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International Law Commission
Seventy-third session (first part)

Provisional summary record of the 3574th meeting
Held at the Palais des Nations, Geneva, on Wednesday, 4 May 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. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Saboia
	Mr. Šturma
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 11 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. Rajput said that the Special Rapporteur's third report on protection of the environment in relation to armed conflicts (A/CN.4/750) was both extensive and comprehensive. To begin with methodology, although the distinction observed between the words "shall" and "should" was not entirely helpful, it had served to distinguish "applicable" from "aspirational" international law in relation to protection of the environment during armed conflict. That distinction was explained in paragraph (12) of the commentary to draft principle 3, as adopted at first reading. It was therefore rather disconcerting that the Special Rapporteur intended to abandon it, arguing that even those provisions formulated with the word "should" had normative elements. That intention would no doubt surprise States, several of which had cast doubt on the normative basis of some of the draft principles adopted on first reading that were formulated with "shall".

The Special Rapporteur's recommendation that her preferred term "environment" should be used throughout the draft principles presented problems. At the first-reading stage, the term "natural environment" had been used in Part Three, on the principles applicable during armed conflict, but the broader term "environment" had, quite rightly, been used in the parts of the draft that covered the phases before and after armed conflict. By referring to "the environment" in Part Three, the Commission would be rewriting the international law applicable during armed conflict and contradicting the decisions of the International Court of Justice. During peacetime, international law on the protection of the environment and human rights applied with full force and was not conditioned by international humanitarian law. During armed conflict, however, it applied alongside international humanitarian law, as the Court had noted in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. The term "natural environment" had a specific meaning in the context of armed conflict and, for that reason, was used in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and the Rome Statute of the International Criminal Court. In its recent work, the International Committee of the Red Cross had shown a preference for the same term. However noble the intention, any move to use a different term in that context would be seeking to change the entire body of settled law applicable during armed conflict. He was therefore strongly opposed to the Special Rapporteur's recommendation and found himself in agreement with Mr. Park, Sir Michael Wood and Mr. Murphy in that regard.

The Special Rapporteur was proposing the insertion of the words "including in situations of occupation" in draft principle 1 on the basis that, as indicated by the International Committee of the Red Cross in comments included in the compilation of comments and observations received from Governments, international organizations and others (A/CN.4/749), occupation was "a type or part of international armed conflict". However, in its work on the topic, the Commission was also considering the phases before and after armed conflict. Situations of occupation, which were dealt with in Part Four, did not permeate the entire project. He therefore did not support the Special Rapporteur's proposal, which, counterproductively, might create the false impression that the scope of the project was somehow limited to situations of occupation. Occupation was primarily a feature of international armed conflicts, but the draft was also intended to cover non-international armed conflicts. In addition, while an occupation might continue after an armed conflict, it would be strange to argue that it could begin before an armed conflict.

As Israel had noted, although the word "enhance" was appropriate in draft principle 3 (2), which was formulated using "should" and went further than merely calling upon States to comply with their existing obligations, it was not appropriate in draft principle 3 (1), which was formulated using "shall" and was limited to existing obligations. The replacement of the words "to enhance" with "for" would address that inconsistency. The Special Rapporteur's explanation of her decision to reject the suggestion made by Israel in that regard, namely that the words "to enhance" were used in draft principle 3 (1) and (2) because the word "enhancing" was used in draft principle 2, was not satisfactory, since, by the same token, the

use of that verb in draft principle 2 could also be altered to align it with the text in draft principle 3.

While he agreed with the essence of the Special Rapporteur's recommendation regarding draft principle 4, the specific drafting changes proposed might actually aggravate the concerns of States by giving the impression that cultural importance alone was sufficient for designation as a protected zone. The provision would be clearer if amended to read: "States should designate, by agreement or otherwise, areas of major environmental and related cultural importance as protected zones."

With regard to draft principle 5, Germany had noted that the amalgamation of different legal regimes carried the risk of "overburdening" the draft principles and that narrowing them more strictly to the matter at hand might therefore "help promote future adherence and implementation". The Commission should be careful not to introduce peacetime protections wholesale into the framework of armed conflict, including in all its temporal phases. In draft principle 5 (2), he was not sure that it would be possible to undertake "effective consultations and cooperation" while an armed conflict was ongoing.

With regard to draft principle 6, he was not convinced that the Special Rapporteur's proposal, which involved deleting the words "in relation to armed conflict" from the title, would address the concern expressed by the United States of America. If the goal was not to cover all military activities, the words "in relation to armed conflict" were necessary in the title as well as in the text.

Several States had pointed out that, as draft principle 7 was not based on binding obligations, the word "shall" should be replaced with "should". While the Special Rapporteur agreed that the provision was not intended to be normative in nature, she was recommending the use of the word "shall" on the basis that it was used in the various Security Council resolutions cited in footnote 215 of the report. However, in none of those resolutions was the word "shall" used with reference to the consideration of environmental impacts. In its resolution 2612 (2021), for example, the Security Council "requested" the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo to consider the environmental impacts of its operations when fulfilling its mandated tasks, and that was the situation in other resolutions referred to in footnote 215. It would be fair and appropriate to use "should" instead of "shall" in draft principle 7. The Commission should not seek to overburden peacekeeping missions.

States were unlikely to be comfortable with the changes proposed to draft principle 8. Incorporating the idea of transit would imply that the environment of displaced persons required continuous protection, which could be provided only at the expense of the protection of civilians and the environment. That would be especially true in conflicts involving non-State actors, which, rather than abiding by the draft principles, might seek to turn them to their advantage during a combat. Efforts to broaden the protections for indigenous persons and displaced persons might have a counterproductive effect of a similar kind. Such policy considerations should not be overlooked, since the provisions in question reflected the Commission's policy choices rather than strict law.

The issue of the prosecution of non-State actors for environmental harm needed to be addressed in draft principle 9 in order to respond to the comments received from States and other entities. To that end, an additional paragraph 3 could be added, to read: "States should take appropriate legislative and other measures to prosecute non-State actors for environmental damage caused in relation to armed conflict." The title of the draft principle could be changed from "State responsibility" to "Responsibility".

He agreed with the Special Rapporteur's proposal that draft principles 10 and 11 should be aligned with the Guiding Principles on Business and Human Rights. The commentaries could then be further developed keeping in mind that expanding area of law. He was not fully convinced, however, by the Special Rapporteur's proposal that, on the basis of certain non-binding texts issued by the European Union and the Organisation for Economic Co-operation and Development, the adjective "high-risk" should be inserted. In the texts in question, "high-risk" was used in quite a general way, including with reference to situations not of armed conflict but of mere instability. He would advise against the use of such a subjective criterion. In addition, he was seriously concerned at the proposal to replace

the phrase “area of armed conflict” with “area affected by an armed conflict”. It was fair to ask States to have mechanisms to hold business enterprises accountable for the impact of their activities on the areas of armed conflict in which they operated. It was quite burdensome to expect that they should be accountable even for activities that had an impact beyond those areas.

With regard to draft principle 13, he was strongly opposed to the proposed new paragraph 2, which would disrupt the delicate balance achieved on first reading and surprise some States. In paragraph 30 of its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice had taken the position that States needed to “take environmental considerations into account” when assessing what was necessary and proportionate in the pursuit of legitimate military objectives and that “respect for the environment” was one of the elements that went into making such an assessment. The Special Rapporteur’s proposal went far beyond the Court’s position. Moreover, the extremely high standard that the Special Rapporteur was seeking to introduce would render the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques and draft principle 19 redundant.

As for the proposal that the term “population” should be replaced with “protected persons” in draft principles 20 and 21, he agreed with Mr. Park that the Commission should not follow the definition set out in article 4 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention).

The proposed replacement of the words “by the conflict” with “in relation to the conflict” in draft principle 23, which would be a substantial change based on a suggestion made by a single entity and did not factor in the difficulties of post-conflict peacebuilding.

Information-sharing was a sensitive issue, particularly in the context of armed conflict. It would not be appropriate to rely on instruments dealing with the sharing of information relating to environmental damage during peacetime. States had indicated that there were currently no existing obligations that corresponded to draft principle 24 (1); hence that provision was simply hypothetical. Consequently, he saw merit in the proposal of the United States that “shall” should be replaced with “should” in that paragraph. Not a single State had suggested the deletion of paragraph 2. The Special Rapporteur’s proposal for its deletion was based primarily on suggestions made by other entities. In that connection, it was unclear why the Special Rapporteur had placed so much emphasis on the comments made by Belgium, which had expressed the view not that paragraph 2 should be deleted but that it would be incorrect to mention reasons of national defence or security in relation to international organizations, and Belarus, which took the opposite view, that international organizations might hold certain sensitive information and should be covered.

Turning to the proposal to add a preamble, he said that, even if the majority of members were keen on adding one, the necessary discussions would be lengthy and complex. Even a second reading spread over two years, which had been mentioned as a possibility by Mr. Forteau, might be insufficient. More importantly, the addition of a preamble would require the Commission to make a clear choice about its desired approach to the project. In other words, the Commission would need to decide whether it preferred the “anthropocentric” approach of international humanitarian law or an “environmental values” approach. Germany and Israel had conveyed their understanding that international humanitarian law and the protection of the environment in relation to armed conflict were purely anthropocentric and not of a matter of environmental values. In his view, it would be best not to add a preamble in order to avoid having to take a position on that important but philosophical issue. Constructive ambiguity was preferable to destructive clarity. If the Commission did decide to add a preamble, it would be necessary to mention military necessity and proportionality, which were the core values of international humanitarian law.

The topic had an underlying complexity. As noted in the report, the various comments made on the draft adopted on first reading sometimes pointed in opposite directions. In the context of the second reading, the Commission should ask itself what it was doing and for whom it was doing it.

With regard to the first of those questions, the Commission should not lose sight of the fact that it was dealing with situations in which armed conflict was occurring or had

already occurred. Although existing humanitarian law had its limits in the context of protection of the environment, and the Commission could certainly progressively develop the law where necessary, the practical realities of armed conflict should not be forgotten. As one scholar had noted, warfare without bloodshed was an impossible dream. The temporal dimension of the project was no justification for ignoring those realities. During armed conflict, life-or-death decisions had to be taken in a split second. Those decisions had implications not only for the decision maker or the side for which he or she was fighting but also for other groups, including indigenous peoples and displaced persons that might be affected. If the Commission sought to strengthen the draft principles on the basis of the law as applied in peacetime, it would most likely produce a fantastical text, which would not only be difficult to implement but might even aggravate the risks for those who found themselves in the position of belligerents. In addition, the financial constraints faced by those called upon to participate in peacekeeping operations within and beyond their borders should not be ignored. Colombia, for example, had expressed concern about the "difficulties and complexities of complying with all these principles in the 'during' phase of a conflict" in view of its "limited operational, financial or logistical capacities and significant national defence and public security challenges".

As for the second of those questions, it would be an understatement to say that the majority of States had been critical of the draft adopted on first reading. The States that had expressed criticism in that regard had by no means been limited to those that had traditionally been sceptical of the Commission's work. Czechia, for example, had argued that the line between the codification of international law and its progressive development was blurred in some of the draft principles, noting that "an ambitious and innovative list of recommendations based on very general concepts" was not what was expected of the Commission. Regrettably, rather than seeking to address those concerns, the Special Rapporteur seemed to have sought comfort in the comments of other entities and sometimes those of other States. Most of the suggestions made by States had been rejected, while most of the drafting changes proposed to the draft adopted on first reading were based on comments from other entities. Of all the changes proposed to the first-reading text, 11 were based exclusively on the comments of others, 9 were based on the comments of others and supported by a few States – often just one or two – and only 4 were based solely on the suggestions of States. Further, of all the suggestions made by States, 94 had been rejected and just 9 had made it through. That was a glaring and disturbing imbalance. He wondered whether that imbalance resulted from a subconscious suspicion towards States. The Commission could not expect States to trust it if the Commission did not trust them. As noted by a famous poet and philosopher from India, Saint Kabir, one could not sow seeds of honey locust and expect to grow mangoes.

Despite his reservations, he considered that the topic was extremely important. The Commission should be guided by the need to adopt a practical approach. He was in favour of referring the draft principles to the Drafting Committee and hoped that the various considerations that he had set out in his comments would be taken into account in that context.

Mr. Saboia said that the Special Rapporteur's third report on protection of the environment in relation to armed conflicts showed the advantage of incorporating a wide range of views, including those of entities other than States, at the second-reading stage. The Commission's temporal approach to the topic and its efforts to consolidate the legal framework for the protection of the environment in relation to armed conflicts had attracted broad support in the comments and observations received from Governments, international organizations and others.

He supported the changes proposed by the Special Rapporteur to draft principles 1 and 2. He agreed with the Special Rapporteur that the expression "to enhance the protection of the environment in relation to armed conflict" adequately reflected the purpose of draft principle 3 (1). In that connection, he supported the idea of an "environmental rule of law", as described in paragraph 41 of the report. It was not uncommon for forces working to undermine the rule of law to engage in practices that harmed the environment and the institutions created to protect it. The draft principles would serve the purpose of strengthening respect for the law in the fields of both armed conflict and environmental protection.

He supported the changes proposed by the Special Rapporteur to draft principle 5, which had attracted widespread support, and he agreed with the responses that she had provided to the various comments received in that regard. In particular, he supported the Special Rapporteur's explanation of her decision not to propose the addition of a reference to vulnerable groups other than indigenous peoples, namely that nothing prevented States from extending similar protection to other groups that maintained a close relationship with the environment. The Special Rapporteur was also right to argue that the wording "territories that indigenous peoples inhabit", which reflected the language of the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169), was a general formulation. That formulation was sufficiently broad in scope to cover the various legal regimes adopted by States in relation to indigenous peoples and their lands.

Regarding draft principle 7, he agreed with the Special Rapporteur that the phrases "shall consider" and "take appropriate measures", which reflected consistent and widespread practice, including the practice of the Security Council, were adequate. With regard to draft principle 9, he supported the Special Rapporteur's proposal for a new paragraph 2 to state that the draft principles were without prejudice to the existing or evolving rules of international responsibility of non-State actors, including individual criminal responsibility and the responsibility of international organizations, for environmental damage caused in relation to armed conflict.

Concerning Part Three, he supported the Special Rapporteur's proposal to use the term "the environment" throughout the text. He agreed with the Special Rapporteur that it would be better not to overburden draft principle 13 with additional legal references at the current stage. That said, he supported the proposed new paragraph 2, which reflected the prohibition, in article 35 (3) of Protocol I Additional to the Geneva Conventions of 1949, on the use of methods and means of warfare that were intended, or might be expected, to cause widespread, long-term and severe damage to the environment. He also supported the Special Rapporteur's proposal to add, in the commentaries, a general commentary to introduce Part Three. He supported draft principle 16 and the rest of the Special Rapporteur's comments and proposals regarding Part Three.

The Special Rapporteur was to be commended for her detailed analysis of the comments received in relation to draft principle 20. He saw draft principle 21 as an updated formulation of customary rules on the extent to which an Occupying Power was permitted to lawfully and sustainably exploit the natural resources of an occupied territory and the conditions subject to which it was permitted to do so. He hoped that the right of peoples to self-determination and the principle of permanent sovereignty over natural resources, which had been invoked by several commentators, would be reflected in the commentaries. Draft principle 22 had benefited a great deal from the Special Rapporteur's analysis and proposals.

He supported the remaining draft principles and the Special Rapporteur's proposal regarding the recommendation to be made to the General Assembly.

The meeting rose at 11.45 a.m.