

Provisional

For participants only

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Seventy-first session (first part)

Provisional summary record of the 3465th meeting

Held at the Palais des Nations, Geneva, on Thursday, 16 May 2019, at 10 a.m.

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Present:

<i>Chair:</i>	Mr. Šturma
<i>Members:</i>	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	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
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewelyn	Secretary to the Commission
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The meeting was called to order at 10.05 a.m.

Peremptory norms of general international law (*jus cogens*) (agenda item 5) (*continued*)
(A/CN.4/727)

Mr. Tladi (Special Rapporteur), summing up the debate on his fourth report on peremptory norms of general international law (*jus cogens*) (A/CN.4/727), said that the large number of contributions to the discussion attested to the importance of the subject. As he agreed broadly with some of the criticisms made in respect of the report, he would concentrate in his summing up on the other points raised. In particular, he took the view that Mr. Murphy's rebuttal of the description of the Commission's previous consideration of the topic mischaracterized the report. The decision to retain the draft conclusions in the Drafting Committee until they were complete had been adopted as a compromise after certain members of the Commission had expressed dissatisfaction at the "fluid approach" proposed in the first report. The Commission had accepted the compromise approach, which had been communicated to States in its 2016 report. Moreover, in each of the previous three years, the topic had been considered in the second half of the Commission's session, with the result that the presentation of commentaries in the same year had been impractical.

In commenting on several States' criticisms concerning the lack of State practice to justify the draft conclusions, Mr. Murphy had taken one line from the report out of context and had misinterpreted it to imply that the Special Rapporteur considered a single item of practice to be sufficient for the establishment of a rule. The rest of the paragraph in the report showed that that was not the case and offered multiple sources of evidence of State practice for various rules. As to the reliability of the assertion in the report that no State had pointed to a single draft conclusion that was entirely unsupported by practice, the statement that Mr. Murphy had quoted, which had been made by Slovakia, had not identified any specific draft conclusion that was not backed up by practice, but had simply stated that several draft conclusions were not based on State practice.

Furthermore, Mr. Murphy had quoted a statement made by the United Kingdom to the effect that there was no State practice to support the contention that a State could, on the basis of an assertion of a breach of a *jus cogens* norm, refuse to comply with a binding Security Council resolution. However, that statement also did not point to any draft conclusion that was not backed up by practice, as no draft conclusion proposed in the third report provided for such a refusal. The primary concern expressed by the United Kingdom had been that a State might decide not to abide by a Security Council resolution if it determined unilaterally that the resolution conflicted with a peremptory norm. The issue was thus not one of principle, but rather concerned the implications of unilateral decisions. Draft conclusion 17 did not justify unilateral decisions not to comply with Security Council resolutions any more than other draft conclusions permitted unilateral decisions.

The Drafting Committee had resolved the matter by broadening the scope of draft conclusion 14 to encompass sources of international law other than treaties. Mr. Murphy's suggestion that the fourth report presented draft conclusion 14 as being based on customary international law was incorrect: the draft conclusion had been the result of a compromise reached in the Drafting Committee and had never been presented as reflecting customary international law, as was clear from the commentary that had been circulated to the Commission members.

Members generally agreed with the report's content on the question of peremptory norms of regional international law, or regional *jus cogens*, particularly the point that there was little practice supporting the concept of regional *jus cogens*. Only two members had disagreed with that assessment: Mr. Cissé apparently considered that article 53 of the 1969 Vienna Convention on the Law of Treaties included regional *jus cogens* and that regional *jus cogens* was, in turn, an integral part of that article; and Mr. Nolte seemed to take the view that article 53 was not all-encompassing. Otherwise, the only points of disagreement concerned the way in which the lack of support for regional *jus cogens* in practice should be reflected in the commentaries. Many members agreed that the idea of regional *jus cogens* was incompatible with the universal character of peremptory norms. Others had suggested that the commentaries should not categorically rule out the existence of regional

jus cogens but should leave open the possibility of future developments in that area. As several members had pointed out, the examples offered by Mr. Nolte as regional *jus cogens* were actually examples of particular rules in regional systems that had relatively higher priority than other rules in those systems. Mr. Šturma had mentioned various terminological alternatives that, although they described systems of hierarchy, were not themselves *jus cogens*. Mr. Grossman Guiloff, while agreeing with Mr. Nolte's assessment, had suggested that the examples that the latter had given formed another category of rules whose effects might be analogous to, but could never be the same as, those of peremptory norms. In general, the question of regional *jus cogens* would best be addressed in the commentaries.

The draft commentaries had already been circulated and would be revised in the light of the members' comments, notably those calling for nuance and caution. He took note of the three points made by Mr. Hassouna: that there was no support in practice for the notion of regional *jus cogens*; that there was a doctrinal debate among legal scholars concerning the possibility of regional *jus cogens*; and that regional *jus cogens* was distinct from unifying and binding norms in different regions. Most members had also made the point that, whatever the merits or demerits of regional *jus cogens*, the topic under consideration was limited to *jus cogens* of a general nature. A final point worth adding, made by Mr. Gómez-Robledo, was that regional norms might give rise to peremptory norms of general international law.

As to the proposed list of *jus cogens* norms, although the terms "non-exhaustive" and "illustrative" were used interchangeably in the report, he preferred the former, because the latter might be taken to suggest that other norms not included in the list would necessarily have to be similar in type to those proposed. The fact that the norms listed pertained mainly to the areas of human rights and peace and security might suggest that norms in other areas such as environmental law would not be able to achieve *jus cogens* status.

On the question of whether and where such a list should be included, he had hoped that the Commission would be able to agree on a middle ground between a full list and no list at all; that was what he had attempted to offer, by including norms that had been recognized by the Commission in the past as having peremptory character. A number of possible locations for a list had been proposed: Sir Michael Wood's suggestion that it should be included in the commentaries was not really a middle ground, as the Commission had already taken that approach in the past; the proposal by Ms. Galvão Teles and Mr. Hmoud that the list should be included in an annex might represent an acceptable compromise if the list was properly presented; and the suggestion by Mr. Murphy and Sir Michael Wood that the list should be prefaced with a statement to the effect that it contained *jus cogens* norms that had previously been identified by the Commission might also form the basis for a compromise. Most members seemed to support the inclusion of a list of some sort, although their preferences varied, with some members not wishing to simply reproduce a list of norms previously identified by the Commission and favouring the inclusion of a fuller list, others questioning the value of the existing list but agreeing to its inclusion if its provenance was clearly stated, and one member, Mr. Valencia-Ospina, expressing a willingness to accept the inclusion of a list if it was accompanied by a clarification that it did not constitute a normative determination by the Commission.

Some members, including Sir Michael Wood and Mr. Laraba, had expressed the view that what the Commission had produced in the commentary to draft article 50 of the 1966 draft articles on the law of treaties was not a list of norms, as only the prohibition of the use of force was expressly identified as having the character of *jus cogens*. Those arguments were acknowledged in the report, which also mentioned arguments that pointed to the opposite conclusion. That was why the report referred to the Commission's "ambiguous" attitude at the time towards the other examples of rules of *jus cogens*.

A second point, which had been raised by several members, concerned the choice to rely on the commentary to the 2001 articles on responsibility of States for internationally wrongful acts as the basis for the list, to the exclusion of the commentary to the 1966 draft articles on the law of treaties, given that important norms such as the equality of States, the protection of human rights and the principle of self-determination were mentioned in paragraph (3) of the commentary to draft article 50 of the 1966 text. In response, he noted

that the proposed list was non-exhaustive and thus did not imply that any norms not included were not peremptory norms of general international law. Furthermore, the ambiguity as to the status of the norms mentioned in the 1966 commentary implied that the draft conclusion should preferably rely on the commentary to the 2001 articles. Lastly, paragraph (3) of the commentary to draft article 50 of the 1966 draft articles indicated only that “other members” had been in favour of mentioning those other norms.

The argument put forward by Mr. Zagaynov and Mr. Valencia-Ospina that a list could be invoked as a basis for disqualifying any other norms from peremptory status was not borne out by history. For example, the Commission had not considered self-determination to be a peremptory norm in 1966, but that principle had since been accepted as such. Furthermore, the commentaries to articles 26 and 40 of the 2001 articles on State responsibility did not suggest that the norms to which they referred were applicable only to the topic of State responsibility. In fact, those norms applied much more broadly, including in relation to the enforcement of human rights law and the application of treaty law.

Some members supported the Special Rapporteur’s proposed draft conclusion 24 but had nevertheless raised some fundamental issues concerning the methodology used. The first issue concerned the time needed to compile a list of *jus cogens* norms. During the consideration of the topic in the Working Group on the long-term programme of work, the members’ former colleague Mr. Forteau had said that that task could take 5 minutes or 50 years, depending on whether the Commission relied on *jus cogens* norms that it had already identified or embarked on a detailed study of each norm proposed for the list, including those for which there was not enough evidence. It was the former approach that was advanced in the report as a middle ground.

The second methodological issue concerned the lack of depth and breadth in the analysis. One aspect of that criticism was the lack of nuance in the description of the norms themselves; several members had argued that an in-depth study of each norm was required. However, that suggestion ignored the purpose of the report, which was not to elaborate a list, but rather to reproduce a pre-existing list with an *ex post facto* assessment of whether there was support for the norms it contained. To do anything more than that would be impossible and would exceed the scope of the current topic. That type of methodological rigour could be expected only for a substantive, primary-rule-oriented topic. His approach had been to modestly repack lists that had been produced by previous members of the Commission. In the light of the Commission’s frequent references to the need for consistency with its previous work, he presumed that that was an acceptable approach. Furthermore, there seemed to be almost complete agreement that the norms on the proposed list qualified as peremptory norms. As some members had said, the matter at hand concerned broad principles and thus did not require detailed analyses of the scope and application of each principle.

Another point raised was that the approach adopted was not faithful to the one used in developing draft conclusions 4 to 9. That criticism seemed to expect a degree of rigour under the current topic that had never been expected under other topics. For example, under the topic that the Commission had most recently finalized, that of the identification of customary international law, which was also a methodological topic, only one of the conclusions adopted was not purely methodological: the one on the persistent objector rule. He did not recall that, in the justification for that conclusion, there had been any clear expression of the formative elements of customary international law, namely widespread and general practice and, separately, *opinio juris*. Members who were insisting, in the case of *jus cogens*, on the requirement of support by “a very large majority of States” had not raised the questions of widespread practice or widely held *opinio juris* in the context of that other topic.

A few members had said that the Commission should not take a step back from the steps forward it had taken in the past. He agreed with Ms. Escobar Hernández that the non-inclusion of a list, no matter how carefully it was explained, would be taken to imply that the current Commission members were questioning decisions taken by their predecessors.

Other members had seemed to suggest that the Commission should indeed call those decisions into question, on the grounds that previous references to *jus cogens* norms had

not been based on in-depth analyses. However, that could set a dangerous precedent, particularly given that States had not challenged those earlier conclusions, but had in fact embraced them. Mr. Valencia-Ospina had made a valuable point, noting that the Drafting Committee had agreed not to refer, in draft conclusion 9, to the Commission's own role in determining the peremptory character of norms of general international law, as it was not the only body that did so. However, draft conclusion 9 was methodological in nature, whereas draft conclusion 24 did not have the same normative quality and was intended to be a factual statement.

As to the suggestion of an overreliance on the decisions of international courts and tribunals, he noted that decisions of the International Court of Justice and, to a lesser extent, decisions of other international courts and tribunals were the most frequently used source for the Commission's draft texts. They constituted an important, even if subsidiary, means of determining the peremptory character of norms, as had been noted by a number of members. That was particularly true of international court decisions that had not been challenged by States. For instance, although, in his view, the decision of the International Court of Justice in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* had been wrong because it had not been based on practice, States had acquiesced to that decision, which had come to be accepted as customary international law.

Mr. Murphy had also argued that, because the judicial decisions did not state that the principle of self-determination was a peremptory norm of general international law, the report was relying on decisions concerning obligations *erga omnes* as implying peremptory status, even though not all obligations *erga omnes* related to peremptory norms. Mr. Valencia-Ospina, while concurring with that view, had said that he did not believe that only the explicit use of the words "*jus cogens*" or "peremptory" could constitute evidence of the peremptory character of a norm. Mr. Aurescu had suggested that the report could have included more extensive discussion of the relationship between obligations *erga omnes* and peremptory norms; that relationship had in fact been discussed in the third report (A/CN.4/714). Although not all obligations *erga omnes* flowed from peremptory norms, there was at least a substantial overlap between the two, as the Commission noted in paragraph (7) of the commentary to part two, chapter III, of the articles on State responsibility.

As to the idea put forward by Mr. Murphy that obligations *erga omnes* without a peremptory norm connection could be described as obligations that "operated in common spaces", not all such obligations were obligations *erga omnes*. The right to self-determination did not relate to common spaces. If obligations *erga omnes* flowed from both peremptory norms and some rules concerning common spaces, it would be reasonable to conclude, given that self-determination was not related to common spaces, that the identification, by the International Court of Justice, of the *erga omnes* nature of self-determination implied that that norm had a peremptory character. Furthermore, when the Court referred to obligations *erga omnes* in relation to self-determination, it presumably meant obligations *erga omnes* flowing from peremptory norms, since it always grouped self-determination together with other norms that were generally accepted as peremptory norms, without any reference to common spaces in that context.

The Commission was entitled to engage in some deductive reasoning, as the United Kingdom House of Lords had done in its decision in *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, in which, in describing the consequences of a breach of a peremptory norm, specifically the duty to cooperate found in article 41 of the articles on State responsibility, it had relied on the International Court of Justice advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, which itself referred only to obligations *erga omnes* and not to peremptory norms.

As to some members' insistence that a source could be regarded as referring to *jus cogens* or peremptory norms only if it used those particular words or phrases, his view was that the Commission should not take such a mechanical approach, since interpretation, analysis and deduction ought to be an inherent part of its work. The draft conclusions were based on evidence that the international community of States as a whole accepted and recognized the norms in question as ones from which no derogation was permitted. Thus,

indirect evidence, such as the description of a norm as “intransgressible” or the application of the consequences of a breach of peremptory norms, including article 41 of the articles on State responsibility or article 53 of the Vienna Convention, constituted relevant evidence.

In General Assembly resolution 33/28, States acting collectively had, in a classic case of the application of article 53, conditioned the validity of an agreement on that agreement’s consistency with the norm of self-determination, and that constituted evidence. He was not suggesting that the resolution or any other material, by itself, provided conclusive evidence of acceptance and recognition by the international community of States. That conclusion could be drawn only from the totality of the evidence.

It had also been suggested in the discussion that the dictum of the Federal Constitutional Court of Germany that referred to self-determination as a peremptory norm somehow did not qualify as evidence because the Court had also referred to other norms, such as protection of the environment, that were not on the Commission’s proposed list of *jus cogens* norms. However, neither the conclusions on identification of customary international law nor the commentary thereto provided for a proposition to be disregarded if there was an accompanying proposition that the Commission did not take up.

As to the comments noting that the International Court of Justice, in its advisory opinion in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, had declined to reach any conclusion on the peremptory character of the right to self-determination, he noted that the Court had not said that self-determination was not a peremptory norm of international law. It had heard many views submitted by States to the effect that the right to self-determination was of a peremptory character, and several judges had alluded to that view in separate opinions without denying the peremptory status of that right. Furthermore, the Court had unequivocally declared that all States Members of the United Nations had the duty to cooperate in order to bring to an end the continued breach of the right to self-determination. Moreover, in the Commission’s general commentary to part two, chapter III, of the articles on State responsibility, the duty to cooperate was identified as a particular consequence of serious breaches of peremptory norms of general international law, not a general consequence of breaches of international law, or even a general consequence of breaches of obligations *erga omnes*. It was one of the “additional consequences” attracted by serious breaches of peremptory norms. If the Commission accepted the correctness of both the *Chagos Archipelago* advisory opinion and its own statement in the commentary to the articles on State responsibility, it could only conclude that the Court had, without using the words, accepted self-determination as a peremptory norm of general international law. That conclusion was supported by the advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

In the *Chagos Archipelago* proceedings before the International Court of Justice, several States had identified self-determination as a peremptory norm of general international law. Notably, not a single State had advanced a contrary position, even though States that held such a position might have been expected to respond to the General Assembly’s reference to the issue in its request for an advisory opinion. The suggestion that the fact that those arguments had not been taken up by the Court indicated that the right to self-determination was not a peremptory norm of general international law implied that State practice in the form of public statements before the International Court of Justice was regarded not only as irrelevant but even as negated, if those statements were not taken up by the Court.

On the question of whether State practice was sufficient to meet the “very large majority of States” criterion, his view was that the requirement appeared to have been met in the context of self-determination. There was no need to show that every State had actively and explicitly expressed its opinion or attitude in respect of that norm, as silence could count as State practice and be evidence of *opinio juris*, subject to the qualifier identified in the conclusions on identification of customary international law. In cases where many States had expressed themselves as to the peremptory character of a norm, it might be sufficient to show that few or no other States had objected, provided that they had been in a position to react and would have been expected to do so. As he had noted in

reference to the *Chagos Archipelago* advisory opinion, no State had contradicted the views expressed by other States concerning the peremptory status of self-determination.

He could give many other examples of statements demonstrating that the “very large majority” requirement had been met. According to the summary records of Sixth Committee meetings, at the twenty-first session of the General Assembly, Ecuador had said that “the prohibition of the threat or use of force, respect for the territorial integrity and political independence of States, the self-determination of peoples ... were peremptory rules of international public policy”; the Ukrainian Soviet Socialist Republic had stated that “those peremptory norms could be defined by reference to the law of the United Nations Charter and included ... self-determination of peoples”; and the Union of Soviet Socialist Republics had said that “*jus cogens* should cover, first, the most important principles of the Charter, and in particular the principles of the prohibition of aggressive war and any use of force contrary to the purposes of the Charter ... equal rights and self-determination of peoples”. Similarly, Pakistan had referred to self-determination in its list of examples of peremptory norms; Somalia had said that it was “especially gratified to note that the draft gave due recognition ... to the effects on treaties of the peremptory norms of *jus cogens*, which included the rule of self-determination”; and Czechoslovakia had recognized the principle of equal rights and self-determination of peoples as a peremptory rule of conduct in inter-State relations. At subsequent sessions, Afghanistan had described self-determination as a “universally accepted and fundamental principle ... which was a cardinal principle of *jus cogens*”, and Trinidad and Tobago had also stated that the principle of equal rights and self-determination of peoples was a peremptory norm.

The only statement to the contrary that he had been able to find had been made by Israel during the Sixth Committee’s debate on the Commission’s report at the seventy-third session of the General Assembly. It seemed clear that the overwhelming majority of States believed the right to self-determination to be a peremptory norm, especially as so many States had expressed that conviction without being contradicted by other States.

On the question of whether the peremptory status of the right to self-determination could be invoked to justify the use of force, as in Mr. Murphy’s hypothetical example of an invasion by the United States of America into Venezuelan territory, in his view that example conflated the identification of a norm as *jus cogens* with the consequences of the peremptory character of a norm. The identification of self-determination as a peremptory norm in no way implied that a third State was entitled to use force against another State to give effect to self-determination. Recalling that article 41 of the articles on State responsibility provided that States had a duty to cooperate to bring to an end any breach of peremptory norms, he said that he wished to make two points. The first was that cooperation, by definition, did not include unilateral action; the second was that, under article 41, breaches were to be brought to an end “through lawful means”, which meant that the action taken must not conflict with the rules of international law, let alone with other peremptory norms.

If the implications of that hypothetical example were accepted, they would lead to absurd consequences. States would be permitted to breach peremptory norms of international law, such as the prohibition of torture, in order to prevent breaches of other peremptory norms, such as the prohibition of terrorism. In his view, the commentary to the articles on State responsibility was clear on that matter: if the prohibition of the use of force was a peremptory norm of general international law, then circumstances precluding wrongfulness could not be invoked by a State to preclude the wrongfulness of such an act, even if the circumstances related to the breach of a peremptory norm by another State. According to the commentary to article 26 of the articles on State responsibility, a genocide could not be advanced as a justification for the commission of a counter-genocide; similarly, a breach of the right to self-determination could not be used to justify a breach of the prohibition of the use of force.

He did not mean to suggest that there were no complicated issues with respect to the relationship between self-determination and the use of force. As Mr. Saboia had noted, one of the issues that might need to be taken into account with regard to self-determination was the question of the legitimate use of force. His own understanding was that, to the extent that the use of force was permissible under international law, it was limited to peoples

seeking self-determination and excluded third States. However, even that principle was not without complications, as was apparent from the example cited by Ms. Lehto, in which a number of States had voted against or abstained from voting on a General Assembly resolution concerning apartheid because the text included a reference to the right to take up arms in the fight for self-determination.

He had gone into some detail on the question of self-determination not only to demonstrate that some of the comments about a supposed lack of rigour in the report were at best an exaggeration, but also to show that, while the peremptory nature of that norm could be justified solely on the basis of the materials referred to in the report, to go into such detail in respect of the substance of every norm would not be possible if the topic was to remain a methodological one. Indeed, the detailed explanation he had given with regard to self-determination was but the tip of the iceberg; it had not even touched on the issues that Commission members had raised concerning the scope of the principle, the beneficiaries of the right, whether it applied outside the colonial context or whether it included the right to secede. In his estimation, to do justice to the status of the norms in the list would require at least two reports on each norm, or about 16 years of work by the Commission. If the effects of changes in membership of the Commission were factored in, Mr. Murase's 20-year prediction did not seem so far-fetched. And a proper list – even a non-exhaustive one based on a strict and rigorous application of the criteria set out in draft conclusion 4 – would require a *tabula rasa*, meaning that the 50-year time frame mentioned by Mr. Forteau began to seem an ambitious estimate. If the methodological challenges raised by some members of the Commission were considered decisive, the choices would be either to have no list at all or to work on the project for decades into the future.

The fact was that most States, even if by only a slight majority, supported the inclusion of a list of some kind, as did a substantial majority of Commission members: 19 at the last count, as against 9 who were opposed. Moreover, the latter estimate erred on the side of caution by including among the opponents some members who supported the idea of a list but did not wish to refer draft conclusion 24 to the Drafting Committee.

That picture compelled him to make a number of observations. First, it would be a missed opportunity if the Commission did not seize the moment and, at the very least, elevate its previous lists from commentary text to the operative part of the draft conclusions. Second, since the decision on whether or not to include a list would have to be based on a number of factors that, unfortunately, pulled in different directions, to ignore the majority view both within the Commission and among States would be unfair. Third, one of the criticisms levelled at the list was that it would divide States and draw criticism, yet no Commission member had unequivocally questioned the correctness of the list; only Mr. Murphy had cast doubt on the peremptory status of the right to self-determination. Furthermore, as the text was still at the first-reading stage, States would have an opportunity to comment on it, and on whether or not to have a list at all, in due course. Fourth, as the Chair had pointed out, the readers of the draft conclusions would include persons who were not experts in international law, and a list would, at the very least, be useful for such persons.

He did not mean to minimize the valid questions that had been raised in the course of the debate. He had focused on criticism of the rigorousness of the report, but there were other criticisms that needed to be addressed, including definitional issues concerning the various norms, notably the prohibition of the use of force or aggression, the basic rules of international humanitarian law and the prohibition of slavery; the question of whether draft conclusion 24 was intended to be merely a statement of fact that listed norms that the Commission had previously characterized as peremptory, or whether it represented a normative statement about the peremptory status of those norms; the absence from the list of some important norms of international law; and the fact that some norms were identified in the report but not included in the list. Any compromise solution must address all those issues.

With respect to the definitional issues, he wished to emphasize, again, that the topic was a methodological one. As Mr. Hmoud had pointed out, any attempt to address those issues would not only be disproportionately difficult, but would also change the nature of the topic.

Careful drafting could make it clear that the list was not a proclamation by the Commission that certain norms had the character of *jus cogens*, but only a statement of fact concerning peremptory norms that it had identified in the past. Concerns on that score could be addressed in the commentary, in line with what Mr. Murphy had called the “second path”.

With regard to the absence from the list of some important norms of international law, some members had expressed the view that the Commission seemed to be stuck in the 1960s, noting that the list did not address concerns of modern international law such as the rights of lesbian, gay, bisexual, transgender and intersex persons or the protection of the environment. Others, on the contrary, had noted that traditional norms such as sovereignty, non-intervention and *pacta sunt servanda* were not included. His intention had been to make it clear that the list was non-exhaustive, but the criticisms by some members suggested that he had not been successful in that endeavour.

Many diverging views had been expressed on the norms that were identified in the report but excluded from the list, such as *non-refoulement* and enforced disappearance. On the whole, the solution most likely to garner consensus was not to mention those norms in the list. In any event, that would be a logical consequence of Mr. Murphy’s “second path”. While that approach might limit the Commission’s ability to encourage the recognition and acceptance of other norms, as some members had pointed out, he believed that even a non-exhaustive list would still encourage discussion and promote practice in that regard.

Of the proposals made, he believed that Sir Michael Wood’s proposal that the list should be reproduced in the commentary, for which there had been some support, was not really a compromise. He likewise could not support Mr. Murase’s proposal that the Commission should establish a working group, which would lead the Commission down the 50-year path. He did, however, like Mr. Murase’s alternative proposal that a follow-up topic, under a different special rapporteur, should be adopted for the identification of a list of norms, though that would presumably be a long-term undertaking. Lastly, he thought that the proposal by Mr. Hmoud and Ms. Galvão Teles to place the list in an annex was a good one.

In conclusion, he said that he had several proposals to make for the Commission’s consideration: first, that there should be a draft conclusion stating that a non-exhaustive list of norms previously identified by the Commission was contained in an annex; second, that an annex containing the list should be appended to the draft conclusions, prefaced by a “without prejudice” clause to indicate that the list did not preclude the existence of other norms; and, third, that the commentary should not address the substance of the norms, thus reflecting Mr. Murphy’s “second path” and reducing the risk of a somewhat over-exuberant interpretation of certain norms such as the right to self-determination. The draft conclusion thus would read:

Draft conclusion 24

Non-exhaustive list of peremptory norms

A non-exhaustive list of norms that the Commission has previously referred to as having attained the status of peremptory norms of general international law (*jus cogens*) is contained in the annex to the present draft conclusion.

Annex

Without prejudice to the existence or future emergence of other peremptory norms of general international law (*jus cogens*), the following norms have previously been referred to as having attained the status of peremptory norms of general international law (*jus cogens*):

- (a) the prohibition of aggression;
- (b) the prohibition of genocide;
- (c) the prohibition of crimes against humanity;
- (d) the prohibition of war crimes;
- (e) the prohibition of apartheid;

- (f) the prohibition of slavery;
- (g) the prohibition of torture;
- (h) the right to self-determination.

He hoped that the Commission would refer the proposed text to the Drafting Committee for consideration and more precise formulation.

Mr. Murase said that the decision to have or not to have a non-exhaustive list in the draft conclusions was a policy decision for the Commission to take, not one to be addressed in the Drafting Committee, which was a technical body. The inclusion of a list in an annex did not do justice to the importance of the topic and would send the wrong message to the Sixth Committee and the international community as a whole, suggesting that the Commission had taken the matter too lightly. The Commission should at least hold an informal meeting to discuss whether or not the list should be included in the body of the draft conclusions.

Mr. Murphy said that the Special Rapporteur's proposal was very reasonable, although it was unlikely to be fully satisfactory to all members. He understood Mr. Murase's point about the possible adverse implications of that course of action, but he was comfortable with the basic contours of the proposed draft conclusion and was in favour of referring it to the Drafting Committee, on the understanding that it was not necessarily the final text.

Mr. Jalloh said that the Special Rapporteur's proposal was a good compromise and that he too could agree to refer it to the Drafting Committee. Regarding Mr. Murase's comments, he wished to point out that the Drafting Committee did, in fact, deal with matters of substance, not just technical matters, and that if it encountered real difficulties it could always refer the text to, for example, a working group of the Commission for informal discussions.

Mr. Zagaynov said that, as the Special Rapporteur's proposal was new, the members would need a short space of time in which to review it. His concern was that the proposal would be perceived as a codification of peremptory norms of general international law. He would also like to take a closer look at the reformulation of some of the norms on the proposed list. He was concerned that the Special Rapporteur, in his summing up, had made no mention of the role and importance of the principles contained in the Charter of the United Nations in relation to *jus cogens* norms.

Sir Michael Wood said that Mr. Murase's concern could be addressed in the commentary, which should emphasize that the topic was a methodological one that had never been intended to include a detailed study of the substance of peremptory norms. He certainly did not think there was any need to form a working group to discuss the matter. As for Mr. Zagaynov's concern, his understanding was that the proposed language was intended to provide a basic framework for the draft conclusion, the precise wording of which would be finalized in the Drafting Committee. While the proposal would not be entirely satisfactory to everyone, that very fact could be a sign that it was a good compromise. He was in favour of referring the text to the Drafting Committee.

Mr. Tladi said his assumption was that any text referred to the Drafting Committee would be considered in accordance with the Commission's usual practice and that the precise wording of the draft conclusions would be referred back to the full Commission. He would have preferred to include a draft conclusion that listed norms that were considered to be peremptory norms of general international law, but he had instead proposed a compromise approach. He did not think that the plenary Commission should engage in a drafting exercise, which would be the only reason for putting a written text before the members. He therefore recommended that the draft conclusion he had just read out should be referred to the Drafting Committee.

The Chair said he took it that the Commission wished to refer the new version of draft conclusion 24, as proposed by the Special Rapporteur, to the Drafting Committee, taking into account the comments and observations made during the debate.

It was so decided.

Mr. Huang, speaking on a point of order, said that he, like Mr. Zagaynov, wished to see a written copy of the Special Rapporteur's new proposal before a final decision on it was taken.

The Chair pointed out that the decision just taken was not the final decision, which would be taken by the Commission after the Drafting Committee had considered the proposal and finalized the text. He did not think that Mr. Zagaynov's comments had been intended to set a precondition for the referral of the draft conclusion to the Drafting Committee. As a large majority of the Commission members were in favour of referring draft conclusion 24 to the Drafting Committee, that was the appropriate course of action.

After a procedural discussion in which **Mr. Tladi, Mr. Saboia, Mr. Huang, Ms. Lehto** and **Mr. Hassouna** took part, **the Chair** said that the text would be referred to the Drafting Committee for consideration and finalization. It would, of course, be made available to members in written form as soon as possible, and in any event before the first meeting of the Drafting Committee.

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

Mr. Murphy, noting that the second report of the Special Rapporteur on protection of the environment in relation to armed conflicts (A/CN.4/728) contained a description of the debate held on the topic in the Sixth Committee at the seventy-third session of the General Assembly, said that several Member States seemed to be uncertain as to what exactly the Commission was trying to achieve in its work on the topic. Some delegations had raised the classic issue of whether the project was, or should be, mostly codification or mostly progressive development. Such comments reflected concerns about whether the Commission was trying to change the law of armed conflict. However, some delegations had also asked whether the Commission was engaged in a legal project at all, as opposed to a project in which it admonished States to follow particular policies of one kind or another.

The issues raised by Czechia were a good example of that concern. Among other things, it had said that the direction that the Commission intended to take was not clear and that States had difficulty in commenting on the draft principles without knowing whether they were intended to reflect the current state of international law, provide guidance that was not firmly grounded in positive law, or both.

He could understand why there was such confusion. The Commission had never explained whether references to "principles" in a project referred to legal principles, moral principles, non-binding guidelines or some combination thereof. In the current project, it was not clear whether the goal was to identify and fill gaps in international law relating to armed conflict or, alternatively, to develop a statement of best practices that were not mandatory but that States should follow in the various temporal phases of armed conflicts. The Commission could not avoid such confusion simply by using the words "shall" or "should" as code words for "law" or "policy". Rather, the confusion arose because the Commission had approached the project as a jumble of both law and policy, leaving States to guess which was which. That approach not only was confusing, but might also have the unintended consequence of weakening the law, if States guessed wrong as to what was law and what was policy.

Turning to the draft principles, he said that he would comment on proposed draft principles 6 *bis* and 13 *quinquies* together, as they concerned, respectively, "corporate due diligence" and "corporate responsibility". He had three general comments to make that were relevant to other principles as well.

His first general comment was that he was surprised to see such a focus on corporations and a lack of attention to other non-State actors. The report contained a very useful discussion of the role of armed non-State actors in the illegal exploitation of natural resources, but in the draft principles themselves the focus was solely on States and corporations. The overall effect was to stigmatize corporations as the only bad actors when it came to non-State activity in the area covered by the topic; meanwhile, wrongdoers such as insurgencies, militias, criminal organizations and individual criminals were overlooked. That approach might be perceived by some as an overzealous effort by the Commission to

cast corporations as the lone villains when it came to the illegal exploitation of natural resources during armed conflict. He wondered whether the draft principles might be reoriented so as to cover all non-State actors within a State's jurisdiction.

His second general comment was that both of the draft principles relating to corporations implied that the Commission was urging every State to exercise extraterritorial jurisdiction over its corporations whenever they were operating in a foreign country. The extraterritorial civil jurisdiction that was exercised fairly aggressively by his own country was viewed by many States as excessive, leading to considerable friction and, at times, to controversy. For the Commission to urge all States to exercise jurisdiction in that way struck him as an unusual step, and one that was certainly not predicated on existing State practice. Moreover, the draft principles' call for the exercise of such extraterritorial jurisdiction was not qualified by considerations such as whether the State where the conduct was occurring was already regulating the corporate activity, whether remedies in that State had been exhausted, or whether the conduct at issue was especially egregious. In short, the Commission appeared to be calling for States, with no basis in international law, to engage in action that might well lead to considerable inter-State disputes.

His third general comment was that he had been surprised to see the term "human health" used in the two draft principles, as the focus of the topic to date had been on protection of the environment, not on protection of human health.

Proposed draft principle 6 *bis* was based on various sources, as discussed in paragraphs 29 to 34 of the report, which referred to a series of normative frameworks that were characterized, in paragraph 35, as "voluntary" in nature. Mandatory schemes of a limited nature were identified only with respect to United States law, in paragraph 35, and European Union regulations, in paragraphs 36 and 37. Perhaps because such sources could not be said to establish an international obligation that was incumbent upon all States, draft principle 6 *bis* used the word "should" rather than the word "shall". Indeed, the Special Rapporteur had indicated in her introductory statement the previous day that draft principle 6 *bis* and other draft principles that used the word "should" were essentially phrased as recommendations. Yet the draft principle proceeded to indicate that States should "ensure" that their corporations exercised due diligence when operating in areas of armed conflict or post-conflict situations. The use of a word such as "ensure" set a high bar for State compliance, which might almost be read as an obligation of result. Even the non-binding guidelines cited in the report had not gone that far.

In the past, the Commission had not sought to impose an obligation of result upon States *vis-à-vis* the regulation of their nationals abroad; instead, it had called upon States themselves to exercise due diligence in relation to the conduct of non-State actors within their territory. Even then, the Commission had taken the view that State responsibility arose not simply as a result of harmful conduct engaged in by non-State actors, but as a result of a failure by the State to exercise due diligence in seeking to regulate such actors. If that same approach were to be reflected in the text of draft principle 6 *bis*, it would result in a State obligation to exercise due diligence in regulating non-State actors to ensure that they acted with due diligence, a rather complicated and potentially confusing type of obligation. It would be helpful if the Special Rapporteur could point to examples of such an obligation, either in existing treaties or in prior Commission projects.

The second sentence of proposed draft principle 6 *bis* referred to the purchase of natural resources in an "equitable" manner. He was unsure of what was meant by that, to whom or to what such purchases should be "equitable" and how the reference related to the protection of the environment.

In the light of those considerations, he wished to propose that draft principle 6 *bis* should read "States should take appropriate measures with respect to non-State actors over whom the State has jurisdiction to minimize environmental harm by those actors in areas of armed conflict or post-conflict situations, bearing in mind the rules of international law regarding the exercise of national jurisdiction".

With regard to proposed draft principle 13 *quinquies*, two of the sources cited in the report were worth highlighting. First, the report again made reference to various types of non-binding guidelines, notably the Guiding Principles on Business and Human Rights

adopted by the Human Rights Council. However, under the Guiding Principles, corporations were not seen as having obligations under international law or, therefore, as having liability under international law. Even if that had not been the case, the Guiding Principles were not considered to be a reflection of customary international law. Thus, like the sources cited in support of draft principle 6 *bis*, those cited in support of draft principle 13 *quinquies* referred, at best, to normative frameworks that were expressly voluntary in nature.

Second, the report relied heavily on the United States Alien Tort Statute and associated jurisprudence, which were discussed in depth in paragraphs 81 to 89. Two elements were missing from that discussion, which were important for the Commission to take into account. While the report cited the 2013 judgment of the Supreme Court of the United States in *Kiobel v. Royal Dutch Petroleum Co.*, it downplayed the central holding in that judgment, which was that the presumption against the extraterritorial application of United States law applied to claims under the Alien Tort Statute. The Court had unanimously found that nothing in the text, history or purpose of the Statute indicated that it was intended to apply extraterritorially so as to regulate the conduct of persons in another State's territory. That judgment, which spoke at length about the frictions that could arise from efforts by one State to regulate conduct in another State, called into question the validity of many of the prior lower-court cases that were cited in the report.

Another element that was missing from the discussion was any mention of the 2018 judgment of the Supreme Court of the United States in *Jesner v. Arab Bank, PLC*. In that judgment, the Court had decided that the foreign corporate defendants could not be sued, reasoning that United States courts should not find that a private right of action under the Alien Tort Statute could impose liability upon artificial entities such as corporations. While the case technically addressed only foreign corporations, the Court's reasoning created considerable doubt as to whether any corporations could be sued under the Alien Tort Statute. Indeed, the United States Court of Appeals for the Second Circuit had expressly found that they could not. It was therefore unwise for the Commission to rely too heavily on the Alien Tort Statute litigation for the purpose of supporting the extraterritorial application of national law as envisaged in draft principle 13 *quinquies*.

Both paragraphs of that draft principle, like draft principle 6 *bis*, contained the confusing combination of "should" and "ensure", providing that States "should" take steps to "ensure" that non-State actors were held responsible both for their direct operations and for the operations of entities under their control. Except in the second sentence of paragraph 2, the concept of "due diligence" did not seem to be present with respect to the conduct of either States or non-State actors; the draft principle therefore appeared to establish an obligation of result across the board.

One curious aspect of the draft principle was the reference to the "responsibility" of non-State actors, rather than to their "liability". Another curious aspect was the absence of a requirement that the harm at issue must have been proximately caused by the corporation concerned; the text almost implied that all corporations were responsible for all harms, even those with which they had no connection at all. Moreover, no account was taken of situations in which harm was caused by multiple actors; the text read as though corporations alone were to be held liable. A final curious aspect was the contrast between the two sentences in paragraph 2. The first sentence seemed to impose liability on a parent corporation that controlled a subsidiary, while the second sentence established a different, due diligence standard when such a relationship existed.

In general, the stakes at issue in draft principle 13 *quinquies* seemed to be considerably higher than those in draft principle 6 *bis*. If States failed to ensure that their corporations were held liable for their own acts, or for the acts of entities that they controlled, did that trigger the responsibility of States for an internationally wrongful act? That would be a very bold claim by the Commission, one that he imagined many States would not welcome. It was also a claim that, in his opinion, was not adequately addressed by the use of the word "should."

Accordingly, he wished to propose that draft principle 13 *quinquies* should read "States should take appropriate measures with respect to non-State actors over whom the

State has jurisdiction to provide remedies for environmental harm directly caused by those actors in areas of armed conflict or post-conflict situations, bearing in mind the rules of international law regarding the exercise of national jurisdiction”.

Proposed draft principle 8 *bis* consisted of a Martens clause, albeit one formulated to state that in cases not covered by international agreements, it was the environment that remained under the protection of international law.

In that regard, he wished to raise a number of issues, the first of which related to the sources cited in support of adopting a Martens clause relating to the environment. The main source was the International Committee of the Red Cross (ICRC) guidelines for military manuals and instructions on the protection of the environment in times of armed conflict, as well as the General Assembly resolution inviting all States to incorporate the guidelines into their military manuals and instructions. Missing from the report, however, was an analysis of whether States had in fact included a Martens clause relating to the environment in their military manuals. Such a clause had not been included in the United States Department of Defense *Law of War Manual* or in any international agreements, including the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. Thus, the report did not establish that current State practice supported the acceptance of a Martens clause relating to the environment. Indeed, it might be presumptuous for the Commission to claim that the environment benefited from a Martens clause in cases not covered by treaties concluded by States, when States themselves had never so indicated in any of those treaties.

The second issue was whether the draft principle was advisable as a matter of policy. Adopting a Martens clause in relation to the environment might detract from the centrality of the protection of persons in times of armed conflict. To date, the Martens clause, as it appeared in treaties, had been intended to protect people. It had never been used to refer to the environment or to any other object, such as cultural property or civilian infrastructure. If the Martens clause began to be applied with reference to the protection of a variety of things, it might come to be regarded as having lesser significance in relation to its original purpose. The Special Rapporteur rightly noted, in paragraph 181, that humanitarian and environmental concerns were “not mutually exclusive”, but they could be in competition; that tension was amply demonstrated by proposed draft principle 14 *bis* on human displacement. He hoped that all members would agree that, when such competition arose, the protection of persons should take precedence over the protection of the environment.

The third issue was that the text proposed for draft principle 8 *bis* did not replicate the typical language of a Martens clause. For example, the draft principle did not begin by referring to “cases not covered by these draft principles”. Certain words were missing, such as the repetition of the word “from” as a modifier of all three final elements in the clause. Moreover, the addition of the phrase “in the interest of present and future generations” seemed to change the normal meaning of the clause significantly.

The final issue to note was that, when the Martens clause appeared in treaties, it was typically located in the preamble. That was true of the original 1899 and 1907 Hague Conventions and of a number of disarmament treaties. While a Martens clause did appear in the operative part of the Geneva Conventions of 1949, albeit only in the common article on denunciation, and in article 1 (2) of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), it generally served as a preambular marker. That might be an argument for placing it in the commentary rather than in a draft principle. Statements of that kind had been made in commentaries on two previous occasions.

The central objective of proposed draft principle 13 *bis* was to replicate the provision contained in article I (1) of the Environmental Modification Convention. The report was ambiguous as to whether that provision was part of customary international law, with the Special Rapporteur concluding simply that she saw “merit” in including the provision in the draft principles. During her introduction of the second report, the Special Rapporteur had acknowledged the question of whether the provision reflected customary international law. While he appreciated that acknowledgement, the text of the draft

principle, as proposed, asserted an unqualified prohibition, which seemed to signal a belief that the rule set out therein was customary international law.

For several reasons, it was difficult to conclude that draft principle 13 *bis* was a rule of customary international law, at least according to the methodological approach advanced by the International Court of Justice in the *North Sea Continental Shelf* cases and by the Commission in conclusion 11 of the conclusions on identification of customary international law.

First, General Assembly resolution 31/72 on the Environmental Modification Convention had been adopted by a vote of 96 to 8, with 30 abstentions; that indicated that the Convention was not unanimously or widely accepted. Furthermore, nothing in the preamble or text of the Convention suggested that States believed that they were simply codifying an already existing rule of customary international law.

Second, the Convention had only 78 States parties. That also demonstrated that the rules set forth therein were not widely accepted.

Third, the Convention permitted reservations and declarations, which some States parties had formulated, including in relation to the application of the provision at issue.

Fourth, many States parties appeared to regard their obligations under the Convention as applying only *vis-à-vis* other States parties. For example, the United States Department of Defense *Law of War Manual* provided that it was “prohibited to use environmental modification techniques having widespread, long-lasting, or severe effects of a means of destruction, damage or injury to another Party of the ENMOD Convention”. Such a statement was not unique to the United States: the military manuals of Israel, New Zealand and the Republic of Korea, for example, also indicated that the treaty was binding on States parties only *vis-à-vis* other States parties.

Fifth, the Convention contained several important qualifiers and was accompanied by several understandings that did not appear in draft principle 13 *bis*. Thus, even if the Convention could be said to reflect customary international law, article I (1) could not be extracted as an isolated provision, to the exclusion of other aspects of the Convention.

Sixth, as the report acknowledged, the 2005 ICRC study on customary international humanitarian law did not find that that provision of the Convention had become part of customary international law. It included the statement “Whether the provisions in the ENMOD Convention are now customary is unclear”.

He therefore had doubts as to whether the Convention was reflective of customary international law. Even if it was, he doubted that draft principle 13 *bis* sufficiently reflected the qualifications and understandings associated with the obligation set forth in the Convention.

For those reasons, he did not support the draft principle as proposed in the report. However, the proposal put forward by the Special Rapporteur the previous day to add the phrase “in accordance with its international obligations” to a reformulated draft principle 13 *bis* was an excellent idea, which he hoped would be pursued in the Drafting Committee.

He had no concerns to raise in relation to proposed draft principle 13 *ter*, which he considered to be firmly anchored in the law of armed conflict. “Pillage” was generally defined as the taking of private or public movable property, including enemy military equipment, for private or personal use. It did not, however, extend to an appropriation of property that was justified by military necessity.

While he supported the draft principle, he was not persuaded as to the relevance of the sources cited in paragraphs 27 and 28 of the report, such as the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa. He would not like to see them reflected in the commentary. Such references appeared to be an effort to read into the prohibition of pillage certain very broad provisions contained in environmental treaties. Relying on such instruments could be viewed as altering the law of armed conflict in that area, as the general standards set forth in environmental treaties could not be viewed as superseding the measures that belligerents in an armed conflict were permitted to take as a matter of

military necessity, in accordance with article 23 (g) of the Hague Regulations respecting the Laws and Customs of War on Land.

With regard to proposed draft principle 13 *quater*, he thought that the references in chapter IV (C) of the report to *ex gratia* payments relating to nuclear tests in the Pacific were not germane to the topic. They would be germane only if weapons testing was considered to fall within the scope of the topic, which it did not.

The title and paragraph 1 of the draft principle referred to both the “responsibility” and the “liability” of States. The Commission had encountered some difficulty in its consideration of the possible international liability of States for injurious consequences arising out of acts not prohibited by international law, and had ultimately avoided the concept of the liability of States. The Special Rapporteur’s understanding of the “liability” of States in the context of draft principle 13 *quater* should therefore be clarified.

He was also struck by certain parts of the text of paragraph 2, which seemed to ask States to establish compensation funds in relation to armed conflicts with which they might have had no involvement. He wished to propose that the draft principle should be simplified to read:

1. These draft principles are without prejudice to the rules on the responsibility of States for internationally wrongful acts.
2. States involved in an armed conflict should consider, as appropriate, the establishment of a special compensation or remediation fund for environmental damage directly caused by that armed conflict.

Proposed draft principle 14 *bis* was an interesting one, but a better balance might need to be struck. He would prefer to see the final clause moved to the beginning of the draft principle, and wished to propose that the text should read “When providing shelter and relief for persons displaced by armed conflict, States and other relevant actors should take appropriate measures to minimize environmental degradation in areas where such persons are located”.

He agreed with the Special Rapporteur that no definition of the term “environment” should be given. However, he was not convinced of the need to use either “environment” or “natural environment”, but not both, in the draft principles. As acknowledged in the report, those terms did not have the exact same meaning. The use of the term “natural environment” in some of the leading treaties on the law of armed conflict reflected an intentional choice by States that the Commission should not try to alter in the draft principles.

In conclusion, he said that he appreciated the Special Rapporteur’s excellent work on such an important topic. He was in favour of referring all the draft principles to the Drafting Committee, subject to the comments that he had made, which might lead to the reworking or even the omission of some of the draft principles or paragraphs thereof.

Mr. Hmoud said that the Special Rapporteur’s second report addressed two areas pertaining specifically to the environmental issues associated with non-international armed conflicts, namely the protection of natural resources and the environmental effects of human displacement. He would have welcomed a more comprehensive discussion of other areas in which the legal regime for the protection of the environment applied to non-international armed conflicts, but trusted that such areas would be adequately addressed in the commentaries to the draft principles. As the Commission had stated in the past, international armed conflicts and non-international armed conflicts posed similar threats to the environment. If the purpose of the topic was to identify and enhance the legal regime for the protection of the environment, the applicability of the draft principles to non-international armed conflicts should be clarified, since the majority of current armed conflicts were non-international. While several of the proposed draft principles were *lex lata* in relation to international armed conflicts only, there was no reason why they could not be proposed as progressive development of the law.

The issues discussed and the draft principles proposed in the report should complement the work that had already been done on the topic, as well as the draft principles

that had been provisionally adopted. The legal regime for the protection of the environment in relation to armed conflicts was divided among various areas of law, both conventional and customary; the draft principles would consolidate the main principles of that legal regime, without, of course, being exclusive. The rules of environmental protection continued to develop as practice within the international community became increasingly widespread. The draft principles would not hamper that development, nor would they take precedence over special protection regimes, such as the legal regime for the protection of the marine environment. There had been widespread support for the topic among States and international organizations. The Commission should therefore strive to adopt the draft principles, with the commentaries thereto, on first reading at the current session, in order to give States ample time to reflect on them and to provide feedback in due course.

The extensive practice of international organizations, specialized agencies and programmes in relation to the illegal exploitation of natural resources and its damaging effects on the environment clearly indicated the importance of such an issue. Although there were few rules on the matter, international and regional treaty practice, as well as relevant United Nations resolutions, had firmly established the principle that the unlawful exploitation of natural resources was prohibited. Pillaging was prohibited under the Hague Convention respecting the Laws and Customs of War on Land, the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), which extended that prohibition to international and non-international armed conflicts, as well as to situations of occupation. The prohibition of unlawful exploitation arose from the principle of permanent sovereignty over natural resources, as established in instruments such as the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime. Security Council resolutions dealing with specific conflict situations also reflected that prohibition, although Security Council sanctions on the exploitation of and trade in natural resources were intended to bring specific conflicts to an end and should be viewed in that functional and political context.

In the light of treaty practice, international practice and case law, there were solid grounds for including the prohibition of pillaging in the draft principles. The prohibition should cover the various stages of international and non-international armed conflicts and situations of occupation. The Special Rapporteur had not made that point sufficiently clear in chapter II of the report.

Corporate due diligence was an evolving area of international law. The Security Council had imposed obligations on States to regulate corporate trade in natural resources in conflict zones. Substantial efforts had been made at the regional level, including within the European Union, to promote responsible business practices and corporate due diligence, but such efforts did not amount to the creation of a customary norm. Nonetheless, the principle of corporate due diligence should be progressively developed to ensure that corporations did not trade in unlawfully procured natural resources. He therefore supported proposed draft principle 6 *bis*, although the text should clearly state that national measures should include the prohibition of corporate trade in unlawfully obtained natural resources. The draft principle should also call for cooperation between States, as well as between States and international organizations, to ensure effective implementation of the due diligence obligation.

Despite the clear link between human displacement and environmental degradation, no concerted effort had been made to establish a treaty or other legal framework for prevention and mitigation. Burden-sharing by the international community was currently insufficient and had not been effective in alleviating the negative effects of conflicts on the environment or on communities hosting displaced persons. The displacement of millions of Syrian refugees to neighbouring countries had had a negative impact on the environment in those countries, yet the international community had made no meaningful contribution to the alleviation of that impact. The Commission should therefore assert, in the relevant draft principle, that burden-sharing should be applied to mitigate the negative effects of human displacement on the environment and natural resources. Proposed draft principle 14 *bis*

should provide not only that States and international actors should take measures to prevent and mitigate environmental degradation, but also that they should cooperate to that end.

He agreed with the Special Rapporteur that organized armed groups and multinational enterprises were the most relevant non-State actors in terms of responsibility and civil liability. However, individuals could also incur civil liability for environmental damage in the context of armed conflict. While individual criminal responsibility could arise from acts that constituted crimes under international criminal law, there was nothing to prevent the inclusion in the draft principles of a civil liability provision similar to the provision on corporate liability.

While the status of organized armed groups as subjects of international law was debatable, in certain areas of international law they bore direct obligations and could thus incur responsibility for violations of international law. One such area was armed conflict, where the fact of being a party to a conflict gave rise to legal obligations to respect the applicable rules. Organized armed groups had an obligation to comply with international humanitarian law and to ensure that it was respected in the territories under their control or effective control. However, such groups could not lawfully constitute courts to punish violations of international humanitarian law. All such courts should be established and operated as State institutions. It was impossible for organized armed groups to establish courts of that nature, unless they were acting on behalf of the State. While the ICRC study on customary international humanitarian law, General Assembly resolution 60/147 and the resolution of the International Law Association on reparations for victims of armed conflict did not lead to the conclusion that there was a customary law basis for an obligation of reparation applicable to organized armed groups, States should tackle the issue in their domestic law. He therefore wished to propose that the draft principles should call for States to adopt measures to provide for reparations by organized armed groups and their leaders for violations of environmental obligations under international law.

With regard to corporate responsibility, there had been a significant increase in the international community's interest in regulating the operation of multinational enterprises in the context of armed conflict. The Guiding Principles on Business and Human Rights and the updated Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises were two examples of efforts to ensure that businesses and corporations did not operate unlawfully in conflict areas. There had been much debate as to whether such entities had direct rights and obligations under international law. Neither the Guiding Principles nor the OECD Guidelines imposed binding legal obligations; they were meant to encourage best practices and respect for international humanitarian law in conflict situations. States had also enacted legislation purporting to regulate and control corporate activities extraterritorially in areas of armed conflict. States should also comply with human rights treaty obligations relating to the environment, including those involving the right to life and the right to health, by ensuring compliance by multinational enterprises and making redress available to victims of violations. He supported proposed draft principle 13 *quinquies*, paragraph 2. While private military and security companies should be subject to State regulation, States should not shield such entities from legal responsibility and should ensure that, when they acted as agents of the State, they were held responsible for violations of international humanitarian law and human rights relating to the environment. Of course, States could incur international responsibility directly when such entities acted on their behalf, but could also incur responsibility for aiding and abetting wrongful conduct, where such conduct was not attributable to the State itself.

When States violated their environmental law obligations during armed conflict, they incurred international responsibility. The lack of ample case law on the responsibility of States for environmental damage did not undermine the fact that States could be held legally responsible for such damage and could face consequences as a result. International organizations could be held responsible as well; he wished that the Special Rapporteur had elaborated on that point further in her report, as international organizations were regularly involved in situations of armed conflict. The report demonstrated the difficulty of establishing a direct causal link between a wrongful act committed during an armed conflict and the ensuing damage to the environment, which could take years to manifest.

Intervening factors and the quantification of damage when multiple actors were involved were among the many obstacles to the determination of State responsibility for such acts. The same obstacles hindered the determination of State liability for lawful acts that caused damage to the environment. Nonetheless, the Commission should not endeavour to resolve such problems in the draft principles themselves. Rather, it should discuss relevant case law in the commentaries, which should also outline the obstacles to the determination of State responsibility and provide guidance on how those obstacles could be overcome. In addition, the Commission should affirm that the general rules applicable to State responsibility and civil liability also applied to State conduct that damaged the environment.

There was adequate case law and practice that could be used as guidance on the issue of reparations for environmental harm caused by States. The general rules relating to the consequences of wrongful acts of the State should not be restated in the draft principles but could be explained in the commentaries. Such consequences included restitution, compensation and satisfaction. The draft principles and the commentaries could shed light on the specific consequences of environmental claims. For example, the Commission might wish to elaborate further on the means of determining restitution and the forms that compensation could take. The fact that the commentaries to the articles on responsibility of States for internationally wrongful acts touched upon the issue of compensable environmental damage should not prevent the Commission from elaborating on the issue further. In that regard, he wished to note the extensive practice of the United Nations Compensation Commission, which had continued to develop following the adoption of the articles on State responsibility. In particular, the non-exhaustive list developed by the Compensation Commission in relation to compensable environmental damage should be reflected in proposed draft principle 13 *quater*, or, failing that, in the commentary thereto. He agreed that the types of damage for which reparation was to be provided should include damage to ecosystem services, whether or not the damaged goods and services were tradable or economically usable. That position was in line with the 2018 judgment of the International Court of Justice in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*.

The draft principles could also tackle the issue of the evidence needed to substantiate environmental claims arising from wrongful conduct by States, albeit without being overly prescriptive. In that regard, he noted the quotation, in paragraph 139 of the report, of a statement made in the *Trail Smelter* case, to the effect that while damages could not be determined by mere speculation or guess, it was enough if the evidence showed “the extent of the damages as a matter of just and reasonable inference”. A standard of proof should be included in the draft principles or in the commentaries; the Commission could propose, even as *lex ferenda*, that the standard should be less stringent than the one for non-environmental claims, in view of the difficulty of establishing a direct causal link between wrongful conduct and environmental damage.

He supported the Special Rapporteur’s proposal to include a provision on *ex gratia* payments and victim assistance in the draft principles. There was sufficient practice in the field to warrant such a provision, especially given that States were willing to provide victims with compensation for environmental damage, if funds were available, without assuming responsibility for the damage. Draft principle 13 *quater*, paragraph 2, should not be addressed to States alone; relevant international organizations should also be called upon to establish compensation funds and to cooperate with States in that endeavour.

He supported the inclusion of a draft principle based on the Environmental Modification Convention. The terms “widespread”, “long-lasting” and “severe” should be explained in the commentary to the draft principle, in a manner that was consistent with the explanation provided in the understanding relating to article I of the Convention, rather than with the meaning of those terms as understood in Protocol I additional to the Geneva Conventions of 1949, since the Convention was *lex specialis* in the area in question.

He also supported the inclusion of a Martens clause in the draft principles. The Martens clause was a firmly established principle of customary international law, especially in the field of the law of armed conflict, and was therefore applicable to environmental protection in relation to armed conflicts. Its inclusion in the draft principles would fill the

gap that might exist in customary law protection and facilitate the identification and interpretation of customary rules.

He would have preferred that the draft principles should include a definition of “environment”. The draft principles entailed a wide range of legal obligations, and courts would need guidance in how to interpret those obligations. Providing a definition would prevent courts from freely defining the scope of such obligations on the basis of their own definitions of the term. The Drafting Committee should therefore consider introducing a definition before recommending the adoption of the draft principles on first reading.

The Special Rapporteur presented strong arguments for using the term “environment” rather than “natural environment”. He wished to note, however, that articles 35 and 55 of Protocol I additional to the Geneva Conventions of 1949 used the term “natural environment”. The Commission should avoid any implication that the draft principles were intended to alter the scope of those two articles. His preference was therefore to maintain the term “natural environment” in draft principles 9 and 12. He failed to see the need to employ only one term throughout the draft principles, especially if doing so could be viewed as a departure from the relevant treaty rules. While the Special Rapporteur seemed to downplay the effect of including the concept of “human environment” within the scope of the general term “environment”, doing so would extend the scope of applicability of draft principles 9 and 12 beyond the natural environment.

In conclusion, he said that he wished to thank the Special Rapporteur for her excellent report. He hoped that the Commission would be able to adopt the full set of draft principles on first reading at the current session, and recommended that all the draft principles should be referred to the Drafting Committee.

The meeting rose at 1.05 p.m.