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Held at the Palais des Nations, Geneva, on Monday, 27 May 2019, at 3 p.m.

Contents

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Present:

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

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3 p.m.

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

The Chair invited the Special Rapporteur to sum up the debate on her second report on protection of the environment in relation to armed conflicts (A/CN.4/728).

Ms. Lehto (Special Rapporteur) said that she was grateful to the Commission members for the thoughtful contributions they had made in the course of a rich and interesting debate. She had taken careful note of all their comments, including those relating to future commentaries to the draft principles.

Turning first to the nature of the draft text and the final form of the Commission's output on the topic, she said that the Commission had chosen to call the outcome of its work "principles" on three previous occasions: in 1950, when it had adopted the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, and in 2006, when it had adopted both the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities and the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations. While the Nuremberg Principles were principles of international law, the other two sets of principles took the form of non-binding declarations. The term therefore obviously lent itself to both purposes.

At the Commission's sixty-seventh session, when it had discussed various options for the final form of its output on the current topic, it had accepted the reasons given by the previous Special Rapporteur, in her statement introducing her second report, for not calling the provisions "conclusions", "guidelines" or "draft articles" (A/CN.4/SR.3264) and had generally supported her proposal to use the term "principles". Although delegations in the Sixth Committee had criticized individual draft principles and their wording, very few had taken issue with the nature of the draft text.

Regarding the question of whether the draft principles were of a legal nature or a policy nature, she recalled that those draft principles that were of a policy nature were worded in a manner that was similar to the wording of earlier texts adopted by the Commission. Members had regarded those earlier texts as a means of encouraging States to take certain actions, assisting States in their negotiations in specific cases or contributing to the development of international law by guiding States and indicating matters that should be dealt with in specific agreements. Draft principles that were formulated in order to encourage States to address certain problems or take certain measures or to assist States in that regard were therefore not an innovation in the Commission's practice. On the other hand, many of the current draft principles reflected existing customary law. That was true of nearly all the draft principles in part two (principles applicable during armed conflict), the three draft principles in part four (principles applicable in situations of occupation), the proposed draft principle on the prohibition of pillage and the Martens clause. Draft principle 12 (prohibition of reprisals) could, however, be seen as promoting the progressive development of international law, which also formed part of the Commission's mandate. The draft text thus contained provisions of differing normative value, and the nature of each provision in that respect was evident from the manner in which it was formulated and the relevant commentary. If members so wished, appropriate wording could also be added to the general commentary.

The issues addressed in those draft principles that could be regarded as standards of practice and conduct, as well as the guidance that they provided and the sources on which they were based, had not been chosen at random. In response to Mr. Rajput's objection to her reference to the European Union timber regulation (regulation (EU) No. 995/2010 of the European Parliament and of the Council of 20 October 2010), she pointed out that the report *Green Carbon, Black Trade*, which had been prepared jointly by the United Nations Environment Programme and the International Criminal Police Organization (INTERPOL), showed that illegal logging was a major environmental problem all over the world. Furthermore, the European Union regulation was binding on 31 States; in addition, two African States had entered into voluntary partnership agreements with the European Union

on legal timber exports, two other African States were negotiating an agreement of that kind and six States were considering measures to curb the export of timber from illegal logging.

With respect to the questions raised about the use of the words “shall”, “should” and “should ensure” in the draft principles, and in particular whether “should ensure” would appear to impose an obligation of result, she noted that the wording of the newly proposed draft principles did not differ from that of the draft principles that had already been adopted on the topic. In addition, the principles on the allocation of loss used both “should” and “shall”, sometimes in conjunction with “ensure”. Clearly, the proper formulation would depend on the context, and decisions on the final wording would be taken by the Drafting Committee. Having said that, she failed to see how the wording “should ensure”, which in 2006 had been deemed to be appropriate for a non-binding standard of conduct, could come to be seen as producing an obligation of result. In general, the choice of either “shall” or “should” was an effective way of indicating the normative value of a provision, as was explained in the commentary. In the Sixth Committee, some delegations had objected to mandatory language such as “shall” or “must”, but none had challenged the use of the word “should”. The draft principles that reflected customary international law generally used “shall”. That was true, in particular, of the draft principles in parts two and four of the text, which were based on the Geneva Conventions and the Additional Protocols thereto and on customary international humanitarian law. If those draft principles were to be formulated as non-binding recommendations, using the term “should”, the text might be seen as relativizing and undermining existing obligations.

The matter of whether the topic as a whole constituted progressive development or whether some provisions reflected customary international law had been raised in the Sixth Committee in 2018 and had been discussed by the Drafting Committee and the Commission at its sixty-seventh session. She agreed with Mr. Nolte that it would be senseless to try to classify a whole draft text as either progressive development or codification, since individual provisions might be more or less progressive in comparison with State practice or *opinio juris*. As one former Commission member, Mr. Pellet, had contended in his article “Between Codification and Progressive Development of the Law: Some Reflections from the ILC”, all topics involved some degree of codification because no topic was entirely new when it was taken up by the Commission, and all topics also included an element of progressive development because there were uncertainties that called for clarification. As Mr. Grossman Guiloff had stated, a binary approach entailed a risk of oversimplification. In any event, the Commission should explain at length in the commentary what legal support existed for each provision.

In response to the concern that inadequate attention had been paid to part two of the text, which dealt with the period of armed conflict, and to the suggestion that new draft principles should be added on the legitimate rights of belligerents, the status of neutral States, collateral damage and the meaning of the terms “widespread”, “long-term” and “severe”, she recalled that the working group established by the Commission in 2017 to identify outstanding issues within the context of the topic had not proposed any new draft principles on the conduct of hostilities or on the law of neutrality. Moreover, the addition of significant substantive provisions at the second-reading stage would be somewhat out of the ordinary. It would be inadvisable to focus solely on the period of armed conflict and the law of armed conflict, for the reasons she had given in her introduction to her first report at the Commission’s seventieth session (A/CN.4/SR.3426). It also would have been unhelpful to systematically examine the Geneva Conventions and the Additional Protocols thereto, along with the relevant disarmament treaties, in order to identify all the provisions that directly or indirectly protected the environment, since the International Committee of the Red Cross (ICRC) had been engaged in that very task for the last 10 years, and the results of its study would shortly be published as revised guidelines on the protection of the environment in times of armed conflict. If the Commission had done no more than clarify how the existing law of armed conflict protected the environment, it would have duplicated the work of ICRC.

The draft principles had been prepared on the understanding that they would generally apply to both international and non-international armed conflicts. However, the Commission had used different terminology, referring variously to "States", "parties", "international organizations", "relevant actors" or "occupying Power", depending on whether the measures referred to in a particular draft principle were to be taken by parties to an international armed conflict, parties to a non-international armed conflict, including non-State armed groups, or any State in a position to do so. Furthermore, in those cases where a draft principle drew on existing rules of international law, the commentary referred to the applicability of those rules in international or non-international armed conflicts. That, in her view, was the best approach.

Turning to the proposed draft principles contained in annex II, she noted that draft principle 6 *bis* on corporate due diligence had been supported by 10 members, although a number of comments had been made with regard to its wording. While the final formulation would be a matter for the Drafting Committee to decide, she wished to point out that the proposed draft principle was based not only on the Guiding Principles on Business and Human Rights, but also on an extensive web of due diligence guidelines adopted by States, international organizations and businesses in relation to situations of armed conflict, the protection of the environment and responsible purchasing of natural resources, as well as legally binding measures at the national or regional level. Although that degree of practice might not be sufficient to support the idea that corporate due diligence requirements had attained the status of customary law, it provided an adequate basis for a draft principle phrased as a recommendation. The addition of the draft principle in question would be useful because it combined several different perspectives: protection of natural resources and the environment, armed conflicts and post-conflict situations. Regarding Mr. Murphy's suggestion that the focus of the draft principle should be shifted from corporations to non-State actors in general, she agreed with Mr. Grossman Guiloff that such a one-size-fits-all approach would be problematic; moreover, there was no established definition of "non-State actor" in international law. The proposed draft principle was not intended to stigmatize corporations; rather, it reflected the extensive existing practice and commitments of States and corporations.

Proposed draft principle 8 *bis* had received extensive support; only three members had expressed reservations about it. The extension of the Martens clause to cover environmental protection had been approved by States in the Sixth Committee some 25 years earlier. While States might not have reproduced the clause in their military manuals, more and more States were including environmental guidelines in such manuals and in other instructions to their armed forces.

Mr. Nolte had objected to the inclusion of the expression "principles of humanity" in that clause, on the grounds that such principles specifically served human beings, not animals, plants or the environment. She agreed that the environment as such was protected, rather, by the "dictates of public conscience". At the same time, leaving out the expression "principles of humanity" would downplay the intrinsic link between the survival of human beings and the state of the environment in which they lived. It would also exclude the link to international human rights law, which provided important protections for the environment, and might also send a message that could easily be misunderstood. She suggested that Mr. Nolte's views could perhaps be included in the commentary to draft principle 8 *bis*. Other drafting proposals regarding the Martens clause could be discussed in the context of the Drafting Committee.

Proposed draft principle 13 *bis* on environmental modification techniques was also broadly supported by the Commission members, with three members expressing a preference for the alternative drafting that she had presented in her introductory statement. She proposed that the Drafting Committee should use the alternative formulation as the basis for its work.

Proposed draft principle 13 *ter* on pillage had been supported by almost all the Commission members who had commented on the topic. Mr. Valencia-Ospina had pointed to the need to clarify the difference between the terms "pillage", "looting", "plunder" and "spoliation". Mr. Nguyen had suggested that the concept of illegal exploitation should be

defined, and Mr. Park had proposed that the draft principle should be reformulated so as to include the concept of illegal exploitation of natural resources.

The "illegal exploitation of natural resources" was a standard expression that was used frequently in Security Council resolutions. As pointed out in paragraph 21 of the report, however, it was used in those resolutions as a general notion that could refer to the activities of States, non-State armed groups or other non-State actors, including private individuals. It could thus refer to illegality under international or national law. It was a descriptive term, not a legal concept, and her view was that the Commission should not use it in the draft principle or try to define it. Even the Protocol against the Illegal Exploitation of Natural Resources adopted by the International Conference on the Great Lakes Region did not define that expression. In contrast, the concept of "pillage" was authoritatively defined in the ICRC commentary to the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) and in the jurisprudence of the international criminal tribunals.

Nevertheless, there was quite a degree of variation in the use of the terms in question. In its judgment in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the International Court of Justice referred to "looting, plundering and exploitation", while the African Charter on Human and Peoples' Rights employed the term "spoliation". Research on those terms showed, however, that "pillage", "plunder", "spoliation" and "looting" all had a common legal meaning and had been used interchangeably by international courts and tribunals.

In the traditional scholarly literature, writers from Grotius to Feilchenfeld had used the words "pillage" and "plunder" as synonyms, and the same was true of the judgment of the Nuremberg Tribunal. In the jurisprudence that had emerged following the Second World War, the word "spoliation" appeared to be the preferred term, although it was regarded as a synonym of "plunder". The jurisprudence of the modern international criminal courts and tribunals further confirmed that the words "pillage", "plunder" and "looting" all referred to the unlawful appropriation of public or private property during an armed conflict.

The term "pillage" had been chosen for proposed draft principle 13 *ter* because it was used in relevant treaties such as the Hague Regulations respecting the Laws and Customs of War on Land, the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Protocol II additional to the Geneva Conventions of 1949 and the Rome Statute of the International Criminal Court. The Charter of the International Military Tribunal (Nuremberg Charter) and the statute of the International Tribunal for the Former Yugoslavia also used that term.

Ms. Oral had raised the question of whether the concept of pillage was too narrow to capture the whole phenomenon of the illegal exploitation of natural resources. Mr. Zagaynov had expressed doubts as to its applicability to non-international armed conflicts and, furthermore, saw it as being related mainly to acts committed by individual soldiers for their personal profit. According to the ICRC commentary to article 4 (2) (g) of Protocol II, the prohibition of pillage covered "both organized pillage and pillage resulting from isolated acts of indiscipline", and applied to "all categories of property, both State-owned and private". That understanding had been confirmed in international jurisprudence, such as that of the Special Court for Sierra Leone. Pillage applied only to natural resources that could be subject to ownership and constitute "property", yet valuable natural resources often constituted public property. She agreed with Ms. Oral that the global commons, for instance, was left outside the protection of that rule. However, the prohibition of pillage was the best legal tool available to address the illegal exploitation of natural resources, at least in its worst forms.

Three Commission members had raised the question of whether that prohibition applied to situations of occupation in the context of the draft principles. She recalled that the Commission had agreed, at its seventieth session, that the draft principles contained in parts two and three of the text should apply *mutatis mutandis* to situations of occupation. Specific references to the prohibition of pillage were made in the commentary to draft principle 20.

With regard to proposed draft principle 13 *quater*, seven Commission members had expressed general support for the proposed formulation, while seven other members had said that they saw a need for a "without prejudice" clause. Ms. Escobar Hernández had expressed concerns regarding the wording of paragraph 1.

Ten Commission members had expressed support for proposed paragraph 2, while three had indicated that they did not support it. While the paragraph could certainly be reformulated in a variety of ways, there was a need to preserve its nature as a pragmatic proposal that encouraged States to take appropriate measures to provide reparation and compensation for environmental damage caused during an armed conflict.

Mr. Murphy had proposed that paragraph 2 should be limited to the States that were involved in an armed conflict. However, that would change the general thrust of the provision in such a way that it would no longer be in line with draft principle 15, which was closely related to that provision and which encouraged cooperation among "relevant actors, including international organizations" with respect to post-armed conflict environmental assessments and remedial measures.

Paragraph 3 of proposed draft principle 13 *quater* had been supported by six Commission members and had been opposed by three. One member had suggested that the issue could be addressed in the commentary. The substance of paragraph 3 was hardly contestable; in fact, the compensability of pure environmental damage had recently been confirmed by the International Court of Justice in its compensation judgment in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*. Moreover, there was no question about the applicability of the principle in situations of armed conflict: the United Nations Compensation Commission had stated more than 10 years previously that there was "no justification for the contention that general international law precludes compensation for pure environmental damage" (S/AC.26/2005/10, para. 58). The International Law Commission itself had stated as much in paragraph (15) of the commentary to article 36 of its articles on responsibility of States for internationally wrongful acts and in paragraph (6) of the commentary to principle 3 of its principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. Given that the Commission had previously made such statements only in commentaries, it should now do so in a draft principle.

Comments had been made on proposed draft principle 13 *quinquies* by almost all Commission members who had made statements on the topic. Eleven Commission members had said that they saw merit in its inclusion in the set of draft principles, while five had expressed the opposite view. Several comments had been made with regard to its drafting, for the purposes of making it less prescriptive, making it clearer, ensuring that it did not unnecessarily narrow the liability of parent companies or mitigating the effects of extraterritorial jurisdiction. Three members had proposed that draft principle 6 *bis* should be merged with draft principle 13 *quinquies*.

Regarding the issue of extraterritoriality, the court cases most frequently referred to in that connection, *Kiobel v. Royal Dutch Petroleum Co.* and *Jesner v. Arab Bank, PLC*, which had been adjudicated by the Supreme Court of the United States of America, concerned situations that were somewhat different from the one addressed in the proposed draft principle. In many of the cases involving the Alien Tort Statute that had preceded the *Kiobel* case, and in *Kiobel* itself, there had been only a tenuous link between the corporations concerned and the United States as the forum State, such as "mere corporate presence" in *Kiobel*. The *Jesner* case dealt only with foreign corporations, giving rise to the question of whether a different conclusion would be reached in the case of national corporations, which would have a much stronger link to the United States, for the purpose of reversing the presumption against extraterritoriality.

The scope of proposed draft principle 13 *quinquies* was limited in different ways. First, it concerned only corporations that were domiciled in the State's jurisdiction. In that sense, it could be said to reflect the lessons learned, for instance, from the United States Alien Tort Statute jurisprudence. Second, the proposed draft principle applied only to situations in which such corporations had business activities in areas of armed conflict or in post-conflict situations, and in which the host State could not provide access to justice.

The phrase “adequate and effective procedures and remedies” was a general formulation that left room for national application. The provision was worded as a non-binding recommendation and accordingly used the word “should” instead of “shall”. The draft principle had thus not been phrased as a general call on all States to exercise extraterritorial jurisdiction, but its wording could doubtless be further improved in the Drafting Committee.

Mr. Reinisch’s useful references to pertinent national legislation in France and Switzerland could be included in the commentary. Reference could also be made in that regard to national action plans on business and human rights, which were encouraged by the United Nations. The national action plans of a number of States, including Czechia, Denmark, France, Germany, Ireland, Italy, Slovenia, Sweden, Switzerland and the United Kingdom, referred to existing legislation, planned action or legislative initiatives for holding legal persons established in those countries accountable for their activities abroad. Another example in that regard was the regional legal framework applicable to the States members of the European Union and some other States in Europe, which provided that the law applicable to a claim was that of the State in which the damage had occurred. That was an example of practice that mitigated the effects of extraterritoriality.

Commission members had also made proposals in that context for a new draft principle addressing the responsibility of non-State armed groups. Mr. Hmoud’s proposal concerned reparations by non-State armed groups, and Mr. Jalloh’s proposal concerned individual criminal responsibility. While she understood the concerns that had prompted those proposals, she saw a number of problems with both alternatives.

Proposed draft principle 14 *bis* on human displacement had been broadly supported; however, one member had said that it concerned an issue of policy rather than law and another had questioned its legal basis. Mr. Valencia-Ospina had pointed out the connection between the issue of human displacement and the draft articles on the protection of persons in the event of disasters and had suggested a number of valuable materials and references for inclusion in the commentary.

Most Commission members appeared to share the view that there was no need to define the word “environment” in the context of the draft principles, although two members had said that they were in favour of including a definition. While the 2006 principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities included a definition of “environment”, that understanding of the term had not attained the status of an established definition, let alone universal recognition. She thought it unlikely that reintroducing the same definition or presenting a new one in the context of the draft principles would fare any better.

On the proposal to use the term “environment” throughout the draft principles, views among Commission members had been more divided. Eight Commission members had supported the proposal, while five had said that there was no need to harmonize the use of terms. Two members had said that they would prefer to use the term “natural environment” throughout the set of draft principles. Mr. Murphy had referred to the possibility that the use of the broader term “the environment” in part two of the draft principles might appear to be a deliberate departure from the language of the relevant treaty provisions. That concern could perhaps be addressed by an appropriate “without prejudice” clause in the commentary. For example, the commentary to article 55 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) stated that the “concept of the natural environment should be understood in the widest sense”.

She agreed with Sir Michael Wood that the Commission should reconsider the general shape and object of the draft principles, including their overall structure, at the second-reading stage. In addition, she was encouraged by Ms. Galvão Teles’s view that the Commission would not necessarily have to wait until the second reading to do so. Should there be extra time available for the Drafting Committee, she would be happy to put forward a proposal for improving the overall structure of the draft principles.

The Chair said he took it that the Commission wished to refer to the Drafting Committee all the draft principles proposed by the Special Rapporteur in her second report, taking into account the comments and observations made during the debate and the Special Rapporteur's recommendations.

It was so decided.

Organization of the work of the session (agenda item 1) (*continued*)

Mr. Grossman Guiloff (Chair of the Drafting Committee) said that, for the topic "Protection of the environment in relation to armed conflicts", the Drafting Committee was composed of Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Hmoud, Mr. Huang, Mr. Murase, Mr. Murphy, Mr. Nguyen, Mr. Nolte, Ms. Oral, Mr. Park, Mr. Rajput, Mr. Ruda Santolaria, Mr. Tladi, Mr. Vázquez-Bermúdez and Sir Michael Wood, together with Ms. Lehto (Special Rapporteur) and Mr. Jalloh (Rapporteur), *ex officio*.

The meeting rose at 4.10 p.m.