

Provisional

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International Law Commission
Seventy-first session (first part)

Provisional summary record of the 3470th meeting

Held at the Palais des Nations, Geneva, on Friday, 24 May 2019, at 10 a.m.

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(*continued*)

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Present:

Chair: Mr. Šturma

Members: Mr. Argüello Gómez
Mr. Cissé
Ms. Escobar Hernández
Ms. Galvão Teles
Mr. Gómez-Robledo
Mr. Grossman Guiloff
Mr. Hassouna
Mr. Hmoud
Mr. Huang
Mr. Jalloh
Mr. Laraba
Ms. Lehto
Mr. Murase
Mr. Murphy
Mr. Nguyen
Mr. Nolte
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.

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

The Chair invited the Commission to resume its consideration of the second report on protection of the environment in relation to armed conflicts (A/CN.4/728).

Mr. Reinisch said that the Special Rapporteur's highly informative report provided an impressive account of many cross-cutting themes in international law that concerned protection of the environment in relation to armed conflicts. It also contained very detailed background material on judicial developments in various countries aimed at holding corporations liable for environmental and other harm, including when committed by their subsidiaries abroad.

Draft principle 6 *bis* and draft principle 13 *quinquies* in particular touched upon highly controversial issues of corporate responsibility and extraterritorial jurisdiction. As the report rightly noted, the courts in the United States of America had in their decisions become much more reluctant with regard to extending the extraterritorial reach of their jurisdiction, as for example in *Sosa v. Alvarez-Machain*, *Esther Kiobel et al. v. Royal Dutch Petroleum Co, et al.* and *Jesner et al. v. Arab Bank, PLC*, among others.

While the report cited an abundance of jurisprudence on corporate due diligence, there was a conspicuous absence of references to current national legislative initiatives aimed at the statutory foundation of diligence obligations, in particular of parent companies for their own activities and those of their subsidiaries. For instance, a 2017 French law on the duty of due diligence of parent companies and contractors, which imposed a duty on parent companies to prevent social and environmental damage resulting from their own activities and those of their subsidiaries, subcontractors and suppliers, might deserve attention in that context. Similarly, mention could be made of a Swiss legislative initiative on "responsible enterprises", aimed at making companies responsible for human rights violations or environmental damage, and a German legislative initiative on "production chains", which set out numerous duties for large companies with regard to due diligence and the precautionary principle.

Like Mr. Nolte, he was not particularly concerned about a possible confusion between *lex lata* and *lex ferenda*. In his view, the guidance provided in the report and the nuanced wording of the proposed draft principles made it possible to make the necessary distinction, although he agreed that the Drafting Committee could possibly make it even more precise.

Like some other members, however, he was concerned about the very inconsistent levels of specificity and detail in the proposed draft principles. While some of the draft principles seemed to reassert very broad principles contained in the Hague or Geneva rules, others reaffirmed general principles of State responsibility or ventured into highly controversial areas related to current legislative discussions on securing the responsibility of corporations for acts committed by subsidiaries or suppliers and even for acts committed abroad.

Concerning draft principle 6 *bis* on State measures to ensure corporate due diligence, Mr. Aurescu had proposed replacing the words "necessary legislative and other measures" with "all necessary measures", which would indeed correspond more closely to the language used in article IV of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts. In his own view, however, any foundation for corporate due diligence would require primarily legislative action. Thus, the call for the elaboration and adoption of domestic legislation and regulation, possibly complemented by other measures, seemed adequate.

As the Special Rapporteur had pointed out, the core idea of draft principle 6 *bis* was to require the home State of transnational corporations to enforce the due diligence obligation. In that regard, perhaps the phrase "corporations registered or with seat or centre

of activity in their jurisdiction” should be replaced with “corporations under their jurisdiction”. The current formulation seemed to be specifically tailored to systems that determined corporate nationality by corporate seat, *siège social* or incorporation. Different terms were used in national laws to refer to the establishment of corporate headquarters or seat, registration or incorporation or administrative establishment of a parent company. For instance, in Switzerland, the law referred to “*siège statutaire, administration centrale ou établissement principal*”, while in France the key criterion was the “*siège social*”. The wording “under their jurisdiction” would be more general and would signify that States should take certain legislative and other measures in respect of corporations under their jurisdiction.

Concerning the formulation “to ensure that corporations ... exercise due diligence and precaution”, he agreed with Mr. Murphy and others that the word “ensure” set a high bar for States, in contrast with the softer “should” used at the beginning of the draft principle. Some members had proposed adding the words “as appropriate” to the phrase. The verb “ensure” was used in the Paris Agreement, which seemed appropriate in that context since the Agreement was an internationally binding instrument, whereas the draft principles were to be considered non-binding. Perhaps the Special Rapporteur had been inspired by the frequent use of the word “ensure” in the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, which were non-binding. However, it should be borne in mind that those guidelines were addressed directly to multinational companies, while the Commission’s work was directed at States, at least in the context of draft principle 6 *bis*.

As to the last sentence of draft principle 6 *bis*, which stated that due diligence and precaution “includes ensuring that natural resources are purchased and obtained in an equitable and environmentally sustainable manner”, the Commission might be going beyond the level of detail expected in the draft principles by referring to due diligence obligations in that context.

Draft principle 13 *quinquies*, on corporate responsibility, was closely linked to draft principle 6 *bis*, which dealt with measures by States to ensure corporate due diligence. In that connection, he noted that, in the second sentence of paragraph 2 of draft principle 13 *quinquies* – which stated that “parent companies are to be held responsible for ascertaining that their subsidiaries exercise due diligence and precaution” – the words “are to” had been used in place of “should”. What seemed to be missing currently was a legal standard that triggered the responsibility of parent companies. He was not convinced that the word “ascertaining” was sufficient in that context. Perhaps a criterion regarding, for example, the degree of control and oversight of the parent company over its subsidiaries should be added in order to determine the responsibility and liability of the parent company.

As to draft principle 13 *quater* on responsibility and liability of States, he feared that there was a high likelihood that States would reject paragraph 2. In spite of the paragraph’s soft formulation and the use of the verb “may” rather than “should” in the phrase “may consider”, such a general duty as that set out in the paragraph to ensure reparation of environmental damage, regardless of any connection between the State and the damage, would impose considerable obligations on States, whatever the nature of those obligations. In fact, that proposal was similar to the principle enunciated by the Institute of International Law in its work on State succession to ensure responsibility even when no responsible actors remained in existence after the dissolution or merger of States. While fully understandable from a policy perspective in order to ensure that victims of unlawful acts in the context of State succession or of environmental damage did not remain uncompensated, it was difficult to see the underlying source for such a subsidiary responsibility. Of course, the formulation “may consider” was to be welcomed in that it made it clear that such a duty was merely a suggestion.

He had no objection to the proposed draft principles on environmental modification techniques or the Martens clause.

In conclusion, he recommended referring the draft principles to the Drafting Committee.

Mr. Zagaynov said that the Special Rapporteur's second report contained a very interesting analysis of academic studies, national legislation, judicial practice and activities of various international organizations. Methodological difficulties included the challenge of defining the term "environment". In a footnote to the text of draft principle 1 provisionally adopted by the Commission in 2016, it was indicated that the question of whether the term "environment" or "natural environment" was preferable for all or some of the draft principles would be revisited at a later stage. In her second report, the Special Rapporteur mentioned the fact that the concept of the "environment" did not have a generally accepted usage as a term in international law and referred to the inalienable relationship between human rights law and environmental protection. Together with the proposed draft principles themselves, those elements seemed to suggest that the Special Rapporteur was leaning towards a broader understanding of the term "environment". The wisdom of such an approach was questionable.

In the commentary to draft principle 1, it was noted that not all draft principles would be applicable during all phases, namely before, during and after armed conflict. It was thus not clear to which phases particular principles applied. In addition, it was indicated that the term "armed conflict" was to be understood as covering both international and non-international armed conflicts. The fact that the draft principles might apply to both peacetime and wartime made a legal analysis of the issues and draft principles themselves a complex undertaking.

Draft principle 13 *ter* on pillage was based on article 47 of the 1907 Regulations respecting the Laws and Customs of War on Land, which had later been transposed into article 33 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War. In paragraph 23 of her report, the Special Rapporteur referred to the commentary of the International Committee of the Red Cross (ICRC) on the Convention, according to which the prohibition of pillage applied to both public and private property, and concluded that the general nature of the wording allowed a reading that included natural resources, whether owned by the State, communities or private persons. That interpretation had, she noted, been acknowledged by the International Court of Justice in its judgment in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*. It should be borne in mind that the situations described in that case mainly involved activities conducted by military personnel for personal appropriation of property and not by the State as such, although, of course, the State had been held responsible for failing to prevent such activities. In that regard, it should be borne in mind that under the Rome Statute the crime of pillaging concerned the appropriation of property for private or personal use.

He was somewhat confused by the Special Rapporteur's conclusion in paragraph 21 that the "illegal exploitation of natural resources", which she took to form part of the concept of "pillage", could cover the activities of States and non-State entities. That conclusion was not fully in line with the affirmations in paragraphs 61 and 62 of the report, namely that, based on the definition of the Rome Statute, the goal of pillage was to appropriate property for private or personal use, and that appropriation justified by military necessity could not constitute the crime of pillaging. Accordingly, additional clarification was required regarding who should be considered a pillager and the circumstances in which the seizing of private property would constitute pillage.

Concerning the application of the rules on the prohibition of pillage to situations of internal conflict, in paragraph 22 the Special Rapporteur referred to the 1977 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts. However, the Protocol referred to the prohibition of pillage with respect to "persons who do not take a direct part or who have ceased to take part in hostilities". Therefore, it was not clear whether the rules on pillage could be applied to the exploitation of natural resources during internal armed conflicts. The examples cited in relation to rule 52 of the ICRC study on customary international humanitarian law on the prohibition of pillage referred to pillage of the property of the wounded and sick and the dead but not of natural resources.

Regarding the application of draft principle 13 *ter* to peacetime situations, the Special Rapporteur acknowledged the difficulty of breaking the link between illegal

exploitation of natural resources and armed conflict, noting in paragraph 26 that the motivation for the adoption of the Protocol against the Illegal Exploitation of Natural Resources of the International Conference on the Great Lake Regions had been the need to do just that. Thus, even in the region with the most extensive practice in that regard, it had still been necessary to conclude a separate international treaty on the issue. The international environmental law examples provided in paragraphs 27 and 28 of the report were ill-suited to serve as grounds for applying the prohibition of the pillage of natural resources to peacetime situations. To his mind, that area required a more nuanced reading. The Security Council resolutions cited in the report could hardly serve as justification in that connection. In his view, at the current stage of the Commission's work at least, it was not appropriate to equate the terms "pillage" and "illegal exploitation of natural resources". Those issues required clarification, and the application of the prohibition of pillage should be confined to the armed conflict phase.

Similar problems arose with respect to draft principle 6 *bis* on corporate due diligence and draft principle 13 *quinquies* on corporate responsibility, which also seemed to attempt to simultaneously regulate different legal and factual situations. The question arose as to whether the Commission could treat in the same way the regulation of the natural resource development activities of companies within the territory of their own State in the throes of an internal conflict, and the regulation of identical activities of companies of an occupying State in an occupied territory. It would hardly make sense to apply to both situations the common principle of the need for the State concerned to take measures to ensure that corporations exercised due diligence and precaution with respect to the protection of human health and the environment and to hold companies responsible for harm caused in areas of armed conflict or in post-conflict situations. Given that companies operating in the territory of their own State, including in situations of internal conflict, not to mention post-conflict rebuilding, were bound by the State's existing legislation with respect to liability for damage, that area did not necessarily require additional regulation. There were many issues relating to companies operating overseas in situations of armed conflict that far transcended the scope of protection of the environment. Indeed, there had been discussions in the Human Rights Council and the Security Council about the legality of the activities of companies in occupied and non-self-governing territories.

As the Special Rapporteur had rightly noted, the framework documents cited as part of the analysis were of a non-binding nature. Initiatives by some States to transpose those norms into national legislation tended to be the exception rather than the rule. It was therefore difficult to talk of applying general principles of due diligence or precaution or holding corporations responsible when they were operating in areas of armed conflict. He agreed with those members who had recommended that the Commission should weigh up the extent to which it was necessary and justified to include those draft principles in the project. As an alternative, it might make sense to call on States to urge corporations to carry out risk assessments for their activities if they were operating in areas of armed conflict, including in the context of minimizing potential damage to the environment. He supported those members who were opposed to mentioning harm to health in the draft principles.

With regard to the chapter on responsibility and liability of non-State actors, as indicated in the report, it was necessary to consider general issues of compensation for environmental damage, which was subject to special regulations. The draft principles should not subvert or seek to subvert that regime in any way. That said, the chapter was of undoubted interest. The Special Rapporteur raised a number of issues related to compliance with international humanitarian law by non-State entities. Surprisingly, in paragraph 58 she stated that few solid conclusions could be drawn regarding the international responsibility of organized armed groups. The Commission should not, however, limit itself to the activities of States and corporations. It would be interesting therefore also to consider pillage and the illegal exploitation of natural resources in relation to the responsibility of organized armed groups, for example in territory controlled by Islamic State in Iraq and the Levant (ISIL).

Concerning draft principle 13 *quater*, it was difficult to argue with the proposition that the draft principles should be without prejudice to existing rules of international law on responsibility and liability of States. The rationale for that position actively drew on the

work of the United Nations Compensation Commission, whose work had indeed been groundbreaking. Its activities had been based upon the specificities of Security Council resolution 687. In that connection, he noted that the experience of the Eritrea-Ethiopia Claims Commission, which had been established pursuant to a bilateral treaty, had also been highly specific.

Paragraphs 116 and 117 of the report rightly noted that examples of State responsibility for environmental harm during armed conflict were few in number and varied depending on whether the harm occurred in the commission of internationally unlawful activities or perfectly legitimate activities. Environmental damage was very difficult to calculate and quantify. Moreover, it was not always possible to establish which of the parties to the hostilities was responsible for the damage caused and the extent of such responsibility. Draft principle 13 *quater* (2) provided for collective measures to ensure that environmental damage did not go uncompensated when its source was not known. That rule was not reflected in existing regulations; rather, the question of establishing a compensation fund or other collective mechanism was more likely a matter of political choice.

With regard to draft principle 8 *bis*, the relevant analysis mentioned several international agreements on environmental protection that did not expressly include a reference to the Martens clause. As a result, it was difficult to claim at the current stage that there was State support for the application of that clause to protection of the environment. He was not convinced that there were sufficient grounds for including such a provision in the draft principles. A number of members had already expressed doubts about the phrase “in the interest of present and future generations” and in that context it should be kept in mind that the clause applied only during wartime. In paragraph 179, the Special Rapporteur linked the application of the clause to environmental protection on the basis of United Nations General Assembly resolution 49/50, which contained an appeal to States to apply the ICRC guidelines for military manuals and instructions on the protection of the environment in times of armed conflict as widely as possible. In that connection, it would be useful to know to what extent the provisions of those guidelines had in fact been widely incorporated into national legislation.

In conclusion, it might be wise to analyse further the concerns raised by a number of members with respect to draft principles 6 *bis*, 13 *quater* and 13 *quinquies* and to decide on the fate of those provisions.

Ms. Escobar Hernández said that she wished to congratulate the Special Rapporteur on her excellent second report and her oral presentation thereof. The report was intended to conclude the Commission’s consideration of the topic on first reading, to which end it addressed subjects that had been left pending in previous sessions and responded to the questions and concerns raised by members of the Commission and some States in 2018. That approach was reflected in the structure of the report, which could leave one with the impression that the report analysed isolated issues in an unrelated manner and proposed various unrelated draft principles. However, nothing could be further from the truth. Each chapter was easily understood in relation to the Commission’s previous work, and the Special Rapporteur’s decision to attach as an annex to the report a full list of the draft principles provisionally adopted by the Commission greatly facilitated understanding of the draft principles as a whole.

The Special Rapporteur had provided an extraordinary amount of information in the report, which, although useful for the consideration of the various subjects addressed, could give the – mistaken – impression that some of the elements of practice included therein were not directly related to the topic under consideration. Nevertheless, the information provided adequately situated each issue within the general context of international law. That was undeniably valuable, particularly when one bore in mind that, since the outset of its consideration of the topic, the Commission had opted for a methodology that emphasized the interplay between various areas of international law.

By way of a final general remark, she wished to highlight that although the bibliography attached to the report was undoubtedly of great interest, it would have been helpful if the list had not consisted solely of works in English and, to a lesser degree, French.

In chapter II of the report, the Special Rapporteur addressed the issues of the illegal exploitation of natural resources and human displacement from the perspective of their impact on the protection of the environment in the context of armed conflicts. Her analysis clearly highlighted the importance of those phenomena in modern armed conflict and fully justified the insertion of the three new draft principles proposed in the report.

With regard to draft principle 13 *ter*, she agreed with the Special Rapporteur's decision to address pillage in the draft principles. The fact that the concept of pillage had not been conceived with the protection of the environment in mind was not an obstacle to introducing a prohibition on pillage in that context. Indeed, the Special Rapporteur provided ample evidence in her report to support the conclusion that the concept of pillage had acquired a new meaning in today's world and that its prohibition in relation to natural resources warranted special consideration in the draft principles. Nevertheless, draft principle 13 *ter* could perhaps be redrafted so as to explain more clearly the link between the pillage of natural resources and the protection of the environment, thus eliminating any doubt as to its relevance to the topic.

The relevance of the proposed draft principle 14 *bis* to the draft principles was beyond all doubt. She had no particular remarks in that regard.

With regard to draft principle 6 *bis*, the Special Rapporteur provided good examples of the consequences of the illegal exploitation of natural resources on armed conflicts, with regard to both its capacity to trigger and exacerbate armed conflict and its negative impact on the protection of the environment. She therefore fully supported the inclusion of the draft principle, which took into account the new realities of armed conflicts. Nonetheless, she had some doubts regarding its content, particularly with regard to the distinction between due diligence in the strict sense and the purchasing and obtaining of natural resources "in an equitable and environmentally sustainable manner". She was unsure whether the two issues should be addressed together; perhaps the negative impact of purchasing and obtaining natural resources on the environment would be better addressed in draft principle 13 *ter* on pillage.

In chapters III and IV of the second report, the Special Rapporteur presented an analysis of what was referred to in the report as the "responsibility" [*responsabilidad en sentido general*] and the "liability" [*responsabilidad civil*] of States and non-State actors. The distinction drawn between the two categories was unclear in the current context. The use of such a distinction by the Commission in the past had been restricted to the context of its work on the responsibility of States for internationally wrongful acts and responsibility for activities not prohibited by international law. It seemed to her, in the light of the Special Rapporteur's analysis in her second report, that such a distinction was not applicable to the case at hand and could create significant confusion with regard to the general regime of State responsibility, a risk that was not mitigated by the inclusion of a "without prejudice" clause in draft principle 13 *quater*, paragraph 1, which preserved "the existing rules of international law on responsibility and liability of States".

Furthermore, the terminology used in the Spanish version of the text to refer to the categories in no way reflected the issues considered by the Special Rapporteur in the report or the debate as to the distinction between "responsibility" and "liability". To arrive at that conclusion, it sufficed to consult two legal reference dictionaries, namely the dictionary of legal Spanish of the Royal Spanish Academy (*Diccionario del español jurídico de la Real Academia Española*) and Black's Law Dictionary. It could not be deduced from either dictionary that the terms "*responsabilidad en sentido general*" and "*responsabilidad civil*" were equivalent to the concepts described in the report. Moreover, the meaning of "civil responsibility" or "*responsabilidad civil*" varied from one dictionary to the next. Whereas in Black's Dictionary "civil responsibility" was, to some extent, equivalent to "liability", in the Royal Spanish Academy's dictionary, "*responsabilidad civil*" was defined as any type of responsibility that was not of a criminal or administrative nature. Therefore, even on linguistics grounds alone, the distinction made by the Special Rapporteur should be avoided. In that regard, she wished to recall that the terms "responsibility" and "liability" had been used only in the English versions of the Commission's work on responsibility, while in the Spanish and French versions the terms "*responsabilidad*" and "*responsabilité*", respectively,

had been used to refer to both categories. Those factors should be taken into account by the Commission and the Drafting Committee in the context of the topic under discussion.

Moreover, the distinction between “responsibility” and “liability” was not relevant to the problem addressed by the Special Rapporteur in the second report. If one closely considered chapters III and IV of the report and draft principles 13 *quater* and *quinquies*, it seemed that the objective pursued by the Special Rapporteur could be summarized thus: first, to ensure the adoption of adequate reparation and compensation measures for damage caused to the environment, by either the perpetrator of that damage, whether a corporation or a State, or, in a subsidiary manner, the State; second, to ensure the establishment of methods for determining the responsibility of corporations that caused damage to the environment in the context of armed conflict; and, third, to prevent the sort of fraudulent outcomes in terms of corporate responsibility that could arise from the so-called “corporate veil” and the distinction between a parent company and its subsidiary, which was sometimes purely formal in nature.

An appropriate response to those issues could be found without drawing an artificial distinction between “responsibility” and “liability”, which created more problems than it resolved and which could have unintended negative consequences regarding the definition of the nature of State responsibility. To that end, it would be necessary to modify the title of draft principle 13 *quater*, as well as the text of paragraph 1. Reference should be made to the “subsidiary responsibility” of States, which would entail the establishment of a specific duty to provide reparations for damage caused to the environment in an armed conflict and to introduce mechanisms for that purpose. The Drafting Committee would doubtless be able to come up with a formulation that appropriately reflected such a concept.

Although she supported the objective sought by the Special Rapporteur in draft principle 13 *quater*, she was not wholly convinced that it had been drafted in the most appropriate manner. In particular, draft principle 13 *quater*, paragraph 1, should be deleted or completely reworked along the lines she had just laid out. In addition, the apparently prescriptive character of the draft principle required further consideration in the Drafting Committee. Given that the draft principle established a sort of “subsidiary responsibility” for environmental damage where the perpetrator of the damage remained unidentified and referred to the establishment of alternative mechanisms of reparation for environmental damage, it should be located after the draft principle on the responsibility of corporations, which were directly responsible for their own activities.

The Special Rapporteur had provided sufficient elements to justify the inclusion of draft principle 13 *quinquies*. Her analysis of the involvement of the corporate sector in causing damage to the environment in the context of armed conflicts was well balanced. The fact that not all the instruments cited in support of her argument were directly relevant to the law of armed conflict was not problematic, in view of the cross-cutting approach adopted by the Commission in relation to the topic under discussion. However, the Drafting Committee should consider the use of the phrase “*de facto* control of the operations” in paragraph 2 and explain the relationship between the parent company and its subsidiary. It might also be useful to address more directly the specific issue of security companies and their relationship with the State, either in the draft principle itself or in the commentary thereto.

With regard to chapter V, she supported the Special Rapporteur’s decision not to include a definition of environment in the draft principles and fully concurred with the reasons she had provided for that decision. She also agreed with the Special Rapporteur’s decision to use the term “environment”, rather than “natural environment”. Work already done on the topic over the years had clearly shown that the latter term could be excessively restrictive and did not appropriately cover all the issues arising from the relationship between the environment and armed conflicts, which went beyond the mere protection of the natural environment and included the protection of the health and well-being of the individual and his or her immediate surroundings.

With regard to draft principle 8 *bis*, the Martens clause, she understood, but did not fully share, the concerns expressed by some members of the Commission with regard to the possible consequences of extending the scope of the Martens clause to the context of the

draft principles. Although it was true that the Martens clause had been created in order to guarantee a minimum level of protection for human beings during armed conflict, the way in which it was interpreted should not be restricted by its original context. Since its first formulation, the Martens clause had been used to guarantee the protection of the individual in contexts other than that originally intended, in the light of the evolving nature of the “dictates of public conscience”. That evolving nature justified the extension of the scope of the Martens clause to the protection of the environment, especially since, as sufficiently demonstrated by the Special Rapporteur, the protection of the environment was tightly bound to the protection of human beings in the context of armed conflicts. Perhaps the concerns expressed by some members of the Commission would be addressed if a greater degree of nuance were introduced in the title of the draft principle, which could read, for example, “Application of the Martens clause”. That was a question for the Drafting Committee, however, and did not affect the content of the draft principle itself.

Lastly, she wished to express her support for draft principle 13 *bis* on the prohibition of environmental modification techniques. Although she shared the concerns expressed by some members of the Commission with regard to the prescriptive character of the draft principle, which was perhaps not entirely compatible with the nature of the instrument that the Commission was developing, that was a matter that could be dealt with in the Drafting Committee.

She recommended that the draft principles proposed in the second report should be referred to the Drafting Committee and hoped that the Commission would be able to adopt them on first reading at the current session.

Mr. Cissé said that he wished to congratulate the Special Rapporteur on her excellent second report on the protection of the environment in relation to armed conflicts. The report was well researched, reader-friendly and contained a wealth of information on a variety of issues relating to the topic under discussion.

The report addressed the issue of non-international armed conflicts. That was a topic of great importance for the African continent, where numerous internal armed conflicts had left a trail of destruction in terms of human lives and had led to the severe degradation of the environment and natural resources. The consideration of the issue of non-international armed conflicts in the report was timely and highlighted the urgent need for legislation or, at the very least, principles to govern such conflicts moving forward. Non-international armed conflicts were more common than international armed conflicts yet remained insufficiently regulated, especially with regard to certain fundamental issues, such as the responsibility and obligations of organized armed groups. Criminal responsibility for non-State actors should be established. In that regard, it was encouraging to note that the Special Court for Sierra Leone, in its judgment in *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, also known as the *RUF (Revolutionary United Front)* case, had recognized the responsibility of the accused for the widespread and systematic pillage of resources in the areas under their control. The case had set a precedent that could be applied in other African States where organized armed groups had systematically pillaged natural resources with total impunity. The response of international law to such issues was now well known, since individual criminal responsibility could be invoked in domestic and international courts.

The content of draft principle 13 *ter* struck him as rather cursory in the light of the arguments developed in the report with regard to the responsibility of organized armed groups. It should be developed further, particularly with regard to the definition of the obligations of organized armed groups and the procedural guarantees applicable in situations where individual members of such groups were brought before domestic courts. That would entail expanding on the draft principle on the basis of pertinent case law and well-established principles in the area of responsibility and reparations for damage to the natural environment and natural resources. The well-known principle of civil law whereby any act of an individual which caused damage to another gave rise to an obligation to make good the damage was apt in the context.

He recommended that the draft principles contained in the second report should be referred to the Drafting Committee.

Mr. Vázquez-Bermúdez said that he wished to begin by thanking the Special Rapporteur for her excellent second report and her presentation thereof. The report, which was based on in-depth research and a thorough analysis of a number of particularly complex issues, would enable the Commission to complete the first reading of the draft principles on that important subject. His intervention would be brief as he agreed with most of the analysis and proposals made by the Special Rapporteur, who had addressed several of the new areas identified by the Working Group for the topic in 2017 as being able to usefully complement the Commission's work, as well as others that were necessary to fill a number of gaps.

In that context, he wished to highlight the Special Rapporteur's important analysis of a number of issues related, in particular, to the protection of the environment in non-international armed conflicts. First, she explained that, although it was not a new phenomenon and not one exclusively related to non-international armed conflicts, the illegal exploitation of natural resources had attracted increased attention as a form of financing for non-State armed groups, which prolonged armed conflicts and entailed serious consequences for the environment. As she pointed out, the rules of international law protecting natural resources in conflict derived from several areas of law, including the law of armed conflict and international environmental law. The prohibition of pillage was a rule of customary law that was well established in the law of armed conflict and recognized in international conventions, domestic legislation and military manuals. The prohibition of pillage applied to both international and non-international armed conflicts and to all categories of property, thus including natural resources. The principle of permanent sovereignty over natural resources provided general protection to a State's natural resources, in particular against foreign illegal appropriation.

A number of international conventions mentioned in the second report were also relevant, such as the African Charter on Human and Peoples' Rights and the Lusaka Protocol of the International Conference on the Great Lakes Region, whose adoption had been motivated *inter alia* by the "negative impact of the illegal exploitation of natural resources, which aggravates environmental degradation". Also relevant was international environmental law, which, through treaty regimes, provided special protection to the environment that continued to apply in armed conflict, at least to the extent that their provisions did not conflict with the law of armed conflict.

Mention must also be made of the relevance of international criminal law, in particular the Rome Statute of the International Criminal Court, which also established pillage as a war crime in both international and non-international armed conflicts. Draft principle 13 *ter*, on the prohibition of pillage of natural resources, therefore had a very sound basis. The commentary to the draft principle should clarify aspects related to terminology and to the contexts in which different terms had been used, such as the term "illegal exploitation of natural resources", which, on the face of it, had a broader scope than "pillage". The commentary should also refer to the fact that the holders of the rights over the land in question and the natural resources contained therein were, on occasion, indigenous peoples and to the need for the parties to the armed conflict to respect those rights.

Another undeniably relevant issue in relation to the illegal exploitation of natural resources in a context of armed conflict, which had been dealt with in the second report, concerned the participation of actors external to the conflict in the illegal exploitation and commercialization of those resources, such as private companies. In that regard, international conventions such as the United Nations Convention against Transnational Organized Crime, as well as regional regulations, including the certification mechanism of the International Conference on the Great Lakes Region and the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-affected and High-risk Areas, played a role in preventing and suppressing those illegal activities. Those regulations had, in some cases, inspired the adoption of domestic legislation.

On the basis of the aforementioned analysis and related regulatory developments, the Special Rapporteur proposed draft principle 6 *bis*, which he supported.

The Special Rapporteur addressed another sensitive and complex matter on which several States had expressed interest in connection with the current topic, namely massive human displacement as a consequence of armed conflicts, which caused both great suffering to those displaced and damage to the environment, particularly in vulnerable areas. That reality had been sufficiently documented by such agencies as the Office of the United Nations High Commissioner for Refugees (UNHCR) and the United Nations Environment Programme (UNEP), and had been the subject of regulatory developments, such as the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). In his statement at the Commission's 3466th meeting, Mr. Valencia-Ospina had also provided important and useful information that was relevant in that context. Draft principle 14 *bis*, on human displacement, was fully justified as a means of ensuring that States and other relevant actors provided relief to persons displaced by conflict and local communities and took, at the same time, appropriate measures to prevent and mitigate the environmental consequences of such displacement. The references in the draft principle should be reordered accordingly, as had already been suggested by various members.

Draft principle 14 *bis* had been placed in Part Three, on principles applicable after an armed conflict. However, human displacement could take place during an armed conflict. While it would be more feasible to provide people with relief and to mitigate environmental degradation once the armed conflict had come to an end, relief to displaced persons could still be provided and environmental degradation prevented or mitigated during armed conflict. It might be more appropriate to place that draft principle in Part One, on general principles, or at least in Part Two.

Responsibility and liability, including the liability of non-State actors, was a very important aspect of the topic. As the Special Rapporteur rightly pointed out, multiple actors other than States might be present or involved in an armed conflict and cause damage to the environment. Such actors could include non-State armed groups of different affiliations and degrees of organization, as well as companies, including private military and security companies. He agreed with the Special Rapporteur that the working definition of "non-State actor" of the International Law Association provided a useful frame in that context.

With regard to non-international armed conflicts, account should be taken of the definition thereof that the Commission had included in its work on the topic "Effects of armed conflicts on treaties" and which was based on the case of *Prosecutor v. Duško Tadić a/k/a "DULE"*.

Organized armed groups, as parties to an armed conflict, were bound by international humanitarian law. It was also increasingly accepted that those groups could violate international human rights law. However, as the Special Rapporteur rightly pointed out, while there were certain developments clarifying the status and international obligations of organized armed groups, a number of questions remained.

Individual criminal responsibility was a fundamental basis for establishing responsibility for violations of international humanitarian law and international criminal law, including in relation to damage to the environment.

As for corporate responsibility and liability in relation to environmental protection, the Special Rapporteur presented a detailed and well-founded analysis on multinational enterprises, making reference to important instruments, such as the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, as well as the work of human rights treaty bodies, international jurisprudence, such as that of the Inter-American Court of Human Rights, as well as relevant national jurisprudence. Another important development that reflected the importance that States attached to the matter at hand was the development in the Human Rights Council of a binding instrument on transnational corporations and human rights.

Another important aspect that the Special Rapporteur had rightly analysed in her second report was the issue of private military and security companies, or so-called private contractors, which had become a standard feature in current armed conflicts and in post-conflict situations, thus raising the question of their responsibility for environmental harm. Indeed, the nature of the services that they provided distinguished them from other business

enterprises and, depending on their role and functions in a situation of armed conflict, their staff members might be legally bound by international humanitarian law. Their acts might also trigger State responsibility in accordance with the rules of attribution.

He supported draft principle 13 *quinquies*, on corporate responsibility, which provided that States should take the necessary legislative and other measures to ensure that corporations registered or with seat or centre of activity in their jurisdiction could be held responsible for harm caused to human health and the environment in areas of armed conflict or in post-conflict situations. As an important complement, the draft principle also provided that, to that effect, States should provide adequate and effective procedures and remedies and make them available to the victims.

He also wished to express his support for draft principle 13 *quater*, on responsibility and liability. The rules of international law on responsibility for internationally wrongful acts, as well as the rules on liability for damage caused by acts not prohibited by international law, were applicable in the context of the topic at hand. The reference in paragraph 1 to the effect that the draft principles were without prejudice to those rules was therefore appropriate. It stood to reason that a number of terminological concerns would now need to be taken into account, such as those expressed by Ms. Escobar Hernández. He likewise supported paragraph 2 of the draft principle, which was drafted in non-binding language. Paragraph 3, which specified the extent of the damage that had to be caused to the environment for the purposes of reparation, should also be retained.

He wished to express his full support for draft principle 13 *bis*, as proposed by the Special Rapporteur. That draft principle, inspired by the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (Environmental Modification Convention), would fill a clear gap in the draft principles. The former Special Rapporteur had already pointed out that the Convention in question was one of the best-known provisions relevant for the protection of the environment. In view of the continuing technological advances in so-called “geoengineering”, which had now become a reality and could potentially be used for hostile purposes, it was important to include in the draft principles a principle relating to the prohibition of using environmental modification techniques for military or other hostile purposes. As the Special Rapporteur rightly pointed out, that principle would also apply to situations of non-international armed conflict. He agreed with Mr. Murase and others who had stated that there was sufficient evidence for it to be considered a customary rule.

In any event, it did not seem appropriate to add language to the effect that the obligation in question must be fulfilled as part of the international obligations of States, as that would entail the Commission’s simply recalling that States must comply with treaties, and, even if the principle had not yet acquired customary status, doing so would inadvertently impede its crystallization as a customary rule.

While he could, in principle, support the inclusion of a draft principle based on the Martens clause, the Drafting Committee would have to reflect carefully on the wording most appropriate to the context of the current topic. The clause had historical and symbolic importance, as it indicated that custom, the principles of humanity and the dictates of public conscience, in addition to treaties, were applicable in the field of the law of armed conflict. In essence, the Martens clause pointed out that custom and general principles of law, in addition to treaties, were applicable. It was clear that, in any branch of international law, the applicable law might be found in treaties, in international custom or in general principles of law.

The principles of humanity constituted a general principle of law, which was closely linked to another important general principle, that of human dignity, and to the elementary considerations of humanity, as referred to by the International Court of Justice, and were applicable both in times of peace and in times of armed conflict. Those principles served human beings: the protection of the environment, which sustained life, ultimately protected human beings. The dictates of public conscience, enshrined in the Martens clause, could also be interpreted in relation to the protection of the environment.

He agreed with the Special Rapporteur that no definition of the term “environment” should be included in the set of draft principles for the reasons that she had indicated.

Regarding the use of the terms “environment” and “natural environment”, he could support the Special Rapporteur’s proposal to keep only the reference to “environment” and to explain in the commentaries that the Commission was not seeking to alter the term within the framework of the law of armed conflict. If a consensus could not be reached, the reference to “natural environment” could be retained in Part Two and be accompanied by an introductory comment explaining that the Commission had decided to retain the term, as used in the law of armed conflict.

He supported sending all the draft principles contained in the second report to the Drafting Committee.

The Chair, speaking as a member of the Commission, said that he wished to thank the Special Rapporteur for her excellent second report on the topic, which was clear, well researched and documented.

While he would try to be brief, he nevertheless wished to make a few general comments concerning mostly the structure of the draft principles and the terms used in the report. First, the structure of the report seemed to reflect the complexity of contemporary international law. Although he agreed with the three-phase approach adopted for the topic, he also agreed with those colleagues who had pointed out that the main perspective should be the law of armed conflict, which was fully applicable in phase two. That also suggested that a more cautious approach should be adopted when it came to the applicability of some principles and rules that were not considered to apply during armed conflicts. In particular, he had in mind the rules of international environmental law or certain rules, guidelines and recommendations related to business and human rights, including corporate social responsibility. He did not deny that those concepts were not only fashionable but also very important. However, their application must accommodate the conditions of armed conflicts, which were governed by international humanitarian law, including the principle of military necessity.

The second general issue that he wished to raise, which had already been mentioned by Mr. Park, Mr. Murase, Mr. Rajput and other colleagues, was that of terminology, in particular the use of the terms “responsibility” and “liability” in Part Three and Part Four of the report, as well as in draft principles 13 *quater* and 13 *quinquies*. The dichotomy of State responsibility for internationally wrongful acts and liability, as established in the Commission’s previous works, was just one part of the entire picture. Upon closer inspection, it seemed to him that, in the report, those terms had at least three or four different meanings, even if he excluded “individual criminal responsibility”, which was clearly distinguishable and the most developed. First, the term “responsibility” in the sense of a primary obligation to do something or compliance – as opposed to responsibility as a consequence of a violation of international law – appeared to be linked mainly to the concept of “corporate social responsibility” and to the United Nations Guiding Principles on Business and Human Rights. The international responsibility and liability of States envisaged in the “without prejudice” clause in draft principle 13 *quater* corresponded to the classic terms used in the Commission’s works. Nevertheless, paragraph 2 of that draft principle went further and recommended a kind of progressive development of international law in the form of special compensation funds. That made much more sense in situations of liability for harmful consequences of activities not prohibited by international law than in cases of responsibility for wrongful acts by a State that was known but in respect of which the State was not able or willing to provide reparation.

However, the terms did not seem to be used consistently. Thus, draft principle 13 *quinquies*, on corporate responsibility, included a recommendation for States to adopt legislative and other measures not only to ensure corporations’ compliance with human rights and environmental standards but also to establish a kind of civil liability for such corporate persons and their parent companies.

Indeed, responsibility of non-State actors in international law was a challenging idea in theory and difficult to attribute in practice. In her report, the Special Rapporteur rightly mentioned not just the case of *Esther Kiobel, et al. v. Royal Dutch Petroleum Co., et al.* and other relevant judicial decisions but also recent United Nations documents, such as the Guiding Principles on Business and Human Rights and their third pillar. Lastly, he wished

to point out that a working group set up by the Human Rights Council had published, in July 2018, a so-called “zero draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises”. However, even that progressive – and controversial – draft convention provided for direct obligations and responsibility of corporations under international law only in the preamble. Otherwise, the draft was based on obligations of States, due diligence and so on.

The last general comment that he wished to make concerned the issue of the definition of “environment”. To his mind, the topic required such a definition, which could easily be included in the commentary. What was more important, however, was that the term should be used consistently throughout the draft principles. In view of the centrality of phase two and the law of armed conflict, like other colleagues, he preferred the term “natural environment”.

Turning to the draft principles, he said that he had a number of comments to make. First, he wished to express his support for draft principle 8 *bis*, on the Martens clause. However, he shared the concern of some colleagues, including Mr. Nolte, that the different object of protection – the environment – necessitated drafting changes, in particular the possible deletion of the words “the principles of humanity”.

Second, while he could see the merit of draft principle 6 *bis*, on corporate due diligence, which addressed an important issue, it posed some problems, which could be avoided by using the phrase “as appropriate”. He therefore suggested the deletion, in the first sentence, of the words “human health and”, as the topic at hand was the protection of the environment. Moreover, he wished to reserve his position as to whether the second sentence, on the purchase of natural resources, should be retained in its current form.

Third, draft principle 13 *bis*, on environmental modification techniques, belonged with the core provisions of Part Two. While he supported the provision, he would prefer to change its wording to reflect articles 35 (3) and 55 of Protocol I additional to the Geneva Conventions of 1949 rather than the language of the Environmental Modification Convention.

Fourth, he supported the inclusion of draft principle 13 *ter* because it addressed the concept of pillage, which was well-established in international humanitarian law. However, the draft principle, or at least the commentary, should make it clear whether the concept was limited to the traditional concept of pillage for private purposes or whether it should be expanded to cover the exploitation of natural resources in the public domain. Moreover, it should be clarified that the illegal exploitation of natural resources was perpetrated by many types of non-State actors. Therefore, the Commission should not focus solely on States and corporations, as it had done in the draft principles on corporate due diligence and responsibility. However, the wording of the draft principle on pillage, as such, seemed to be broad enough to cover all actors.

Fifth, concerning draft principle 13 *quater*, he had already commented on the issue of responsibility and liability. Like Sir Michael Wood and others, he fully supported paragraph 1. As for the following paragraphs, he was not opposed to them as they explicitly conveyed the progressive development of international law, including the idea of special compensation funds. However, he also agreed with Mr. Murphy’s proposal to amend paragraph 2 to read: “States involved in an armed conflict should consider, as appropriate, the establishment of a special compensation or remediation fund for environmental damage directly caused by that armed conflict.”

However, it should be stated, at least in the commentaries, that the main objective of that fund would be the protection of victims of armed conflicts. Consequently, environmental damage should be compensable but should not take priority over compensation for damage relating to the death, personal injury or loss of property of the victims of armed conflicts.

With respect to draft principle 13 *quinquies*, he had already commented on the terminological issues that might cause some difficulties. It should be explained that the contribution to international law made by that draft principle would require States to

legislate in order to establish the civil liability of corporations. The last sentence of paragraph 2 was problematic for a number of reasons, not least because of the issue of the “corporate veil”. It should be made clear whether parent companies were responsible, or liable under civil law, for breach of relevant requirements or just obliged to ensure, as appropriate, that their subsidiaries exercised due diligence and precaution. Was it an obligation of means or an obligation of result? When it came to the concept of “due diligence and precaution”, what was meant by the term “precaution”? Was it related to the precautionary principles known in environmental law or to something else?

Lastly, draft principle 14 *bis* concerned just one specific aspect of human displacement. The recommendation for States and other relevant actors to take appropriate measures to prevent and mitigate environmental degradation in areas where persons displaced by conflict were located was a good contribution to the progressive development of international law. Perhaps, as suggested by Ms. Galvão Teles, it could be even broader and address the consequences of human displacement for the environment.

In conclusion, he recommended sending all the draft principles to the Drafting Committee.

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

Mr. Hmoud (Chair of the Planning Group) said that the Planning Group was composed of Mr. Argüello Gómez, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez-Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Huang, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Vázquez-Bermúdez, Sir Michael Wood and Mr. Zagaynov, and Mr. Jalloh (Rapporteur), *ex officio*.

The meeting rose at 11.40 a.m.