Provisional

For participants only

16 June 2022

Original: English

International Law Commission

Seventy-third session (first part)

Provisional summary record of the 3572nd meeting

Held at the Palais des Nations, Geneva, on Friday, 29 April 2022, at 11 a.m.

Contents

Present:

Chair:	Mr. Tladi
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Saboia
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 11.05 a.m.

Protection of the environment in relation to armed conflicts (agenda item 3) (*continued*) (A/CN.4/749 and A/CN.4/750)

Mr. Grossman Guiloff said that the Special Rapporteur's third report on protection of the environment in relation to armed conflicts (A/CN.4/750) approached the issues in a thorough and methodical manner. It proposed sound principles to address complex legal questions that had become even more pertinent in the light of ongoing environmental challenges. To date, only 23 States had submitted written comments on the report, attesting, to an extent, to the serious structural issues that impeded the participation of some States and to the need for capacity-building in that area. Participation was essential to a rules-based order in international relations, besides having a bearing on the Commission's conclusions on a given topic.

Beginning with some general observations, he wished to express his support for the Special Rapporteur's holistic approach to the topic and for the view that the Commission could not simply conclude that international humanitarian law had all the answers – a position supported by the fact that the topic encompassed customary norms and progressive development before, during and after an armed conflict, including in situations of occupation. The concurrent applicability of different areas of law had been expressly recognized in the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*, and a good number of States had expressed their support for a holistic approach that encompassed, *inter alia*, humanitarian law, environmental law and human rights law.

He welcomed the decision to address the exploitation of natural resources in relation to armed conflict, specifically in draft principle 10. The inclusion of due diligence obligations had been consistently encouraged by the Netherlands, and also by the Environmental Law Institute, which had noted that, since 1989, 35 major armed conflicts had been financed through the exploitation of natural resources. The importance of taking action against the exploitation of natural resources in areas where it might contribute to armed conflict was also emphasized in United Nations Security Council resolution 1625 (2005), and the decision to address situations of occupation had been welcomed by several countries as well as by the International Committee of the Red Cross and various civil society organizations.

With regard to the comments on State practice received, he wished to emphasize that State practice was derived from a variety of sources and that limited State practice was not necessarily an indication of an absence of legal norms in a particular area of law. A general concept could be applied to new situations by a process of deduction. Using deductive reasoning to regulate new forms of conduct for which precedents were lacking, in strict compliance with the Vienna Convention on the Law of Treaties, was an essential part of legal tradition.

As a last general observation, he wished to highlight the importance of referring to attacks on nuclear facilities in the draft principles, especially in the light of the recent invasion of Ukraine by the Russian Federation and the attacks on Chernobyl. Those events had made the Special Rapporteur's careful analysis of State obligations in that connection even more pertinent. Furthermore, the interaction between international environmental law and human rights law was a field of law that was developing rapidly, and a number of countries had noted that the draft principles might serve as a catalyst for the progressive development of international law in that area.

Turning to the draft principles themselves, he said that he supported the Special Rapporteur's proposal to include an express mention of situations of occupation in draft principle 1, and also her proposed change to draft principle 2, although, in his view, protection of the right to health and other human rights should also be mentioned, at least in the commentary. He strongly supported the changes proposed to draft principle 4, on the designation of protected zones, which, as many States had noted, was of particular importance in the light of recent developments in Ukraine. He agreed with the Special Rapporteur that the phrase "by agreement or otherwise" should be retained in full, but also shared her view that the comments of the United States of America in respect of the words

"or otherwise" were very helpful and should be reflected in the commentary. While many areas of environmental importance had major cultural significance, as the International Committee of the Red Cross had pointed out, that was not always the case. Accordingly, "cultural significance" should not be a prerequisite for the draft principle's applicability. Clarification of the meaning of "cultural significance" should be provided in the commentary, as requested by several States. Germany had suggested that the commentary should make clear that the notion of cultural significance was "subordinate and of derivative meaning", while at the same time noting that the two criteria should not be seen as cumulative. He agreed with both of those observations.

As noted by the Special Rapporteur, the two modal verbs "should" and "shall" carried very specific nuances, and the choice of which to use in particular formulations required careful consideration. In draft principle 5, "should" should be replaced with "shall" in both paragraphs because the provision codified an existing obligation set forth, *inter alia*, in article 4 (1) of the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169). The draft principle's status as an obligation was supported by article 29 of the United Nations Declaration on the Rights of Indigenous Peoples and further confirmed by judicial application of the obligations contained in both international texts. Because of the nature of its mandate, the Commission inevitably had to strike a balance between codification and progressive development, and to reflect the distinction between the two in its use of terms such as "shall" and "should", even though the distinction was not always black and white.

As documented by international and regional courts and also by various international bodies, indigenous peoples had a special, long-established relationship with their land and territories. That special relationship had been recognized by the Human Rights Committee, which had clarified that article 27 of the International Covenant on Civil and Political Rights, on the right to culture, was related to the ability of indigenous communities to control and use their land and resources, and also by the Inter-American Court of Human Rights, which, in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, had ruled that, pursuant to article 21 of the American Convention on Human Rights, States had a duty to respect and protect indigenous peoples' rights to property, culture and access to traditional sites. The special relationship was also reflected in States' obligation to consult indigenous peoples in all situations in which their territories had been, or would be, adversely affected. In addition, the African Court on Human and Peoples' Rights had applied the principles of the United Nations Declaration on the Rights of Indigenous Peoples in its 2017 decision in *African Commission on Human and Peoples' Rights v. Kenya*, and the Commission itself had recognized the special relationship between indigenous peoples and their land in the context of the African Charter on Human and Peoples' Rights. The fact that the draft principles encompassed obligations arising before, during and after armed conflict, including in situations of occupation, underscored the value of such decisions.

In draft principle 6, "should" should again be replaced with "shall", to reflect that the provisions concerned obligations established under customary international law. The qualifier "as appropriate", used in the first sentence, ensured that the scope of the obligation was sufficiently limited.

He welcomed the Special Rapporteur's decision to include draft principle 8, as he firmly believed that the correlation between human displacement and environmental protection was a key issue. Unlike some of his colleagues, he did not think that the two concepts could be cleanly separated and he saw no need to find a zero-sum balance between protecting the human rights of migrants and protecting the environment. He saw the two goals as intrinsically and indivisibly linked rather than as twin objectives. By way of example, he recalled that, in the Rohingya refugee camps in Cox's Bazar, indiscriminate land-clearing and deforestation had caused massive landslides that had destroyed the temporary shelters. As the number of environmental refugees increased, it would become still more difficult to separate the two issues. The unfortunate reality of displacement was that such situations were often enduring ones, and, in that context, the human rights of migrants and refugees were likely to become even more closely interconnected with environmental protection. For those reasons, he fully supported the changes proposed to draft principle 8, including the addition of a reference to areas through which persons displaced by armed conflict transited. Since

many individuals and communities were likely to be displaced as a result of environmental degradation in relation to armed conflicts, the environmental damage that was a direct consequence of such displacements could not be overlooked.

With regard to draft principle 9, the text should make clear that the benefits of "full reparation" should be passed on to affected individuals and communities, and the commentary should include a definition of relevant measures, drawing to an extent on the judgment of the International Court of Justice in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*. Another helpful reference was general comment No. 3 of the Committee against Torture, which provided a comprehensive definition of the concept of reparations and outlined the obligations of States in that respect. He was also in favour of including the reference to the responsibility of non-State actors in draft principle 9 (2).

He agreed with the proposed changes to draft principle 10, although it was not essential to broaden the draft principle's scope by replacing the term "corporations" with "business enterprises". Still, the change did not detract from the substance. The commentary, on the other hand, should be expanded, to clarify that assessing due diligence was one of the "appropriate legislative and other measures" that States should take. Business enterprises should cease or refrain from engaging in commercial activities that would entail a substantial risk of causing significant environmental damage to areas affected by armed conflict or post-conflict situations, or of contributing to the unlawful extraction of natural resources located in those areas. When a business enterprise engaged in activities in areas affected by armed conflict, the due diligence assessment should include checking whether the enterprise was complying with the applicable rules of international and domestic law. When making that assessment, business enterprises should give appropriate weight to the domestic laws of the State in which the business activities were being carried out.

Although they did not specifically address situations of armed conflict, the guidelines for multinational enterprises issued by the Organisation for Economic Co-operation and Development were another pertinent reference. The guidelines called on enterprises to establish environmental management systems that included the "collection and evaluation of adequate and timely information regarding the environmental, health, and safety impacts of their activities", a provision that illustrated the importance attached to the prevention of environmental damage. A number of countries, including Canada, the Netherlands, Norway and Sweden, had made good progress in implementing the guidelines, and in Chile a bill that would establish criminal responsibility for environmental crimes was being considered by the Senate. The words "should" and "shall" should be used judiciously in the draft principles to avoid hindering further progress in that area.

He welcomed the reference to "human health" in draft principle 10. Maintaining that the draft principles related to the environment only, in isolation from human rights, was to oversimplify the topic, and damage to human health was undoubtedly one of the potential consequences of failure to protect the environment. However, the commentaries needed to be expanded to refer to other human rights that might be affected by environmental damage.

With regard to draft principle 12, he agreed with the Special Rapporteur that the reference to the Martens Clause in the title should be retained. He saw merit in ensuring consistency between the language of the draft principle and the language of the 2020 guidelines on protection of the environment in armed conflict of the International Committee of the Red Cross and its 1994 guidelines on military manuals and instructions on the protection of the environment in times of armed conflict. In the light of comments from some States, he also agreed that the commentary to draft principle 12 should be expanded to emphasize the importance of the Martens Clause and provide clarification regarding its applicability. It was important to bear in mind the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*, according to which: "… while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict." References to certain other decisions that supported the values recognized in draft principle 12 and elsewhere might also be pertinent. For example, the rule of customary international

law that prohibited the capture of coastal vessels engaged in fishing to feed the civilian population had been recognized by the United States Supreme Court in 1900 in the *Paquete Habana* case and by the Prize Court of France in 1801 in the *La Nostra Senora de la Piedad* case. In the latter case, the Prize Court had established that the capture of such vessels was contrary to "the principles of humanity and the maxims of international law".

He supported the proposed deletion of draft principle 15, on the understanding that, as suggested by the International Committee of the Red Cross, the commentary to draft principle 14 would encompass the concepts originally set forth in draft principle 15.

He agreed that draft principle 16 should refer to "the environment" rather than "the natural environment". The concept of the "environment" was broader than the concept of "nature", which was generally considered to encompass only the features of the natural world itself. The "environment", in contrast, was a complex system of interconnections in which the various elements involved, which included humans and the natural world, interacted with each other in different ways. In paragraph 29 of its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice expressly stated that the environment represented "the living space … of human beings". The proposed change would bring the language of the draft principle into line with similar documents such as the Geneva List of Principles on the Protection of Water Infrastructure. Thus, as proposed by the Special Rapporteur, "the environment" should be used throughout the draft principles, with the commentary clarifying that the choice of term was without prejudice to the manner in which Protocol I Additional to the Geneva Conventions of 1949 was interpreted and applied.

He supported the proposed changes to draft principle 20 (2), whereby the Occupying Power would be required to take appropriate measures to prevent environmental harm that was likely to violate the rights of the protected persons of the occupied territory. The link between the individual right to a clean, healthy and sustainable environment and human rights in general had been recognized by the Human Rights Council in its resolution 48/13 (2021). A reference to specific human rights that were adversely affected by damage to the environment would also be acceptable to him, provided that other relevant human rights were mentioned in the commentaries.

He agreed with the changes proposed to draft principle 21 and draft principle 22. The proposed reformulation of draft principle 22 was particularly important, as it would bring the language into line with key texts such as principle 21 of the Declaration of the United Nations Conference on the Human Environment and principle 2 of the Rio Declaration on Environment and Development. The concept of due diligence in the context of occupation was addressed directly in the advisory opinion of the International Court of Justice on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*. The advisory opinion of the Inter-American Court of Human Rights on the environment and human rights, and specifically the Court's recognition of the extraterritorial responsibility of States for conduct that caused damage in another State, might also be of relevance to the draft principle. It was also important to note that the norms of human rights law continued to apply during an occupation.

With regard to draft principle 24, he agreed with the proposed change to paragraph 1 and would also support the deletion of paragraph 2, as suggested by the Special Rapporteur, provided that the section of the commentary that dealt with cooperation in good faith was expanded. He also agreed with the proposed changes to draft principle 25, although it was important that a non-exhaustive list of relevant actors was included in the commentary as well as clarification as to whether non-State actors and international organizations should be considered "relevant actors".

Draft principle 26 was indispensable, and the measures referred to therein should be described as "timely and appropriate", not just "appropriate", to reflect the inherent urgency attached to them. Since the timeliness of the measures referred to in draft principle 27 was likewise of critical importance, he also supported the proposal to add the phrase "as soon as possible" in paragraph 1 of that draft principle. He was in favour of sending all the draft principles to the Drafting Committee.

Mr. Forteau said that he was grateful to the Special Rapporteur for the impressive and meticulous work she had put into her third report, which put the Commission in an

excellent position to begin the second reading. As he had not been a member of the Commission when the draft had been adopted on first reading, he would allow himself to express his general sentiment about the current draft and its main shortcomings. In any case, most of the amendments proposed by the Special Rapporteur concerned points of drafting, which could be dealt with in the Drafting Committee. It was for that reason that he would focus on issues of a more general nature, building on observations made by States and responding to recent developments in international law.

The topic of the environment in relation to armed conflict had never been so relevant and therefore deserved the Commission's full attention. At the second-reading stage, the Commission should not confine itself to examining the positions of States, however important they might be. It was regrettable that the Special Rapporteur had addressed neither the criticisms made in academic writings about the draft adopted on first reading nor recent case law and practice, although, in fairness, some of the developments in case law and practice that had taken place in recent weeks could not have been taken into account either by States or by the Special Rapporteur.

That being said, the Commission was once again confronted with the limitations of a second reading planned for a single session, which reduced the speaking time available to members for commenting on each of the draft principles in the light of the observations of States and reassessing the soundness of the draft adopted on first reading. That hindered substantive debate, ruled out the possibility of further interaction with the Sixth Committee and ran the risk of undermining the long-term authority of the project. Such an approach had several consequences. First, the Commission would not have time, at the current session, to reflect in depth on how to address the issue of non-State actors – either non-State belligerents or private military companies – even though that issue arose frequently in the draft and warranted a study in its own right. Second, the Commission would have little time to discuss and adopt a draft preamble, for the inspiration of which the Special Rapporteur did not indicate which texts she had used. Third, the Special Rapporteur had decided not to propose any further draft principles as it would not be possible, according to her, to submit them to States before their final adoption. That would have been possible, however, had the second reading been spread over two years. Fourth, it would not be possible to carry out a detailed analysis of the most recent practice, case law and doctrine.

The Special Rapporteur referred, in paragraph 12 of the report, to a large number of the comments made in academic writings on the draft adopted on first reading, but three points needed to be made in that regard. First, the references were all to English-language sources: the updated bibliography to be circulated as an addendum to the report should be multilingual and the references to the practice of domestic courts should not be limited to the courts of common-law jurisdictions. Second, the report did not include any analysis of the aforementioned comments. Third, some of those comments were in fact highly relevant. For example, draft principle 13 (2) had been sharply criticized for its excessive conservatism, as it was limited to "widespread, long-term and severe" damage and as no indication was given as to how to interpret those three qualifiers. It would be necessary to discuss the paragraph further and to revise it significantly.

More fundamentally, the most recent practice showed that the Commission could and should be more ambitious in strengthening the protection of the environment in relation to armed conflict. First, in its order of 16 March 2022 in *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, the International Court of Justice had noted that "any military operation … inevitably causes loss of life, mental and bodily harm, and damage to property and to the environment". Second, the same order showed that the issue of works and installations containing dangerous forces warranted further consideration, which should be done on the basis of rule 42 of the study entitled "Customary international humanitarian law" of the International Committee of the Red Cross and also guided by the activities of the International Atomic Energy Agency in that area. Third, it was important to mention the Court's judgment of 9 February 2022 in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, in which it had awarded compensation to the Democratic Republic of the Congo for damage to natural resources, including flora and

fauna. That recent practice should be incorporated into the commentary and should perhaps lead to a review of the language of some of the draft principles.

In its judgment of 9 February 2022, the Court had reaffirmed the principle of full reparation, which lent support to draft principle 9. It had also recalled that Uganda was "liable to make reparation for all acts of looting, plundering or exploitation of natural resources [in the occupied territory] even if the persons who engaged in such acts were members of armed groups or other third parties". In addition, it was important to take account of the advances made in the same judgment, which established a presumption of causation and of proof of injury in the case of occupation; the respondent – the Occupying Power – was required to rebut that presumption if it wished to avoid paying compensation for any damage caused in the occupied territory. That issue had yet to be addressed at all, either in the draft adopted on first reading or in the Special Rapporteur's third report, which did not take into account the special responsibility of the occupier based on the obligation of vigilance. Yet, as a result of that obligation, the occupying State could be found responsible for damage caused by private individuals, as the Court had recalled in its judgment. There was therefore less of a need, from the standpoint of international law, for recourse to the liability of private individuals, as in draft principle 11.

The general commentary also needed to be strengthened with regard to the protection of the environment in case of occupation. In particular, it should be recalled that, under article 6 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention), the provisions of the Convention relating to the environment continued to apply for the duration of the occupation, which, as the International Court of Justice had noted in its 2004 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, applied even to an occupation extending over several decades.

International obligations in that context must be strengthened and progressively developed in order to increase the legal burden of war on those that decided to initiate it. For instance, it would seem justifiable to replace "should" with "shall" in draft principle 28: the obligation to protect and preserve the marine environment, which the International Tribunal for the Law of the Sea had described as an obligation *erga omnes*, certainly bound the responsible State to ensure that remnants of war at sea did not constitute a significant danger to the environment and, if necessary, to seek the assistance of other States or international organizations. Those obligations stemmed in particular from articles 192 and 194 of the United Nations Convention on the Law of the Sea and, more broadly, from the entirety of Part XII of the Convention, which was certainly now customary in its general thrust.

More generally, the draft adopted on first reading seemed to draw too heavily on *jus in bello* and, in so doing, to go too far in sacrificing the environment on the altar of military necessity.

As Mr. Murase had noted, it should not be overlooked that, by harming the environment, a belligerent could incur international responsibility under *jus ad bellum* in addition to *jus in bello*. Condoning conduct on the basis of *jus in bello* did not necessarily condone it on the basis of *jus ad bellum*, as the Commission had made clear in its work on State responsibility, with specific reference to environmental obligations in the event of armed conflict.

The draft adopted on first reading seemed very unbalanced in that regard. That was particularly true of draft principle 13 (1), which implied that the law of armed conflict should be the main point of reference. The same criticism could be levelled at draft principle 12, which seemed to restrict the law applicable in the event of armed conflict to humanitarian law alone. However, the law of armed conflict and humanitarian law by no means did away with other norms of international law, in particular *jus ad bellum* in respect of the State responsible for the outbreak of armed conflict. The Commission had in fact made that point in the case of an aggressor State in article 15 of its 2011 articles on the effects of armed conflicts on treaties. It was highly regrettable that a comparable provision could not be found in the draft principles under consideration, and the Drafting Committee should consider the possibility of proposing one.

It was true that the commentary to draft principle 9 included some discussion of environmental responsibility for violations of *jus ad bellum*, but that discussion was clearly not sufficient and, further, was called into question by other draft principles.

Draft principle 26 was problematic in that it too readily absolved a State that caused environmental harm of its responsibility and of its obligations of cessation and reparation. In addition, the wording of the draft principle, in which reference was made to a situation where the source of environmental damage was "unidentified" or reparation "unavailable", was very imprecise from a legal perspective. In that connection, in its judgment in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the International Court of Justice had held that, where armed conflict made it difficult to establish the damage or its cause, it was still possible to impose reparation and compensation. Further, in the same judgment, the Court had not limited reparation to "widespread, long-term and severe" damage to the environment, as was done in draft principle 13. The Court had instead recalled that, in the context of armed conflict and occupation, it must apply its general case law on the right to reparation for any environmental damage.

Equally questionable was the assertion, in the commentary to draft principle 20, that "most environmental harm" during armed conflict would "result from lawful activities". Such activities might be "lawful" under *jus in bello* but certainly not necessarily under *jus ad bellum*.

Of course, he fully understood that the existence of an armed conflict made it necessary not to impose unrealistic obligations on the belligerents, going beyond what could reasonably be expected of them, as several States had rightly recalled. There was nevertheless no reason to limit the responsibility of a State that had violated *jus ad bellum* when its armed actions caused environmental harm.

The distinction between *jus ad bellum* and *jus in bello* was relevant in other respects too. For example, did draft principle 4 address the designation of zones protected under *jus in bello* or those protected under peacetime law, as in the case of the creation of marine protected areas? There again, the consequences in terms of international responsibility, which was often the only leverage that could be used against a State that did not respect its obligations, would be different. As a result, draft principle 9 needed to be significantly strengthened.

If, in its work on the topic, the Commission was engaged in a purely *jus in bello* exercise, it should state so explicitly so as to avoid any misunderstanding. If, however, the topic was not limited to *jus in bello*, in accordance with the original intention stated in the syllabus of 2011, a number of adjustments needed to be made to the draft. In that connection, he noted with interest the comments made by Mr. Grossman Guiloff regarding the need for a holistic approach.

With regard to the text of the draft principles themselves, he wished to begin by expressing his support on certain points of principle, namely the application of the draft principles to all armed conflicts, both international and non-international; the need to refer to the practice not only of States but also of international organizations; the use of the term "environment" instead of "natural environment"; and the recognition that it would be inappropriate to include a follow-up mechanism.

Two points then needed to be made. First, the use of the word "enhance" – which should be translated into French as "*renforcer*" rather than "*améliorer*" – seemed inappropriate in draft principles 2 and 3. On the one hand, the use of that word suggested that existing law was insufficiently protective, which might be counterproductive. The Commission should instead emphasize the existing potential of international law and the need to interpret it in a manner that protected the environment, given the contemporary importance of environmental requirements. On the other hand, it introduced a confusion between the codification of law and its creation. The explanations provided by the Special Rapporteur in paragraph 37 of the report were insufficient to dispel those doubts, even if they had been formulated by the Chair of the Drafting Committee at the time. The use of the word "enhance" should therefore be reviewed. In the same vein, one might wonder whether draft principle 13 (1) should not be included in Part Two of the draft, since it concerned all phases of a conflict.

Second, the draft principles and their commentaries did not always explain the extent to which international environmental law applied in relation to armed conflict. Was it fully applicable except in cases where it was incompatible with the *lex specialis* of the law on armed conflict? Might it require some readjustment in the context of armed conflict? In paragraph 24 of her report, the Special Rapporteur expressed agreement with the comments of France on that point, but they seemed indicative of a narrower approach than simply adhering to the principle of *lex specialis*. As the International Court of Justice had found in its advisory opinions on the *Legality of the Threat or Use of Nuclear Weapons* and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the law of armed conflict did not prevent the application of other rules, except when a specific matter fell concurrently within the scope of different bodies of rules. The law of armed conflict did not, however, constitute a reason for a general departure from international environmental law. It was vital to give thorough consideration to the international law that should apply, in particular, but not only, in the context of draft principle 13 (1). It would be regrettable if the Commission failed to clarify that point, since it had been the very reason for the inclusion of the topic in its programme of work.

Furthermore, it was unclear what was meant in draft principle 20 by "applicable international law" or the "law … of the occupied territory". Must the Occupying Power respect its own commitments under the Paris Agreement in the occupied territory, or those undertaken by the occupied State? Since the outbreak of an armed conflict did not *per se* put an end to international environmental commitments, it would be necessary to explain exactly what that signified for international standards and which rules applied. What was the position with regard to the implementation of an agreement on watercourses? Who should be a member of a regional fisheries commission in the event of occupation? How could the monitoring mechanisms of environmental conventions be applied? Draft principle 20 and the commentary thereto shed very little light on those questions.

With regard to draft principles 4 and 17, it was also far from clear how such important conventions as the Convention on Biodiversity, the Convention on Wetlands of International Importance or the World Heritage Convention would apply in the event of armed conflict and to what extent the belligerents would have to respect zones protected by those conventions. Nothing was said on that matter; that gap was all the more regrettable as a number of learned writers considered that the Commission's articles on the effects of armed conflicts on treaties had not elucidated that issue sufficiently.

In fact, the whole of Part Four ignored that crucial point. The key question was whether there was a rule of transmissibility that required environmental commitments accepted by the occupied State to be deemed territorial in nature, which meant that they must therefore be respected by the Occupying Power. Once again, *jus in bello* should not be the sole set of rules taken into account. Peacetime environmental commitments should remain in effect during occupation, unless there was a justifiable reason for them to be set aside. That was the reason why some States held that draft principle 21 offered scant protection, since it weakened that afforded by international environmental law.

Lastly, he wished to make a few brief remarks about specific draft principles, but he would not have time to develop his ideas on them further. With regard to draft principle 20, he believed that a protected zone could be designated unilaterally and not only by agreement. In draft principles 10 and 11, there was no reason to add a reference to "high-risk areas" unless those provisions were meant to cover hazardous facilities. Also in those two draft principles, the phrase "operating in or from their territories" was incorrect: the Occupying Power was also under an obligation to ensure that enterprises operating in the territory that it occupied – which was not "its" territory – protected the environment. Different wording should therefore be found. Draft principle 10 should refer not only to the purchase of natural resources, but also to their exploitation and use. Paragraphs 2 and 3 of draft principle 13 were too restrictive and were incompatible with international environmental law. Draft principle 17 did not adequately explain why a protected zone that contained a military objective was not protected against attack: it was particularly vague about the zones to which it would apply and the conditions that would entail the loss of protection, which might concern only a part of the zone. Draft principle 18, or at least the commentary to it, was very vague on how to deal with the illegal exploitation of resources. In fact, since none of the draft principles

covered such exploitation, that draft principle should be revised in light of the latest case law on the matter.

Mr. Nguyen said that the report reflected the current status of the relationship between the law of armed conflict and the protection of the environment nearly fifty years after the adoption in 1977 of Protocols I and II Additional to the Geneva Conventions of 1949 and in 1976 of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. As the modern weaponry used in non-international conflicts could inflict cross-boundary damage, the environment had to be protected at all times, regardless of whether a conflict was international or not. However, the traditional law of armed conflict did not envisage the phenomenon of non-international armed conflicts and there was insufficient State practice to identify any customary rules that might cover the conduct of non-State actors in such conflicts. That lacuna would lead to the unequal treatment of States and non-State actors that caused environmental damage. For that reason, some principles that applied to international armed conflicts should be extended to non-international conflicts. The use of the word "should" rather than "shall" throughout the text would dispel States' misgivings that the Commission was attempting to create new norms or extend *lex lata*. State practice also showed that there were few principles governing protection of the environment during the occupation of a country. The commentary should clarify which principles applied in general to different types of conflicts.

Use of the term "environment" was consistent with the notion that it covered not only the natural environment but also areas of outstanding cultural importance. The Martens Clause certainly applied to the environment in the broader sense. However, the Commission should consider the inclusion of outer space in the draft principles, since it also required protection from the harmful consequences of armed conflict.

He agreed with the Special Rapporteur that it would be advisable to add the phrase "including in situations of occupation" in draft principle 1 but, in the commentary, it would be necessary to make it plain that, since a situation of occupation existed only when a State's territory was partially or wholly under the effective control of a foreign Power, the principles covering a situation prior to an armed conflict were not appropriate to a situation of occupation. The commentary should also say whether the principles applicable to non-international armed conflict extended to the situation of occupation and explain any links or overlaps between the principles applicable during an armed conflict, in situations of occupation and after an armed conflict.

The commentary to draft principle 4 should distinguish between the designation of protected zones in peacetime and their designation before or during armed conflicts, since a number of international conventions or programmes stipulated that protected zones must be designated under domestic laws, whereas the Convention for the Protection of Cultural Property in the Event of Armed Conflict provided for the designation of protected areas during an armed conflict. Protected zones designated in peacetime should not be treated as military objectives. One question that should be answered was whether international organizations and non-State actors could assist States with the designation of areas that should be protected in an armed conflict. Another issue that should be addressed was the possible abuse of designated protected zones to impede normal military operations.

In draft principle 5, it would be advisable to use the term "ethnic minorities" rather than "indigenous peoples" in order to underline States' responsibility to protect them. However, non-State actors and Occupying Powers likewise had a duty to protect the environment of vulnerable people. He wondered whether wording similar to that in paragraph 1 could be included in paragraph 2 to clearly indicate that they should also undertake effective consultations and cooperation with ethnic minorities for the purpose of rendering assistance and adopting remedial measures during an armed conflict.

Draft principles 4 and 17 were closely related. Under draft article 4, protected zones were designated by States, mostly before the conflict. They could be natural, cultural or heritage sites protected pursuant to a national decision or a bilateral or multilateral agreement. They might even have been agreed between the future occupied State and Occupying Power. Draft principle 17, on the other hand, should be construed as applying mostly to protected zones designated by agreement during the conflict, although it also extended to agreements

concluded before the conflict. Under draft principle 17, the agreement in question was not limited to States but was open to all parties to a conflict, including non-State actors. A reference to “before and during armed conflict” after the term “designated by agreement” would cover all possible situations relating to the “protected zone”, a term that was used in various ways in international law.

He supported draft principle 19. The effects of the widespread damage done to the environment in Viet Nam by wartime “environmental modification techniques” were still being felt half a century later. The prohibition of such techniques rested not on a rule of customary law but on the dictates of the public conscience. Draft principle 19 would encourage the extension of the ban on the use of such techniques to encompass all the parties to a conflict, including non-State actors.

There should be no time limits placed on the environmental assessments referred to in draft principle 25, since the damage done to the environment during a war could severely affect the health and well-being of the population of a theatre of war for decades afterwards. Such assessments should be repeated for as long as remedial measures were necessary.

With regard to draft principle 27, it would be advisable to clarify the responsibility of the parties to a conflict. The commentary should make it plain that the party that caused the conflict should take charge of clearing all the remnants of war on land, at sea and in outer space.

It would be helpful to have a preamble that stated that the protection of the environment in an armed conflict was a pressing concern of the international community and that recalled the interconnectedness of the topic and other fields of international law. He was in favour of referring the draft principles to the Drafting Committee.

The meeting rose at 12.20 p.m.