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Held at the Palais des Nations, Geneva, on Tuesday, 10 July 2018, at 10 a.m.

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Present:

<i>Chair:</i>	Mr. Valencia-Ospina
<i>Members:</i>	Mr. Al-Marri
	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guilloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission
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The meeting was called to order at 10.05 a.m.

Protection of the environment in relation to armed conflicts (agenda item 7)
(A/CN.4/720)

Report of the Drafting Committee (A/CN.4/L.876)

The Chair said that it would be recalled that, in 2016, the Commission had considered the report of the Drafting Committee on the topic protection of the environment in relation to armed conflicts and had adopted the texts of draft principles 1, 2, 5, 9, 10, 11, 12 and 13. The commentaries to those draft articles had subsequently been adopted at that session.

At the same session in 2016, the Commission had had before it the third report (A/CN.4/700) of the former Special Rapporteur, Ms. Jacobsson, which had included proposals for further draft principles. The Drafting Committee had subsequently adopted the texts of draft principles 4, 6, 7, 8, 14, 15, 16, 17 and 18, which were set out in document A/CN.4/L.876. As commentaries to those draft articles had not been prepared for that session, the Commission had taken note of the draft principles.

The commentaries to those draft principles had since been drafted by the Special Rapporteur, Ms. Lehto, on the basis of an original draft by the former Special Rapporteur. He drew attention to document A/CN.4/L.876, which reproduced the text of the draft principles, and invited the members of the Commission to proceed to their adoption.

Part One

General principles

Draft principles 4, 6, 7 and 8

Draft principles 4, 6, 7 and 8 were adopted.

Part Three

Principles applicable after an armed conflict

Draft principles 14 to 18

Draft principles 14 to 18 were adopted.

The text of the draft principles, as contained in document A/CN.4/L.876, was adopted.

First report on protection of the environment in relation to armed conflicts
(A/CN.4/720)

The Chair invited the Special Rapporteur to introduce her first report on protection of the environment in relation to armed conflicts (A/CN.4/720).

Ms. Lehto (Special Rapporteur) said that the continuing interest of States and other bodies in the Commission's work on the topic had been manifested not only in the debates of the Sixth Committee in 2016 and 2017 but also in two resolutions of the United Nations Environment Assembly in 2016 (UNEP/EA.2/Res.15) and 2017 (UNEP/EA.3/L.5), which expressed support for the ongoing work of the Commission on the topic and requested the Executive Director to continue interaction with the Commission, *inter alia* by providing relevant information to the Commission at its request. She had held very useful consultations in relation to the preparation of the report with the United Nations

Environment Programme, from which the original suggestion that the Commission should look at the topic had come in 2009, and the International Committee of the Red Cross.

The topic had been on the Commission's programme of work since 2013 and had been under active consideration on the basis of the three reports submitted by the former Special Rapporteur in 2014, 2015 and 2016. That meant, as the Commission had noted in 2017, that a substantial body of work had already been done on the topic. Again in line with the conclusions of the Commission the previous year, the current report built on the previous three reports on the topic and sought to ensure coherence with the work that had been undertaken so far. For instance, she had not found it necessary to define the approach to or the methodology of the work in the report, as she could subscribe to what had been presented in that regard earlier and agreed to by the Commission. The report also built on the work accomplished so far in the sense that, in addition to proposing three new draft principles relative to situations of occupation, it contained an assessment of the relevance of the already adopted draft principles to such situations.

The words "in relation to" in the title of the topic indicated that the temporal scope of the topic was not limited to armed conflict, but was intended to cover the whole conflict cycle: before, during and after an armed conflict. The draft principles had been organized accordingly: those in Part One related to measures to be taken before an armed conflict, or principles that were of a general nature and relevant to all temporal phases; those in Part Two related to periods of armed conflict; and those in Part Three concerned post-conflict circumstances. For reasons explained in the report and to which she would come to later in her introduction, the proposed new draft principles relative to situations of occupation were placed in Part Four.

The broader approach had proved to be beneficial to the topic. Limiting the consideration to the law of armed conflict could have forced the Commission to walk on a trodden path, thus questioning the added value that the topic could bring. The broader approach had enabled the Commission to identify particular legal issues relating to the protection of the environment that were likely to arise during the different stages of armed conflict and had facilitated the development of concrete draft principles. Furthermore, the temporal approach had made it possible and necessary to look at other relevant areas of law such as international human rights law and international environmental law that might complement the law of armed conflict.

The report focused on the protection of the environment in situations of occupation, one of the areas that had been identified in 2017 as requiring further consideration. While military occupation could be defined as a subcategory of international armed conflict, it had its own legal regime which required separate treatment. Moreover, the law of occupation provided a clear set of rules, the core of which had attained customary status. At the same time, that body of law — the 1907 Regulations concerning the Laws and Customs of War on Land (the Hague Regulations), complemented by the Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention) and the Protocol additional to the Geneva Conventions of 12 August 1949 (Additional Protocol I), as appropriate — lacked, for the most part, specific provisions on the protection of the environment. Compared to Part Two of the draft principles (situations of armed conflict), where the task was to identify existing rules of armed conflict directly relevant to the protection of the environment, the protection provided to the environment by the law of occupation was mostly indirect.

The specific provisions of the law of occupation that were highlighted in the report related, first, to property rights; second, to certain protected objects; and, third, to the general obligation of the occupying State to restore and maintain public order and civil life in the occupied territory. While the underlying rationale of those provisions was mainly related to ensuring property and exploitation rights and other economic interests, or the

survival and welfare of the civilian population, they provided indirect protection to the environment.

The rules of the law of occupation had proved flexible enough to be adapted to changing circumstances. Two concepts of the law of occupation relevant to the topic under consideration that lent themselves particularly well to evolutive interpretation were the notion of “civil life” in article 43 of the Hague Regulations and that of “usufruct” in article 55 thereof. The Commission had discussed the evolutive interpretation of treaties in the context of the topic “Subsequent agreements and subsequent practice in relation to interpretation of treaties”. In that regard, the commentary to draft conclusion 8 [3], “Interpretation of treaty terms as capable of evolving over time”, as set out in paragraph 76 of the Commission’s report on its work at its sixty-eighth session (A/68/10) was of particular interest.

In that connection, the International Court of Justice had recognized evolutive interpretation as an acceptable method of treaty interpretation, notably in its 1971 advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, in which the Court had described such notions as “well-being and development”, or “sacred trust”; in its 1978 judgment in the *Aegean Sea Continental Shelf (Greece v. Turkey)* case, in which the Court had stated that the meaning of certain generic terms was “intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time”; and its 2009 judgment in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, in which the Court had declared that:

“... where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is ‘of continuing duration’, the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.”

Reference could also be made to other court cases which demonstrated a similar approach.

A certain flexibility was thus built in and recognized in the law of occupation. That was also related to the great variety of different situations of occupation in terms of stability and duration. The longer an occupation lasted, the more evident was the need for the occupying State to introduce changes so as to avoid stagnation and to be able to fulfil its duties under occupation law. It should be recalled in that respect that the occupying State was expected to administer the occupied territory for the benefit of the occupied population, and had a general obligation, under article 43 of the Hague Regulations, to ensure that the occupied population lived as normal a life as possible under the circumstances. Such an obligation had an obvious connection to the protection of the environment, given that environmental protection was widely recognized as belonging to the core functions of a modern State.

Other areas of law were also relevant in situations of occupation, the more so the longer the occupation lasted. A number of international court cases had confirmed not only that human rights law applied to situations of occupation but also that it played a more important role during the occupation than during the hostilities phase. In the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the International Court of Justice had stated that respect for the applicable rules of international human rights was part of the obligation of the occupying State under article 43 of the Hague Regulations. It had also confirmed that international human rights instruments were applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory, “particularly in occupied territories”. Reference

could also be made to the case law of the International Tribunal for the Former Yugoslavia, as well as that of the European Court of Human Rights, which had made it clear in several judgments that the European Convention on Human Rights applied in situations in which a State party exercised effective control of an area outside its national territory.

Regarding the issue of the relationship between human rights law and the law of occupation as *lex specialis*, she wished to draw attention to the report of the Commission's Study Group on the fragmentation of international law, which pointed out that the power of a *lex specialis* norm was "entirely dependent on the normative considerations for which it provided articulation: sensitivity to context, capacity to reflect State will, concreteness, clarity, definiteness". On that basis, it could be said that the law of occupation was often better adapted to the specific context of occupation, namely provisional nature, coercion and occasional instability. In more established situations and, in particular, in protracted occupations, the limitations of the law of occupation nevertheless became obvious. Human rights, and in particular economic, social and cultural rights, provided the occupying State with useful guidance regarding the obligation to restore and maintain public order and civil life in circumstances that approximated peacetime.

The connection between human rights and the environment had been recognized worldwide. It was a vast topic which was addressed in the report only briefly, using the right to health as an example which showed how the human rights obligations of an occupying State with regard to the right to health complemented the related rules of the law of occupation and how that required environmental protection and contributed to it.

The report also discussed the relevance of international environmental law and concluded that both customary and conventional environmental law continued to play a certain role in situations of occupation. As far as customary law was concerned, reference could be made to the 1996 advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*, which provided important support in that regard. The Commission's own 2011 draft articles on the effects of armed conflicts on treaties indicated that, *inter alia*, treaties relating to the international protection of the environment might continue to operate during armed conflict. To the extent that such treaties addressed environmental problems that had a transboundary nature, or a global scope, and the treaties had been widely ratified, it might be difficult to conceive suspension only between the parties to a conflict.

Turning to chapter IV, which contained the proposed draft principles, she said that they had been placed in a separate Part Four for the simple reason that parallels could be drawn between occupations and armed conflicts, on the one hand, and occupations and post-conflict circumstances, on the other, depending on the nature of the occupation.

A second general point that she wished to make at the current juncture was that all the draft principles, including those adopted at that meeting, were cast at a high level of abstraction. What the general obligations or recommendations would entail in practice had been specified in the commentaries. She had followed the same approach with regard to the three draft principles proposed in the report under consideration.

Turning to draft principle 19, she said that the obligation of the occupying State to respect the environment of the occupied territory, as provided for in paragraph 1 of the draft principle, could be based on the general thrust of article 43 of the Hague Regulations, in particular the requirement to take care of the welfare of the occupied population. The obligation to ensure that the occupied population lived as normal a life as possible in the prevailing circumstances should be interpreted to entail environmental protection as a widely recognized public function of the modern State.

Moreover, environmental concerns could be said to relate to an essential interest of the territorial sovereign, which the occupying State, as a temporary authority, must respect.

The existence of such a general obligation was supported by human rights law, as discussed in chapter III of the report. There was a close link between key human rights, such as the rights to food, health and life, on the one hand, and the protection of the quality of the soil, water and even biodiversity in order to ensure viable and healthy ecosystems, on the other.

The wording of the first sentence of paragraph 1 was based on the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*, in paragraph 33 of which the Court had stated:

“... 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.”

The Permanent Court of Arbitration, in the *Iron Rhine Railway* case, had used the formulation “environmental considerations”, stating that “where a State exercises a right under international law within the territory of another State, considerations of environmental protection also apply”.

While paragraph 1 could rely on authoritative sources as far as the term “environmental considerations” was concerned, she acknowledged that the passive form in the first phrase might not be particularly successful and proposed to align the wording of the sentence with that of paragraph 50 of the report to read: “The occupying State has a general obligation to respect the environment of the occupied territory and to take environmental considerations into account in the administration of such territory, including ...”.

The second part of paragraph 1 was based on the established understanding of the scope of a military occupation. Once established in a certain land territory, the authority of the occupying State was seen to extend to adjacent maritime areas and the superjacent airspace.

Paragraph 2 recalled the obligation of the occupying State, by virtue of article 43 of the Hague Regulations and article 64 of the Fourth Geneva Convention, to respect, unless absolutely prohibited, the legislation of the occupied territory pertaining to the protection of the environment. The requirement that the occupying State should respect the laws and institutions of the occupied country had the potential to be an important safeguard for the environment, depending on how effectively the environment and natural resources were protected in national legislation. It might be assumed that most States, if not all, had introduced laws and regulations pertaining to the protection of the environment. Environmental rights had been recognized at national level in the constitutions of more than 100 States. Major multilateral environmental agreements had moreover attracted a high number of ratifications, which made it likely that either the occupied State or the occupying State or both were parties to them. Especially when incorporated into the legislation of the occupied State, such conventions would be covered by the obligation of the occupying State to respect the laws and institutions of the occupied territory.

Draft principle 20 stated that an occupying State must administer natural resources in an occupied territory in a way that ensured their sustainable use and minimized environmental harm. That principle was based on article 55 of the Hague Regulations, which provided for the occupying State’s administration of the natural resources of the occupied territory (excluding natural resources as private property, which were subject to other and, in general, more protective rules). It should be recalled in that regard that many natural resources were also important environmental resources. The destruction, depletion or unsustainable utilization of natural resources might lead to the degradation of ecosystems, including the loss of habitat and species.

As was pointed out in the report, usufruct was a broad principle that did not entail specific obligations for occupying States. It had traditionally been interpreted to refer to good housekeeping, according to which the usufructuary “must not exceed what is necessary or usual” when exploiting the relevant resource. Such a criterion necessarily reflected the particular context in which it was used. The notion of sustainable use of natural resources had been described as “a prolongation of the concepts of resource protection, resource preservation and resource conservation, as well as those of wise use, rational use or optimum sustainable yield”; in that sense, it provided the modern equivalent of usufruct. The general duties of the occupant under article 43 of the Hague Regulations also supported the inclusion of sustainability as a major consideration to be taken into account in the administration and exploitation of the natural resources of an occupied territory.

How the requirement of sustainable use of natural resources would translate into practice in a situation of occupation obviously depended on the specific circumstances such as the nature of the occupation and the duration, extent and scale of any exploitation project. Moreover, the actions of the occupying State should not interfere with the sovereign right of the territorial State to decide on its environmental and developmental policies in the exploitation of natural resources of the occupied territory.

In that sense, and referring to the established understanding of the concept of usufruct, it was proposed that the occupying State should exercise caution in the exploitation of non-renewable resources and not exceed pre-occupation levels of production. Renewable resources should be exploited in a manner that ensured their long-term use and the resources’ capacity for regeneration.

The wording of draft principle 20 was based on article 54 (1) of the International Law Association’s Berlin Rules on Water Resources.

Draft principle 21 provided that an occupying State must use all means at its disposal to ensure that activities in the occupied territory did not cause significant damage to the environment of another State or to areas beyond national jurisdiction. The responsibility not to cause damage to the environment of other States or to areas beyond national jurisdiction had been called “the cornerstone of international environmental law” and “the most accepted principle of international environmental law as yet”. The obligation not to cause harm to the environment of other States was generally seen as customary law in the context of environmental protection. Regarding the applicability of that principle in the specific context of occupation, reference could be made to the advisory opinion of the International Court of Justice on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, in which the Court had underlined the international obligations and responsibilities of South Africa towards other States while exercising its powers in relation to the occupied territory, stating that “physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States”. Furthermore, the Court had referred to the general obligation of States to ensure that activities within their jurisdiction and control respected the environment of other States or of areas beyond national control in other recent cases, such as *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* and the joined cases concerning *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*.

The Commission’s articles on the prevention of transboundary harm from hazardous activities also stated that the obligation applied to activities carried out within the territory or otherwise under the jurisdiction or control of a State. It should be recalled that the Commission had consistently used that formulation to refer not only to the territory of a State but also to the activities carried out in other territories under the State’s control. As explained in the commentary to article 1 on the prevention of transboundary harm, “it

covers situations in which a State is exercising *de facto* jurisdiction, even though it lacks *de jure* jurisdiction, such as in cases of unlawful intervention, occupation and unlawful annexation”. It seemed therefore well grounded that an occupying State had to observe the “no harm” principle (due diligence) so as to prevent serious transboundary harm to the environment of third States.

The formulation of the proposed principle was based on paragraph 101 of the *Pulp Mills* judgment of the International Court of Justice. It should be noted that the words “at its disposal” allowed for flexibility depending on the prevailing circumstances.

Turning to the relevance of the earlier adopted draft principles to situations of occupation, she said that the relevance of the principles in Part One to situations of occupation did not seem to be in doubt. The basic premise of the draft principles in Part One — such as designation of protected areas — was that the proposed measures were taken with a view to enhancing the protection of the environment in the event of an armed conflict. Such an armed conflict might or might not include an occupation.

To the extent that periods of intense hostilities during an occupation were governed by the rules concerning the conduct of hostilities, the draft principles in Part Two concerning the protection of the environment in the “during” phase would be applicable as such. Additionally, the environment of an occupied territory would continue to enjoy the general protection accorded to the natural environment during an armed conflict in accordance with applicable international law and, in particular, the law of armed conflict as reflected in draft principle 9.

With regard to Part Three, she had tentatively suggested that certain draft principles addressing post-conflict situations, namely draft principles 15, 16, 17 and 18, were relevant also to situations of occupation. Although she was not proposing new language for those draft principles, she would make the necessary additions to the relevant commentary.

The wording of draft principle 15, on post-armed conflict environmental assessments and remedial measures, was broad enough to include measures that might be taken by an occupying State, but which did not imply the existence of a legal obligation. The cooperation of the occupying State could be encouraged if it was in a position to contribute to post-conflict environmental assessments or remedial measures.

Draft principle 16, on remnants of war, explicitly referred to areas under the jurisdiction or control of a State and therefore seemed to cover situations of occupation.

Draft principle 17, on remnants of war at sea, contained a general reference to States that reflected the different legal situations in which remnants of war at sea might constitute a danger to the environment: a particular State might have either sovereignty or jurisdiction, both sovereignty and jurisdiction, or neither sovereignty nor jurisdiction with regard to the area in which the remnants were located. Such remnants could also be located in a sea area under the control of an occupying State.

While the ability of the occupying State to share or grant access to information obviously depended on the security situation, paragraph 2 of draft principle 18, on sharing and granting access to information, contained an exception addressing security concerns.

In her report, draft principle 6 on the protection of the environment of indigenous peoples had mistakenly been referred to in the context of Part Three. Draft principle 6 was one of the principles of general application that belonged to Part One, which in her view was in its entirety relevant to situations of occupation. The Secretariat had been requested to issue a corrigendum.

It was her intention to submit another report in 2019, which would address certain questions related to the protection of the environment in non-international armed conflicts,

including how the international rules and practices concerning natural resources might enhance the protection of the environment during and after such armed conflicts, as well as certain questions related to the responsibility and liability for environmental harm in relation to armed conflicts. Issues related to the consolidation of a complete set of draft principles would also need to be considered.

Mr. Park said that he wished to congratulate Ms. Lehto once again on her appointment as Special Rapporteur and welcomed the resumption of discussion of the topic “Protection of the environment in relation to armed conflicts”.

He would like to express appreciation for the efforts of the Special Rapporteur in preparing the first report, which dealt comprehensively and thoroughly with the protection of the environment in the context of situations of occupation and contained proposals for three draft principles. While situations of military occupation were rare in the twenty-first century, they still existed in parts of the world, providing the *raison d’être* of the discussion on the relevant legal regime concerning the protection of the environment during occupation.

The approach the Special Rapporteur had adopted in addressing the topic, as described in paragraph 16 of her report, was, in his view, an appropriate one which would ensure coherence with the work that had been undertaken in the previous three reports on the topic. He supported the Special Rapporteur’s view that the Commission should maintain its position of not modifying the law of armed conflict.

He did, however, have some doubts about the flow of reasoning deriving the principle and/or obligations on the topic. Firstly, with regard to the relationship between “protection of environment” and “property rights”, he observed that the Special Rapporteur derived obligations to protect the environment from provisions on property rights, particularly those contained in articles 53 and 55 of the Hague Regulations. Such provisions had been interpreted as applying to natural resources, which were important aspects of the environment.

While he agreed that the constituent elements of the natural environment qualified, in principle, as civilian objects, obligations to protect the environment were not always drawn from or based wholly on property rights or usufruct since there were two kinds of environment: the environment *per se* and the environment as it was more closely related to human beings. While the latter could perhaps be explained through the concept of property rights, that was not the case for the former. The draft principles adopted provisionally by the Drafting Committee also clearly made the distinction between two categories of environment by using the term “natural environment”. It should also be noted that currently many international conventions on the environment made a distinction between “environmental damage” and “personal damage” or “property damage”.

Consequently, the occupying State’s obligation to protect the environment could be found in and derived from, *inter alia*, the expectation that the occupying State should administer the occupied territory for the benefit of the occupied population, the principle of permanent sovereignty over natural resources, the principle of self-determination and the need for the *status quo ante* to be maintained. Without depending on the contention as to property rights, it could be assumed that the requirement for the occupying State to respect the laws and institutions of the occupied country served as a safeguard for the protection of the environment.

Secondly, the Special Rapporteur had used deductive rather than inductive reasoning, noting in paragraph 26 of the report that State practice on the actual application of the law of occupation was limited to a handful of cases. There was therefore insufficient State practice regarding the protection of environment in situations of military occupation. While the use of deductive reasoning was consequently unavoidable, he had doubts about

the overarching and somewhat simplified flow of logic in three steps in the report, especially in chapter II, whereby (1) human rights law applied to situations of occupation, (2) human rights included the issue of the protection of environmental rights, and therefore (3) the environment must be protected as an obligation in the situation of occupation. There was perhaps a logical leap in that reasoning.

While it was true that the International Court of Justice had underlined the relevance of human rights law in times of occupation and the occupying State's legal obligation to take human rights law into account with regard to both its actions and its policies in the occupied territory, as emphasized throughout the report, the question at stake was no longer whether or not human rights law applied in occupied territory, but rather how, and to what extent, it applied in such circumstances. In that regard, he urged the Special Rapporteur to further develop the relative application of human rights law in different situations of occupation, which was mentioned in paragraph 55 of the report in the following terms: "While it is generally agreed that human rights law applies in situations of armed conflict, it is equally non-contentious that its application must be qualified, taking into account the specific requirements of the law of armed conflicts."

Such overarching and somewhat simplified reasoning was similarly found in chapter III, entitled "Role of international environmental law in situations of occupations", particularly in paragraph 80 of the report, which stated "it is possible to conclude that international environmental law, both customary and conventional, continues to play a certain role in situations of occupation". Of course, the protection offered by international environmental law might usefully supplement that offered by international humanitarian law. However, only a small number of multilateral environmental treaties specifically addressed the issue of their applicability to situations of armed conflict. The Special Rapporteur cited the 2011 draft articles on the effects of armed conflicts on treaties in support of her reasoning; however, he was unsure whether those draft articles applied to occupation, since the commentary to draft article 1, entitled "Scope", did not explicitly mention the situation of occupation. It was unclear whether the Commission had omitted such mention intentionally.

Since, in the possible application of human rights law and international environmental law, much depended on the nature and duration of the occupation, such relativity should be more carefully nuanced in the draft principles proposed by the Special Rapporteur. In addition, it should be noted that two different and opposite parameters existed between international humanitarian law and human rights, namely the fulfilment of military needs and respect for the interests of the occupied population.

Thirdly, since, as noted in paragraph 19 of the report, a situation of military occupation was a specific form of international armed conflict which constituted an intermediate phase between war and peace, it was not possible to limit a period of military occupation to one of the three specific phases identified in the context of the current topic, namely before, during or after armed conflict. In that respect, it would be appropriate to deal with the situation of occupation separately in Part Four of the draft principles.

The notion of occupation required further clarification. Firstly, it should be mentioned that the law of occupation applied only in international armed conflicts. It did not apply to non-international armed conflicts; for example, the retaking by a central government of parts of its territory previously held by insurgents or the occupation by insurgents of part of the national territory were not within the meaning of the law regarding occupation. Secondly, occupation ought to be specified as referring to "military occupation" and as excluding "pacific occupation", which occurred with the consent of the host State. Thirdly, occupying parties should cover not only States, but also international organizations, since the latter might also be an occupying entity or power. In draft principles 7, 8, 14, 15, 16, 17 and 18 provisionally adopted by the Drafting Committee, for

example, it had been acknowledged that in certain situations, international organizations might engage in activities concerning the protection of environment in relation to armed conflicts.

Overall, it would be true that in discussing the obligations of the occupying State, much depended on the nature and duration of the occupation. Indeed, that concern had been employed in the conclusion of the International Law Association in the context of the due diligence obligations of occupying States, in which it had been noted that the extent of their obligations would vary according to the degree of control they exercised.

The Special Rapporteur had carefully detailed the three phases of occupation, namely the initial phase of an occupation, more established situations of occupation and a prolonged occupation. However, he was unsure whether such considerations had been taken into account, since the proposed draft principles did not reflect such a distinction, and the principles applicable during armed conflict and those applicable in military occupation were almost identical. If, as the Special Rapporteur noted in paragraph 19 of the report, occupations could be said to constitute an intermediate phase between war and peace, it would be better to state clearly that the draft principles contained in Part Two and in Part Three would apply *mutatis mutandis* in the situation of occupation. Such a proposal could be supported since it was unclear when an occupation began and ended.

Noting that, contrary to previous practice, the Special Rapporteur had not provided titles for Part Four or the draft principles, he said that he wished to propose the following title for Part Four: “Part Four (Principles applicable in situations of occupation)”, which was consistent with the titles of the previous parts, namely: Part One (General principles), Part Two (Principles applicable during armed conflict) and Part Three (Principles applicable after an armed conflict).

Paragraph 1 of draft principle 19 articulated an obligation of the occupying State to take environmental considerations into account in the administration of the occupied territory, which had already been stipulated as an obligation during armed conflict in draft principle 11 [II-3]. In such environmental considerations, the scope would be limited to areas where an occupying State had effective control, in other words where an occupying State had established its authority and retained the capacity to exercise such authority, and not to areas where the territorial State was entitled to exercise sovereign rights, as the Special Rapporteur had suggested. As noted in paragraph 21 of the report, article 42 of the Hague Regulations also regarded effective control as the main characteristic of the situation. He therefore proposed the deletion of the final phrase “including in any adjacent maritime areas over which the territorial State is entitled to exercise sovereign rights”. That phrase would be unnecessary if the limitation on the scope of obligation for the occupying State was explained clearly in the commentary.

While he had no objection to paragraph 2, he proposed the addition of two sentences — to become new paragraphs 3 and 4 — regarding the varying extent of obligations according to the degree of control and the phases of occupation. The proposed new text would read:

“3. The extent of obligations upon the occupying State may vary according to the degree and the period of control.

4. The principles enumerated in Part Two and Part Three will apply *mutatis mutandis* in the situation of occupation.”

If the Commission accepted his earlier proposal that occupying parties should cover not only States but also international organizations, the words “the occupying State” in draft principle 19 should be replaced with “the occupying State and international

organization” or simply “the occupying Power”. Lastly, he proposed that the title of draft principle 19 should be: “General obligations of the occupying State or occupying parties”.

In stressing the general duties of the occupying Power, it was appropriate to refer in draft principle 20 to sustainability as a major consideration to be taken into account in the administration and exploitation of the natural resources of an occupied State. In practical terms, however, such considerations might only be applicable in situations of prolonged occupation, or at least more established situations.

He wished to draw attention to the legal character of “sustainable development”. The Special Rapporteur noted in paragraphs 94 to 97 of the report that sustainable development *per se* had not been recognized as a legal obligation or principle, but as a policy objective. The Commission had already discussed the legal status of “sustainable development” in its consideration of other topics, including “Protection of persons in the event of disasters” and “Protection of the atmosphere”. In the context of the topic of protection of the atmosphere, as pointed out in footnote 1275 of the commentary to draft guideline 5, on sustainable utilization of the atmosphere, in a number of international arbitration cases “sustainable development” had been mentioned as an “emerging principle” (A/71/10, p. 292). It was unclear whether “policy objective” and “emerging principle” had different legal meanings. He was therefore unsure whether draft principle 20 could be formulated as a legal obligation by using the word “shall”. Since the rule of usufruct was a broad principle that did not entail specific obligations for occupying States, he proposed that the word “shall” should be replaced with “should”. He proposed that the title of draft principle 20 should be: “Ensuring sustainable use of natural resources”.

Draft principle 21 dealt with the occupying State’s obligation not to cause damage to the environment of another State in conducting activities in the occupied territory. Such obligation was generally seen as customary law in the context of environmental protection. Whether that obligation could be applicable not only in peacetime but also during armed conflicts and occupation was debatable. As the Special Rapporteur had noted, the Commission’s 2001 articles on the prevention of transboundary harm from hazardous activities explicitly covered situations of occupation. While he agreed that an occupying power had environmental obligations both within the occupied territory and with regard to the avoidance of transboundary harm, it was possible to foresee situations in which the occupying power invoked the application of the principle of proportionality or the rules on military necessity as exonerating it from its environmental obligations. He proposed that the title of the draft principle 21 should be: “Ensuring not to cause transboundary harm”.

Although the Special Rapporteur had stated that questions related to the protection of the environment in non-international armed conflict would be dealt with in the second report, the general direction of the Commission’s discussion, as reflected in the provisionally adopted draft principles, did not distinguish between international and non-international armed conflict. It would be helpful for an understanding of future work on the topic if the Special Rapporteur could provide a clear explanation on that point.

Regarding the relevant rules on occupation applicable to the previous work, there were two possible ways forward: either to clarify in the relevant commentary the relationship of the draft principles to situations of occupation rather than adding new wording to them, or to insert a *mutatis mutandis* clause in draft principle 19.

Mr. Hmoud said that he would be interested to hear about any examples of an international organization being recognized as an occupying Power.

Mr. Park said that, while there was no specific practice, specialist authors had made reference to such a situation.

The meeting rose at 11.30 a.m.