

Provisional

For participants only

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International Law Commission
Seventy-first session (first part)

Provisional summary record of the 3467th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 21 May 2019, at 10 a.m.

Contents

Programme, procedures and working methods of the Commission and its documentation


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

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Present:

Chair: Mr. Šturma

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

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Programme, procedures and working methods of the Commission and its documentation (agenda item 8)

The Chair said that the enlarged Bureau had met to consider the possibility of recommending the inclusion of one or more topics in the Commission's programme of work, in the light of the expected conclusion of several topics in the coming years.

The enlarged Bureau was currently in a position to recommend the inclusion of the topic "Sea-level rise in relation to international law", which had been added to the Commission's long-term programme of work at its seventieth session, held in 2018. The syllabus for the topic had been annexed to the Commission's report on the work of the seventieth session (A/73/10). As anticipated in the syllabus, the topic would be considered by a study group to be chaired on a rotating basis by several members of the Commission. For the time being, the study group would be open-ended. The inclusion of the topic in the programme of work would be without prejudice to the inclusion of further topics at a later stage.

Mr. Murase said he was pleased that the topic had been recommended for inclusion. Given its importance, he hoped that all the members of the Commission would participate in the work of the study group, that reports by the Chairs of the group would be translated into all six official United Nations languages, that the Drafting Committee would meet to discuss the outcome of the group's work, that the draft texts produced by the group would be accompanied by commentaries, and that an adequate number of plenary meetings would be devoted to the consideration of the topic at future sessions.

The Chair said that the translation of reports into all six official United Nations languages should be possible, provided that the reports were submitted on time. The open-ended nature of the study group would enable all the members of the Commission to participate. It would be premature to respond to the other points raised by Mr. Murase, as much would depend on the nature of the study group's output.

He took it that the Commission wished to add the topic "Sea-level rise in relation to international law" to its programme of work and that it also wished to establish an open-ended study group on the topic, to be chaired, on a rotating basis, by Mr. Aurescu, Mr. Cissé, Ms. Galvão Teles, Ms. Oral and Mr. Ruda Santolaria.

It was so decided.

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

Mr. Murase said that he wished to thank the Special Rapporteur for her excellent second report on protection of the environment in relation to armed conflicts (A/CN.4/728) and her introductory statement. He would begin by making a few general comments. As he had mentioned in the past, the Commission needed to be honest in recognizing that, while certain inhumane weapons and forms of warfare were prohibited, *jus in bello*, or the law of armed conflict, was essentially a body of rules that authorized soldiers to kill and injure enemies on the battlefield in order not to sacrifice their own lives. In such a context, protection of the environment was a concern that was remote, if not entirely irrelevant to the engaged parties. If military necessity prevailed over environmental considerations, the parties to an armed conflict could be permitted to employ any means of warfare available, unless specifically prohibited by the law of armed conflict. Military advantage or necessity was one of the guiding principles underlying that law. That was the reality, and there was a crucial need to strike the proper balance in the exercise of codification and progressive development of international law on the topic.

The topic was a challenging one in that it addressed not only the relationship but also the tension between the law of armed conflict and the law of the environment. The key was to achieve a proper balance between safeguarding the legitimate rights of the belligerents in an armed conflict and protecting the environment. He was of the view that, in the draft principles, too much emphasis was placed on the latter, to the detriment of the

former. The legitimate rights of combatants must be duly taken into account, especially in part two of the draft principles, on principles applicable during armed conflict, and part three, on principles applicable after an armed conflict.

With that in mind, he proposed the insertion of a draft principle 4 *bis* that would read “Notwithstanding principle 4 on the protection of the environment, the legitimate rights of belligerents must be respected”. The addition of such a provision would be in keeping with the dictates of positive international law.

The topic did not concern the protection of the environment in peacetime. If the Commission lost sight of the focus on armed conflicts, the effectiveness of its work would be undermined. It should therefore refrain from including anything unrelated to armed conflicts in part one of the draft principles. In fact, it had previously rejected some proposals made by the previous Special Rapporteur that bore no relation to armed conflicts, including proposals relating to the concept of sustainable development and to status-of-forces agreements.

It was unfortunate that there was no separate part on principles applicable before armed conflict (phase one), which could usefully have included a number of provisions, including on the assessment of new weapons, which was dealt with in article 36 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), and, perhaps, on the preparation of military manuals. Phase one was currently addressed in part one, on general principles, which also contained principles related to the protection of the environment in peacetime. He believed that part one should be divided into two parts: one dealing with general principles and the other with phase one.

Another problem with the draft principles was that not enough attention was paid to phase two, which should be the core of the topic. There were 7 draft principles in part one and 14 in part three, but only 7 in part two. He therefore welcomed the Special Rapporteur’s new proposals concerning environmental modification techniques and pillage.

The most important issue regarding part two was the question of what sorts of weapons or methods of war were permitted or prohibited. The crucial qualifier in that context, namely “widespread, long-term and severe”, was not properly defined. Moreover, parts two and three did not address the issue of “collateral damage”.

Another issue was the lack of a provision on the use of terms, which should be draft principle 1 *bis*. The Commission should, at the very least, define the terms “environment”, “armed conflict” and “occupation”. There was also a need for a provision distinguishing between States that were parties to armed conflicts and neutral States. Some of the draft principles provided for obligations of the parties, others established obligations of third parties, namely neutral States, and still others provided for obligations of both the parties and neutral States. The matter might need to be clarified in the draft principles and in the commentaries thereto.

Regarding proposed draft principle 6 *bis*, on corporate due diligence, he doubted that there was sufficient evidence to prove the existence of such a duty in international law. In paragraphs 30 and 31 of the report, the Special Rapporteur referred to Security Council resolutions, but, as noted in conclusion 12 of the conclusions on identification of customary international law, such resolutions could not, of themselves, “create a rule of customary international law”. Other evidence put forward by the Special Rapporteur included the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, which were mere recommendations, and a regulation of the European Union on conflict minerals, which was binding only on European Union member States.

In any event, “corporate due diligence” was not a legal obligation, but merely a policy that companies were expected to pursue voluntarily as part of “corporate social responsibility”. Thus, States could not impose due diligence obligations on corporations in ordinary market-economy countries. Although the term “should” was used in proposed draft principle 6 *bis*, he was not convinced that the Commission needed to address corporate due diligence in the draft principles.

The principle that States had an obligation to ensure that activities within their jurisdiction or control, including the activities of corporations, did not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction (principle 21 of the Declaration of the United Nations Conference on the Human Environment), which had emerged from the *Trail Smelter* case, was applicable in peacetime but not in times of armed conflict. He assumed that proposed draft principle 6 *bis* was addressed mainly to third States, namely neutral States, and not to belligerent parties to an armed conflict. The traditional law of neutrality distinguished between unlawful assistance by a neutral State and assistance by private persons or private enterprises belonging to a neutral State. While the former was prohibited on account of its incompatibility with the duty of abstention under the international law of neutrality, the latter was not attributed to the neutral State, which was thus under no obligation to prevent it.

Under the international law of neutrality, the only duty of neutral States relating to private persons was the duty of acquiescence; in other words, the obligation to tolerate certain restrictions imposed on private persons through the adoption of control measures by belligerent States, especially in the area of maritime commerce. The scope of such measures was limited to the export of war materials, and did not cover the export of natural resources. Accordingly, it seemed clear that proposed draft principle 6 *bis* could not be supported in the context of armed conflicts.

Regarding proposed draft principle 8 *bis*, he did not agree with the Special Rapporteur's conclusion, in paragraph 180 of the report, that the Martens clause was "of an overarching character and therefore relevant to all three phases of the conflict cycle". In his opinion, the clause was relevant only to phase two, whereas the derivative principle of "elementary considerations of humanity" was applicable not only in relation to armed conflicts but also in peacetime, as stated by the International Court of Justice in the *Corfu Channel* case.

The Special Rapporteur indicated, in paragraph 180, that the Commission had referred to the Martens clause "in the context of environmental protection" in the commentaries to the draft articles on the law of the non-navigational uses of international watercourses and in the commentaries to the draft articles on the law of transboundary aquifers. However, in the first of those two sets of commentaries, the Martens clause was discussed in relation to what would become article 29 of the Convention on the Law of the Non-navigational Uses of International Watercourses, which was entitled "International watercourses and installations in time of armed conflict". Moreover, in the latter set of commentaries, the clause was dealt with in the context of article 18, entitled "Protection in time of armed conflict". Accordingly, in keeping with the Commission's previous work, proposed draft principle 8 *bis* should be placed in part two, on principles applicable during armed conflict. In addition, as the Martens clause was generally found in the preamble to treaties, proposed draft principle 8 *bis* should be placed at the beginning of part two, or should be referred to only in the commentaries.

Regarding proposed draft principle 13 *bis*, there appeared to be sufficient *opinio juris* to support the argument that the prohibition of environmental modification techniques was an established rule of customary international law, and he agreed with the inclusion of a reference to such techniques in part two. However, it should be recalled that the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques concerned "arms control", and not *jus in bello*, or the law of armed conflict. The Commission therefore should not single out environmental modification warfare, but should also refer to other methods of warfare, such as nuclear, chemical and biological weapons, all of which had a direct impact on the environment.

Under the law of armed conflict, environmental damage was prohibited only when military actions exceeded the threshold of military necessity, resulting in widespread, long-term and/or severe damage. The question was what standards should be used to assess such damage.

Article I of the Environmental Modification Convention was often cited in that regard, since the Convention had been the first instrument in which such language had been employed. According to the "understandings" adopted by the then Conference of the

Committee on Disarmament, for the purposes of the Convention, the term “widespread” meant “encompassing an area on the scale of several hundred square kilometres”, “long-lasting” meant “lasting for a period of months, or approximately a season”, and “severe” meant “involving serious or significant disruption or harm to human life, natural and economic resources or other assets”. The use of the conjunction “or” in article I meant that the threshold for the provision’s application was not particularly high, since damage had to meet only one of those three criteria.

However, the Convention should be cited with caution because, as he had mentioned, it related not to the law of armed conflict but to arms control or disarmament. The standards established therein were absolute, whereas standards under the law of armed conflict were relative in the sense that they were applied in proportion to military necessity.

The threshold of application in articles 35 (3) and 55 of Protocol I additional to the Geneva Conventions of 1949, which referred to “widespread, long-term and severe damage”, was much higher than the threshold under the Environmental Modification Convention. The use of the conjunction “and” meant that all three elements had to be present. Furthermore, “long-term” was understood to mean “decades” under the Protocol, as opposed to “a period of months” under the Convention. Thus, under the Protocol, it appeared that any weapon or means of warfare was permissible, with the possible exception of nuclear weapons, the effects of which lasted for decades, as had been the case for victims of the atomic bombings of Hiroshima and Nagasaki.

In the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, it was asserted that articles 35 (3) and 55 of the Protocol had “a very high threshold of application” and that their conditions for application were “extremely stringent”. Consequently, the Committee had concluded that the environmental damage caused during the bombing campaign did not reach the Protocol I threshold. Accordingly, the meaning of the phrase “widespread, long-term and severe” in draft principle 9 (2) should be clarified through the addition of a new paragraph.

Article 56 (2) of Protocol I provided that dams, dykes and nuclear electrical generating stations could be made the object of attack only if they were being used “in regular, significant and direct support of military operations”. The provision thereby laid down a relativity rule with regard to the use of warfare in relation to the environment. The International Court of Justice referred to the rule in paragraph 30 of its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, in which it argued that “respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality”. A similar finding of relative permissibility had been reached in the Final Report to the Prosecutor, which stated that the importance of a target must be assessed in relation to the incidental damage expected and that if a target was sufficiently important, a greater degree of risk to the environment might be justified.

It was also worth noting that, in article 8 (2) (b) (iv) of the Rome Statute of the International Criminal Court, the phrase “widespread, long-term and severe damage” was used in laying down the principle of proportionality. If attacks on the environment were not absolutely prohibited, but allowed in certain situations on the grounds of military necessity, then it was possible that collateral damage was also permissible in such situations.

He therefore believed that the issue of collateral damage could not be ignored by the Commission in its work on the topic. Notwithstanding humanitarian rules regarding the protection of civilians from attacks, the damage suffered by innocent third parties (bystanders) was described, in international law, as “incidental loss” or “collateral damage” to the extent that military advantage prevailed, and, as such, was considered permissible. That was a cold, harsh reality of international law; the Commission should have no illusions in that regard. The issue of collateral damage was relevant not only to part two of the draft principles but also to part three, which dealt with responsibility and compensation.

With regard to proposed draft principle 13 *ter*, there seemed to be sufficient evidence of the existence of a rule prohibiting the pillage of natural resources. He agreed with the Special Rapporteur that as far as the law of armed conflict was concerned, the

prohibition of pillage was an established rule of customary international law. Pursuant to the judgment of the International Court of Justice in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, that prohibition also covered the exploitation of natural resources.

Concerning proposed draft principle 13 *quater*, as other members of the Commission had noted, the words “responsibility” and “liability” were used incorrectly in the report. In 1981, when he had been a staff member of the Secretariat, he had been assigned to assist the first Special Rapporteur for the topic “International liability for injurious consequences arising out of acts not prohibited by international law”. Since that time, everyone in the Commission had known that the word “responsibility” referred to “wrongful acts”, while “liability” referred to lawful acts that were not prohibited by international law. The Commission should be consistent in its use of the two terms.

With regard to State responsibility and liability for damage related to armed conflict, he fully agreed with the Special Rapporteur’s observation, in paragraph 116 of the report, that “State responsibility only comes into play as a result of a violation of a relevant international legal obligation, while environmental damage in armed conflict may also result from lawful military activities”. In that respect, under the law of armed conflict, only acts that constituted violations of the law of armed conflict could give rise to compensation, in line with article 3 of the Regulations respecting the Laws and Customs of War on Land and article 91 of Protocol I additional to the Geneva Conventions of 1949. Since proposed draft principle 13 *quater* had been placed in part two, on principles applicable during armed conflict, the Commission should clarify that, in principle, parties to an armed conflict were not required to pay compensation for damage arising from military activities that were considered lawful under the law of armed conflict. The same was true in respect of collateral damage to third parties, provided that such damage was justified by military necessity.

He wondered whether the placement of the “without prejudice” clause in paragraph 1 of proposed draft principle 13 *quater* ought to be reconsidered. Such clauses tended to be placed in the last paragraph of draft texts.

With regard to paragraph 2, the Vienna Convention on Civil Liability for Nuclear Damage, for example, stipulated that a State within whose territory a nuclear installation was situated must ensure the payment of claims for compensation for nuclear damage by providing the necessary funds to the extent that the yield of insurance or other financial security was inadequate to satisfy such claims. However, dual civil liability of that nature was established only by certain special treaties. As a result, he was not sure that there existed a customary rule to the effect that when reparation from the liable party was unavailable, States should ensure that the damage did not go unrepaired or uncompensated, as indicated in paragraph 2. In addition, as the Special Rapporteur rightly mentioned with regard to *ex gratia* payments and victim assistance, such payments were neither a legal obligation nor a duty. Thus, despite the use of the word “may”, he could not agree with the second part of paragraph 2, according to which States “may consider the establishment of special compensation funds or other mechanisms of collective reparation for that purpose”.

He was somewhat concerned about the Special Rapporteur’s description, in paragraph 110 of the report, of the relationship between *jus ad bellum* and *jus in bello*. It seemed, in essence, that she supported the theory of selective application (or denial of application) of *jus in bello* for States that had violated *jus ad bellum*. That theory remained controversial. *Jus in bello* was based on the premise of equality of the parties, but the theory of selective application was diametrically opposed to the traditional notion of *jus in bello*. Thus, for example, because Iraq had violated *jus ad bellum* by invading Kuwait, the United Nations Compensation Commission had not applied the principle of equality of the parties in relation to Iraq, and the claimants had not had to prove the cause of the alleged environmental damage; that would have been unthinkable in ordinary litigation. However, the Iraqi forces had set fire to oil wells in Kuwait in order to secure a safe retreat. The use of smokescreens was a legitimate method of warfare to the extent that it did not exceed the limits of military necessity. To relieve the claimants of the burden of proving the cause of the damage seemed, to him, to be quite unfair, at least from the viewpoint of the equal application of *jus in bello*.

With regard to proposed draft principle 13 *quinquies*, as in the case of proposed draft principle 6 *bis*, there did not appear to be sufficient evidence of the existence of a legal obligation. As the Special Rapporteur herself recognized, corporate social responsibility was merely a moral responsibility and societal expectation. If it did not constitute an obligation under international law, there was no obligation on States to ensure that corporations were held responsible. He therefore doubted that proposed draft principle 13 *quinquies* should be retained.

Regarding proposed draft principle 14 *bis*, there was clearly a factual link between human displacement and the environment, and he understood that the international community needed to address the environmental effects of human displacement urgently. Initially, he had had some reservations about the draft principle, given that there was limited evidence in international law for the existence of the duty set out therein. However, having heard Mr. Valencia-Ospina's views on the subject, he was now convinced that draft principle 14 *bis* should be included on the basis of emergent rules of customary international law.

Since the title of the topic referred to "protection of the environment", the lack of a definition of the term "environment" seemed unusual. Of course, if the meaning of a word was obvious, there was no need for a definition: "sea" did not need to be defined in the United Nations Convention on the Law of the Sea, for example. But if there was any ambiguity, a definition was needed: that was why the Commission had decided to define "atmosphere" in its draft guidelines on protection of the atmosphere. The term "environment" was very ambiguous, and needed to be defined. Definitions of the term could be found in certain conventions and in the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*, but the Commission could formulate its own definition for the purposes of the current project. The Commission should consider carefully whether it wished to include natural resources in the concept of the environment, as the two terms were used separately in the draft principles. Certainly, the human environment should be included, as well as the natural environment. The former referred to the environment relevant to human life, while the latter referred to the environment itself, irrespective of whether it was relevant to human life. The scope of protection should be limited to the environment in relation to situations of armed conflict. The definition of "the environment" in the context of the topic should therefore be a narrow one.

In conclusion, he said that he was in favour of referring all the draft principles to the Drafting Committee.

Sir Michael Wood said that the report referred to a large range of materials that varied widely in terms of their authoritativeness, from treaty provisions and the general comments of human rights treaty bodies to resolutions of various international bodies, decisions of international, regional and domestic courts, and legal writings. The Special Rapporteur was to be commended for dealing with those materials with a high degree of sophistication and in carefully chosen language. However, the various materials were generally cited without reference to what States had said about them, and in some sections of the report there was little reference to State practice.

Generally speaking, he agreed with many of the comments just made by Mr. Murase. He also shared Mr. Murphy's uncertainty about the overall shape of the draft principles, which were somewhat unbalanced in their current form. They veered back and forth between obligations and guidelines, between States and corporations, between conservation and protection and sustainable use. Perhaps the Commission should reconsider the general shape and object of the draft principles at the second-reading stage.

The subject of chapter II (A), namely the illegal exploitation of natural resources, was a complex one. Such exploitation could be illegal under either national law or international law; it could be perpetrated by States or other international legal persons or by corporations or other private persons; and it was subject to non-binding but nevertheless important standards and to the rules of national criminal and civil law. Under international law, which was the chief concern of the Commission, it was essentially addressed by the prohibition of pillage, a well-established rule of both conventional and customary

international law. The proposal to include draft principle 13 *ter*, on pillage, among the draft principles therefore seemed appropriate.

He had doubts about proposed draft principle 6 *bis*, on corporate due diligence. He doubted that States would welcome even purely hortatory language concerning the adoption of legislative measures, and noted that, in paragraph 38 of the report, the Special Rapporteur herself stated that particular challenges in that respect had been addressed “by way of non-binding standard-setting”. The proposed draft principle raised a number of concerns. First, the recommendation to legislate was not qualified by a phrase such as “as and when appropriate”. Second, it referred to the protection of “human health” and the environment; while he did not question the close relationship between health and the environment, that phrase appeared to go beyond the subject matter of the topic. The Drafting Committee might wish to consider omitting the reference to “human health”. In addition, the draft principle referred to the rather vague notion of “due diligence and precaution”; such general terms did not seem appropriate in the context of a demand that States should take measures “to ensure” certain behaviour by their corporations. Furthermore, he did not believe that the current topic was the appropriate context in which to start laying down standards, however general, for the purchase or “obtaining” of natural resources. And, like Mr. Murphy, he was not sure what was meant by purchasing or obtaining resources “in an equitable and environmentally sustainable manner”.

Proposed draft principle 14 *bis*, on human displacement, seemed unproblematic at first sight, but he wondered to what extent it related to law, and was therefore suitable for consideration by the International Law Commission, as opposed to policy to be followed by States when dealing with persons who were fleeing from armed conflict. The draft principle dealt with very important matters, but he was not sure that those matters were best addressed in what presumably was meant to be a set of draft principles with at least some legal purpose. Was it for the members of the Commission to tell States how to balance measures to combat environmental degradation with the provision of relief to displaced persons and local communities? He doubted that such pre-eminently policy and practical matters were best addressed by international lawyers.

Chapter III (A), on armed non-State actors, was very interesting, but as no draft principle was proposed, he would not comment on it.

Chapter III (B), on corporate responsibility and liability, dealt first with multinational enterprises, which was a very complex field. The discussion ranged over wide areas of the domestic law, including the private international law, of many States, and covered such technicalities as “piercing the corporate veil”. It was also a highly contested field, as shown, for example, by the opposing views of the European Commission on the one hand, and the Netherlands and the United Kingdom on the other, in their *amicus* briefs in *Kiobel v. Royal Dutch Petroleum Co.* before the Supreme Court of the United States of America. Moreover, the Supreme Court had greatly reduced the impact of the Alien Tort Statute, with the result that the earlier cases referred to in the report might no longer reflect United States law and practice. Regarding the subset of corporations referred to as “private military and security companies”, it was difficult to draw any firm conclusions from the available materials.

Proposed draft principle 13 *quinquies*, on corporate responsibility, while not purporting to reflect any rights or obligations under international law, appeared to be highly prescriptive. Not only did that seem to run counter to the reluctance of many States to accept expansive extraterritorial jurisdiction in civil matters, but the terms in which the draft principle was framed, with references to “corporations registered or with seat or centre of activity in their jurisdiction”, “harm caused to human health and the environment”, “adequate and effective procedures and remedies” and “victims of the corporate actions”, were not always particularly clear. At least in its current form, he was not in favour of including the proposed draft principle in the set of draft principles, as it raised more questions than it answered.

Turning to chapter IV of the report, on the more familiar subject of State responsibility and liability, he said that he did not agree with everything in the explanatory paragraphs. For example, he did not subscribe to the Special Rapporteur’s analysis of

article 16 of the articles on responsibility of States for internationally wrongful acts, as her analysis did not give full weight to the basic distinction drawn by the Commission, in paragraph (1) of its commentary to article 16, between “the situation of aid or assistance” and that of “co-perpetrators or co-participants in an internationally wrongful act”. He did not see how, in the first scenario described in paragraph 121 of the report, “the act of aiding and assisting” rose to the “level of co-perpetration”: paragraph (10) of the commentary, which was cited in support of that interpretation, did not say that. Moreover, he did not necessarily agree with everything that was stated in paragraph 123 about common article 1 of the Geneva Conventions. Nevertheless, he was content with paragraph 1 of proposed draft principle 13 *quater*: the Commission should not attempt to describe the law of State responsibility as it applied to harm to the environment during armed conflict, the details of which, as the report made clear, were relatively complex.

Chapter IV (B) was largely a description of past efforts in relation to reparation for environmental damage. It contained some interesting information, especially about the United Nations Compensation Commission and its particular mandate from the Security Council. The judgment of the International Court of Justice in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* was clearly important in that context. *Ex gratia* payments and victim assistance, which were covered in chapter IV (C) of the report, were essentially matters of policy and were often based on domestic laws, not specifically on international law. A good number of the examples given, such as those concerning nuclear testing, did not seem to concern armed conflict. Having considered chapters IV (B) and IV (C) carefully, he was not in favour of including paragraphs 2 and 3 in proposed draft principle 13 *quater*, at least not in their current form. They dealt essentially with policy questions. Moreover, in his view, it was neither possible nor appropriate to lay down, in lapidary and quasi-legal fashion, policy prescriptions that States “should” follow in all the many possible factual situations.

Regarding proposed draft principle 13 *bis*, on environmental modification techniques, according to the 2005 International Committee of the Red Cross (ICRC) study on customary international humanitarian law, it was not clear that the Environmental Modification Convention reflected customary international law. In any event, he assumed that the draft principle was intended to be specific to environmental modification techniques within the meaning of that Convention. That should be made clear in the commentary, which should also clarify that the draft principle did not concern effects on the environment of the use of weapons more generally.

Turning to proposed draft principle 8 *bis*, which consisted of a Martens clause, he noted that the precise meaning and effect of the clause had been the subject of much debate and that, in strictly legal terms, it did not appear to go beyond what had been termed the “narrow” view. Essentially, the clause reaffirmed the applicability of rules of customary international law. He saw no problem with the inclusion of such a clause in a draft principle, provided that the commentary made clear that the clause was simply being restated in the specific context of protection of the environment. While its precise formulation would need to be considered by the Drafting Committee, he suggested that the best version was perhaps the one in article 1 (2) of Protocol I additional to the Geneva Conventions of 1949. However, the reference, in the proposed draft principle, to “the interest of present and future generations” seemed out of place in the restatement of such a clause, and he proposed that it should be omitted.

Regarding the use of the terms “the environment” and “the natural environment”, the rules of the law of armed conflict concerning the protection of the environment dealt with “the natural environment”; that was the term used both in the relevant treaty provisions and in chapter 14 of the ICRC study on customary international humanitarian law, which concerned rules 43 to 45 of customary international humanitarian law. Insofar as those rules were reflected in part two of the draft principles, it was important to retain the term “natural environment”, as in the provisionally adopted drafts; that would be his strong preference. Otherwise, the Commission could give the impression that it was seeking to change the existing rules of international humanitarian law. However, if a consensus emerged on the use of “the environment” throughout the draft principles, as suggested by the Special Rapporteur, an explanation would be needed. Such an explanation should not be limited to

Protocol I additional to the Geneva Conventions of 1949, but should also cover, for example, the customary international law of armed conflict. The general point that the expression “the environment” had various meanings, depending on the context, could be made in the commentary.

In conclusion, he said that he agreed that the proposed draft principles should be referred to the Drafting Committee, together with the comments made in the current debate.

Mr. Nolte said that the Special Rapporteur had produced a broad-minded and thoroughly researched report on protection of the environment in relation to armed conflicts and that she had succeeded in describing the many complex challenges, both factual and legal, which the topic entailed. He particularly appreciated the transparency with which the Special Rapporteur made it clear that most of the draft principles proposed were aimed at progressively developing the law, not at codifying existing law. To his mind, that was a strength, not a weakness. He therefore did not agree with Mr. Murphy that there was a lack of clarity as to whether the principles in question were “legal principles, moral principles, non-binding guidelines or some combination thereof”. On the contrary, the Special Rapporteur made it clear throughout the report, and not only through the choice of the word “should” or “shall”, whether a particular principle was meant to progressively develop the law or to restate existing international law.

In any case, the question of whether the work under a given topic generally pursued the goal of progressive development or codification was the wrong question for most topics. The work itself was not an exercise in one or the other; that distinction was relevant only to the individual provisions adopted by the Commission for each topic. It was not the designation of the Commission’s output as draft articles, conclusions, principles or guidelines that determined whether a particular provision was a restatement of the law, and thus a form of codification, or whether it was more policy-oriented, and thus a form of progressive development.

The Special Rapporteur’s approach was not, *pace* Mr. Murphy, a “jumble of both law and policy” that left States “to guess which was which”. Rather, it was an approach that enabled the Commission to more freely discuss the policy choices she proposed. The Special Rapporteur had provided the Commission with much material from which such policy choices could be drawn. It thus did not matter that a significant number of the materials and sources quoted in the report were not authoritative statements of the law, but duly considered positions arrived at by respected bodies that had reflected on the spirit of the law, even though that spirit had not yet been translated into firm legal rules.

He agreed with the Special Rapporteur that the proposed principles’ focus on private corporations rather than armed groups was appropriate, or at least not inappropriate, as the aim was to concentrate on what States could reasonably do when devising regulations to protect the environment in the event of an armed conflict. He also agreed that the international responsibility of organized armed groups, while not a legally uncharted area, was a fragmented topic on which few solid conclusions could be drawn. He would add that the rules regarding the responsibility of such groups should be identified and developed in a different framework, not in the context of the draft principles under discussion. From that perspective, the formulation of recommendations regarding private corporations did not appear to be an effort, as Mr. Murphy had suggested, to stigmatize them as the “lone villains” while overlooking “insurgencies, militias, criminal organizations and individual criminals”. Perhaps, as had been suggested, some principles could be added to restate the rules on the conduct of, and responsibility for, armed conflict.

The problem with regard to extraterritorial jurisdiction seemed to be that certain host States were unable to protect their people and their environment from the effects of armed conflict. In such cases, it made sense for other States to assist such temporarily disabled States by exercising a degree of control over the legal persons under their own jurisdiction. But such benevolent protection could turn into paternalistic interference when a host State made certain legitimate policy choices, including the exercise of its right to freely dispose of its natural resources. The Special Rapporteur had recognized that problem in her introductory statement, in which she had noted that a host State might not be in a position to effectively enforce its legislation and that, in such situations, the home State of a

multinational enterprise had a particularly important role to play in providing an effective remedy for alleged wrongdoing. She had also pointed to a very interesting recent judgment of the Supreme Court of the United Kingdom, in *Vedanta Resources PLC and another (Appellants) v. Lungowe and others (Respondents)*, in which the Court had decided that the case should proceed through the English courts even though there was no question about the competence, independence and integrity of the Zambian courts or the ability of the Zambian State to enforce their judgments. The Court's judgment might well serve as an illustration of the ambiguous role that third States and their courts could play in certain situations. Such States also had a responsibility to ensure that their courts took the legislative choices and judicial systems of other States seriously.

He therefore suggested that if the Commission adopted draft principles recommending the exercise of extraterritorial jurisdiction, it should reaffirm the policy space available for the regulation of a multitude of situations, while also recommending that the exercise of extraterritorial jurisdiction should be limited so as not to interfere with the legitimate policy choices of other States. Perhaps one way to achieve that aim would be to state that such jurisdiction could be exercised only if it served to ensure respect for generally recognized human rights and the rights of other States.

As for the draft principles themselves, he supported proposed draft principle 13 *ter*, on pillage. He also supported the general direction of proposed draft principle 6 *bis*, on corporate due diligence, although he wondered whether it should be formulated in less absolute terms, perhaps with the inclusion of a reminder of both the legislative choices open to States and the responsibility that States bore when pursuing the stated goal. A qualification such as "as appropriate" might be advisable, since it could also serve as a reminder that States should exercise their legislative powers with due regard for the legislative power of other States. The second sentence of proposed draft principle 6 *bis* seemed to go well beyond an obligation of due diligence. Like Mr. Nguyen and others, he found that the requirement of "ensuring that natural resources are purchased and obtained in an equitable and environmentally sustainable manner" would be very difficult to satisfy. The idea should either be rephrased or be moved to the commentary.

He supported proposed draft principle 14 *bis*, on human displacement. However, like Mr. Murphy, he would like to see the word order changed so as to clarify that the protection of the environment did not generally take precedence over the provision of relief for displaced persons.

He also supported the general direction of proposed draft principle 13 *quinquies* on corporate responsibility and, unlike Mr. Murphy, did not think that its aim was to establish corporations' responsibility under international law. He did not fault the Special Rapporteur for citing the Alien Tort Statute and the ensuing litigation as a possible source of the notion of extraterritorial responsibility for human rights violations. The fact that the United States Supreme Court had interpreted the Statute narrowly should not prevent the Commission from finding the underlying idea commendable. The case of *Kiobel v. Royal Dutch Petroleum Co.* had, however, shown that such legislation must be formulated very carefully in order to avoid friction between States. That was one reason why, in the first sentence of paragraph 1, the word "ensure" might be seen as asking too much of States unless that demand was qualified by the phrase "as appropriate". The second sentence of paragraph 2 was couched in mandatory language, unlike the rest of the draft principle, and should therefore be reworded to indicate that that sentence was a general policy recommendation.

Proposed draft principle 13 *quater* dealt appropriately with responsibility and liability of States. The "without prejudice" clause in paragraph 1 showed that the purpose of the draft principle was not to establish new grounds for responsibility and liability, or to take a position on contentious issues in that regard. The Special Rapporteur should not attempt to go beyond the Commission's earlier work on those matters; there was thus no need to define those two terms in the context of the current topic, since a reference to that earlier work was sufficient. The recommendation in paragraph 2 that States should take appropriate measures to ensure that damage did not go unrepaired was a good one. His reply to the point raised by Mr. Murphy in that context was that it would not be asking too much to invite every State to contribute, as it saw fit, to a fund for repairing the common good that was the environment, when the latter had been damaged by unidentified sources.

Paragraph 3 should not be couched in mandatory language and should be placed in the commentary.

Although he generally supported proposed draft principle 13 *bis*, the current wording might well create the impression that it set forth an unquestionable obligation under customary international law. For that reason, he would welcome the inclusion of the phrase “in accordance with its international obligations”, as proposed by the Special Rapporteur in her introductory statement.

Although the adoption of proposed draft principle 8 *bis* containing a variation of the Martens clause would be a move in the right direction, it would be going a step too far in one respect. He agreed with the Special Rapporteur that the draft principles should contain a general principle confirming the existence of rules on the protection of the environment in times of armed conflict that transcended express treaty rules. The fact that military manuals did not yet reflect the ICRC proposal on that subject should not deter the Commission from formulating such a general residual principle. The Martens clause, as a well-established expression of that principle, was an excellent starting point for a legal approach that was not necessarily confined to the law of armed conflict; there was nothing unreasonable about referring to “established custom” and “the dictates of public conscience” as legally relevant sources for the protection of common concerns of humanity, such as the environment. He was therefore in favour of the proposal to include such a clause, but disagreed with the idea that the environment, as such, remained under the protection of “the principles of humanity”, given that the environment could not be equated with human beings. The principles of humanity specifically served human beings, not animals, plants or the environment. The fact that the environment was of fundamental importance to human beings did not constitute grounds for treating the environment as if it were human.

The potential implications of the idea that the environment was protected by the principles of humanity were highly problematic. What would it mean for the concept of human dignity? How could a balance be achieved between the dignity of human beings and the “dignity” of the environment? If that route was taken, the quintessence of the principles of humanity, in other words the central position of the human person within the environment, might be forfeited, even if the concept of the environment was regarded as including the interests of future generations and even if the environment was recognized as possessing intrinsic value. He therefore shared the opinion of those who thought that the Commission should not employ wording that might detract from the centrality of the protection of persons in times of armed conflict.

When the Commission had adopted a version of the Martens clause for the protection of the environment in the commentaries to its draft articles on the law of the non-navigational uses of international watercourses and to its draft articles on the law of transboundary aquifers, it had not included a reference to the principles of humanity. It had, however, explained that special attention was to be paid to the requirement that regard should be given to vital human needs. The Commission should retain that approach, since none of the major developments in international environmental law since the adoption of those two sets of commentaries warranted a fundamental departure that consisted of stating that the environment itself should be protected by the principles of humanity.

He was unpersuaded by the fact that the ICRC guidelines for military manuals and instructions on the protection of the environment in times of armed conflict provided otherwise. He suspected that ICRC, as the guardian of the treaties on international humanitarian law, did not wish to tinker with time-honoured formulations and had thus decided to leave the reference to the principles of humanity in the new text. However, that did not mean that the Commission should simply incorporate wording that ICRC might have used without fully considering its possible implications.

Whether the Commission should define the word “environment” and whether it should employ only that term were two different questions. One possibility would be to refer to both the “environment” and the “natural environment” in the same document without defining either term, especially as “natural environment” was an established term in some legal contexts and the Commission should not give the impression that it was trying to change an accepted meaning. The use of both terms would not make the draft principles

inconsistent, since concepts were defined in order to give them a particular meaning for certain purposes, and that meaning could vary depending on the legal rules in question. In the broader philosophical sense, the term “environment” might well be open-ended and virtually all-encompassing, and thus might leave too much room for interpretation. However, he still took the view that the Commission should not define the term “environment” but should indicate in the commentary that its meaning might vary depending on the context, and in particular on the object and purpose of the principles in which it was used.

He was in favour of referring all the proposed draft principles to the Drafting Committee.

Mr. Hassouna said that he wished to commend the Special Rapporteur on her well-structured and well-researched report. The vital and urgent nature of the subject was illustrated by the fact that an unusually large number of delegations had commented on the topic in the Sixth Committee at the seventy-third session of the General Assembly.

In her second report, the Special Rapporteur skilfully and comprehensively addressed the most important issues raised by States, namely protection of the environment in non-international armed conflicts, responsibility and liability, illegal exploitation of natural resources, human displacement, sustainable use of natural resources and permanent sovereignty over such resources. He welcomed the format of the report, in which each draft principle followed the reasoning in support of its inclusion. The annex setting out all the draft principles that had been provisionally adopted by the Commission or the Drafting Committee was also useful.

With reference to paragraph 3 of the report, which dealt with the complementarity of different areas of international law and noted that obligations under human rights law and environmental law did not cease to exist during an armed conflict, he would like to know when an obligation to protect the environment could be suspended during a national emergency, such as an armed conflict, that threatened the life of a nation.

With respect to paragraph 4, concerning the convergence of norms applicable to international and non-international armed conflicts, he pointed out that, although many scholars and some States agreed that such convergence was taking place, a fair number of States and academics were more cautious in that regard. The Special Rapporteur should therefore remember that international armed conflicts and non-international armed conflicts were still under two separate regimes with different applicable norms. That situation was reflected in the Geneva Conventions and the Additional Protocols thereto, article 8 of the Rome Statute and customary international law. The Commission should not assume that a rule pertaining to international armed conflicts was equally applicable to non-international armed conflicts.

Moving on to paragraph 11, he suggested that, in addition to addressing the thorny issues of illegal exploitation of natural resources and the environmental effects of human displacement, which admittedly were frequently encountered in current non-international armed conflicts, the commentary could refer to other problems that arose in non-international armed conflicts and that had an impact on the environment.

In paragraph 21, it would have been appropriate to bear in mind not only the definition of the illegal exploitation of natural resources in Security Council resolutions, but also the definition of that notion in customary international law, multilateral agreements and judicial decisions. He fully supported the inclusion of a draft principle on the prohibition of pillage as an established rule of customary and treaty law that was embodied in the Geneva Conventions and the Additional Protocols thereto. He also approved of the inclusion of a draft principle confirming that States had permanent sovereignty over their natural resources, as that would be consonant with the findings of the International Court of Justice in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* and with the provisions of the African Charter on Human and Peoples’ Rights.

In the commentary to proposed draft principle 13 *ter* on pillage, it would be advisable to specify the elements of pillage on the basis of the provisions of the Rome

Statute and the jurisprudence of the International Tribunal for the Former Yugoslavia and the Special Court for Sierra Leone. Rather than echoing the language of article 33 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), it would be better to draw on the language of article 4 (2) of 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) and to state “The act of pillage of natural resources and the threat thereof is and shall remain prohibited at any time and in any place whatsoever”.

With reference to proposed draft principle 14 *bis* concerning the effects of human displacement on the environment, he wished to draw attention to the alarming increase in the number of internally displaced persons, as reported in the 2019 *Global Report on Internal Displacement* issued by the Internal Displacement Monitoring Centre. In addition, the ICRC study *Displacement in Times of Armed Conflict* illustrated the challenges facing the international community when dealing with human displacement. The Commission should therefore consider replacing the current language of the draft principle with the wording of article 40 (6) of the draft international covenant on environment and development that had been drawn up by the International Union for Conservation of Nature and Natural Resources, which was quoted in paragraph 47 of the report, in order to emphasize that the provision of relief for displaced persons and local communities was not of secondary importance in comparison to the protection of the environment. The commentary should make that point and should include a reference to burden-sharing.

With regard to the responsibility and liability of non-State actors, the report usefully highlighted the fact that even though organized armed groups were omnipresent in non-international armed conflicts, international law relating to such groups and to violations of international humanitarian law committed by them was still underdeveloped, particularly in respect of protection of the environment. For that reason, although he agreed with the Special Rapporteur’s conclusions in paragraph 58 of the report, he also thought that the Commission should clarify the legal accountability of organized groups specifically in relation to the environment. The commentary should also include definitions of the notions of responsibility and liability and an explanation of the difference between them.

With regard to corporate responsibility and liability, it would be helpful to clarify whether the Guiding Principles on Business and Human Rights, which had been endorsed by the Human Rights Council, and the OECD Guidelines for Multinational Enterprises differentiated between the conduct of private corporations in peacetime and their conduct in times of armed conflict. Furthermore, the general environmental protection obligations of private military and security companies should be clearly stated. It would likewise be helpful if, in the commentary to proposed draft principle 13 *quinquies*, the Special Rapporteur could explain how the legal link between environmental harm and its effects on human health was established. The Commission should also consider whether paragraph 2 of that draft principle might not unnecessarily restrict the responsibility of a parent corporation and preclude its liability in cases where it did not exercise *de facto* control but where there was nonetheless intermingling of funds and overlapping ownership.

In chapter IV of the report, the Special Rapporteur provided a well-structured overview of State responsibility and liability for environmental damage related to armed conflict. The United Nations Compensation Commission had indeed been notable for its success in handling claims concerning environmental damage caused by the Iraqi invasion and occupation of Kuwait, as indicated in the report. He agreed with the Special Rapporteur that State responsibility could result only from an internationally wrongful act, that environmental damage could also stem from lawful military activities in an armed conflict and that rules on responsibility for environmental damage caused in relation to armed conflict were still being developed. Since international organizations often participated in armed conflicts, they too could be held responsible for environmental damage. With regard to the compensability of pure environmental damage under international law, the Commission should clarify whether the special circumstances of an armed conflict had any influence on the manner in which reparation was made for environmental harm, or whether the principles of international law governing the consequences of internationally wrongful acts applied *mutatis mutandis* to armed conflicts. He noted that paragraphs 2 and 3 of

proposed draft principle 13 *quater* made no direct reference to State responsibility for an internationally wrongful act affecting the environment. In paragraph 3, the words “or can be” should be added after the phrase “irrespective of whether the damaged goods and services were”, in order to allow greater discretion in the determination of compensation. That would be consistent with the 2012 compensation judgment of the International Court of Justice in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*. The marketability of such resources should therefore be a complementary consideration.

With respect to proposed draft principle 13 *bis*, he supported the inclusion of a draft principle on environmental modification techniques but did not think that it should be based on the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, which had only 48 signatories and 78 States parties. Instead, its wording should be in line with rule 45 of the ICRC study on customary international humanitarian law, which was more widely accepted.

He was in favour of including a Martens clause to ensure that acts of war not expressly prohibited by treaty or customary law were subject to the application of the draft principles. The language of proposed draft principle 8 *bis* should, however, also include references to State practice and to the Commission’s earlier work on other topics.

As far as the use of terms was concerned, he agreed that the inclusion of a definition of the term “environment” would probably narrow the draft principles’ applicability and not leave room for any developments in the understanding of that notion. The distinction between “environment” and “natural environment” should be clarified in the commentary, and the latter notion should be used throughout the text for the sake of coherence with other international humanitarian law instruments.

By the end of the current session, the Commission should adopt a complete set of draft principles and commentaries on first reading. To that end, all the draft principles should be referred to the Drafting Committee.

There could be no better testament to the importance of the topic than the recognition by the International Court of Justice, in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, that the environment was not an abstraction but represented “the living space, the quality of life and the very health of human beings, including generations unborn”.

Mr. Rajput said that the Special Rapporteur was to be commended for her well-researched, thorough and thoughtful second report on protection of the environment in relation to armed conflicts and her detailed introductory statement. She had risen to the challenge of taking over a topic that had already acquired a certain form and direction under the previous Special Rapporteur and had brought the project to the conclusion of the first-reading stage.

Two of the points made by States in the Sixth Committee in 2018 were of general relevance and should continue to guide the Commission’s work in 2019. First, States had urged the Commission to highlight the complementarities between the law of occupation and other areas of international law. Some had recommended caution in that regard, pointing out that the extent to which rules contained in other bodies of law might apply during armed conflict must be considered on a case-by-case basis. Another point that had been stressed was that the Commission should ensure that its work on the topic remained in line with the existing rules of international law.

Before turning to the substantive sections of the report, he wished to make three preliminary points based partly on the comments made by States. First, he doubted that the entire regime of international environmental law, as applicable in peacetime, could be applied to the protection of the environment in relation to armed conflicts, particularly in view of the three temporal phases that the Special Rapporteur intended to cover. The references, in paragraphs 27, 28 and 109 of the report, to environmental protection treaties and declarations that were applicable in peacetime gave the impression that, in the Special Rapporteur’s view, the regime of international environmental law was fully applicable in situations of armed conflict and covered all three temporal phases.

In paragraph 30 of its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice expressed the view that treaties relating to the protection of the environment were not intended to deprive States of the exercise of their right of self-defence under international law because of their obligations to protect the environment. It also affirmed, however, that States must take environmental considerations into account when assessing what was necessary and proportionate in the pursuit of legitimate military objectives, and that respect for the environment was one of the elements to be taken into consideration in assessing whether an action was in conformity with the principles of necessity and proportionality.

The Court had thus stopped far short of recognizing the complete and unrestricted applicability of environmental law obligations during an armed conflict. That approach was supported by principle 24 of the Rio Declaration on Environment and Development, which noted that, as warfare was inherently destructive of sustainable development, States must respect international law providing protection for the environment in times of armed conflict and must cooperate in its further development.

The Court's reliance on the provisions of international humanitarian law, as opposed to general environmental protection treaties, was worthy of note. The Court had concluded that, taken together, articles 35 (3) and 55 of Protocol I additional to the Geneva Conventions of 1949 embodied a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare that were intended or might be expected to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals. Therefore, the Commission should approach the standard of environmental protection from a *jus in bello* perspective rather than approaching *jus in bello* from an environmental law perspective.

Second, any discussion of the relationship between armed conflict and environmental protection should be limited to the primary norms of environmental law. The Commission should avoid the temptation to draw on areas of law that were of only secondary or indirect relevance to environmental protection. In the report, the Special Rapporteur drew on two such areas: human health, in proposed draft principle 6 *bis* and proposed draft principle 13 *quinquies*, and human displacement, in proposed draft principle 14 *bis*. If the Commission decided that it did wish to draw on areas of law that were secondary or indirectly relevant, it would need to determine which ones.

Third, much of the material on which the report was based took the form of guidelines, instructions or reports prepared by expert groups constituted by international organizations, or guidelines prepared by regional institutions. Paragraph 37, for example, included a discussion of the European Union timber regulation, which was authoritative in Europe but might be less so in other regions of the world. The Commission had a specific mandate in the service of States and was bound to consider State practice in reaching its conclusions, even when it engaged in progressive development of international law. Thus, if it placed too much emphasis on informal material prepared by bodies without State involvement, it risked being seen as another expert group that freely selected material as it saw fit and arrived at its conclusions on the basis of policy preferences. Although the draft principles proposed in the report were not binding on States, there was a risk that States would be more inclined to ignore the Commission's output if it was based on policy preferences rather than legal rules.

Proposed draft principles 6 *bis* and 13 *quinquies* concerned the regulation of corporate behaviour. While he did not oppose such regulation, he questioned whether the draft principles were an appropriate means of pursuing that end. In his view, such matters should primarily be regulated under domestic law.

With regard to the first sentence of proposed draft principle 6 *bis*, he, like Mr. Murase and Mr. Park, was uncomfortable with the expansion of the scope of the topic to include human health. Concerning corporate due diligence, although he recognized the prominent role that the Guiding Principles on Business and Human Rights played in the contemporary debate on the subject, they could not be considered binding for want of sufficient legal precedent. Indeed, the Guiding Principles themselves included a provision

to the effect that nothing in the text should be read as creating new international law obligations or as limiting or undermining any legal obligations that a State might have undertaken or be subject to under international law with regard to human rights. Much of the other material cited in the report also took the form of recommendations.

As the entities involved in the illegal exploitation of natural resources in times of armed conflict could take various forms, as noted in paragraphs 30 and 31 of the report, due diligence obligations should not be limited to corporations only. Those obligations should also apply to other entities, such as sole proprietorships, partnerships, limited liability partnerships and other legal entities, individuals or unorganized groups involved in business and trading activities in conflict areas. The first sentence of draft principle 6 *bis* would have to be revised accordingly.

With regard to the second sentence of draft principle 6 *bis*, although he had no objection in principle to a requirement that natural resources should be purchased and obtained “in an equitable and environmentally sustainable manner”, the expression itself was unclear. Indeed, it could be interpreted as placing an additional burden on corporations, which would thus be discouraged from operating in conflict areas. In his view, such issues should be left to domestic legislation. In any case, the word “may” was preferable to “should”.

The Special Rapporteur’s justification for the obligation set out in the second sentence of paragraph 1 of proposed draft principle 13 *quinquies*, namely that States should provide adequate and effective procedures and remedies in respect of harm caused by corporations that were registered or based in their jurisdictions, relied on the Alien Tort Statute of the United States and the recent judgment of the Supreme Court of the United Kingdom in *Vedanta Resources PLC and another (Appellants) v. Lungowe and others (Respondents)*, which she had mentioned in her introductory statement. The report referred to a few cases in which States had exercised extraterritorial jurisdiction, but such practice, if recommended in the draft principle, might cause friction among States. The Commission should not venture into that area, as it might give the impression that it was seeking to legislate on matters that involved complicated conflict-of-laws issues.

With regard to paragraph 2 of proposed draft principle 13 *quinquies*, he had some concerns about the piercing of the corporate veil, as independent legal personality was one of the fundamental principles of corporate law, and the corporate veil could be pierced only in limited circumstances, such as fiscal fraud, as provided for under domestic law. In its 1970 judgment in *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, the International Court of Justice had found insufficient grounds for piercing the corporate veil and had held that international law must recognize the independent corporate personality of institutions created under municipal law.

In complex corporate structures with several holding companies, the operations of individual entities remained distinct, as did their statutory and other compliance requirements. Any proposal to make a parent company responsible for the actions of its subsidiaries would raise questions of enforcement and compliance. A broad provision contemplating the piercing of the corporate veil might discourage corporations from participating in initiatives such as post-conflict reconstruction projects.

Paragraphs 88 and 89 of the report referred to two decisions rendered by district courts in the United States in support of the argument that parent companies could be held accountable for the actions of their subsidiaries. Although the importance of district court decisions should not be underestimated, he wondered whether they provided sufficient grounds on which to disturb one of the fundamental principles of private international law, an area in which the Commission had neither experience nor expertise. In his view, the Commission should avoid venturing into that area; the practice of treaty bodies offered little support in that regard.

With respect to proposed draft principle 13 *ter*, he believed that the inclusion of a provision that extended the prohibition of pillage, which was a rule of customary international law, to include the pillage of natural resources would not be beyond the scope of the topic. However, as the draft principles were intended to cover all three temporal phases of armed conflicts, the text should include a clarification that the discussion of

pillage was limited to armed conflicts and post-conflict situations; otherwise, the draft principles might appear to be seeking to restrict the exploitation of natural resources prior to an armed conflict. He fully supported the use of the term “pillage”, which was used in many treaties, including the Rome Statute, and was used interchangeably with the terms “spoliation”, “plunder” and “looting” in the case law of the International Court of Justice and the International Tribunal for the Former Yugoslavia.

He supported proposed draft principle 13 *bis* on environmental modification techniques, on the understanding that it constituted not a principle of customary international law but an exercise in progressive development.

The report contained a well-researched and thorough discussion of the Martens clause that highlighted all the nuances of its normative value, content and application in international humanitarian law. As the members of the Commission were well aware, the Martens clause had been introduced as a diplomatic manoeuvre to save the Hague International Peace Conference of 1899 from collapse, and had subsequently been developed over time. In the absence of the Martens clause, the principle derived from the judgment of the Permanent Court of International Justice in *The Case of the S.S. “Lotus”* applied, whereby States were free to act as they wished, provided that they did not contravene an express legal prohibition. Paragraphs 173 to 178 of the report traced the development of the Martens clause and demonstrated convincingly that it applied only to international humanitarian law.

The Commission had previously limited the operation of the Martens clause to the specific context of international humanitarian law. In article 29 of the draft articles on the law of the non-navigational uses of international watercourses and article 18 of the draft articles on the law of transboundary aquifers, for example, that limitation had been made clear by means of an explicit reference to the “principles and rules of international law applicable in international and non-international armed conflicts”.

Proposed draft principle 8 *bis*, as set out in the report, represented a departure from the manner in which the Commission had previously used the Martens clause: it shifted the focus from the principles and rules of international law applicable in international and non-international armed conflicts to those of environmental law. However, that shift was not supported by sufficient State and judicial practice and interfered with some of the fundamental concepts of international humanitarian law.

Although it might seem tempting to argue that, conceptually, nothing prevented the Commission from replacing the reference to “principles and rules of international law applicable in international and non-international armed conflicts” with a reference to environmental law, three objections could be raised in that regard. First, as the Martens clause was intended to provide protection during armed conflict, its expansion to cover other temporal phases would do violence to its very purpose. Second, the terms “principles of humanity” and “dictates of public conscience” had a very specific meaning in international humanitarian law, which would be lost if the focus was shifted to environmental law. Third, the reference to the “interest of present and future generations” in draft principle 8 *bis* struck him as an attempt to graft environmental considerations onto the Martens clause, which had never before been used for that purpose. Thus, draft principle 8 *bis*, as proposed, could provoke sharp reactions from States.

The Commission should therefore ensure that it used the Martens clause in a manner that was consistent with its previous work, in particular article 29 of the draft articles on the law of the non-navigational uses of international watercourses.

He supported the Special Rapporteur’s decision to propose a draft principle on both responsibility and liability (draft principle 13 *quater*). In its work on responsibility of States for internationally wrongful acts, the Commission had referred only to “responsibility”; in its work on transboundary harm arising out of hazardous activities, by contrast, it had referred to “liability”. A State could be held “responsible” only if it breached an international obligation, but it could be held “liable” even for consequences arising out of acts not prohibited by international law. Since liability was absolute and did not require a breach of an obligation as such, it could be invoked and applied only in limited circumstances and in situations in which the injury caused was of a serious nature.

Paragraph 2 of proposed draft principle 13 *quater* was intended to address situations in which the source of environmental damage in armed conflict was unidentified or reparation from the liable party was unavailable. It advised non-responsible States to provide compensation through special compensation funds or other mechanisms. That provision seemed to have been inspired by the arguments outlined in the report with respect to reparation for environmental damage, the compensation commissions set up by the United Nations, and the *ex gratia* payments for environmental damage that had been made by some States.

He was not entirely persuaded by the arguments with regard to reparation. In situations in which an international obligation had been breached, the wrongdoer State was responsible for reparation. However, paragraph 2 provided for reparation in the absence of a breach, or in the presence of a breach but the absence of attribution. He understood that the paragraph constituted a mere invitation to States to provide compensation, but there was no strict legal basis for such a proposal. In addition, there was a risk that, if the Commission relied on the sparse practice of compensation commissions or *ex gratia* payments, it might discourage States from making such payments in the future for fear that their actions might be treated as practice or even be subject to some form of estoppel.

As for paragraph 3 of the proposed draft principle, he was uncomfortable with the use of the term “ecosystem services”, as it was not a legal term defined either in State practice or in the literature. The relevance of the reference to trade in or economic use of goods and services was also unclear. The Special Rapporteur seemed to be drawing on paragraphs 208 to 213 of the 2015 judgment of the International Court of Justice in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, but ecosystems had not been a central element of that case.

With regard to proposed draft principle 14 *bis* on human displacement, he was grateful to Mr. Valencia-Ospina for explaining the developments currently under way. The Commission should refrain from involving itself in that area, which was best left to States, was not a core aspect of the topic and would in any case require a great deal more study. In addition, as it was an area that was covered by soft law instruments, he doubted that the Commission could make an effective contribution in that regard.

Although he disagreed with some of the proposed draft principles, the Special Rapporteur’s second report had nevertheless sparked an interesting debate and had drawn the Commission’s attention to some important issues of international humanitarian law and its relationship with environmental law. He supported the referral of all the draft principles to the Drafting Committee and was confident that, with the Special Rapporteur’s open-minded and flexible attitude, the issues that he had identified could be resolved.

The meeting rose at 1.05 p.m.