation and Development (OECD), the International Conference on the Great Lakes Region, as well as the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters. Mention was also made of some transnational initiatives developed jointly by States, businesses and civil society.

In some cases, such initiatives had provided the impetus for States to incorporate similar standards into their national legislation so as to make them binding on corporations subject to their jurisdiction that operated in or dealt with conflict-affected areas. Legally binding instruments had also been developed at the regional level. Examples of such legally binding frameworks, either at the regional or national level, included the Protocol against the Illegal Exploitation of Natural Resources of the International Conference on the Great Lakes Region; the United States Dodd-Frank Wall Street Reform and Consumer Protection Act, section 1502 of which addressed conflict minerals originating in the Democratic Republic of the Congo; Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas; and Regulation (EU) No. 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who placed timber and timber products on the market.

All those initiatives, whether non-binding codes of conduct or binding legislation or instruments, were intended to prevent and suppress the illegal exploitation of natural resources. At the same time, they had different scopes and purposes and did not always display a clear environmental focus, or a focus on conflict situations. She therefore considered it useful to recommend that States should take the legislative and other measures necessary to ensure that corporations domiciled in their jurisdiction, when operating in areas of armed conflict or in post-conflict situations, exercised due diligence and precaution with respect to the protection of the environment. Such recommendation was contained in proposed draft principle 6 *bis*.

The language of draft principle 6 *bis* built on the existing frameworks of corporate due diligence, *inter alia* regarding how natural resources were purchased and obtained. At the same time, there was a specific focus on the protection of the environment and conflict situations. The proposed draft principle did not reflect a generally binding legal obligation and, accordingly, had been phrased as a recommendation. She suggested that the proposed draft principle, which concerned preventive measures, should be located in Part One, which included draft principles relating to the period before armed conflict and general principles not tied to any particular phase.

Turning to chapter II, section B, which addressed the second issue related to the protection of natural resources and the environment in armed conflicts, namely the environmental effects of human displacement, she said that population displacement was a

typical consequence of the outbreak of an armed conflict and one that might give rise to significant human suffering, as well as environmental damage. A 2014 study on the protection of the environment during armed conflict by the International Law and Policy Institute had noted that massive conflict-induced displacement of civilian populations “may have even more destructive effects [on] the environment than actual combat operations”. Non-international armed conflicts, in particular, had reportedly caused important derived effects in terms of displacement, including environmental strain in the affected areas.

As the Office of the United Nations High Commissioner for Refugees (UNHCR) had pointed out in its 2005 *Environmental Guidelines*, considerations relating to access to water, the location of refugee camps and settlements, as well as food assistance by relief and development agencies, “all have a direct bearing on the environment”. Uninformed decisions concerning the siting of a refugee camp in, or near, a fragile or internationally protected area might result in irreversible – local and distant – impacts on the environment. Areas of high environmental value suffered particularly serious impacts that might be related to the area’s biological diversity, its function as a haven for endangered species or the ecosystem services that they provided.

UNEP, the International Organization for Migration, the World Bank and the United Nations Environmental Assembly had similarly drawn attention to the environmental impact of displacement. Furthermore, the 2012 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) required States parties to “take necessary measures to safeguard against environmental degradation in areas where internally displaced persons are located, either within the jurisdiction of the State Parties, or in areas under their effective control”. It should also be recalled that, in the Sixth Committee, a number of States had specifically called for the inclusion of the impacts of displacement in the current topic.

Proposed draft principle 14 *bis* on human displacement addressed both States and other actors. Such other actors might include United Nations agencies, other international organizations, international donors and development agencies, as well as international NGOs. The proposed draft principle also included a reference to relief for displaced persons, as well as local and host communities. That reference had been deemed necessary in order to prevent the draft principle from being portrayed as setting the environment against displaced persons, when the two, in reality, were dependent on each other. Better environmental governance increased resilience for host communities, displaced persons and the environment as such. It was proposed that draft principle 14 *bis*, also phrased as a recommendation, should be placed in Part Three.

Chapter III, on the responsibility and liability of non-State actors, built on the recognition that, in addition to parties to a conflict, multiple other actors might be present in conflict areas and be involved in causing environmental harm. The chapter considered in particular three categories of non-State actors: non-State armed groups, multinational enterprises, including private military and security companies, and individuals. Individual criminal responsibility was obviously a cross-cutting category applicable, *inter alia*, to leaders and members of armed groups and persons representing private companies. Other categories of non-State actors that might be present in conflict zones, such as international organizations, criminal groups and NGOs, had not been considered. In that regard, chapter III followed the working definition used by the International Law Association in its 2016 final report on non-State actors.

Section A.1 of chapter III summarized relevant developments regarding the establishment of the responsibility of non-State armed groups. It examined the international legal rules that could be seen as binding on such groups, unilateral commitments and special agreements, such as peace agreements, as well as the role that armed non-State groups might have in the enforcement of applicable legal rules. While there was a certain amount of practice in all those areas, it had to be concluded that the international responsibility of non-State armed groups was still an emerging concept. Individual criminal responsibility continued to provide the primary basis for holding leaders and members of non-State armed groups responsible for violations of the law of armed conflict or international criminal law.

As far as individual criminal responsibility was concerned, section A.2 focused on the Rome Statute of the International Criminal Court, drawing attention, *inter alia*, to the considerable latitude of the Court in ordering reparations which might also entail environmental remedies. Reference was also made to the 2016 policy paper on case selection and prioritization of the Office of the Prosecutor of the Court, in which it indicated that the Office would give “particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, *inter alia*, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land”. However, to date, environmental considerations had been expressly referred to only in the indictment of Omar Al Bashir in *Situation in Darfur, The Sudan*.

Chapter III, section B, focused on corporate responsibility and liability, an area that provided a better basis for a draft principle on the responsibility of non-State actors than the areas considered in the previous section.

The illegal exploitation of natural resources thrived during armed conflicts because it was part of international supply chains, which meant that problems could rarely be solved between the parties to the conflict alone. While it might be useful, for instance, to address natural resources in peace agreements, research showed that such provisions had limited value and effectiveness when the resources in question were traded internationally. That recognition had provided the background for the development of the non-binding normative frameworks for resource extraction and trade, as well as the legal regulation at the regional and national levels discussed in chapter II. It was also relevant to the question of corporate responsibility and liability. Proposed draft principle 13 *quinquies* was therefore closely related to the draft principle on corporate due diligence proposed in chapter II.

According to paragraph 1 of proposed draft principle 13 *quinquies*, States should take the necessary legislative and other measures to ensure that corporations domiciled in their jurisdiction could be held responsible for harm caused to human health and the environment in areas of armed conflict or in post-conflict situations. In addition to the corporate due diligence initiatives mentioned in chapter II, three further normative developments provided the relevant background and basis for paragraph 1.

First, reference could be made in that connection to the business and human rights framework, including the United Nations Guiding Principles on Business and Human Rights, which required business enterprises to respect human rights and international humanitarian law when operating in conflict situations, and the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, which included detailed guidance on international environmental standards.

Second, reference could be made to the jurisprudence of United Nations human rights treaty bodies, such as the Committee on Economic, Social and Cultural Rights and the Human Rights Committee. For instance, in its general comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, the Committee on Economic, Social and Cultural Rights had required States parties to take the steps necessary to “prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction”, “especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective”. United Nations human rights treaty bodies had also addressed the issue in their comments on individual State situations.

Third, reference could be made to national case law on corporate wrongdoing abroad. The cases cited concerned violations of national law or violations of international law, such as serious human rights violations or international crimes, including in situations of armed conflicts. Some of those cases related to the causation of environmental harm. Section B.1 offered a brief overview of jurisprudence based on the Alien Tort Statute of the United States of America and provided further examples of national case law from Europe, from both common law and civil law jurisdictions. It should be noted in that regard that in Europe claims in the area under consideration had been filed with domestic courts, but that process had been facilitated by a regional legal framework based on two European Union regulations that set uniform rules for all member States, as well as for Switzerland, Norway and Iceland.

Legally binding obligations could be imposed on corporations under both the domestic law of the State in which they were domiciled and that of the State in which they conducted their operations. In that regard, it was worth pointing out that the available case law on corporate criminal and civil responsibility covered a much wider geographical area than that discussed in the report.

In situations of armed conflict, however, or in the aftermath of a conflict, the host State might not be in a position to enforce its legislation effectively. It might be recalled that the collapse of State and local institutions was a common consequence of armed conflict and one that often cast a long shadow, as it undermined law enforcement, the protection of rights and the integrity of justice. Where that was the case, the home State of a multinational enterprise had a particularly important role in providing effective remedies for alleged wrongdoings. The same applied to the responsibility and liability of private military and security companies, which were discussed in chapter III, section B.2. On that basis, paragraph 1 of proposed draft principle 13 *quinquies* addressed the home States of corporations that operated in areas of armed conflict or in post-conflict situations.

In that context, she also wished to refer to the recent judgment of the Supreme Court of the United Kingdom in *Vedanta Resources PLC and another (Appellants) v. Lungowe and others (Respondents)*, an environmental case concerning the release of toxic substances into a watercourse in Zambia by a mining company that was a subsidiary of the British multinational Vedanta Resources PLC. The central question before the Supreme Court at that stage had concerned the appropriate forum; the Court had decided that the case should proceed through the English courts.

That was an interesting decision, as the allegedly wrongful acts or omissions had taken place in Zambia, the damage had occurred in Zambia and the subsidiary that operated the mine was subject to Zambian legislation. There were, furthermore, a number of practical considerations that pointed to Zambia as the proper forum. Importantly, the competence, independence and integrity of the Zambian courts had not been called into question.

The Supreme Court had nevertheless concluded that there would be a real risk, indeed a probability, that the claimants, a group of some 1,826 poor villagers whose health and farming activities had been harmed by repeated discharges of toxic matter into the watercourse since 2005, would not obtain substantial justice in Zambia. Two considerations were of particular relevance: the absence of funding and the non-availability of legal advice, which put the villagers in a weak position in a complex litigation against the subsidiary, the largest private employer in the country.

It was firmly established that the obligation to respect, protect and ensure human rights entailed an obligation on States to take appropriate legislative or other measures to regulate private companies, including private security providers, so as to prevent violations of the relevant rights and provide for appropriate remedial processes. The extent to which such an obligation applied extraterritorially was less settled and also depended on the particular circumstances of each case. It was recognized in the report that different views had been expressed with regard to the extraterritorial reach of human rights obligations. The word “should” was used in paragraph 1 of the proposed draft principle so as to indicate that the obligation in question had a normative basis without claiming that it was a legally binding obligation with clear contours.

Paragraph 2 addressed the question of the so-called “corporate veil”, a notion that referred to how corporate groups were organized, including the separate legal personalities of the parent company and its subsidiary in another country. In that regard, reference could be made to some of the national case law presented in Section B.1 concerning a duty of care on the part of the parent company, which would justify “piercing the corporate veil” under particular circumstances.

General comment No. 24 (2017) of the Committee on Economic, Social and Cultural Rights set out the duty of States parties to the Covenant to address the legal and practical challenges of holding companies responsible for activities in other countries “in order to prevent a denial of justice and ensure the right to effective remedy and reparation”.

The wording of paragraph 2 was not meant to imply the existence of a legal duty, but to make an appeal to home States, which had a very positive role to play in that regard.

With regard to State responsibility for environmental damage caused in conflict, chapter IV, section A, gave an account of the relevant rules of international law and a brief overview of existing international practice. Environmental damage caused in conflict had first been recognized as compensable under international law by the United Nations Compensation Commission established by the Security Council in 1991 to handle claims concerning the invasion and occupation of Kuwait by Iraq, but subsequent international practice had been fairly limited.

In that regard, it should also be pointed out that, often, environmental harm in conflict did not violate the law of armed conflict and did not give rise to international responsibility on that ground. It was telling that the United Nations Compensation Commission, the Eritrea-Ethiopia Claims Commission and the International Court of Justice, the latter in its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and partly also in the above-mentioned *Armed Activities* case, had relied on other grounds for responsibility, namely *jus ad bellum* and human rights law.

It was also important to note the complex nature of many current armed conflicts, which resulted from the participation or involvement, direct or indirect, of multiple States. That might also entail different obligations and thresholds for their violation in the case of environmental damage.

Chapter IV, section A, also included an analysis of the articles on responsibility of States for internationally wrongful acts aimed at determining how such complications could be addressed from the point of view of State responsibility. It was submitted that article 16 on aid or assistance and article 47 on the plurality of responsible States provided a solid basis for addressing at least some such situations. There was nevertheless fairly little practice for either article, particularly in relation to conflict situations.

Common article 1 of the Geneva Conventions of 12 August 1949 was also mentioned in section A as a special regime that seemed to set stricter limits on aid and assistance in conflict situations than did article 16.

While that section of the report responded to the request to address questions of responsibility and liability, it did not provide a basis for a substantive draft principle. However, as the draft principles touched on issues of remediation and reparation, it seemed advisable to state expressly that they were without prejudice to the rules of State responsibility. A provision of that kind was proposed as paragraph 1 of draft principle 13 *quater*.

Chapter IV, section B, dealt with the question of reparation for environmental harm. Environmental damage presented courts with a number of specific difficulties, for example the establishment of a causal link. Important advances had nevertheless been made in that area in recent decades. In that regard, the experience of the United Nations Compensation Commission was particularly rich and still provided an important point of reference. Methods of assessment and valuation of environmental damage had also been developed and tested in recent cases of the International Court of Justice and by investment arbitration tribunals.

The United Nations Compensation Commission provided the sole example of an award of compensation for conflict-related environmental damage, but the compensation judgment of the International Court of Justice in *Armed Activities* was expected within a year. Reference could also be made to the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory established in follow-up to the above-mentioned advisory opinion of the International Court of Justice, although the functions of the Register of Damage were limited to the classification and consideration of claims and did not extend to compensation.

Concerning the general principles of reparation, reference could be made to the Commission's own work, namely the articles on State responsibility and the draft principles

on the allocation of loss in the case of transboundary harm arising out of hazardous activities.

One clear conclusion that could be drawn from the foregoing concerned the compensability under international law of pure environmental damage. According to the International Court of Justice in its compensation judgment in *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, it was consistent with the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation was due for “damage caused to the environment, in and of itself, in addition to expenses incurred by an injured State as a consequence of such damage”.

The United Nations Compensation Commission had concluded in a 2005 report (S/AC.26/2005/10, para. 58) that there was “no justification for the contention that general international law precludes compensation for pure ecological damage”. The Commission had taken the same position in the articles on responsibility of States for internationally wrongful acts and the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, as had the International Law Institute in its own work. That conclusion was reflected in paragraph 3 of proposed draft principle 13 *quater*.

Chapter IV, section C, complemented the section dealing with reparation based on a legal obligation by offering a few examples of *ex gratia* payments and victim assistance. Those concepts shifted the focus from the liable party to the party suffering the harm and from the legal violation to the injury suffered by the victim. While most of the examples concerned monetary compensation, or reparation that had an economic component, the victim’s perspective might also support broader and needs-based assistance.

Ex gratia payments and other types of remediation without the establishment of responsibility might also be available when there was no, or no proven, violation of the applicable legal norms. They could be seen as pragmatic measures that provided a limited contribution to the implementation of the relevant international norms in the absence of full liability and could also prove useful in the area of environmental remediation.

Those considerations were reflected in paragraph 2 of proposed draft principle 13 *quater*. That paragraph was also closely related to draft principle 15 on post-armed conflict environmental assessments and remedial measures. She suggested that draft principle 13 *quater* should be placed in Part Three of the draft principles.

Two additional draft principles were proposed in chapter V, one modelled on the Environmental Modification Convention and the other on the Martens clause. Concerning the Environmental Modification Convention, it had been proposed at the Commission’s seventieth session that the prohibition on the use of environmental modification techniques for military or any other hostile aims having widespread, long-lasting or severe effects as the means of destruction, damage or injury to another State should be considered in the report and a draft principle proposed along those lines.

Reference was also made to the draft guidelines on the protection of the atmosphere. Draft guideline 7, which had been adopted on first reading at the Commission’s seventieth session, concerned intentional large-scale modification of the atmosphere. The relevant section of the commentary relied on the Environmental Modification Convention for its definition of “activities aimed at intentional large-scale modification of the atmosphere”. The wording of proposed draft principle 13 *bis* was based on article I (1) of the Environmental Modification Convention, and it was made clear that the prohibition applied only between States. It could be argued that the obligation in question applied only to States parties to the Environmental Modification Convention, although it seemed that the list of States parties included most of those with the capacity to develop and use environmental modification techniques. The study of the International Committee of the Red Cross on customary international humanitarian law also linked that obligation to widespread State practice concerning the prohibition of using the environment as a weapon.

On that basis, another way of formulating the draft principle might be to refer to the prohibition on using the environment as a weapon, but such drafting would no longer be aligned with article I of the Environmental Modification Convention. If there was any

uncertainty regarding the customary status of the provision, and she recognized that there might be, she would propose adding language such as “in accordance with its international obligations” to proposed draft principle 13 *bis* in order to emphasize that it was a treaty-based obligation.

As amended, proposed draft principle 13 *bis* would thus read:

“Environmental modification techniques

States shall refrain, in accordance with their international obligations, from military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to another State.”

She proposed that draft principle 13 *bis* should be placed in Part Two.

The Martens clause had been mentioned in the Commission’s earlier work on the topic and had also been raised in the Drafting Committee the previous year. In general, the Martens clause became relevant in circumstances in which treaty law was insufficient or non-existent. In particular, the reference to the “dictates of public conscience” underscored the importance of an evolutionary reading of the rules of international humanitarian law. It could also be said, as one scholar had noted, that by virtue of the Martens clause, international humanitarian law itself recognized that its treaties were not comprehensive and that, as a discipline, it could not be insulated from developments occurring in other fields of international law. That aspect was of particular relevance in the area of environmental protection, as the understanding of the environmental impacts of conflict had developed considerably since the adoption of the treaties codifying the law of armed conflict.

It could be said that the Martens clause provided additional support for the Commission’s approach to the topic, in particular its decision to take into account relevant rules and principles of international human rights law and international environmental law in its interpretation of the law of armed conflict with a view to enhancing the protection of the environment.

The Martens clause had been invoked specifically in the context of the protection of the environment in armed conflict. For instance, the ICRC guidelines for military manuals and instructions on the protection of the environment in times of armed conflict stated: “In cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, the principles of humanity and the dictates of public conscience.” Furthermore, the World Conservation Congress of 2000 had adopted a recommendation containing an environmental Martens clause. It had been adopted by consensus and was meant to apply during peacetime as well as during armed conflicts.

The Commission, too, had referred to the Martens clause in the context of environmental protection in its commentaries to the draft articles on the law of non-navigational uses of international watercourses and those to the draft articles on transboundary aquifers.

As for the topic at hand, it had been pointed out that the Martens clause was of an overarching character and therefore relevant to all three phases of the conflict cycle. For that reason, proposed draft principle 8 *bis* would be placed in Part One of the draft principles. The wording of the proposed draft principle closely followed the modern formulation of the Martens clause and also appeared in the ICRC guidelines. A reference to the interests of present and future generations had nevertheless been added.

Chapter V, section D, dealt with the definition of the environment and the use of terms. Concerning the definition of the environment, it might be recalled that, in her preliminary report, the first Special Rapporteur, Ms. Jacobsson, had provided a tentative definition of the term “the environment”. However, its purpose had merely been to facilitate a discussion of key terms; it had served as a working definition while the option of not defining the concept at all had been maintained. The first Special Rapporteur had later

made it clear that her preference had been not to include definitions in the set of draft principles.

Section D gave an overview of the definitions of the environment used in international environmental law, in which there was no agreed definition of the term “the environment”. The lack of an agreed definition reflected the nature of “the environment” as a concept that reacted and adapted to developments in knowledge about the environment and how its elements interacted. The environment itself was also constantly changing, owing both to human influence and to natural changes. For those reasons, the development of the term “the environment” depended ultimately on science. Those factors reduced the usefulness of fixed definitions in international environmental law and increased the risk that they might become outdated.

She proposed that no definition of the term “the environment” should be given in the draft principles. In that regard, it should be recalled that the Commission had not defined that term in either the draft articles on the law of non-navigational uses of international watercourses or the draft articles on transboundary aquifers, even though it was frequently used in both.

The second question concerned the need to harmonize the use of terms in view of the difference between Parts One, Three and Four, in which the term “the environment” was used, and Part Two, in which, in accordance with the language of Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, reference was made to “the natural environment”. The Commission had agreed to return to the question of whether “the environment” or “the natural environment” was preferable for all or some of the draft principles.

In her view, the use of two different terms was a temporary solution. In addition, in view of the comments made by States in the Sixth Committee, it seemed obvious that the Commission should seek to use consistent terminology throughout the draft principles.

She proposed to use the term “the environment” throughout the draft principles. That proposal was supported by a practical consideration, namely that the term “the natural environment” would not be appropriate in all the draft principles and might needlessly limit the scope of certain provisions.

There were other, more general considerations to be made. In particular, recent research underscored the need to consider human activities and the environment as an interactive system instead of focusing exclusively on one element. The environment thus represented a complex system of interconnections where humans and the natural environment interacted with each other in different ways that did not permit them to be treated as discrete. The same conception was evident in the concept of the “Anthropocene” as a proposed term for the current geological epoch.

She proposed that the term “the environment” should be used consistently in all the draft principles. It could be explained in the general commentary that, as far as Part Two was concerned, that term had been chosen for the purposes of the present draft principles and was without prejudice to the application and interpretation of Additional Protocol I to the Geneva Conventions.

She hoped that the Commission would be able to complete the first reading at the current session.

The meeting rose at 4.10 p.m.