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International Law Commission

Seventy-third session (first part)

Provisional summary record of the 3584th meeting

Held at the Palais des Nations, Geneva, on Friday, 27 May 2022, at 10 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. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10 a.m.

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

Report of the Drafting Committee (A/CN.4/L.968)

Mr. Park (Chair of the Drafting Committee), introducing the report of the Drafting Committee on the topic of protection of the environment in relation to armed conflicts (A/CN.4/L.968), said that the Drafting Committee had completed the second reading of the 27 draft principles on the topic. As it had done on the second reading of the draft articles on the law of transboundary aquifers, it had also adopted a draft preamble but, as States would have no opportunity to comment on it, the text was general in nature and did not go into the details of specific issues covered by the draft principles themselves. It would be accompanied by a commentary.

The first preambular paragraph, consisting of a general statement that highlighted the importance of protecting the environment, was modelled on a preambular paragraph of the political declaration of the special session of the United Nations Environment Assembly to commemorate the fiftieth anniversary of the establishment of the United Nations Environment Programme. The second paragraph referred expressly to international law that protected the environment in times of armed conflict and was drawn from Principle 24 of the Rio Declaration on Environment and Development. The third paragraph, which recognized that the environmental consequences of armed conflict might be severe and had the potential to exacerbate global environmental challenges, had been prompted by the finding of the International Court of Justice in the case concerning *Gabčikovo-Nagymaros Project (Hungary/Slovakia)* that "in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage". The fourth paragraph, which pointed to the link between the environment, human rights and the human dimension of the topic, had been adopted on the understanding that the commentary would explain that it was connected with United Nations Environment Assembly resolutions 2/15 of 27 May 2016 and 3/1 of December 2017 and Human Rights Council resolution 48/13 of 8 October 2021. The fifth paragraph referred to the implementation of the principles and rules of the law applicable in armed conflict and borrowed language from the advisory opinion of 8 July 1996 of the International Court of Justice on *Legality of the Threat or Use of Nuclear Weapons*. The sixth preambular paragraph directed the reader's attention to the scope and purpose of the draft principles and reflected the idea that the Commission intended to enhance the protection of the environment in different types of armed conflict. The seventh paragraph focused on an important component of the draft principles, namely, measures that should be taken by States, international organizations and other relevant actors to prevent, mitigate and remediate harm to the environment.

The draft principles were divided into five parts. Part One comprised two draft principles, on scope and purpose, respectively. The Drafting Committee had adopted draft principle 1 with the amendment proposed by the Special Rapporteur in her third report (A/CN.4/750): the insertion of the phrase "including in situations of occupation" at the end of the provision signified that the entire set of draft principles applied in such situations. The commentary would make it clear that situations of occupation were a form of armed conflict and that the law of occupation continued to apply until occupation ended, in accordance with Protocol I Additional to the Geneva Conventions of 1949.

The Drafting Committee had made two changes to draft principle 2 in response to comments by States and Commission members and the Special Rapporteur's own proposals. The phrase "through preventive measures for minimizing damage to the environment … and through remedial measures" had been replaced with "through measures to prevent, mitigate and remediate harm to the environment" in order to harmonize the text of draft principles 2, 6, 7 and 8. The phrase "during armed conflict" had been deleted as it was misleading and the phrase "in relation to armed conflicts", which also appeared in draft principles 3, 7 and 12, adequately reflected all the temporal phases covered in the topic. The Committee had considered the phrase "harm to the environment" to be more appropriate than "environmental harm", since it highlighted the fact that the object of protection was the environment and was

the wording used in the relevant legal instruments. The commentary would explain, with reference to the meaning of the word “enhancing”, that, although the fundamental purpose of the draft principles was to enhance the protection of the environment in relation to armed conflict, inter alia by clarifying existing international law, the term did not refer to either *lex lata* or *lex ferenda* and did not imply an effort to progressively develop international law.

Part Two contained nine draft principles. Draft principle 3, on measures to enhance the protection of the environment, remained unchanged, apart from making “armed conflict” plural. It consisted of two paragraphs that referred to the various measures that States should take to enhance the protection of the environment in relation to armed conflicts. The commentary would elaborate on obligations under *jus ad bellum* and other applicable rules and on the relationship between draft principles 3 and 13.

The Drafting Committee had made some changes to draft principle 4, entitled “Designation of protected zones”, in response to comments from States and international organizations and proposals made by the members and the Special Rapporteur. The Committee had decided that, as the phrase “areas of major environmental and cultural importance” could be read as a cumulative requirement – although that was not the objective of the provision – the words “and cultural” should be deleted and the reference to “cultural importance” should be moved to the end of the sentence. The commentary would explain the linkage between environmental and cultural issues. There had been some discussion on whether to retain or delete the word “major”. Some members of the Committee had taken the view that it should be deleted, because the phrase “major importance” would imply a double qualification and entail too high a threshold. They had pointed out that the treaties cited in the commentary adopted on first reading employed only the word “importance” or “important” and they thought that the addition of “major” restricted the scope of the provision. Other members had argued that the adjective “major” indeed placed an obligation on States greater than that provided for in international humanitarian law and that, since draft principle 4 encouraged States to agree on certain steps which might differ from those forming part of their treaty obligations, the aim of that draft principle was also different to that of the treaties mentioned in the commentary. Since any area could be designated a demilitarized zone under the law of armed conflict, the Committee had ultimately decided to delete “major”, but on the understanding that the commentary would state the reasons for that deletion. The Committee had added the phrase “in the event of armed conflict” after “protected zones” because that would make it clear that, although zones should be designated before an armed conflict, they became protected only in the event of an armed conflict. That addition also brought out the connection with draft principle 18.

The Drafting Committee had made changes to both paragraphs of draft principle 5, entitled “Protection of the environment of indigenous peoples”. It had been of the opinion that the addition of “international organizations and other relevant actors” after “States” at the beginning of the first sentence of the first paragraph would clarify the addressees of that paragraph and take account of the role of international organizations and certain non-State armed groups, in particular when they exercised control over territory. In that sentence, “should” had been altered to “shall” as it was more in keeping with the applicable norms, such as article 4 of the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169), and with the case law of regional courts and tribunals. The provision required States, international organizations and other relevant actors to take measures only in connection with a particular environment. The word “appropriate” had been retained before “measures” to ensure that the provision was balanced. The commentary would elucidate the role of States, international organizations and other relevant actors and what was meant by “appropriate measures”. It would also explain that the phrase “the lands and territories that indigenous peoples inhabit or traditionally use” had been substituted for “the territories that indigenous peoples inhabit” to broaden the scope of the provision in line with the United Nations Declaration on the Rights of Indigenous Peoples. The temporal scope of paragraph 2 had been adjusted by replacing “after” with “when”, as proposed by the Special Rapporteur, and again the phrase “the territories that indigenous peoples inhabit” had been reformulated as “the lands and territories that indigenous peoples inhabit or traditionally use”. In order to indicate that consultation was obligatory, “should” had been changed to “shall” and the words “appropriate and” had been inserted before “effective consultations”.

The changes made to draft principle 6 by the Drafting Committee had been prompted by comments from States. In the first sentence, the phrase “in relation to armed conflict” had been placed after “environmental protection” to indicate that it referred to the latter and not to agreements concerning the presence of military forces. The same phrase had been deleted from the title of the draft principle, as proposed by the Special Rapporteur in her third report, because States had commented that there were few agreements on the presence of military forces in relation to armed conflict and that the draft principle appeared to be inconsistent with State practice. That change did not, however, alter the content or scope of the draft principles. The second sentence had been recast to make it consonant with the Committee’s decision consistently to use the phrase “prevent, mitigate and remediate harm to the environment”.

The Drafting Committee had made some changes to draft principle 7, entitled “Peace operations”, in order to clarify the scope of that provision. It had considered that the phrase “peace operations in relation to armed conflicts” was obscure and that adding the word “established” would make it clear that the peace operations in question were those established in relation to armed conflicts. The commentary would shed further light on that concept. The phrase “in relation to armed conflicts” had been adopted to align the provision with the title of the topic. The Committee had decided to retain “shall”, rather than replace it with “should”, because it did not make the provision too onerous and was consistent with its usage elsewhere in the text. On the other hand, it had decided to alter the phrase “take appropriate measures” to “take, as appropriate, measures” to indicate some flexibility with regard to the types of measures that could be taken in different situations, as would be made clear in the commentary. At the end of the sentence, the phrase “the negative environmental consequences thereof” had been changed to read “the harm to the environment resulting from those operations” for the sake of consistency.

The Drafting Committee had made two changes to the first-reading text of draft principle 8, entitled “Human displacement”. First, to ensure harmonization across the draft principles, the words “prevent and mitigate environmental degradation” had been replaced with “prevent, mitigate and remediate harm to the environment”. Second, as proposed by the Special Rapporteur in her third report, the words “or through which they transit” had been inserted after “areas where persons displaced by armed conflict are located”. That proposal, which had been made in the light of the comments and observations received from States, international organizations and others, had given rise to differing views in the Drafting Committee. Some members had considered that the reference to areas where displaced persons were “located” already covered areas through which they transited and that, consequently, the first-reading text should be retained and the appropriate explanations added to the commentary. Others had expressed the view that the change proposed by the Special Rapporteur was necessary in order to introduce a distinction between situations in which displaced persons were stationary, or “located” in a specific place, and those in which they were in movement. The Drafting Committee had decided that the Special Rapporteur’s proposal should be implemented on the understanding that, in the commentary, it would be explained that the words “located” and “transit” were to be interpreted as broadly as possible, such that they covered persons in movement.

The Drafting Committee had adopted a modified version of the first-reading text of draft principle 9, entitled “State responsibility”. The provision now consisted of three paragraphs. No changes had been made to paragraph 1. The Drafting Committee had discussed the possibility of adding an explicit reference to violations of the law applicable to the use of force. Some members had considered that such a change was necessary, since the draft principles were intended to go beyond *jus in bello*, and would bring the provision into line with the judgment of the International Court of Justice of 9 February 2022 in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*. Other members had cautioned that such a change could be interpreted as precluding other areas of international law or as implying that the only draft principles that covered *jus ad bellum* were those in which it was explicitly mentioned. As highlighted by the Special Rapporteur, that issue had to some extent already been addressed in paragraph (3) of the commentary adopted on first reading. The Drafting Committee had agreed that the commentary should be further enriched to reflect those considerations and ensure alignment

with recent jurisprudence. In addition, the concept of "full reparation" would be further developed in the commentary, in response to requests from States.

Following an extensive debate, changes had been made to paragraph 2. In her third report, the Special Rapporteur had proposed replacing paragraph 2 with a new paragraph covering "the existing or evolving rules of international responsibility of non-State actors, including individual criminal responsibility and the responsibility of international organizations". The Drafting Committee had begun by discussing whether paragraph 2 should be deleted. Although differing views had been expressed, it had been agreed that a "without prejudice" clause on the responsibility of States was necessary to accompany paragraph 1. A "without prejudice" clause of that kind would make clear that the draft principles did not deviate from the 2001 articles on responsibility of States for internationally wrongful acts and would direct the reader to those articles, in particular provisions such as article 39 on contribution to the injury. In addition, the Drafting Committee had considered that adopting paragraph 2 as proposed by the Special Rapporteur in her third report could lead to an *a contrario* interpretation.

The Special Rapporteur had proposed the addition of a new paragraph 2 in the light of the comments made by States on the importance of addressing the issue of non-State actors. While acknowledging the importance of that issue, the Drafting Committee had considered that the Special Rapporteur's proposal would benefit from being reformulated and restructured so as to incorporate the "without prejudice" clause included in the first-reading text. In that connection, it had been concluded that it would be more appropriate to have two separate paragraphs. The Drafting Committee had considered that, as the Commission had previously worked on the responsibility for internationally wrongful acts not only of States but also of international organizations, those two bodies of law could be addressed in the same paragraph. The words "or of international organizations" had therefore been added after "States" in paragraph 2. By the same token, the Drafting Committee had considered that, while not closely related, the issues of the responsibility of non-State armed groups and individual criminal responsibility could be addressed in a single paragraph. It had therefore been decided that a new paragraph should be added to explain that the draft principles were also without prejudice to the rules on the responsibility of non-State armed groups and the rules on individual criminal responsibility. The view had been expressed that the scope of the provision could have been expanded to include measures that States should take to hold individuals criminally responsible for crimes that led to the destruction of the environment. The Drafting Committee had concluded that it would be inappropriate to include the words "existing or evolving" before "rules", as had been proposed by the Special Rapporteur, since the Commission's work on the topic was intended to be of enduring relevance. To avoid confusion, it would be explained in the commentary that the applicable rules could develop over time.

The first-reading title of draft principle 9 remained unchanged, since it continued to reflect the substantive focus of the text.

With regard to draft principle 10, changes had been made to streamline and clarify the text adopted on first reading. First, the words "legislative and other" had been deleted from the first sentence, leaving a reference to "appropriate measures". Some members had questioned the use of the word "legislative" on the grounds that, in some legal systems, the desired effect of the draft principles could be achieved without legislation and that some States might already have legislation in place to address the issues in question. Others had expressed the view that explicit reference to legislative measures was important because the purpose of the provision was to enhance the existing obligations of States. The Committee had decided that the words should be deleted and that the meaning of the expression "appropriate measures", which encompassed a variety of measures, including legislative, administrative and judicial measures, should be further developed in the commentary. Second, the words "corporations and other" had been deleted, as proposed by the Special Rapporteur in her third report in the light of comments made by States. The purpose of that change was to simplify the provision and align it with the Guiding Principles on Business and Human Rights, in which the term "business enterprises" was used. Third, the phrase "or territories under their jurisdiction" had been added after "from their territories", also in the first sentence, to ensure consistency with the Commission's previous work on other topics

and take account of the fact that, under international law, States might have obligations to ensure the observance of certain rights of persons under their jurisdiction. Fourth, as proposed by the Special Rapporteur in the light of comments made by States, the words "an area of armed conflict or in a post-armed conflict situation" in the first-reading text had been replaced with "an area affected by an armed conflict". The Drafting Committee had considered that the new wording, which had been inspired by the terminology used in the Guiding Principles on Business and Human Rights and the Organisation for Economic Co-operation and Development (OECD) Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, *inter alia*, was clearer, less ambiguous and broader in scope. Fifth, in the second sentence, the word "otherwise" had been inserted before "obtained" for added clarity. The Drafting Committee had discussed whether the word "obtained" was broad enough in scope to cover situations in which payment was made for resources but had concluded that the word "purchased" was not superfluous. To reflect the changes made to the text of the draft principle itself, the title had been changed to "Due diligence by business enterprises".

The Drafting Committee had modified draft principle 11 to harmonize it with draft principle 10, as amended. Accordingly, the words "legislative and other", "corporations and other" and "corporation or other" had been deleted; the words "or territories under their jurisdiction" had been inserted after "from their territories"; and the words "in an area of armed conflict or in a post-armed conflict situation" had been replaced with "in an area affected by an armed conflict". The title had been changed to "Liability of business enterprises".

Turning to Part Three of the draft principles, he wished to begin with some remarks on the debate in the Drafting Committee regarding the use of the terms "natural environment" and "environment". Throughout its work on the topic, including at the current session, members of the Commission had expressed differing views in that regard. It had been agreed that the word "natural" could be deleted from the texts of draft principles 13, 14 and 16 as adopted on first reading, on the understanding that the Commission's intention was neither to alter the scope of existing conventional and customary international humanitarian law nor to expand the scope of what was meant by "natural environment" under international humanitarian law. It had also been agreed that the understanding reached in that regard would be explained in the commentary.

The Drafting Committee had adopted the text of draft principle 12 without modification, but the title had been amended to "Martens Clause with respect to the protection of the environment in relation to armed conflicts" to ensure harmony with the title of the topic as a whole.

The Drafting Committee had made only one change to draft principle 13 (1), namely the deletion of the word "natural" before "environment". Paragraph 2 had been reformulated in response to the proposal made by the Special Rapporteur, in her third report, for a new provision inspired by article 35 (3) of Protocol I Additional to the Geneva Conventions of 1949. That proposal had been prompted by the comments and observations received from States, international organizations and others. The Drafting Committee had considered that the first-reading text of paragraph 2 could be merged with the newly proposed provision under a common chapeau, thereby creating two subparagraphs. That reformulation clarified the normative value of the draft principle. The chapeau stated explicitly that the two subparagraphs were subject to applicable international law, which strengthened the argument that they were both relevant to situations of non-international armed conflict. The different views expressed regarding the customary status of the provision would be reflected in the commentary. Thus, subparagraph (a) reproduced the text of paragraph 2 as adopted on first reading, although the word "natural" had been deleted before "environment", and subparagraph (b) mirrored article 35 (3) of Protocol I. The only change made to the first-reading text of paragraph 3 was the deletion of the word "natural" before "environment". The same change had been made to the title.

Draft principle 14 had been adopted with the changes proposed by the Special Rapporteur in her third report, which, in turn, had been based on suggestions made by States, international organizations and others. Those changes were aimed at ensuring greater consistency with the law of armed conflict. The Drafting Committee had agreed that the

notion of military necessity was not of the same order of generality as the other principles mentioned in the provision and that referring to military necessity but not to the principle of humanity raised questions and could have adverse implications. It had therefore been decided that the words "military necessity" should be deleted. In addition, the Drafting Committee had considered that the words "in attack" should be deleted to reflect the broader scope of the principle of precautions under the law of armed conflict, including the obligation of precautions in military operations and passive precautions. Again, the word "natural" had been deleted before "environment". The title remained unchanged aside from the deletion of the same word.

The Drafting Committee had decided that draft principle 15 of the first-reading text, on environmental considerations, should be deleted, as had been proposed by the Special Rapporteur in the light of the comments and observations received from States, international organizations and others. The Drafting Committee had considered that draft principle 15 of the first-reading text was closely linked to draft principle 14, which created some overlap between them. It had been agreed that the relevant parts of the commentary to draft principle 15 should be incorporated into the commentary to draft principle 14. The deletion of draft principle 15 had made it necessary to renumber the subsequent draft principles in the document before the Commission (A/CN.4/L.968).

The only change made to the renumbered draft principle 15, entitled "Prohibition of reprisals", was the deletion of the word "natural" before "environment". The Drafting Committee had acknowledged the complexities of the provision and had recalled the statement made on the topic by the Chair of the Drafting Committee at the Commission's sixty-seventh session. The understanding had been reached that, particularly in the light of Protocol I Additional to the Geneva Conventions of 1949 and the differing views expressed by States in that regard, the legal status of the draft principle would be clarified in the commentary. It would also be explained in the commentary that, by adopting the draft principle, the Commission was neither qualifying in any way nor seeking to change the scope and meaning of the prohibition in question under either conventional or customary international law.

No changes had been made to the first-reading texts of draft principle 16, entitled "Prohibition of pillage", and draft principle 17, entitled "Environmental modification techniques". The Special Rapporteur had not proposed any changes to those two draft principles in her third report.

The Drafting Committee had made three changes to draft principle 18. entitled "Protected zones", some of which had been proposed by the Special Rapporteur in her third report and some of which reflected the changes made to draft principle 4. In addition, the provision had been moved to the end of Part Three in order to group together the two draft principles on prohibition, namely draft principles 15 and 16. First, the word "major" had been deleted for consistency with draft principle 4. Second, the reference to cultural importance had been moved. The Drafting Committee's intention had been to clarify that the phrase "an area of major environmental and cultural importance" in the first-reading text did not set out a cumulative requirement. Third, the last part of the first sentence had been reformulated. The Drafting Committee had been concerned that the relative size of the military objective in relation to the size of the protected zone had not been taken into account in the first-reading text. To address that concern, the first sentence now ended with the words "except insofar as it contains a military objective". Those three points would be explained in the commentary. On the basis of the comments and observations received from States, international organizations and others, the Special Rapporteur had proposed the insertion of the words "and shall benefit from any additional agreed protections" at the end of the provision in order to clarify its relationship with other applicable draft principles, in particular draft principles 4 and 13, as well as with other relevant international obligations. The Drafting Committee had considered that a reference to additional agreed protections would ensure that the provision was not interpreted as lowering the general level of protection. It had been decided that the reference should be incorporated as a separate sentence.

Part Four of the draft principles comprised three draft principles. In draft principle 19, paragraphs 1 and 3 had been adopted by the Drafting Committee without further comments and without modifications, but paragraph 2 had been amended as proposed by the Special

Rapporteur. The changes were intended, firstly, to clarify that the opening clause was not establishing a cumulative requirement, and, secondly, to strengthen the provision by aligning it more closely with the law of occupation and international human rights law. To address the first concern, the words “including harm” had been inserted before the phrase “that is likely to prejudice the health and well-being of protected persons”, on the basis that the addition of an “including” clause would clarify that “significant harm to the environment” and “harm that is likely to prejudice the health and well-being” were not cumulative requirements. The commentary would provide a more detailed explanation of the intended meaning of “significant harm”.

The discussion of draft principle 19 (2) had prompted a debate over the use of the terms “population” and “protected persons”, the Special Rapporteur having proposed the replacement of the former with the latter. The word “population” adopted on first reading was a broader, more general term and had been drawn from article 55 (1) of Protocol I Additional to the Geneva Conventions of 1949, but some States had suggested that “protected persons” would be more appropriate. In addition, the latter term was consistent with article 4 of the Fourth Geneva Convention and the draft principle was intended to refer to protected persons of the occupied territory within the meaning of that article. Furthermore, some members of the Drafting Committee had cautioned that, if the term “population” was retained, the provision might conceivably be interpreted as affording protection to individuals transferred to the occupied territory by the Occupying Power. Recalling that, in her third report, the Special Rapporteur had proposed the addition of a reference to the violation of rights at the end of the sentence to expand the scope of the provision to expressly include human rights and the rights of protected persons under the law of occupation, the Drafting Committee had concluded that “protected persons” signalled a focus on individuals that was in line with the proposed addition and was thus the more appropriate term.

As proposed by the Special Rapporteur, the qualifier “environmental” had been added to the title of draft principle 19, which now read: “General environmental obligations of an Occupying Power”. The addition clarified that the scope of the draft principle was limited to general environmental obligations and did not include all general obligations of an Occupying Power.

The comments made regarding the use of “population” and “protected persons” were also relevant to draft principle 20, entitled “Sustainable use of natural resources”. The Committee had been mindful of the fact that, as noted by several States, the word “population” was used in the first-reading text of both draft principle 19 and draft principle 20 but with different meanings. It had concluded that different terms should be used to make the distinction, and that “population” should thus be retained in the case of draft principle 20, with the qualifier “protected” added to clarify precisely which population was concerned by the provision. The word “population” was the most appropriate term because the provision referred to natural resources, which typically benefited the population as a whole, and its focus was the concept of usufruct within the meaning of article 55 of the Hague Regulations, rather than the concept of protection within the meaning of article 4 of the Fourth Geneva Convention. It should be noted, however, that, although the Committee considered it appropriate to use different terms in draft principle 19 and draft principle 20, more generally it was of the view that “protected persons” and “protected population” could be used interchangeably. It was important that the terms were followed by the words “of the occupied territory”, to emphasize the requirement that the administration and use of the natural resources should be to the extent that it was lawful under international law, as would be explained in the commentary.

The Drafting Committee had adopted draft principle 20 with one further change to the first-reading text: the term “environmental harm” had been replaced with “harm to the environment” to harmonize the text with the language used in other draft principles.

Various changes had also been made to the first-reading text of draft principle 21. The Special Rapporteur had proposed a reformulation that aligned the text more closely with the language used in the Commission’s 2001 articles on prevention of transboundary harm from hazardous activities and international instruments such as the Stockholm Declaration of the United Nations Conference on the Human Environment and the Rio Declaration on Environment and Development. The Drafting Committee had agreed with her proposal that

the phrase “exercise due diligence” should be replaced with “take appropriate measures”, on the basis that due diligence obligations were triggered by the word “ensure”, which was already present in the first-reading text. However, her proposal that the phrase “areas beyond the occupied territory” should be replaced with “other States or areas beyond national jurisdiction” had been the subject of extensive debate. The provision was intended to capture three situations – specifically, any non-occupied part of the territory of the State being occupied, any territory of a third State being occupied, and areas beyond national jurisdiction – but some members of the Drafting Committee had been concerned that, if the proposal was adopted, the first of those situations might arguably be excluded from the provision’s scope. As the Special Rapporteur had clarified, the draft principle addressed transboundary harm, and such a revision might imply that the occupation of a territory created a boundary between the occupied territory and the portion of the occupied State that was not occupied. Believing that the change proposed by the Special Rapporteur was modelled on international environmental law instruments rather than on the law of occupation, the Drafting Committee had ultimately settled on a new formulation, which was intended to capture all three situations and read: “the environment of other States or areas beyond national jurisdiction, or any area of the occupied State beyond the occupied territory”. The Committee considered it appropriate to use the terms “occupied territory” and “occupied State” since they reflected the language used in article 56 of the Fourth Geneva Convention.

The commentary to draft principle 21 would include an explanation of the intended meaning of the term “significant harm” that took account of the 2001 articles on prevention of transboundary harm from hazardous activities and the jurisprudence of the International Court of Justice in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* and *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*.The Drafting Committee had agreed that the title of the draft principle should be changed to “Prevention of transboundary harm”, as proposed by the Special Rapporteur, in order to better reflect the substance of the provision.

Part Five, as adopted on first reading, contained six draft principles. In paragraph 1 of draft principle 22, the Drafting Committee had decided to replace the phrase “damaged by the conflict” with “damaged as a result of the conflict” on the grounds that the words “as a result of” conveyed the causal link between the damage and the conflict more effectively. In the Drafting Committee’s view, that revision would also ensure that the provision was understood to encompass not only damage caused directly by the armed conflict but also damage caused indirectly in connection with the conflict. No changes had been made to the first-reading text of paragraph 2 and the title of the draft principle, “Peace processes”, was also unaltered.

Both paragraphs of draft principle 23, entitled “Sharing and granting access to information”, had been modified by the Drafting Committee. In paragraph 1, the words “remedial measures” had been changed to “measures to remediate harm to the environment” in order to harmonize the language used with the text of other draft principles, and the phrase “after an armed conflict” had been changed to “resulting from an armed conflict” in order to broaden the temporal scope of the provision, given that remedial measures could also be adopted during an armed conflict and in situations of occupation. The words “resulting from” also served to clarify the causal link between the harm and the armed conflict. The Committee had discussed the implications of using the word “shall” in paragraph 1, mindful of comments made in that connection by States. Perceiving a need to clarify that, in using “shall”, the Commission’s intention was to allude to the international obligations of the States concerned and not to a general obligation under customary international law, it had decided that the reference to “international law” should be qualified through the addition of the word “applicable”. The commentary would explain the meaning of the phrase “in accordance with their obligations under applicable international law”.

The Drafting Committee had discussed whether paragraph 2 of draft principle 23 should be deleted entirely, as proposed by the Special Rapporteur, but had concluded that a savings clause was needed to maintain the balance of the provision. However, it had also concluded that the text of paragraph 2 as adopted on first reading did not adequately capture the complexities and nuances of all relevant considerations that might need be taken into account when sharing or granting access to information and any exceptions that might exist.

The Drafting Committee had ultimately agreed upon a text for the first sentence that established the right to invoke the grounds for refusal to share or grant information with express reference to applicable international law. The second sentence had been adopted without change from the first-reading text. The Drafting Committee had agreed that the commentary should explain that, in the second sentence, the word "shall" should be read in conjunction with the phrase "under the circumstances" in order to emphasize the flexibility inherent in the provision. The commentary should also specify the types of grounds for refusal that the provision was seeking to capture and should address the complexities surrounding that issue.

Draft principle 24, entitled "Post-armed conflict environmental assessments and remedial measures", had been amended by the Drafting Committee as it saw a need to expressly specify that the relevant actors addressed by the provision included States and international organizations, even though the meaning of the words "relevant actors" would be expanded upon in the commentary. In addition, on the basis that the phrase "is encouraged" in the first-reading text was ambiguous, the Committee had agreed with the Special Rapporteur's proposal – which reflected the comments of States, international organizations and others – that it should be replaced with the word "should" in order to bring clarity to the provision. The commentaries would explain that the use of the word "should" was without prejudice to existing remediation obligations embodied in treaties or under customary international law.

In draft principle 25, entitled "Relief and assistance", the Drafting Committee had made a similar change to the one made in draft principle 24, replacing the phrase "are encouraged to" with the word "should" for the sake of clarity. It had also added a reference to "relevant international organizations", in acknowledgement of the role of international organizations in providing relief and assistance. The commentary would explain the intended meaning of the phrase "reparation is unavailable" and would specify that the provision was without prejudice to any existing obligations in respect of reparations that States might have.

Draft principle 26, entitled "Remnants of war", had been adopted by the Drafting Committee with several changes. In paragraph 1, a reformulation of the opening phrase adopted on first reading had been considered appropriate and the text had been revised to read: "Parties to an armed conflict shall seek …" As the Special Rapporteur had explained in her third report, that change was necessary to adjust the temporal scope of the draft principle: the text adopted on first reading appeared to require a formal end to the conflict. The Drafting Committee had also deemed it appropriate to add the phrase "as soon as possible", after the words "shall seek", to introduce the notion of a time frame for removing toxic or other hazardous remnants of war or rendering them harmless. The phrase "as soon as possible" was found in several treaties relevant to the draft principles, including the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction and the Convention on Cluster Munitions, although different terminology could be found in other treaties, including the Protocol on Explosive Remnants of War (Protocol V) to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects. Lastly, the Drafting Committee had decided to replace "toxic and hazardous remnants of war" with "toxic or other hazardous remnants of war": since a toxic remnant was by definition hazardous, that amendment should ensure that the provision also encompassed non-toxic hazardous remnants. The same change had been made in paragraph 2, for the same reason. Paragraph 3 had been adopted without modification or further comments from the Drafting Committee.

Draft principle 27, entitled "Remnants of war at sea", had been adopted without any modifications.

The Drafting Committee recommended that the Commission should adopt the draft principles on protection of the environment in relation to armed conflicts, as contained in the Committee's report.

The Chair invited the Commission to adopt the draft preamble and each draft principle in turn.

Draft preamble

The draft preamble was adopted.

Draft principles 1 to 27

Draft principles 1 to 27 were adopted.

Mr. Jalloh said that he had certain reservations with regard to the content of draft principle 9 that he wished to place on record. He had raised his concerns, which were shared by several States and international bodies, both during the plenary debate and in the Drafting Committee, but he had refrained from taking the floor earlier in the current meeting as he had not wished to stand in the way of the draft principles' adoption. His concerns lay in the vagueness of draft principle 9 with regard to the responsibility and accountability of individuals and non-State armed groups that caused damage to the environment. The Office of the United Nations High Commissioner for Human Rights had observed that the draft principle "currently does not cover individual responsibility for international crimes causing harm to the environment" and had recommended that the Commission should include "the notion of individual responsibility for international crimes causing harm to the environment in the draft principles". Spain and Switzerland had expressed similar sentiments.

Although much improved, the savings clause contained in draft principle 9 that had been presented for adoption on second reading still did not adequately address the substance of his concerns. He had therefore reiterated his proposal, first made in 2019, that a new paragraph should be added that established an obligation for States to take the necessary legislative and other measures to ensure that individuals were held criminally responsible for severe damage caused to the environment during, before or after armed conflict in certain circumstances that, in his view, fell within the scope of the draft principles. During the current session he had added that it might even be necessary to have different provisions to accommodate the differing responsibilities of individuals and non-State actors respectively. However, he had not pursued the matter owing to time constraints. He regretted that the Commission had not taken the opportunity to contribute to developments in international environmental criminal law, especially in view of ongoing discussions before the International Criminal Court concerning the possible recognition of an international crime of ecocide. He hoped that the Commission would take the opportunity to advance its position should the subject arise again in a future context.

The Chair said he took it that the Commission wished to adopt, as a whole, on second reading, the draft preamble and texts and titles of the draft principles on protection of the environment in relation to armed conflicts, as contained in document A/CN.4/L.968.

It was so decided.

Ms. Lehto (Special Rapporteur) said that she wished to express her gratitude to the past and current Chairs of the Drafting Committee and to the Commission members who had contributed to the work on the topic over the years, including, in particular, the first Special Rapporteur, Ms. Jacobsson, who had completed a substantial part of the work. She also wished to thank the secretariat, in particular the Secretary to the Commission. She would revise the draft commentary adopted on first reading to reflect the amendments made to the draft principles, the addition of a preamble and all additional points raised on second reading, and looked forward to presenting the Commission with a revised text with a view to its adoption on second reading at the second part of the current session.

The meeting rose at noon.