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Provisional summary record of the 3319th meeting
Held at the Palais des Nations, Geneva, on Wednesday, 13 July 2016, at 10 a.m.

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Present:

Chairman:	Mr. Comissário Afonso
Members:	Mr. Al-Marri
	Mr. Caflisch
	Mr. Candioti
	Mr. El-Murtadi
	Ms. Escobar Hernández
	Mr. Forteau
	Mr. Gómez-Robledo
	Mr. Hassouna
	Mr. Hmoud
	Ms. Jacobsson
	Mr. Kamto
	Mr. Kittichaisaree
	Mr. Kolodkin
	Mr. Laraba
	Mr. McRae
	Mr. Murase
	Mr. Niehaus
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Saboia
	Mr. Singh
	Mr. Šturma
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood

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 7) (*continued*) (A/CN.4/700)

The Chairman invited the Commission to resume its consideration of the third report of the Special Rapporteur on the topic of the protection of the environment in relation to armed conflicts (A/CN.4/700).

Mr. Hmoud said that he wished to thank the Special Rapporteur for her well-researched, comprehensive report. The background material that it contained put issues relating to the protection of the environment in the pre-conflict and post-conflict phases into a proper perspective. That would help the Commission and the Drafting Committee to decide whether the draft principles reflected existing international law on the subject, or provided a basis for its development.

The Special Rapporteur's task in creating a nexus between the available material and the proposed principles in the pre- and post-conflict phases was not an easy one. Some States and other relevant actors remained uncertain as to which aspects of environmental protection were already subject to international law and which needed further development. Furthermore, there were areas of international law that already regulated certain aspects that might relate indirectly to environmental protection. It was, therefore, important for the Commission to identify the principles which applied, or should apply, to environmental protection before and after a conflict, as well as those which applied throughout all three phases of a conflict.

As far as the methodology of the report was concerned, he agreed that the practice of traditional subjects of international law, including relevant international organizations and agencies, such as the United Nations Environment Programme (UNEP), formed the appropriate basis of principles designed to enhance the protection of the environment in the pre- and post-conflict phases. Liability and responsibility for environmental damage relating to armed conflict — issues that were not dealt with in the current report — should be tackled in the future; at that point, it would be necessary to examine the reports of the United Nations Compensation Commission, along with international and national jurisprudence concerning damage assessment, the causal link between a breach of international law and environmental damage, contributing factors and forms of reparation. In fact, the relationship between certain obligations arising from the draft principles and the determination of responsibility and liability was a key aspect of post-conflict environmental protection, as the numerous references to it in the report showed.

Another issue that was not addressed in the report was the protection of the environment during occupation. However, it should be emphasized that the principles of the law of armed conflict and the law on the use of force as they related to environmental protection remained applicable during occupation, even after the cessation of hostilities. For that reason, Part Two of the draft principles also applied to occupation.

While the identification of legal principles in environmental treaties that continued to operate during an armed conflict lay outside the scope of the third report, in the future it might be relevant to ascertain which peacetime treaty principles continued to apply in parallel with the law of armed conflict. According to the report, bilateral investment treaties were presumed to continue operating during an armed conflict as they related to private rights. However, the underpinning for environmental protection in relation to armed conflict was more of a public or common interest for the international community, thus not an issue of private rights. Therefore, the content of the environmental protection clauses contained in bilateral investment treaties should be the determining factor in whether or not the treaty as a whole was presumed to continue to operate.

Several aspects of draft principle I-1, on implementation and enforcement, needed to be discussed. The report did not elaborate on the type of preventive measures which a State should take to enhance the protection of the environment in relation to armed conflict, and most of the case law referred to in paragraphs 187 to 237 had no bearing on the content of that draft principle. It was a moot point whether the draft principle might require States to criminalize damage to the environment in relation to armed conflict in their national legislation, something which would obviously amount to the progressive development of international law. As it stood, the principle potentially encompassed a wide range of civilian and administrative preventive measures, examples of which would have to be discussed in future commentaries. It was also important to clarify the phases of the conflict to which the principle referred, since the phrase "in relation to armed conflict" gave no indication in that regard. The title of the principle, "Implementation and enforcement", was inconsistent with its content, which dealt with preventive measures. In that connection, it might in fact be worth considering whether there were any joint or collective preventive measures that States should adopt in order to improve environmental protection as it related to armed conflict.

Since granting access to and sharing information was a key component of cooperation among members of the international community in the context under consideration, he failed to see why draft principle III-5 should not apply before and during an armed conflict, since information-sharing would help to prevent, mitigate and minimize environmental damage during armed conflict. However, the draft principle would have to be formulated in such a way as to make clear that the information in question related solely to environmental protection and excluded information pertaining to a State's national security or defence. The formulation should be flexible to allow for the fact that the existing rules of customary international law made no provision for an obligation of that nature and that it would be difficult to determine the various types of information that could be shared or to which access might be granted. Furthermore, the draft principle, or the commentary thereto, should give examples of the types of information to be accessed or shared at the various stages of an armed conflict. He welcomed the fact that international organizations were also covered by the draft principle, because they could do much to encourage the enhancement of environmental protection during an armed conflict.

Status-of-forces and status-of-mission agreements, the subject of draft principle I-3, usually dealt with the legal status of forces and missions, not with issues such as the use of force, the rules of armed conflict or the protection of the environment during a conflict. Given that peace operations were normally mounted after a conflict, they could promote post-conflict environmental recovery. Draft principle I-4 and the commentary thereto should therefore concentrate on restorative and remedial measures. In the event of peace enforcement operations under Chapter VII of the Charter of the United Nations, the relevant United Nations departments would have to see to it that the requisite measures were taken to protect the environment and mitigate any damage to it. Troop-contributing countries should also ensure that their forces complied with their environmental protection obligations under international law during their participation in peace operations. The reviews provided for in draft principle III-2 (2) were a complementary aspect of that protection.

While he agreed with the essence of draft principle III-1, namely that peace agreements should contain provisions relating to the restoration of the environment damaged by armed conflict, post-conflict environmental protection management — as well as the allocation of responsibilities for such management — was a matter that fell outside the scope of the project. One aspect that the draft principle should include was a provision stipulating that peace agreements should deal with matters relating to criminalization, allocation of responsibility for environmental damage and compensation. As the United Nations and other international and regional organizations were often instrumental in

securing peace agreements among parties to a conflict, that draft principle should refer to the key role they could play in facilitating the inclusion of post-conflict environmental protection and restoration clauses in those agreements.

Turning to draft principle III-2, he said that, although parties to a conflict were currently under no international legal obligation to conduct post-conflict environmental assessments and reviews, it was important to propose such a measure as a legal policy consideration because damage caused during an armed conflict would have to be assessed at some point for the purposes of environmental restoration and remediation. In fact, there was no reason why such steps could not be taken during a protracted conflict, or when damage required immediate steps to restore the environment.

Regarding draft principle III-3, any requirement under existing treaty-based and customary international law that remnants of war must be removed was premised on the fact that they caused harm and suffering to humans and property. For the purposes of the draft principles, it would therefore be necessary to explain how they damaged the environment itself. The draft principle should also stipulate that a party to a conflict should take steps to prevent potential risks to the environment from the presence of remnants of war. The phrase "in accordance with obligations under international law" at the end of the first paragraph of that draft principle should be deleted, as it undermined the binding nature of the provision.

In the absence of any international legal rules on the allocation of responsibility for the removal of remnants of war in the marine environment and the remediation of their effects, the draft principles should indeed address that matter in order to ensure that those remnants did not jeopardize the environment. Parties to a conflict might be made individually or jointly responsible for their removal, as their impact on the marine environment affected the whole international community.

As to draft principle IV-1, the rights of indigenous peoples fell outside the scope of the topic under consideration. Moreover, the draft principle did not deal specifically with the implications for indigenous peoples of environmental damage from armed conflict.

Areas which could be explored in future reports included the extent of the responsibilities of non-State actors and armed groups to protect the environment in the event of armed conflict, liability and responsibility for violations of international law on environmental protection, the effects of the use of certain types of weapons on the environment and determining to which of the three phases of a conflict the various environmental principles applied. The right format for the text at the current stage was draft principles, although the underlying obligations might ultimately warrant giving it the form of a treaty, in which case the possibility of incorporating a dispute settlement clause should be explored. He recommended the referral of the draft principles to the Drafting Committee.

He thanked the Special Rapporteur for the tremendous efforts she had made to steer the project over the years.

Mr. Šturma said that clarifying which draft principles were of particular relevance to each of the three phases of an armed conflict would give the topic added value.

The contents of the report and the draft principles only partly addressed the rules applicable in the third, post-conflict phase, although that phase was supposed to be the subject of the report. The structure of section II of the report, entitled "Rules of particular relevance applicable in post-conflict situations", was rather complicated, and the order of the draft principles proposed by the Special Rapporteur did not necessarily follow the order in which arguments were presented in that part of the report. Some principles relating to the third phase could have been added, while others that had been included were of lesser

relevance. The issues of status-of-forces agreements, peace agreements and remnants of war were particularly important.

The outcome of the topic could take the form of draft principles or draft guidelines, but it would be necessary to give some thought to their formulation, as it was not clear why some principles employed the word "shall", while others used "should" or "are encouraged to".

The general observations in paragraphs 97 to 99 were complex and not fully reflected in the two draft principles derived therefrom. He agreed with the presumption that the existence of an armed conflict did not *ipso facto* terminate or suspend the operation of a treaty; however, that did not mean that all multilateral or bilateral environmental treaties and agreements were relevant to the topic. Some such treaties included explicit provisions on exception or suspension in the event of war, whereas others were, by the nature of their content, unlikely to be affected by military activities or armed conflicts.

With regard to draft principle IV-1, while protection of the rights of indigenous peoples was undoubtedly a very important aspect of human rights law, there was nothing in the report to indicate a connection to the protection of the environment in relation to armed conflicts. Paragraph 2 of the draft principle did not explain how States should protect indigenous peoples during armed conflicts, when international humanitarian law applied as *lex specialis*. Although in an international armed conflict indigenous peoples seemed to enjoy at least the same protection as civilians, in an internal armed conflict their status and protection would depend on whether they were a party to that conflict.

He failed to see why draft principle III-5, on access to and sharing of information, should apply only to the post-conflict phase, since certain elements mentioned therein, such as the principle of precaution and military necessity, pertained to earlier phases. Furthermore, he did not know what was meant by "international tort law". Since access to and the sharing of information plainly rested on the consent of States, the word "should" would be more apposite than "shall".

In view of the fact that existing law and practice offered only a rather weak basis for draft principle I-4, on peace operations, which contained some far-reaching obligations, he suggested replacing the word "shall" with "should". On the other hand, he supported draft principle III-2, on post-conflict environmental assessments and reviews.

He agreed that international jurisprudence on the protection of the environment in relation to armed conflict did exist, even though it was not extensive. That was precisely why it was necessary to select the relevant cases and to draw the appropriate conclusions from them. While the references to the international criminal tribunals seemed unnecessary, some of the cited case law of the Inter-American Court of Human Rights and the European Court of Human Rights was of interest. The examples drawn from the jurisprudence of domestic courts showed the need for the international regulation of remedies for environmental damage. The most important practice was that of the United Nations Compensation Commission and the Eritrea-Ethiopia Claims Commission. However, in his view, the proposed incorporation of "crimes against the environment" into the Rome Statute, mentioned in paragraph 237 of the report, was unrelated to compensation based on international or civil liability for damage.

In abstracto, he had nothing against placing draft principle I-1, on implementation and enforcement, in the part dealing with the pre-conflict phase. However, its location there did not follow from the analysis in the report, which focused on post-conflict measures.

The extensive discussion of possible remedial measures or compensation had created a legitimate expectation of finding a draft principle concerning compensation for environmental damage caused during an armed conflict and the settlement of claims in that

respect in the post-conflict phase. The multilateral conventions cited in paragraphs 110 to 114 were not helpful, because they were concerned only with the civil liability of operators of certain hazardous activities or ships in peacetime and excluded damage by war or warships. On the other hand, the case law of regional human rights courts and of the two above-mentioned claims commissions could be used for the formulation of a draft principle related to post-conflict remedies or compensation for environmental damage.

The section of the report on remnants of war was highly relevant, although draft principle III-3 did not seem to cover all possible remnants of war, such as vehicle wreckage and stocks of oil or chemicals, which might pose a risk to the environment. It was unrealistic to expect that all remnants of war could be cleared, removed or destroyed "without delay after the cessation of hostilities"; it might therefore be more appropriate to employ the word "should" in that connection rather than "shall".

In principle he supported the idea expressed in draft principle III-4 on remnants of war at sea. The issue was, however, quite complex and might warrant more in-depth analysis.

He recommended that all the draft principles, except draft principle IV-1, should be sent to the Drafting Committee. In conclusion, he sincerely thanked the Special Rapporteur for all the work she had done on the topic.

Mr. Caflisch said that his comments would concern solely the applicability of peacetime agreements to situations of armed conflict and post-conflict situations, an issue that was dealt with in paragraphs 100 to 120 of the report and that had already been addressed in one of the draft articles on the effects of armed conflicts on treaties, which had been adopted by the Commission on second reading in 2011 (A/66/10).

The 2011 draft articles had departed somewhat from the traditional approach to the topic in that they promoted the survival of agreements, other than those of a political nature, by stating in draft article 3 that the existence of an armed conflict did not *ipso facto* terminate or suspend the operation of treaties as between States parties to both the treaty and the conflict or as between a State party to the treaty and to the conflict and a State that was not a party to the latter. While that provision could not be considered as establishing a presumption of survival of treaties, it at least did away with the opposite presumption of termination or suspension and made survival a relative probability. Draft article 3 had been supplemented by draft article 6, on factors indicating whether a treaty was susceptible to termination, withdrawal or suspension in the event of an international or non-international armed conflict. The relevant factors were, on the one hand, the nature of the treaty, its subject matter, its object and purpose, its content, the number of parties to it and, on the other hand, the characteristics of the armed conflict, such as its territorial extent, its scale and intensity and, in the case of a non-international armed conflict, the degree of outside involvement. That list was not, however, exhaustive.

Draft article 7 referred to the annex to the draft articles, which contained an indicative list of 12 categories of treaties the subject matter of which involved an implication that they would continue in operation, in whole or in part, during armed conflict. Category (g) consisted of treaties relating to the international protection of the environment. Paragraphs (52) to (55) of the commentary to the annex suggested that that category of treaties was very likely to survive, even though there was an absence of continuous, uniform State practice and settled case law in the matter. Paragraph (54) referred to the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*. The pleadings in that case had quite clearly indicated that there was no general agreement on the proposition that all environmental treaties applied both in peace and in time of armed conflict, subject to express provisions indicating the contrary. The Court had held that the obligations stemming from those treaties were not intended to

impose total restraint during military conflict and that those treaties did not aim at depriving a State of the exercise of its right of self-defence. It had, however, added that "States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality." The Court had also referred to principle 24 of the Rio Declaration on Environment and Development, which stated that "Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary." The commentary therefrom concluded that there was a presumption that environmental treaties did apply in case of armed conflict.

Draft article 11 of the 2011 draft articles, which had been based on article 44 of the 1969 Vienna Convention on the Law of Treaties, provided for the survival of a treaty if it contained clauses that could be separated from the remainder of the treaty without upsetting its overall balance. Such situations probably arose frequently in respect of treaty provisions related to environmental protection. Moreover such provisions were also to be found in treaties on the law of armed conflict and international humanitarian law, for example articles 35 (3) and 55 of the 1977 Additional Protocol I to the 1949 Geneva Conventions, treaties establishing boundaries or regulating the permanent status of territory, multilateral law-making treaties, treaties on navigation and commerce, treaties relating to international watercourses and aquifers and treaties relating to the settlement of disputes by peaceful means.

He was grateful to the Special Rapporteur for giving fairly lengthy consideration in her report to the question of the effects of armed conflicts on environmental protection treaties or treaty clauses. The conclusion which should be drawn from an examination of that issue was that treaties containing environmental protection provisions were relatively stable. The aforementioned question concerned all three phases of a conflict: the pre-conflict phase, when treaties or treaty rules protecting the environment could come into being; the actual conflict, when those rules would continue to apply; and the post-conflict period, when the question of their continued applicability and compensation for damage arose.

The Special Rapporteur had been wise not to include any provisions on the subject in the draft principles which she had proposed, since the matter had already been dealt with in the 2011 draft articles on the effects of armed conflicts on treaties. It might be worth considering the insertion of an exhortation to States to conclude agreements on environmental protection or containing clauses to that end in peacetime. It might also be appropriate to suggest that such agreements should indicate that they would remain applicable in the event of an armed conflict. At all events, either the preamble or the commentary to the draft principles, or both, should refer to the 2011 draft articles in the event of an armed conflict.

Mr. Peter said that he wished to congratulate the Special Rapporteur, not only on her third report but also on her outstanding and exemplary commitment to her work on the subject of protection of the environment in relation to armed conflicts.

The comments made by Mr. Candioti at the previous meeting about the confusing number of different terms — articles, guidelines, regulations, principles, and so on — used to describe the output of the Commission were justified. However, in his view, there was more to it: the Commission had an unwritten tradition of a few people deciding what the outcome of work on a particular topic would be. Areas and topics of crucial importance to all humanity and its survival were downgraded to result only in guidelines, regulations or principles, which, being non-binding, could be tolerated as they did not disturb the *status quo*. Work on topics of global importance to humanity was hampered in sophisticated ways,

mainly through technicalities, discouragement and even manipulation of facts. Articles, which were superior in the eyes of the law and in reality, being likely to become binding instruments, were reserved for uncontroversial, highly academic and less pressing topics. He therefore strongly supported the suggestion that the Commission should have rules determining what the outcome of work undertaken by a special rapporteur would be, so as to avoid double standards.

As to the report under discussion, he maintained his preference for draft articles intended to serve as a basis for a convention specifically addressing the protection of the environment in situations of armed conflict, as it had been scientifically proven that wars damaged the environment. The topic was no less important than it had been when originally conceived. The international community, which had been prepared to engage in diplomacy and peaceful dispute settlement following the devastation of the two World Wars, had a short memory. States were now more eager to go to war, causing untold damage to the environment and affecting the lives of millions across the globe. The Commission would be failing in its duty to humanity if it closed its eyes to that injustice, which undermined the very development of international law.

He welcomed the Special Rapporteur's decision to address the question of environmental protection in the context of international investment. He was, however, concerned that the paragraphs of the report dealing with that issue referred to a very old system of treaties relating to private investments abroad. While the reference to "treaties of friendship, commerce and navigation" was important for historical purposes, as it recalled the gunboat diplomacy of the nineteenth century, such treaties were no longer directly relevant. For that material to be relevant in terms of the report, it should be placed in its historical context. Where reference was made in paragraph 118 to the control of environmentally hazardous or toxic chemicals, consideration might be given to mentioning the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal and the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa. Consideration might also be given to updating the materials available in that area on investment; the resources held by the International Centre for the Settlement of Investment Disputes could prove useful in that regard. It might also be beneficial to survey modern institutions such as the Multilateral Investment Guarantee Agency and programmes like Guaranteed Recovery of Investment Principal, which covered losses arising from wars and conflicts, among other causes, to gauge how the environment was factored into their activities and whether damage to the environment could be insured by such global actors.

He disagreed with the position taken by Mr. Park and Mr. Šturma, who considered that it might not be appropriate to address the issue of indigenous peoples in the context of the topic. Indigenous peoples were normally uprooted from, and dispossessed of, their land by armed force; no indigenous people gave up their land for nothing. It was therefore important to discuss the destruction of the environment in that context. In framing draft principle IV-1, on the rights of indigenous peoples, the Special Rapporteur relied on background materials that were too narrow and weak to support such an important theme. While he could understand the various constraints faced by the Special Rapporteur, there had been an overly selective approach to the sources used. Many works had been written on the issue, but they had not been referenced in the report. Apart from reference to International Labour Organization materials on indigenous people, the main focus was Latin America and the inter-American system of human rights developed under the 1969 American Convention on Human Rights. Asia and Africa were completely ignored, save for a brief reference to the Philippines in paragraph 126. However, Africa was home to various indigenous groups including the Maasai, Barabaig and Hadzabe, some of which still lived in a hunting and gathering culture. Seminal works had been produced on them, as well as a highly developed jurisprudence.

The African Commission on Human and Peoples' Rights had done much work in that area; it had, for example, issued an advisory opinion on the United Nations Declaration on the Rights of Indigenous Peoples and handled a number of cases on indigenous peoples' rights. Those cases included *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (2009), in which the Endorois indigenous people had been successful and the principle of free, prior and informed consent underlined. In that case, it had been emphasized that failing to involve indigenous peoples in decision-making processes and failing to obtain free, prior and informed consent constituted a violation of their right to development under article 22 of the African Charter on Human and Peoples' Rights and other international laws. In her report, the Special Rapporteur had not done justice to the subject matter before arriving at the draft principle. The failure to fortify arguments in the area of indigenous rights gave people the opportunity to say that the plight of indigenous people in conflict situations was irrelevant, which was not the case.

Turning to the draft principles set out in the report, he expressed support for their content but suggested that their presentation should be simplified by adopting a straightforward, consecutive numbering system, as used in the Special Rapporteur's second report, with subheadings on the principles applicable during armed conflict and those applicable after armed conflict. Thought might be given to reformulating, for stylistic reasons, the opening phrases of both paragraphs of draft principle III-3; however, that might be a matter for the Drafting Committee. While, in principle, he welcomed the brave and innovative inclusion of draft principle IV-1, he stressed that respect for the traditional knowledge and practices of indigenous peoples in relation to their lands and natural environment was not enough. Protection was also needed; paragraph 1 of the draft principle should be reworded accordingly. In paragraph 2 of that draft principle, which dealt with the issue of free, prior and informed consent, the words "that would have a major impact on the lands" should be deleted, as such a proviso opened the door to violations. Debate would centre on whether a particular usage would have a major impact, which was an unnecessary debate that indigenous peoples were likely to lose.

The importance of the present and previous reports on the topic could not be underestimated. Protection of the environment was a subject that even those involved in conflict often forgot to discuss or to think about during and after conflicts. Discussions on compensation tended to focus on equipment destroyed and human fatalities rather than on environmental destruction, which could be permanent. Even judges and arbitrators were not sensitive to the issue, sometimes insisting on higher standards of proof and even higher levels of loss in the case of environmental damage, as with the Eritrea-Ethiopia Claims Commission. It was forgotten that damage to the environment could be incremental over time. He therefore congratulated the Special Rapporteur on her work and expressed great regret that, with her membership of the Commission coming to an end, work on the topic might never be completed. It was to be hoped that her efforts would not be wasted and that someone else would take on the burden before the work already done was overtaken by events or by developments in science and law.

In conclusion, he recommended that all the draft principles should be referred to the Drafting Committee, which, in addition to its usual duties, should streamline them for ease of reading and reference.

The meeting rose at 11.20 a.m. to enable the enlarged Bureau and the Drafting Group on Provisional application of treaties to meet.