Provisional

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International Law Commission

Seventy-third session (first part)

Provisional summary record of the 3575th meeting
Held at the Palais des Nations, Geneva, on Thursday, 5 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. 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. Šturma said that he wished to commend the Special Rapporteur for her third report (A/CN.4/750), which was well structured and readable. He would begin by addressing some of the general observations contained in paragraphs 23 to 27 of the report. First, he agreed that international human rights law and international environmental law were generally applicable in armed conflicts. However, he recalled the view expressed by France, as reflected in the compilation of comments and observations received from Governments, international organizations and others (A/CN.4/749), that "provisions of a treaty relating to the international protection of human rights or the environment … should be interpreted taking into account the specific context of situations of armed conflict and in the light of obligations under international humanitarian law".

Second, even though he agreed with the general applicability of the draft principles to different types of armed conflicts, there were limits to that "non-differentiation", including for draft principles other than those that applied to situations of occupation in the context of international armed conflicts.

Third, while he acknowledged the role of the practice of actors other than States, it was mainly relevant State practice and expressions of *opinio juris* that should guide the Commission's work.

Against that background, he wished to comment on the draft principles and the proposed amendments thereto. Concerning draft principle 1, he found the addition of the words "including in situations of occupation" helpful in completing the temporal approach.

He welcomed the proposed reformulation of draft principle 2 and the proposed amendment to draft principle 4. The original wording of draft principle 5 referred only to States, which seemed to create a certain imbalance, particularly in relation to non-international armed conflicts. He was therefore in favour of the proposed change. The Special Rapporteur's proposals concerning draft principles 6, 7 and 8 were acceptable and helpful.

Draft principle 9 affirmed the principle of full reparation, in application of the general rule of State responsibility for internationally wrongful acts. In response to comments from several States, the Special Rapporteur had proposed the deletion of the "without prejudice" clause in paragraph 2. He supported the deletion and the addition of a new saving clause recognizing the existing or evolving rules of international responsibility of non-State actors and individual criminal responsibility for environmental damage caused in relation to armed conflict. Framing it as a "without prejudice" clause seemed appropriate, because the existence of responsibility on the part of actors other than international organizations and individual criminal responsibility remained open to debate.

By contrast, he had some issues with draft principles 10 and 11. On the one hand, he welcomed the use of the term "business enterprises" instead of "corporate" or "corporations", in line with the United Nations Guiding Principles on Business and Human Rights. On the other, the term "high-risk area" could be problematic because it referred at least in part to matters not related to armed conflicts, such as areas with weak or non-existent governance and security or areas where widespread and systematic violations of human rights were being committed. Such situations fell outside the scope of the topic.

Regarding Part Three, "Principles applicable during armed conflict", he wished to recall that international humanitarian law was the *lex specialis* applicable during armed conflict. Therefore, he was not in favour of replacing the term "natural environment", which was used consistently in international humanitarian law instruments, with "environment", unless there were very strong reasons for doing so, which did not appear to be the case.

Probably the most controversial proposed change concerned draft principle 13. Mr. Murphy, Mr. Park, Mr. Rajput and Sir Michael Wood had put forward arguments against the insertion of a new paragraph 2 reflecting article 35 (3) of Protocol I Additional to the Geneva Conventions of 1949. While he did not wish to enter into a debate on the presumably customary nature of the prohibition established in the paragraph, it should be noted that the

rule applied only to international armed conflicts. That was one example of a case where the differentiation of applicable law mattered. However, it seemed that many other members of the Commission supported the new paragraph 2. He was therefore willing to accept its inclusion but strongly recommended inserting the qualifier "in accordance with applicable international law" at the end of the sentence. That correctly reflected the scope of the prohibition *de lege lata* and was without prejudice to the future evolution of customary rules of international humanitarian law.

He would not oppose the suggested deletion of draft principle 15. However, that made it even more important not to introduce any changes to draft principle 14. The principles of distinction, proportionality and military necessity were particularly significant, as they were the key concepts of the international law of armed conflict and were thus also applicable in relation to the natural environment. He did not support the deletion of the words "in attack", which helpfully qualified the term "precautions". The Commission should be careful not to extend the scope of the precautionary principle from international environmental law to international humanitarian law.

On a more general note, like Mr. Rajput and others, he found relevant the question of the target audience of the draft principles, which should, after all, be respected and applied primarily by States and their armed forces. Therefore, the Commission should show great respect for the well-established rules of international humanitarian law adopted to serve the practical purpose of humanizing armed conflicts in a way that was understandable to soldiers. That was one of the reasons why he shared the view of some other members that, when adopting the draft principles on second reading, the Commission should be attentive to the comments of Governments rather than the noble intentions of some environmental non-governmental organizations. If the Commission kept that in mind, it would be able to adopt balanced draft principles. He recommended that all the draft principles should be sent to the Drafting Committee.

Mr. Cissé said that he wished to congratulate the Special Rapporteur for her well-drafted and well-researched report on a topic of great relevance, bearing in mind the many armed conflicts in Africa and elsewhere that had caused severe damage to the environment, with disastrous and often irreparable consequences for the populations affected. It was a complex, cross-cutting topic that lay at the junction of international humanitarian, human rights and environmental law. It was important to reflect on how those different bodies of law could complement the international humanitarian law applicable to the protection of the environment during international or internal armed conflicts and to situations involving the occupation of a territory by an occupying Power.

As aspects of the report that raised questions or merited clarification had already been eloquently discussed by other Commission members, he would focus his brief remarks on the draft principles concerning the protection of natural resources during international or internal armed conflicts. That was an important issue because, according to the Environmental Law Institute, natural resources had been linked to 35 armed conflicts around the world since 1989, including many in Africa, as noted in paragraph 198 of the Special Rapporteur's report.

Regarding draft principle 17, "Protected zones", as had been noted by other Commission members and some delegations in the Sixth Committee, the expression "by agreement" was rather vague and imprecise, and could even undermine the protection that draft principle 4 provided for protected zones and that draft principle 13 provided more broadly for the environment. It had rightly been suggested that a link should be established between draft principles 3, 4, 13 and 17. The United States of America had suggested that the Commission should refer more specifically to an agreement "between parties to the conflict", as the expression "by agreement" alone would not produce the intended effect of determining the responsibilities of parties directly or indirectly involved in international or non-international armed conflicts. However, the Commission could easily remove the ambiguity of the expression by stating that the term "agreement" should be interpreted broadly, as proposed by the Special Rapporteur in paragraph 186 of her report, and referring clearly and explicitly to multilateral treaties or agreements related to the environment, including those concluded under the auspices of the United Nations Educational, Scientific and Cultural Organization and the International Union for Conservation of Nature, which

contained specific provisions on the issue. Draft principle 17 could be redrafted to read: “An area of major environmental and cultural importance designated by agreement between the parties as a protected zone shall be protected against any attack, as long as it does not contain a military objective, and shall benefit from any additional protections established by any other agreement, including multilateral agreements.” The qualifier “major” could be replaced with “recognized”, since the interpretation of what was or was not “major” was perhaps too subjective and dependent on the interests of the parties involved in cases where the criteria for identifying areas of major importance had not been defined beforehand.

Although the prescriptive nature of draft principle 18, “Prohibition of pillage”, was to be applauded, the wording of the provision remained somewhat too laconic to reflect the importance of the subject matter. It would be desirable to add to the content of the draft principle in the light of the comments made by States. Unlike some other members of the Commission, he took the view that it would not be superfluous or meaningless to insert a new paragraph instead of relying on the commentary to capture the essence of the relevant analyses by States.

In draft principle 21, “Sustainable use of natural resources”, he did not find the opening clause satisfactory, since the report did not explicitly state by whom an occupying Power would be “permitted to administer and use the natural resources” under its control. In situations of occupation, it was not clear who or what body had the authority to dictate the conduct of an occupying Power. It would perhaps be appropriate to specify in the commentary that such conduct must be governed by the rules of international humanitarian law related to the protection of the environment. In his view, the draft principle should be reformulated to read: “Natural resources shall be used for the benefit of the population of the occupied territory and for other lawful purposes under the law of armed conflict, with full respect for the territorial sovereignty of States and permanent sovereignty over natural resources, in a way that ensures their sustainable use and minimizes environmental harm.”

He had three observations to make about draft principle 22, “Prevention of transboundary harm”. First, the current wording gave the impression that the legal obligation of due diligence covered only areas beyond the occupied territory, yet that obligation should be discharged first and foremost in the occupied territory, before being extended and producing effects elsewhere.

His second observation, which pertained to both the form and the substance, concerned the placement of the draft principle. Its inclusion in Part Four, on principles applicable in situations of occupation, could imply that the obligation of due diligence was not intended to apply in situations of armed conflict. However, due diligence should, at the very least, be prescribed in both situations.

His third observation concerned the reference to the concept of an “occupied territory”. The report did not clarify whether the concept was to be understood as encompassing both land and maritime territory. In his opinion, it should be understood in a broad sense and as including maritime territory, if the State under occupation was a coastal State. In such cases, the obligation to exercise due diligence in the use of natural resources in maritime areas under national jurisdiction was incumbent on the occupying Power, which was bound, under article 192 of the United Nations Convention on the Law of the Sea, by a general obligation to protect and preserve the marine environment. The Commission could resolve the apparent ambiguity in draft principle 22 by redrafting the provision to read: “An occupying Power shall exercise due diligence in the occupied territory and shall take appropriate measures to ensure that activities in the occupied territory do not cause significant harm to the environment of areas beyond that territory.” The inclusion of maritime territory could be explained in the commentary. To conclude, he recommended that all the draft principles should be sent to the Drafting Committee.

The meeting rose at 11.25 a.m.