

Provisional

For participants only

8 July 2019

Original: English

International Law Commission
Seventy-first session (first part)

Provisional summary record of the 3469th meeting

Held at the Palais des Nations, Geneva, on Thursday, 23 May 2019, at 10 a.m.

Contents

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

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Present:

Chair: Mr. Grossman Guiloff (Chair of the Drafting Committee)
later: Mr. Šturma (Chair)
Members: Mr. Argüello Gómez
Mr. Aurescu
Mr. Cissé
Ms. Escobar Hernández
Ms. Galvão Teles
Mr. Gómez-Robledo
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

In the absence of Mr. Šturma, Mr. Grossman Guiloff, Chair of the Drafting Committee, took the Chair.

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

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

Ms. Oral said that the Special Rapporteur's excellent second report on protection of the environment in relation to armed conflicts (A/CN.4/728) elaborated on the multiple interconnections between environmental protection and human rights and on the ways in which they were affected by armed conflicts. In so doing, the Special Rapporteur highlighted the need to systematically integrate those issues in the context of the twenty-first century. Chief among the many environmental threats that arose as a result of armed conflict was the unabated illegal exploitation of natural resources, ranging from the natural environment and its biological components to minerals and biodiversity. The Special Rapporteur noted that the term "illegal exploitation of natural resources" as used in relevant Security Council resolutions was broad and covered activities carried out by a wide variety of groups, ranging from State actors to non-State armed groups and other non-State actors. The connection between armed conflict and illegal activities such as poaching and the illegal trade in wildlife was not confined to one region of the world: well-known examples included conflict-financing in central and southern Africa through the illegal trade in ivory, the implication of terrorist and tribal militia groups in the illegal trade in rhinoceros horns in South-East Asia, and the Taliban-facilitated hunting of saker falcons in Afghanistan for sale in the Middle East. The illegal trade in wildlife continued to fuel and be fuelled by armed conflict involving illegal armed groups.

The Special Rapporteur had chosen to address the serious problem of the illegal exploitation of natural resources under the concept of "pillage", a word taken from the lexicon of armed conflict. The prohibition of pillage was a long-standing rule of customary international law that was found in many key instruments concerning international armed conflicts. However, reliance on the notion of pillage as it existed under the rules of international humanitarian law was not sufficient. The International Committee of the Red Cross (ICRC), in looking at the definitions of "pillage", had first referred to *Black's Law Dictionary*, which defined it as "the forcible taking of private property by an invading or conquering army from the enemy's subjects". In the context of the International Criminal Court, the elements of the war crime of pillage included the appropriation of "certain property" for private or personal use without the consent of the owner in the context of an international armed conflict. ICRC had concluded that the prohibition of pillage was "a specific application of the general principle of law prohibiting theft". As noted by the Special Rapporteur in paragraph 26 of the report, the "ownership" aspect was further evidenced in the African Charter on Human and Peoples' Rights, which recognized the right of dispossessed people to the lawful recovery of property in the case of "spoliation".

Natural resources were, for the most part, not private property but State property and part of the commons. As the Special Rapporteur pointed out, a number of international instruments that were related to international environmental law provided protection for natural resources such as international watercourses and biological diversity. But those were not necessarily resources that were under private ownership and were thus subject to "pillage" within the meaning of "theft" as the term was understood in the current international law framework.

The illegal exploitation of natural resources should not be confined to the notion of "theft". The International Court of Justice, in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, had upheld the claim that Uganda had engaged in "the illegal exploitation of Congolese natural resources, by pillaging its assets and wealth", in violation of the well-established principle of "respect for the sovereignty of States, including over their natural resources".

The current phrasing of proposed draft principle 13 *ter*, "Pillage of natural resources is prohibited", would limit the concept to the illegal taking of only those natural resources that were private property. The Commission should take the opportunity to extend the

notion of “pillage” from its narrower sense to include natural resources that formed part of the public commons or belonged to the State. The draft principle should therefore include an express reference to “illegal exploitation” and should apply to natural resources that were part of the public domain.

History was replete with examples of massive human displacement resulting from armed conflict. Sadly, victims of armed conflict continued to be uprooted and sent to live in what were often bleak refugee camps. The issue of the environment and human displacement was a broad subject in terms of international law but, for the purposes of the draft principles, the focus was limited to the impacts of human displacement on the environment.

The Office of the United Nations High Commissioner for Refugees (UNHCR), in the 2005 edition of *UNHCR Environmental Guidelines*, to which the Special Rapporteur referred in paragraph 44 of the report, provided some very insightful background information on the issue. The publication noted that the causes of environmental impacts in that context included refugee activities such as uncontrolled fuelwood collection, poaching, and overuse of limited water supplies, and that the environmental impacts could result in irreversible losses of productivity, the extinction of plant or animal species, the destruction of unique ecosystems and the depletion or long-term pollution of groundwater supplies, among other destructive outcomes.

The health and welfare of the millions of displaced persons living in refugee camps were dependent on healthy environmental conditions, such as clean water. But the camps could also result in direct harm to natural resources, wildlife and protected areas. Consequently, she wished to suggest that the language of proposed draft principle 14 *bis* should be aligned with that of other draft principles to include the obligation to protect the environment, not simply to prevent and mitigate environmental degradation.

As noted in paragraph 51 of the report, the term “non-State actor” remained undefined under international law and encompassed a broad range of actors that included not only armed rebel groups and organized criminal groups, but also private companies. She echoed the views expressed by various members of the Commission regarding the lack of a draft principle addressing the responsibility of non-State actors towards the environment in situations of armed conflict. She was open to discussing, in the Drafting Committee, Mr. Park’s interesting proposal for a new principle on “responsibility of organized armed groups”.

The Special Rapporteur was to be commended for having taken the bold step of addressing the role of private companies in the framework of armed conflict and protection of the environment and natural resources. However, and quite understandably in view of the lack of State practice in that respect, the report examined the relationship between human rights and corporate activities, but not necessarily in the context of armed conflict. Most of the cases discussed in the report concerned extractive industries, which were not the only threat to the environment and natural resources; another major threat was the illegal trade in wildlife, which necessarily involved private business entities.

In response to revelations that financial flows from corporations and extractive industries such as the diamond trade were used to finance armed conflict, efforts were being made to strengthen corporate responsibility. As a result of enhanced consumer awareness and global pressure, policies on “conflict minerals” had been adopted by numerous corporations in a self-regulatory manner. Many of those policies imposed due diligence and reporting obligations on multiple supply-chain actors. For instance, Target Corporation expected all its contractors to exercise due diligence in data-gathering and to use smelters and refiners that were certified as “conformant” to Responsible Minerals Initiative assessment protocols. In other cases as well, such self-regulation had been extended beyond parent corporations and subsidiaries to include external contractors and suppliers further down the global supply chain.

Many of those policies had been prompted by rules of the Securities and Exchange Commission of the United States of America that required publicly traded companies to submit conflict minerals disclosure reports. Thus, there was certainly an indication of State practice supported by corporate practice. Proposed draft principle 6 *bis* could serve as an

important link between corporate or business action and the responsibility of States. She was concerned, however, to note that draft principle 6 *bis* was limited to “corporations”. The Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises used the broader term “enterprise”, which included partnerships and other forms of business venture. Indeed, the Special Rapporteur herself used the term “multinational enterprises” in chapter III of the report. Consideration should be given to using the term “enterprise” instead of “corporation” in draft principle 6 *bis*.

Proposed draft principle 13 *quinquies*, on corporate responsibility, could perhaps be aggregated with proposed draft principle 6 *bis*, on corporate due diligence, as suggested by Mr. Huang.

According to the Special Rapporteur, the articles on responsibility of States for internationally wrongful acts provided the general framework for addressing issues of State responsibility in the context of armed conflict. However, as had been pointed out, those articles concerned only unlawful acts. The report outlined the different legal sources of State responsibility for environmental harm arising from violations of international law during armed conflict. However, in all cases the wrongful act must be attributable to the State. Thus, the Special Rapporteur had not addressed questions of responsibility and liability of non-State actors for violations of international law resulting in harm to the environment.

Proposed draft principle 13 *quater*, on responsibility and liability, was intended to cover situations where there were multiple actors or where the party to which illegal acts giving rise to environmental harm were attributable could not be identified. The Special Rapporteur provided an in-depth overview of the different modalities for the award of compensation for environmental damage resulting from armed conflict, most notably the United Nations Compensation Commission in relation to the invasion of Kuwait by Iraq. Another example of existing practice concerned the liability and compensation schemes established under the International Maritime Organization for harm caused by hazardous and noxious substances; that system strictly concerned liability and covered incidents where the wrongdoer could not be identified.

On the very important issue of reparations for environmental harm during armed conflict, she agreed with the Special Rapporteur that such harm should include damage to ecosystem services. One of the key findings by the International Court of Justice in its 2018 compensation judgment in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* was that “damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law”, and that compensation might include indemnification for such impairment or loss and “payment for the restoration of the damaged environment”. She therefore supported the thrust of draft principle 13 *quater*, but would recommend some minor modifications to make it less cumbersome, which could be discussed by the Drafting Committee.

With regard to the Martens clause, she noted that two esteemed professors of international law, Dinah Shelton and Alexander Kiss, had proposed a Martens clause for the environment some 20 years previously. The Martens clause had been reflected in many different instruments, including the Commission’s draft articles on the law of transboundary aquifers and draft articles on the law of the non-navigational uses of international watercourses. Some members of the Commission had expressed reservations about the Special Rapporteur’s proposal for such a clause. However, she disagreed with the interpretation of “principles of humanity” as applying exclusively to humans and not to the environment. She agreed with the Special Rapporteur that “principles of humanity” should not be read narrowly, on the basis of the reasoning outlined in paragraph 181 of the report. History was replete with cases in which civilizations had disappeared because the natural resources that had sustained them had been destroyed. Humanity could not exist without natural resources, biological diversity and healthy ecosystems.

She supported proposed draft principle 13 *bis*, which was consistent with the past work of the Commission. She also agreed with the Special Rapporteur that no attempt should be made to define the term “environment”. There was a reason why it was not

defined in any of the multiple global and regional environmental instruments, and the Commission should heed those precedents.

She was very pleased to see that the first reading of the draft principles was likely to be completed at the current session, and she fully supported their referral to the Drafting Committee.

Mr. Šturma took the Chair.

Mr. Grossman Guiloff said that, from the outset, he would like to express his support for the referral of all the draft principles to the Drafting Committee.

In general, the draft principles proposed in the report satisfactorily addressed existing gaps in the rules applicable to the protection of the environment in situations of armed conflict. In particular, the report addressed some of the most salient issues related to natural resources, responsibility and liability, the Martens clause and the use of the term “environment” or “natural environment”. He also welcomed the discussion on the relationship between the environment and human health. He wished, in particular, to commend the Special Rapporteur on her inclusion of the necessary corollaries to the Commission’s work on the topic, namely, the exploitation of natural resources in relation to armed conflicts and the environmental effects of human displacement caused by conflict.

He also wished to commend the Special Rapporteur for recalling, in paragraph 20 of the report, that the Commission had already recognized the need to address the connection between the legal protection of natural resources and the environment. He agreed that such a connection related to “all three temporal phases of the work: preventive measures, conduct of hostilities and reparative measures”. Unlike some colleagues who thought that only environmental harm directly related to the conduct of hostilities should be considered, he was of the view that the environmental issues related to armed conflict which exacerbated environmental harm were a necessary part of the Commission’s work on the topic. The Special Rapporteur analysed several outstanding issues that the Commission needed to consider, providing a detailed examination of many legal questions that arose in the areas of prevention and reparation of environmental damage. That analysis was an elegant application of the deductive process wherein existing rules could sometimes be applied in order to solve unforeseen problems or situations. It also showed that the current legal regime did not always offer satisfactory answers to many of the pressing concerns that arose in relation to environmental damage.

Chapter II of the report focused on two of the main causes of direct environmental damage in cases of armed conflict: the illegal exploitation of natural resources and situations of large-scale human displacement. It analysed the role that private actors played in the illegal extraction of resources and pointed to the international financial flows that made such conduct profitable. It also showed that human displacement was often a major cause of environmental degradation and that there was a need for States to consider the negative environmental effects that could arise from such displacement in order to minimize them.

With regard to the discussion on what Mr. Murphy had characterized as a lack of attention to non-State actors, he recognized that there was a focus on private corporations in the draft principles, but he tended to agree with the Special Rapporteur that such a focus was necessary, given that the illegal exploitation of natural resources was one of the issues that the Commission sought to address. The aim was not to cast corporations or private enterprises as “villains”, but to spotlight behaviour that caused damage to the environment. The focus on multinational corporations reflected the essential and important role they played in the development of economic relations. Moreover, multinational corporations should not be lumped together with criminal organizations, terrorist groups or the like. The issue was not the regulation of multinational corporations as “villains”, but the regulation of corporations that engaged in behaviour that violated international norms. As a matter of fact, recent developments in the international corporate world showed that a tremendous effort was under way to move towards positive regulation.

Notably, the Security Council had taken action to disrupt situations of illegal exploitation, with a focus on illegal trade, as described in paragraph 30 of the report. The

Security Council had imposed sanctions in relation to certain commodities and even against private actors engaged in conduct that violated international law and was harmful to the environment. The General Assembly had also referred to the negative effects of unlawful exploitation. For example, in the preamble to its resolution 73/283 of 1 March 2019, it recognized that “the trade in conflict diamonds continues to be a matter of serious international concern, which can be directly linked to the fuelling of armed conflict, the activities of rebel movements aimed at undermining or overthrowing legitimate Governments and the illicit traffic in and proliferation of armaments”. The negative effects that such situations had on the environment were evident. Therefore, the State in which a corporation was registered or had the main seat of its operations – the “home State” – should do its best to prevent corporations from causing significant environmental harm or contributing to the unlawful extraction of natural resources in areas in an armed conflict or post-conflict situation. Such an approach could prove very useful, since the home States of corporations were usually able to exercise a decisive influence on corporate conduct by enforcing standards and requirements at the domestic level. It also seemed fair to place the burden of action on the home State, as that State would generally profit from the activities of the corporation, through taxes, for instance.

He agreed with the Special Rapporteur that a good way to prevent such situations from arising was to require corporations first to undertake an effective due diligence assessment. Corporations should then refrain from entering into trade or corporate activities that entailed a substantial risk of causing significant environmental harm to areas affected by armed conflict or post-conflict situations or of contributing to the unlawful extraction of natural resources located in those areas. When a corporation carried out activities in areas affected by armed conflict, the due diligence assessment should verify that corporate conduct complied with the relevant rules of international and national law.

When considering the due diligence assessments undertaken by corporations, home States should give appropriate weight to the national laws of the State where the corporate activities were taking place, an important point that had been raised by Mr. Nolte. The verification process undertaken by the home State should not disregard the norms established by that other State to govern activities undertaken in its territory, provided that those norms were compatible with the relevant rules of international law. On the other hand, a State could establish one set of environmental requirements that was applicable during peacetime and another that was applicable during armed conflict, as long as all such requirements were compatible with its international obligations. In that case, due diligence assessments undertaken in the context of an armed conflict would only need to focus on the legal framework applicable in armed conflict or post-conflict situations; that would go a long way towards addressing the concerns raised in that connection by Mr. Murase. In addition, if a home State required corporations to undertake due diligence assessments with regard to their conduct abroad, it would be taking measures to prevent corporations from causing damage to the environment of third countries. That objective was plainly consistent with the rationale behind the articles on prevention of transboundary harm from hazardous activities, adopted by the Commission in 2001.

The importance of identifying what States could do to prevent environmental harm was highlighted in the report, which noted in paragraph 12 that the United Nations Environment Programme, the United Nations Development Programme and the World Bank had identified the use of extractive industries to fuel conflict as being among the six principal pathways for direct environmental damage in situations of armed conflict.

As for the concern that 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 proposed obligation went no further than the Security Council in its resolutions in relation to conflict minerals from the eastern part of the Democratic Republic of the Congo. The concern that the Commission’s call on States to exercise jurisdiction was not predicated on existing State practice was unfounded. The very existence of Security Council resolutions on the subject, which were binding on all States, to some extent constituted evidence of State practice in that area. The Security Council resolutions did not make the exercise of extraterritorial

jurisdiction conditional on factors such as where the conduct was occurring, whether the conduct was especially egregious or whether domestic remedies had been exhausted.

Regarding the allegedly random or “unbalanced” approach of the draft principles, which had been mentioned by several Commission members, and the claim that such an approach might create confusion for States, he agreed with Mr. Nolte’s characterization of the Special Rapporteur’s use of “shall” and “should” as signifiers for existing law and progressive development. He also agreed with Mr. Nolte that the distinction was a praiseworthy feature of the report and that 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. In fact, the process of developing legal norms often followed a general pattern whereby moral aspirations came to the attention of the international community and then contributed to the development of customary international law; subsequently they were codified through treaties, and finally led to the establishment of supervisory mechanisms. That had occurred in the field of international human rights law, where the Universal Declaration of Human Rights had led to human rights treaties and the further development of international human rights law.

The fact that the Commission’s work on the topic had focused chiefly on *lex lata* did not preclude acknowledgement of the rapid developments that were taking place in international environmental law. The interrelationship between the environment and human rights plainly called for the progressive development of international law. At the same time, it was crucial to remember that the processes of codification and progressive development were not binary and that the absence of State practice did not necessarily signify the non-existence of norms in a particular area of the law. Furthermore, established norms could be and often were applied to new situations through a process of interpretation, but that process could not be described as progressive development. As previous experience had shown, stating that a draft text represented progressive development could actually impede such development. Indeed, that label might well be an oversimplification of the complex deductive process that led to the regulation of behaviour in new areas.

In view of the conclusions drawn by the Special Rapporteur in paragraph 196 of the report, he supported her decision to use the term “the environment” throughout the draft principles and to explain in the general commentary that that choice of wording was without prejudice to the manner in which the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), was applied and interpreted.

As far as the references to human health in proposed draft principles 6 *bis* and 13 *quinquies* were concerned, it was simplistic to claim that the focus of the draft text was on protection of the environment and not protection of human health, since the effects of armed conflict on the environment often had serious consequences for human health. Moreover, the debates in the Sixth Committee had shown that there was support for a broad interpretation of “environment” to encompass such concerns.

He appreciated the Special Rapporteur’s inclusion of draft principle 6 *bis* and supported her decision to refer specifically to the obligations of multinational enterprises in that and other draft principles. The intention was not to attack multinational enterprises, but merely to spell out the responsibility of corporations that violated international law. He would not be in favour of targeting multinational corporations as such, since they made an important contribution to the economy. The draft principle addressed the pressing need to prevent the illegal exploitation of natural resources, which harmed the environment and posed a serious threat to countries’ stability and to international peace and security. States might inadvertently contribute to the illegal extraction of foreign natural resources by allowing corporations to purchase or trade in products that were made from unlawfully obtained resources. He agreed that the obligations of multinational corporations should be addressed separately from those of other non-State actors. The Commission could cover the situation of other actors and the consequences of their conduct in the commentary. He approved of the reference to the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, a major private-enterprise-driven initiative that deserved encouragement. The OECD Due Diligence

Guidance for Responsible Business Conduct, issued in 2018, should also be borne in mind. The Commission should be careful not to hinder further developments in that context.

Moving on to proposed draft principle 8 *bis*, he said that he was in favour of the inclusion of the Martens clause. The Special Rapporteur had clearly demonstrated that, in its expanded form, it applied to the protection of the environment in relation to armed conflicts. He therefore disagreed with Sir Michael Wood's narrow interpretation of the clause as merely reaffirming the applicability of rules of customary international law. The phrase "principles of humanity" was anchored in values and standards that were enshrined in international humanitarian law and human rights law. That position was consonant with the finding of the International Court of Justice, in the *Corfu Channel* case, that "elementary considerations of humanity" might be more exacting in peacetime than in wartime.

He shared Antonio Cassese's pragmatic approach to the interpretation of the term "dictates of public conscience", which was outlined in paragraph 178 of the report, since resolutions and other authoritative acts of representative international bodies contributed to the progressive development of international law. Moreover, the phrase called for an evolutionary reading of the rules of international humanitarian law in light of the rapid legal and normative developments in regard to environmental protection. He likewise agreed that the Commission's approach to the clause gave it an overarching character that was relevant to all three phases of the conflict cycle.

The addition of the phrase "present and future generations" was not prohibited by international humanitarian law, and the phrase was a recognized concept in international environmental law. Its inclusion therefore constituted appropriate progressive development of international humanitarian law in the context of the environment.

While he appreciated the inclusion of proposed draft principle 13 *bis*, he hoped that it could be reformulated to take account of developments since the drafting of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. Given that the long-term consequences of environmental harm for both local and distant populations were more clearly understood than they had been at the time the Convention had been concluded, the draft principle should not be restricted to the prohibition of damage or injury to another State, but should draw on the language of article 55 of Protocol I additional to the Geneva Conventions of 1949. The prohibition of the use of methods or means of warfare that were intended or might be expected to cause widespread, long-term and severe damage to the natural environment should be widened in order to protect the environment in all parts of a State's own territory, in disputed territories and in areas that were under no State control in times of conflict. He therefore proposed that the draft principle should be reworded to read "Military or other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any State or territory is prohibited".

Proposed draft principle 13 *ter* rested on solid footing in customary international law. The prohibition of the pillage of natural resources was clearly established in international law. He concurred with Mr. Nguyen that the principle was linked to the right of peoples to self-determination and to permanent sovereignty over their natural resources. The draft principle should therefore be supplemented with a second paragraph that would read "States shall restrain the illegal trade and exportation of plundered resources that will likely violate the right of self-determination of populations in areas of armed conflict". Clarification of that sentence should be provided in the commentary.

Proposed draft principle 13 *quater* reflected the regional and international recognition of the vital need for reparation to be provided in relation to damaged ecosystems. As environmental degradation could have a widespread impact within a very short period of time, the word "timely" should be inserted before the word "appropriate" to convey the inherent urgency of such action.

With respect to proposed draft principle 13 *quinqüies* on corporate responsibility, he disagreed with Mr. Murphy's comments on the Guiding Principles on Business and Human Rights that had been endorsed by the Human Rights Council, given that those principles did in fact expressly recognize direct corporate obligations under international humanitarian

law. Moreover, while the Guiding Principles were not a statement of customary international law, parts of them reflected such law, and they therefore could not be described as voluntary. All States were expected to prevent business-related abuses and were legally obliged to do so once they had ratified the relevant binding international human rights treaties; the “duty to protect” referred to in the Guiding Principles was derived from those obligations. The normative value of the Guiding Principles was also reflected in the fact that they had been endorsed by the United Nations and that global standards and initiatives relating to business and human rights had long converged around them.

He also disagreed with Mr. Murphy that the United States Supreme Court’s central holding in *Kiobel v. Royal Dutch Petroleum Co.* had been unanimous. In fact, it had been adopted by a bare five-justice majority, with the other four justices concurring with the Court’s judgment but rejecting its reasoning. Lastly, he agreed with Mr. Nguyen that that draft principle should be couched in mandatory language.

He welcomed the inclusion of proposed draft principle 14 *bis*, as human displacement had fundamental implications for environmental protection and could not therefore be treated as a completely separate issue, especially in view of the growing number of environmental refugees. Striking a balance between displaced persons’ rights and environmental protection was not a zero-sum game, since the two objectives were so intrinsically linked as to be indivisible. The meaning of the phrase “appropriate measures” in the draft principle should be clarified in the commentary. The International Finance Corporation’s Performance Standards on Environmental and Social Sustainability, in particular paragraph 8 of Performance Standard 1, might offer useful guidance in that respect.

As he supported the goals of the proposed draft principles, he was in favour of referring all of them to the Drafting Committee.

Mr. Saboia said that he wished to commend the Special Rapporteur on her extremely well-researched report, which provided insight into a number of complex issues such as the close correlation between the illegal exploitation of natural resources and armed conflicts, an old problem that was growing worse. The illegal exploitation of natural resources could be linked to the activities of States, non-State armed groups or other non-State actors. That scourge was addressed in the international instruments cited in paragraphs 25 to 29 of the report. The Security Council had imposed sanctions against individuals and private companies whose activities sustained such exploitation. Legal rules or guidelines on due diligence had been issued at both the regional and national levels in order to prevent such practices. The prohibition of pillage, meaning the random destruction and appropriation of public or private property, was an established rule of customary international law and had been upheld by the International Court of Justice in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*. The degree of international concern that was evident from the sources cited in the report justified the inclusion of proposed draft principles 13 *ter* on pillage and 6 *bis* on corporate due diligence. However, he agreed with Ms. Oral that the scope of the provisions on due diligence should be broadened.

Several States had expressed an interest in including the subject of the environmental impact of human displacement within the ambit of the topic. The Special Rapporteur painted a dismal picture of the manner in which the large-scale displacement of persons, in particular during non-international armed conflicts, could seriously harm the environment and pose a great risk to the health of the local population. In that context, it might be wise to ascertain whether the contents of the draft articles on the protection of persons in the event of disasters and the Commission’s deliberations on that topic were of any relevance to the consideration of human displacement as a result of armed conflict and its impact on the environment. He endorsed proposed draft principle 14 *bis*, while agreeing with those members who thought that the text should cover not only the areas where displaced persons were located but also the areas crossed by them in the course of displacement.

The Special Rapporteur's extensive analysis of the responsibility of armed non-State actors, as combatants, under international humanitarian law had led her to conclude that there was general recognition that organized armed groups, as parties to an armed conflict, were bound by the rules of international humanitarian law. Her analysis of Security Council and General Assembly practice showed that both organs recognized that armed non-State actors were responsible for providing appropriate protection to the civilian population and that their conduct could be deemed to amount to violations of human rights.

As noted by the Special Rapporteur, the international responsibility of organized armed groups was a fragmented topic on which few solid conclusions could be drawn. However, in his view, further consideration should be given to the possibility of producing a draft principle recognizing the duty of armed groups to provide reparation to victims of violations of the law of armed conflict, with due regard to the matter of environmental damage. In many cases, non-State armed groups possessed and controlled a great deal of property and equipment and engaged in financial transactions, frequently by illicit means. States could be called upon to take various measures to enforce the obligation of non-State armed groups to provide reparation. Principle 25 of the Guiding Principles on Business and Human Rights offered a precedent in that regard.

Chapter III (B) of the report contained an overview of the efforts being made by international and regional organizations, human rights treaty bodies and OECD to develop principles and guidelines to strengthen the obligation of enterprises to respect human rights and international humanitarian law, particularly during armed conflicts. The OECD Guidelines for Multinational Enterprises had created an effective system of national contact points to oversee their implementation. As noted in paragraph 78 of the report, between 2000 and 2015, around a quarter of the specific cases addressed by the national contact points had been related to the environment.

The Special Rapporteur also highlighted relevant national legislation in various countries. Under the Alien Tort Statute of the United States, for example, there had been cases in which corporations had been deemed to be capable of co-perpetrating or aiding and abetting genocide or crimes against humanity, and thus to be bound by at least the most fundamental rules of international criminal law.

The question of the relationship between a parent company and its subsidiaries abroad was also relevant. The cases cited in the report showed that, under certain conditions, the so-called "corporate veil" could be pierced in the interest of justice. Paragraph 88 of the report referred to *Bowoto v. Chevron Texaco Corp.*, in which the United States District Court for the Northern District of California had held that piercing the veil would be possible if it was shown that the separate identity of the corporation had not been respected and that "respecting the corporate form would work an injustice on the litigants".

With regard to private military and security companies, it should be borne in mind that, as noted in the commentary to the articles on responsibility of States for internationally wrongful acts, such companies often exercised elements of governmental authority. For that reason, the State to which they were linked could be held responsible for internationally wrongful acts committed by their agents. Moreover, depending on the circumstances, the staff of such companies might be bound by international humanitarian law in situations of armed conflict. If the conduct in question was of sufficient gravity, it might fall within the jurisdiction of an international criminal court. Such companies often maintained a close relationship with the States to which they were linked; that created an obstacle to the application of the competent court's jurisdiction to their conduct. For example, some high-profile court cases in the United States had not resulted in a definitive outcome owing to the proximity of private contractors to State policy, as explained in paragraphs 100 and 101 of the report.

In sum, he supported proposed draft principle 13 *quinquies* on corporate responsibility. Both paragraphs of the draft principle, including the references to human health, should be retained.

In chapter IV of the report, on State responsibility and liability, the Special Rapporteur offered a convincing and well-illustrated survey of the history of the determination of responsibility for internationally wrongful acts and the award of

compensation for harm suffered during armed conflicts and in peacetime, particularly in relation to the environment. The concept of liability included harm suffered owing to activities not prohibited under international law. When the words “responsibility” and “liability” were used together, he understood “liability” to refer to the actions that derived from the attribution of “responsibility” and led to the award of compensation. The Special Rapporteur’s conclusion, in paragraph 131, seemed to reflect both the progress that had been made and the challenges that remained in that regard: while the articles on State responsibility provided a general framework for addressing questions of responsibility and liability in armed conflict, the relevant practice of international courts and tribunals was still evolving.

Chapter IV (B) of the report, which concerned reparation for environmental harm, contained a substantive analysis of court cases concerning the allocation of loss in the case of environmental damage. Consideration was also given to the activities and findings of the United Nations Compensation Commission. As noted in paragraph 143, a key holding in relation to reparation was the landmark 2018 compensation judgment of the International Court of Justice in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, in which the Court held that damage caused to the environment, in and of itself, was compensable under the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation.

Accordingly, he could support proposed draft principle 13 *quater*.

With regard to the additional issues outlined in chapter V, he supported the Special Rapporteur’s decision, in the form of proposed draft principle 13 *bis*, to consider the question of environmental modification techniques, taking the Environmental Modification Convention as her point of departure. In relation to proposed draft principle 8 *bis*, which consisted of a Martens clause, he did not share the concern expressed by certain members of the Commission regarding the use of the term “principles of humanity” in the context of the environment. Although Mr. Nolte had suggested that the Special Rapporteur’s proposal elevated the environment to the same level as human beings, his own view was that the clause served to emphasize the paramount importance of the environment for human life and for the survival of humankind.

He agreed with the Special Rapporteur’s decision not to define the term “environment” and with her reasons for so deciding, as set out in the report. He also accepted her proposal regarding the harmonization of terms.

He supported the referral of all the draft principles to the Drafting Committee and looked forward to the successful adoption of the draft principles on first reading.

Mr. Jalloh said that he wished to thank the Special Rapporteur for her excellent report and oral presentation. Overall, the report provided a solid basis on which the Commission could move towards the successful completion of the first reading of the draft principles. The importance of the topic was highlighted by the fact that so many States had commented on it in the Sixth Committee in 2018.

With regard to methodology, he fully agreed with Mr. Nolte that the Special Rapporteur’s approach to the issue of progressive development and codification was commendable for its transparency and for the wealth of source materials cited; that the focus on private corporations as subjects of State regulation was understandable and should not be taken as an attempt to target corporate entities as such; and that any recommendations on the extraterritorial exercise of national jurisdiction should be accompanied by limitations so as to prevent interference in the legitimate policy choices of States. On that last point, if the Commission did not include such limitations, it might appear to be perpetuating global inequities that were broader than the topic at hand. Many of the large multinational or transnational corporations under discussion, some of which wielded greater power and influence than entire States or groups of States, were based in the global North, whereas the States in which they wielded that power and influence were in the global South.

Concerning chapter II of the report, the illegal exploitation of natural resources had become a defining characteristic of modern conflicts and remained a dominant feature of

the ongoing wars in the Democratic Republic of the Congo and the Central African Republic. The problem of illicit exploitation was particularly severe in Africa. The extraction of and trade in minerals, timber and oil had directly or indirectly financed warring groups and violence or other human rights abuses in such countries as Angola, Côte d'Ivoire, Liberia and Sierra Leone. Since 1996, the Democratic Republic of the Congo had been a focus of international concern. Its large mineral deposits and history of governance challenges were believed to be contributing to the violence being perpetrated by rebel groups and the national army. In that context, States in Africa had been willing to surpass traditional legal standards relating to the exploitation of natural resources.

In June 2014, the Assembly of Heads of State and Government of the African Union had adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) and had called upon all States members of the African Union to sign and ratify that instrument. The Malabo Protocol extended the jurisdiction of the African Court of Justice and Human and Peoples' Rights, which had yet to be established, to cover 14 international and transnational crimes. Article 28 L *bis* of the instrument prohibited the illicit exploitation of natural resources and defined such exploitation as encompassing acts such as concluding an agreement to exploit resources in violation of the principle of peoples' sovereignty over their natural resources, concluding with State authorities an agreement to exploit natural resources in violation of the legal and regulatory procedures of the State concerned, exploiting natural resources without any agreement with the State concerned and exploiting natural resources without complying with norms relating to the protection of the environment and the security of the people and the staff, provided that such acts were of a serious nature affecting the stability of a State or region or of the African Union. The International Criminal Law Section of the future court would have the power to try both natural and legal persons involved directly or indirectly in such crimes.

He agreed with the Special Rapporteur's decision to include the principle of permanent sovereignty over natural resources, although he wished to point out that some courts, such as the Inter-American Court of Human Rights, had taken the position that States did not always have a sovereign right to dispose of their natural resources and that the principle of self-determination was essential. As rightly noted by the Special Rapporteur, General Assembly resolution 1803 (XVII) and the African Charter on Human and Peoples' Rights stated that the right to permanent sovereignty over natural wealth and resources belonged to "peoples". The idea that self-determination entailed the right to sovereignty over natural resources had also been recognized in a series of arbitral awards, including *Texaco Overseas Petroleum Company v. the Government of the Libyan Arab Republic*.

He fully supported the Special Rapporteur's view that the prohibition of pillage was an established rule of customary law and treaty law, as set out in articles 28 and 47 of the regulations annexed to the Hague Convention respecting the Laws and Customs of War on Land, article 33 (2) of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) and article 4 (2) (g) 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). The same prohibition, which could be found in national laws and military manuals, had been applied by *ad hoc* international tribunals such as the Special Court for Sierra Leone. In addition, the African Charter prohibited spoliation. Article 17 of the Protocol against the Illegal Exploitation of Natural Resources adopted at the second summit of the International Conference on the Great Lakes Region required States parties to establish the liability of legal entities for participating in the illegal exploitation of natural resources. Exploitation of that kind had led to the adoption of several Security Council resolutions, as detailed in paragraph 30 of the report. In the light of the materials cited by the Special Rapporteur, he agreed with her conclusion, in paragraph 38, that there was a firm basis on which to prohibit the worst forms of misappropriation of resources in armed conflict, which could be characterized as pillage.

With regard to human displacement, the Internal Displacement Monitoring Centre had issued an alarming report confirming that, in 2018, a record 41.3 million people were living in situations of internal displacement owing to conflict and violence. At United Nations Headquarters, the 2019 edition of the Africa Dialogue Series had been devoted to

the issue of displaced persons in Africa, whose plight affected the continent's economy, environment and host communities.

As the Special Rapporteur noted, article 9 (2) (j) of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) stipulated that States parties should take necessary measures to safeguard against environmental degradation in areas where internally displaced persons were located, either within the jurisdiction of the States parties or in areas under their effective control. The Kampala Convention was a groundbreaking instrument, as it recognized that States, internally displaced persons and the international community all had obligations in that regard. Although it was only a regional convention, it could inform the Commission's work on the topic. As noted by the current President of the International Court of Justice, Judge Yusuf of Somalia, the Kampala Convention was an example of a regional instrument that could serve as a source of inspiration for the world. Africa was developing a unique normative legal architecture to advance human security and the protection of the environment.

Owing to the ongoing conflicts in Yemen, the Syrian Arab Republic and elsewhere, as well as the unprecedented exploitation of natural resources in the Democratic Republic of the Congo and the Central African Republic, a significant wave of displacement was occurring on a global scale. In formulating its response, the international community should draw inspiration from developments taking place at the regional level.

He agreed with Mr. Hmoud that the international community had not sufficiently or effectively shared the burden of alleviating the negative effects of conflicts on the environment or on communities hosting displaced persons. The front-line States that were doing the most to address the issue required additional support from other States. For those reasons, he fully endorsed the Special Rapporteur's proposed draft principles 13 *ter* on pillage, 6 *bis* on corporate due diligence and 14 *bis* on human displacement. The proposed draft principles would be a first step towards a comprehensive legal solution to the challenge of alleviating that burden.

With regard to chapter III, he agreed with the Special Rapporteur's decision to adopt the International Law Association's working definition of "non-State actor", which excluded intergovernmental bodies. Although he understood why the Special Rapporteur had concluded that the international responsibility of organized armed groups, while not a legally uncharted area, was a fragmented topic, he did not agree that few solid conclusions could be drawn in that respect. In his view, that was an area in which international law could be progressively developed. Given the extent and significance of the problem, that task fell squarely within the Commission's mandate in accordance with article 15 of its statute.

Concerning individual criminal responsibility, the Special Rapporteur had noted correctly that international criminal law had developed rapidly and had come to play an essential role in the prosecution of serious violations of the law of armed conflict, including crimes that could lead to the destruction of the environment during armed conflict. There was no global court to try crimes related to the global environment; when global consciousness reached the point where such crimes were prosecuted, the International Criminal Court would probably be best placed to offer a solution.

As noted in paragraphs 61 to 66 of the report, the Rome Statute of the International Criminal Court, which prohibited war crimes, crimes against humanity, genocide and the crime of aggression, contained substantive criminal law provisions that were not necessarily directed at protecting the environment from destruction but could serve as an indirect means to that end. For example, the jurisprudence of *ad hoc* international tribunals such as the Special Court for Sierra Leone provided a more expansive interpretation of the scope of the war crime of pillage. Some of the standards in question applied to both non-international and international armed conflicts.

The Rome Statute emphasized that States had the primary responsibility for investigating and prosecuting the crimes that were within the jurisdiction of the International Criminal Court and that, under the principle of complementarity, the Court exercised jurisdiction only when States were unwilling or unable to do so. A number of

States had incorporated that principle of complementarity into their domestic law. As the Special Rapporteur noted, the Rome Statute provided an essential framework for establishing the responsibility of those who committed or contributed to the commission of serious international crimes, including leaders or members of organized armed groups.

Accordingly, he would have been in favour of a draft principle on the issue. Such a draft principle might, for example, read “States should take the necessary legislative and other measures to ensure that persons who commit crimes that lead to the destruction of the environment during, before or after armed conflict are held criminally responsible”.

In passing, he wished to note that the draft Code of Crimes against the Peace and Security of Mankind included a clause addressing widespread, long-term and severe damage to the natural environment. In a resolution adopted in September 1994, the International Association of Penal Law had proposed that core crimes against the environment affecting more than one national jurisdiction or affecting the global commons outside any national jurisdiction should be recognized as international crimes under multilateral conventions and that, in order to facilitate the prosecution of such crimes, the Commission should include them in the draft statute for an international criminal court, which had been under development at the time. The Commission’s current efforts were thus in line with those proposals.

The question of how to address concerns about corporate responsibility and liability was one of the great challenges facing the international community. The extensive body of hard and soft law instruments cited in paragraphs 67 to 92 of the report gave some indication of the magnitude of that challenge. It also offered insights into some of the possible legal solutions. Although the impact of corporate entities on human rights and the global environment could be positive, it was often negative and, at times, had devastating effects on the most vulnerable. Thus, he fully supported proposed draft principle 13 *quinquies* on corporate responsibility. As the Special Rapporteur had made clear, the proposed draft principles were aimed at progressively developing the law in that area.

He welcomed the Special Rapporteur’s extensive discussion of the Alien Tort Statute of the United States and of the litigation under that law, which provided a starting point for the establishment of extraterritorial responsibility for environmental or human rights violations. The case law of the United States, beginning with the decision of the Court of Appeals for the Second Circuit in *Filártiga v. Peña-Irala*, illustrated the types of regulatory measures that could be taken at the national level to enhance compliance with international law in relation to poor conduct in foreign jurisdictions. Nevertheless, as many colleagues had emphasized, the Supreme Court had recently tended towards a narrower interpretation of the Alien Tort Statute, first in *Kiobel v. Royal Dutch Petroleum Co.* and subsequently in *Jesner v. Arab Bank, PLC*. In *Kiobel*, the Supreme Court had held that the presumption against the extraterritorial application of United States law applied to claims under the Alien Tort Statute. Although that case had left open the question of whether foreign corporations could be sued under the Alien Tort Statute, in *Jesner* the Supreme Court had held that the Alien Tort Statute did not extend to suits against foreign corporations if the relevant conduct had taken place outside the United States. In addition, the Court had noted that even if, under accepted principles of international law and federal common law, corporations were subject to Alien Tort Statute liability for human rights crimes committed by their human agents, in the case in question the activities of the defendant corporation and the alleged actions of its employees had insufficient connections to the United States to subject it to jurisdiction under the Alien Tort Statute. The decision in *Jesner* had thus foreclosed the opportunity to hold foreign corporations liable where there was no connection to the United States. That line of reasoning would become more evident in the context of climate change, ozone depletion and biological diversity.

Nonetheless, the Alien Tort Statute remained a vehicle for holding corporations liable in cases where there was a sufficient connection to the United States. As the Supreme Court had stated in *Jesner*, the enormity of the offences that could be committed against persons in violation of international human rights protections could be cited to show that corporations should be subject to liability for the crimes of their human agents. Although the Court had noted that the international community had not yet taken that step, it had quoted the statement, in the judgment of the Nuremberg Tribunal, that crimes against

international law were committed by individuals, not by abstract entities, and that the punishment of such individuals was the only means of enforcing international law. Even the Government of the United States, in a brief filed in relation to the *Jesner* case, appeared to have taken a middle-ground position in which it had rejected the argument that the Alien Tort Statute foreclosed corporate liability.

The Special Rapporteur was to be commended for addressing the issue of private military and security companies in her report. Wide-ranging international and regional efforts had been made to develop soft-law instruments to guide the conduct of such companies, which had not always acted in accordance with relevant rules and were alleged, in some cases, to have escaped liability. The fact that such companies tended to have close relationships with States raised the question of whether certain bodies of law, such as international humanitarian law, were applicable to them. They often operated in times of vulnerability, when States were in conflict or had failed or were on the verge of doing so.

Sadly, his home country of Sierra Leone was a paradigmatic example of that problem. There, during the civil war that had taken place from 1991 to 2002, private companies from Nepal and South Africa had been hired and deployed to drive members of the Revolutionary United Front out of strategic mining areas in the eastern part of the country in return for diamond concessions. Many of the military and mining companies had shareholders in common and had used those links to benefit from the conflict. Some of the companies had previously provided mercenary services in other countries such as Angola, and there had been allegations that, in the conduct of their military activities, they had violated basic rules of international humanitarian law. The Government had sided with them and had shown no interest in holding them accountable.

Consequently, and for the reasons set out by the Special Rapporteur in the report, he supported the inclusion of proposed draft principle 13 *quinquies*. From the perspective of African States, the provision was likely to be seen as one that could perhaps be strengthened through the replacement of all occurrences of the word “should” with “shall”.

He wished to express his overall support for the approach taken, the analysis carried out and the conclusions drawn by the Special Rapporteur in chapter IV of the report, on State responsibility and liability. He strongly agreed that environmental degradation fell under several different bodies of law that intersected with one another and that it could be linked to the violation of fundamental human rights such as the rights to life, health and food. As noted in paragraph 109 of the report, the implementation of legal obligations in that regard had been uneven. Despite a lack of relevant case law, sufficient standards from which to draw inspiration for the Commission’s proposals could be found in the Hague Regulations respecting the Laws and Customs of War on Land, Protocol I additional to the Geneva Conventions of 1949 and the ICRC study on customary international humanitarian law. In any event, the Commission’s well-regarded articles on responsibility of States for internationally wrongful acts, in particular articles 16 and 47, provided a general framework for its work on the topic. That said, he shared the concern raised by Mr. Park regarding the need to clarify the terms “liability” and “responsibility”.

He agreed with the Special Rapporteur’s analysis and conclusions on the issue of reparation for environmental harm. Such reparation should be provided in an adequate form and in proportion to the damage caused. The provision of such reparation had previously been supported by the Commission in its commentaries to the articles on State responsibility.

He appreciated the Special Rapporteur’s explanation of the various reparation schemes and of the relevance of *ex gratia* payments as forms of reparation that might extend to remediation of harm to the environment. The information provided in the report demonstrated that there was no legal obligation to make such payments, which, as stated by the Special Rapporteur, entailed a shift of focus from the State’s liability to the injury suffered by the victim, with “victim” broadly defined, as in paragraph 9 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

He was therefore fully in favour of proposed draft principle 13 *quater*, since it contributed to the progressive development of victims' rights by acknowledging that, even in the absence of a conviction or prosecution, a person who had suffered harm might still be entitled to monetary or other forms of reparation, which could be useful for the purposes of remediation of damage to the environment.

He agreed with the inclusion of a draft principle phrased in accordance with article I (1) of the Environmental Modification Convention and saw merit in explaining why the formulation in question had been preferred to the one found in articles 35 (3) and 55 of Protocol I additional to the Geneva Conventions of 1949. The difference between the two formulations was, in his view, crucial. As a result, he wished to join Mr. Hmoud in urging the Special Rapporteur to define, in the commentaries, the key terms "widespread", "long-lasting" and "severe".

The well-known Martens clause, which had also been discussed in the context of the topic "Crimes against humanity", provided that, in cases not specifically governed by international agreements, civilians and combatants remained under the protection and authority of the principles of international law derived from established custom, the principles of humanity and the dictates of public conscience. He wished to align himself with the comments made by Mr. Grossman Guiloff and Ms. Oral on the matter. Bearing in mind the conclusion reached in paragraph 183 of the report, he supported the inclusion of the clause.

He also supported the Special Rapporteur's decision not to define the term "environment", because, as asserted by the Commission itself in the commentary to draft principle 11, since knowledge of the environment and its ecosystems was constantly increasing, environmental considerations could not remain static over time, but should develop as human understanding of the environment developed. In addition, the term had not been defined in the Commission's draft articles on the law of the non-navigational uses of international watercourses or in its draft articles on the law of transboundary aquifers, or by the European Commission for the purposes of its Environment Action Programme. Given that knowledge of the environment and its elements was continually expanding and evolving, a strict definition based on current understandings could quickly become inaccurate or irrelevant.

Moreover, he agreed with those Commission members who had expressed opposition to the idea of using only the term "environment", rather than referring also to the "natural environment", throughout the draft principles. The two terms were notably different in scope, with the term "environment" generally considered to have a broader meaning. If a choice had to be made between the two terms, he was not sure that the Commission should depart from the language of Protocol I additional to the Geneva Conventions of 1949. It might be more appropriate to use both terms where relevant in the draft principles and to provide further explanations of the distinction between them in the commentaries.

In conclusion, he said that he supported the referral of all the proposed draft principles to the Drafting Committee. He looked forward to working with the Special Rapporteur and the other members of the Commission to ensure the successful completion of the first reading of the draft principles by the end of the current session. That would represent an important achievement on an issue of great contemporary relevance to States and the international community as a whole.

Mr. Gómez-Robledo said that he wished to thank the Special Rapporteur for her second report and the quality of the study that she had conducted. Within the United Nations system, consideration was currently being given to the Global Pact for the Environment, the purpose of which was to codify relevant principles of customary international law. Since those discussions were still at a preliminary stage, the Commission could not prejudge their outcome, including whether the Pact, if concluded, would be applicable only in peacetime or also during armed conflicts.

A key aspect of the initiative was that it sought to align the obligations of States with the rights of individuals, and would thus require States to apply international human rights law and, where appropriate, international humanitarian law. He invited the Special

Rapporteur to take that initiative into account when the Commission embarked on the second reading of the draft principles.

He wished to draw the Special Rapporteur's attention to a significant legal development that had occurred at the regional level. On 4 March 2018, under the auspices of the Economic Commission for Latin America and the Caribbean, the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean had been adopted. The Agreement was at once a legal instrument for the protection of the environment and a human rights treaty. It was groundbreaking insofar as it contained a provision on the protection of environmental human rights defenders, and also included a commitment to ensure the participation of traditionally excluded or underrepresented groups. The Agreement established, *inter alia*, principles and general provisions that States had a duty to implement in relation to environmental and human rights matters. It also provided for capacity-building, cooperation and the organization of work in relation to the Agreement's implementation. The Agreement had yet to enter into force, but it had been signed by 16 States, and he believed that it should be reflected in the Commission's work, perhaps in the context of draft principle 6, on the protection of the environment of indigenous peoples.

He was grateful to the Special Rapporteur for devoting a substantial part of her report to the question of whether the Martens clause might apply to the protection of the environment in relation to armed conflicts. While her aim was clearly to exhaust all avenues for the protection of the environment, he could not support her tautological reasoning. Given that the protection to be afforded to the environment was in no way analogous to the protection to be afforded to human beings, it was inappropriate and, more importantly, dangerous to read into the Martens clause something that it did not say, especially as such an interpretation could undermine the principle set forth therein. He did not even think that the clause could be said to be an evolving standard. The sanctity and, by extension, the intrinsic dignity of human life could not be transferred to elements of nature. Human beings were unique and were thus fundamentally different from their surroundings. He agreed with the points made by Mr. Nolte in that regard.

The name of the 1972 United Nations Conference on the Human Environment pointed to the fact that human beings were the guardians of the environment. A growing awareness of environmental degradation and the associated risks had led to a strengthening of the environmental obligations of States, but that did not alter the distinction that had to be drawn between human beings and their environment. In that respect, the comments made by Mr. Jalloh about the difference between the terms "environment" and "natural environment" were highly pertinent. To be clear, he personally was interpreting the term "environment" in a narrow sense. He doubted that countries such as China and India could easily reconcile the notion of environmental protection with their primary objective, which was to feed hundreds of millions of people.

In any case, it was acknowledged in the report that there was a lack of State practice concerning the application of the Martens clause to the protection of the environment. Perhaps the only basis on which that view of the Martens clause could be defended was in the area of the rights of indigenous peoples, who had a symbiotic relationship with the environment that rendered them inseparable from it. However, developments in international law pertaining to indigenous peoples had essentially been declarative in nature, with the notable exception of the International Labour Organization Indigenous and Tribal Peoples Convention, 1989 (No. 169). The 2007 United Nations Declaration on the Rights of Indigenous Peoples had not achieved the desired consensus, and he doubted that the entirety of its provisions reflected customary international law.

Information from States on whether they considered the Martens clause to be applicable to the protection of the environment would be useful. In the meantime, the Commission should take a cautious approach and should not refer proposed draft principle 8 *bis* to the Drafting Committee.

He was also unsure about the advisability of including proposed draft principle 13 *bis*. Currently, only 78 States were parties to the 1976 Environmental Modification Convention, which was an international legal instrument dealing with disarmament whose

primary focus was to prohibit the military use of environmental modification techniques, rather than to protect the environment as an essential component of the protection owed to civilians. The Convention had been drafted in response to an initiative undertaken by the then Soviet Union and the United States; that fact alone was enough to raise questions about the motivation behind it. He suspected that the main objective of the two States had been to protect their strategic interests, rather than the environment.

Paragraph 166 of the report indicated that the Convention only prohibited environmental modification that caused damage to another party to the Convention. In other words, its purpose was not to protect the environment as such. Otherwise, its provisions would have been reflected in the 1977 Protocol I additional to the Geneva Conventions of 1949, which prohibited attacks on the environment in the context of armed conflict. He therefore wondered how appropriate it was to cite the Environmental Modification Convention in support of proposed draft principle 13 *bis*, from the standpoint of both treaty law and customary international law. A reference to the Convention could perhaps be included in the commentary.

Regarding proposed draft principle 13 *ter*, he appreciated the Special Rapporteur's summary of existing rules that prohibited the illegal exploitation of natural resources during and after armed conflicts, irrespective of their nature. In order to reflect the content of the proposed draft principle, its title could be changed to "Pillage of natural resources". The second paragraph of article 33 of the Fourth Geneva Convention, on which the proposed draft principle was based, prohibited pillage in general.

The proposed draft principle would have an undeniable impact on the interpretation of the law applicable to situations of occupation. As a result, he recommended that the Commission should explicitly state, in the commentaries or elsewhere, that the prohibition of pillage was absolute, particularly in view of how long situations of occupation could last. Moreover, the Commission should consider whether the proposed draft principle would not be better placed in part one, on general principles.

He was pleased to note that proposed draft principle 13 *quinquies* was based on the Guiding Principles on Business and Human Rights, which encouraged States to adopt measures to ensure that companies operating in conflict zones were not involved in grave violations of human rights. The proposed draft principle concerned a moral responsibility stemming from basic human rights standards, but it was also pertinent to the efforts being made by States at the national and international levels with regard to climate and environmental justice.

However, as noted in paragraph 70 of the report, in 2014 the Human Rights Council had set up an open-ended intergovernmental working group to elaborate a legally binding instrument on transnational corporations and other business entities. The working group had held four sessions to date, the most recent of which had taken place from 15 to 19 October 2018, when it had discussed a preliminary draft of the legally binding instrument and of the optional protocol thereto. The working group had invited States and other stakeholders to submit comments and suggestions on the draft. At its next session, which was scheduled for October 2019, the working group would undertake a second reading of the draft instrument, with a focus on the articles concerning the purpose and scope of the instrument, definitions, jurisdiction, victims' rights, statutes of limitations and applicable law.

It thus appeared that the Commission would have to wait before carrying out any further work on the matter, as it did not yet have a solid foundation on which to base such work in positive law. In any event, he was concerned about the fact that the issue of corporate responsibility was addressed in part three of the draft principles, rather than part one, and was not sufficiently linked to the law applicable to situations of occupation, especially those that lasted indefinitely. The Security Council had dealt with situations of that nature (in Western Sahara, for instance), in which an occupying Power granted permits to companies from third States for the exploitation of natural resources in conditions that went beyond the administration of an occupied territory in accordance with the law of armed conflict. That important issue was not addressed in the report.

On a more general note, he agreed with Mr. Murphy that, in the draft principles, too much emphasis was placed on corporate responsibility and not enough on the responsibility of other non-State actors, such as militias. The focus of the draft principles could perhaps be redirected to include such non-State actors.

With regard to proposed draft principle 14 *bis*, he would have liked to see a reference, in the report, to the origin of the concept of “internally displaced persons”. That was not a minor issue, given that, despite the level of acceptance enjoyed by the concept and the degree of protection generally afforded to such persons, the 1998 Guiding Principles on Internal Displacement had not resulted from genuine negotiation among the States members of the former Commission on Human Rights. References to the concept’s origin and to related jurisprudence, particularly in the inter-American and African systems, should be included in the commentary.

It would also be advisable to clarify, in the commentary, what was meant by the words “other relevant actors”. Although the Special Rapporteur rightly identified UNHCR as one of the most experienced actors in that regard and cited its Environmental Guidelines, which had first been drawn up in 1996, the variety of actors alluded to in the proposed draft principle should be spelled out more explicitly.

He was in favour of referring the proposed draft principles to the Drafting Committee, with the exceptions that he had noted, in particular proposed draft principle 8 *bis*.

The meeting rose at 12.55 p.m.