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Provisional summary record of the 3428th meeting

Held at the Palais des Nations, Geneva, on Thursday, 12 July 2018, at 10 a.m.

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Protection of the environment in relation to armed conflicts (*continued*)

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Present:

Chair: Mr. Valencia-Ospina
Members: Mr. Argüello Gómez
Mr. Cissé
Ms. Escobar Hernández
Ms. Galvão Teles
Mr. Gómez-Robledo
Mr. Grossman Guiloff
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. Rajput
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

The meeting was called to order at 10.05 a.m.

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

Mr. Hmoud, expressing thanks to the Special Rapporteur for her well-researched and capably drafted first report on the topic “Protection of the environment in relation to armed conflicts” (A/CN.4/720), said that one of the challenges inherent to the topic, aside from the general dispersal of relevant rules among international humanitarian law, human rights law and environmental law, was the need to arrive at a set of principles that took into account realities on the ground as well as the various legal interests and policy considerations. The law of armed conflict and its subcategory, the law on occupation, had been codified for decades, notably with the adoption of the 1907 Regulations respecting the Laws and Customs of War on Land (the Hague Regulations), the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention) and the 1977 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Additional Protocol I). However, the rules on environmental protection were fairly new and many were still in development, which made the process of identifying the rules relevant to environmental protection during occupation particularly challenging. Indeed, colleagues who had spoken before him had expressed a range of views in that regard, with some asserting the need for full protection and others doubting the existence of any particular form of environmental protection during occupation. Nonetheless, the report demonstrated with relative certainty that jurisprudence, State practice and the legal literature supported the existence of environmental protection both in the general context of armed conflict and in situations of occupation. The challenge lay in determining the scope of such protection in a manner that reflected the existing rules of international law and the pressing environmental protection concerns of the international community.

The report provided ample sources on the topic of occupation and the rights and obligations involved, including those relating to environmental protection. For him, the core question was whether the issue of occupation should be dealt with in the context of the general rules on the protection of the environment during armed conflict or through a specific review of the topic of occupation. In other words, should the Commission spell out the rules relating to environmental protection during occupation or consider the other rules or principles applicable to armed conflict as applicable to occupation? By deciding to provide for particular rules, the Commission should not deviate from the principles set out by the International Court of Justice, as cited in the report. In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court had stated that it “considers the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions of derogation of the kind found in Article 4 of the International Covenant on Civil and Political Rights.” It had gone on to add

“As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law”.

The Court’s statement made clear that the whole of international humanitarian law was applicable in the situation of occupation which was the subject of the court’s proceeding and not only particular rules. The Court did not place any limitations regarding the applicability of international humanitarian law and human rights law or on the interrelationship between those two branches of law, the first being *lex specialis*. Therefore, that integrated regime of applicability should not be restricted to occupied territories, and the goals of protection of the civilian population under both branches should be upheld.

Another relevant aspect of the Court’s aforementioned advisory opinion was that situations of occupation were part of situations of armed conflict, and that the law of armed

conflict continued to apply for as long as occupation existed. The fact that active hostilities ceased to exist did not bring the occupied territory outside the realm of protection of the relevant rules of international humanitarian law, as expressly provided for in Additional Protocol I, which conditioned termination of application of the Protocol by the end of occupation and without any qualification. The same could be inferred from article 2 common to the four Geneva Conventions relating to the protection of victims of international armed conflicts (Geneva Conventions of 1949). It was clear that neither the type nor the duration of occupation affected the applicability of international humanitarian law as *lex specialis*, so long as the occupation was ongoing.

Protection of the civilian population under international humanitarian law continued even if agreements were concluded between the local authorities and the occupying Power, as was clear from article 47 of the Fourth Geneva Convention. That was an important consideration in the debate on whether to distinguish between situations of belligerent occupation and of pacific occupation, which had to take into account the fact that the law of occupation, as part of international humanitarian law, was driven primarily by humanitarian considerations and did not cease to apply until occupation had effectively ended on the ground. Normally, that was effected by restoring the sovereignty of the sovereign State over the occupied territory or by achieving independence through the exercise of the right of self-determination.

In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice had decided that the rules of international humanitarian law relevant to occupation were applicable to the Occupied Palestinian Territory, including those contained in the Fourth Geneva Convention and customary international law, despite the fact that the Israeli occupation was a prolonged occupation and that there existed an administration, the Palestinian National Authority, established pursuant to the Oslo Accords. Israel had argued in its submission that the Fourth Geneva Convention was not applicable and had contested the sovereignty of Jordan over the West Bank — where the separation wall was being built — at the time of the 1967 war. The Court had refuted that argument asserting that the Convention applied, by virtue of article 2 thereof, because both Jordan and Israel were parties to the Convention and an armed conflict existed between the two parties in which the territory in question was under the military occupation of Israel. Accordingly, the Court had refused to examine the issue of the sovereignty of Jordan over the West Bank on the grounds that it was irrelevant to the application of the Convention. He wished to state, however, that the sovereignty of Jordan over the West Bank prior to 1967 had been *de jure* and had resulted from the exercise by the Palestinian population of their right to self-determination. Such exercise had occurred through the 1950 unity agreement between Jordan and the West Bank. Furthermore, Jordan had been admitted as a Member State of the United Nations, in 1955, with the West Bank as part of its territory; and when Israel had launched an attack on Hebron in the West Bank in 1966, the Security Council had condemned that attack, noting in its resolution 228 (1966), that it was “a carefully planned military action on the territory of Jordan by the armed forces of Israel”.

The only limitations on the applicability of human rights law in the occupied territories were those contained in international humanitarian law regarding the application of protections under that law: where a matter was not regulated by international humanitarian law but was regulated by human rights law, it was exclusively under the regime of the latter. There was no basis, whether under the Hague Regulations or the Geneva Conventions of 1949 and Additional Protocol I, for considering that international humanitarian law and its subcategory, the law of occupation, limited the protection of human rights law where the area was not regulated or where the rules on occupation did not provide the intended protection. In its judgment 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 affirmed that the obligation of the occupying Power under article 43 of the Hague Regulations to take all the measures in its power to restore, and ensure, as far as possible, public order and public life entailed the duty to secure respect for the applicable rules of international human rights law and international humanitarian law.

Another general point to be dealt with was the question of when territory was considered to be occupied. Article 42 of the 1907 Hague Regulations provided that territory was considered occupied when it was placed under the authority of the hostile army and that occupation extended only to the territory where such authority had been established and could be exercised. That “effective control principle” set out in those provisions was well established. He agreed with the Special Rapporteur that the application of the principle entailed a factual examination of the particular situation and was determined on a case-by-case basis. Full control was not required so long as control was effective. The International Court of Justice had reaffirmed, in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, that article 42 of the Hague Regulations was customary international law and had cited its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* in that regard. Although the same principle had been applied in both cases, a different set of facts had been examined to reach the same conclusion. The territory of the Democratic Republic of the Congo had been occupied by Uganda, which had substituted its own authority for that of the Government of the Democratic Republic of the Congo. The Court had also considered the whole Palestinian territory occupied in June 1967 to be occupied, even though Israeli authority had not been fully exercised in areas under the jurisdiction of the Palestinian National Authority. Regarding the issue of whether the withdrawal of Israel from Gaza had ended its occupation in that part of the Palestinian territory, it should be noted that Gaza remained under the effective control of the Israeli occupying Power, as reaffirmed in Security Council resolution 1860 (2009) and numerous General Assembly resolutions adopted subsequent to the withdrawal of Israeli forces — or, more precisely, redeployment.

The law of State responsibility was a different matter from international humanitarian law and its rules on occupation and related obligations. The fact that an occupying Power might not be responsible for acts that were not attributable to it in areas where it did not have control did not relieve that Power of its international humanitarian law responsibilities towards the occupied territories in their entirety, to the extent that it could fulfil such obligations. Armed groups and other parties to an armed conflict were clearly subject to the relevant international humanitarian law rules in the occupied territory as a situation of international armed conflict.

Turning to the issue of environmental protection, he said that because environmental law rules were fairly new as compared to rules of international humanitarian law on occupation, the question that arose was whether such rules applied and to what extent they did so in light of the *lex specialis* character of international humanitarian law. Obviously, the general rules as contained in Part Two of the draft principles were applicable to the situation of occupation. Care must be taken to protect the natural environment, rules of armed conflict must be applied to the natural environment with a view to its protection, and environmental considerations must be taken into account. Such principles reflected the integral application of the rules of international humanitarian law, with the relevant rules of environmental protection that would continue to apply during armed conflict.

One particularity that applied to occupied territories stemmed from the obligation of the occupying Power, under article 43 of the Hague Regulations, to restore and ensure public order and public life and to respect the national laws in force in the territory occupied unless absolutely prevented from doing so. The lack of specific provisions on environmental protection in the law on occupation required that interpretation of the relevant provisions should take into account other rules of international law, namely those contained in the corpus of international environmental law; it also was necessary for such rules to fill the gaps where the law of occupation did not provide sufficient regulation.

Regarding property rights and natural resources, when the Commission had provisionally adopted the draft principles on environmental protection during armed conflict in Part Two, it had chosen not to deal with the issue of natural resources as such. Instead, it had left the matter to be dealt with under the general rules contained in international humanitarian law that dealt with property, public or private, and protection of civilian objects. However, now that the Special Rapporteur had decided to tackle the issue

in relation to the rules on occupation, it might be useful to determine the specific rules that applied in that regard.

The fact that the relevant provisions of international humanitarian law predated developments in the law on the protection of the environment meant that former provisions must be interpreted in light of existing environmental rules and the goal of protection in terms of both the environment and the civilian population. Therefore, while the term “usufruct” was not clear with regard to its current application, it was important to determine the rules in light of the developments in international law. One issue to be considered was the extent, if any, of the authority of the occupying Power to exploit natural resources in the occupied territory. Was such an authority, if it existed, without a limit? General Assembly resolution 1803 (XVII) of 1962 provided for the right of peoples and nations to permanent sovereignty over their natural wealth and resources, which must be exercised in the interest of their development and of the well-being of the people of the State concerned. Such a principle had later been enshrined in article 1 of the International Covenant on Economic, Social and Cultural Rights and had been reaffirmed in numerous United Nations resolutions. Noting that the principle covered not only nations but peoples, and that it had been adopted in the context of decolonization, liberation from alien occupation and independence, he said that to claim that it did not apply to peoples under occupation was an untenable proposition. A number of General Assembly resolutions had been adopted, with an overwhelming majority of States voting in favour, on the permanent sovereignty of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab population in the occupied Syrian Golan over their natural resources. One such resolution had been adopted subsequent to the advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, affirming that the construction of the wall in the Occupied Palestinian Territory violated the principle of permanent sovereignty of the Palestinian people over their natural resources. Although the Court had not specifically referred to article 1 of the International Covenant on Economic, Social and Cultural Rights in that case, the Court had stated that the construction of the wall violated the right of the civilian population to work, health, education and an adequate standard of living. The Court had considered that not only the route of the wall, but also the associated regime, consisting of settlement and the policy of transfer of population, violated the exercise of the Palestinian’s people’s right to self-determination. Furthermore, the rights mentioned by the Court, including to health and to an adequate standard of living, were relevant to the current topic in determining the applicability of environmental protections in occupied territories.

General Assembly resolution 1803 (XVII) was relevant for determining treatment during occupation and the authority of the occupying Power to administer natural resources, including limits on that authority. Exploitation by the occupying Power should be for the benefit of the people under occupation, for their development and their well-being, and was not a licence for the occupying Power to confiscate and requisition such resources or to transfer them to its own population. When the term “usufruct” had been adopted, as part of the Hague Regulations, no such limitations had existed as to the authorities of the occupying Power. However, international law had developed considerably since then and people’s rights were now well established, including the right to sovereignty over natural resources. As for the benefit of the people under occupation, a further limitation on the authority of the occupying Power to administer natural resources was the prohibition of pillage — contained both in the Hague Regulations and in the Fourth Geneva Convention, which was applicable especially with regard to non-renewable resources.

Under the Hague Regulations and the Fourth Geneva Convention, the occupying Power had an obligation to apply the national law of the occupied territory and thus observe the existing environmental laws in the occupied territory and to take contrary measures only when necessary for the well-being and civil life of the civilian population. In terms of environmental protection, that interpretation required that environmental measures that benefited the civilian population should be applied in the occupied territories if they exceeded the protection of the environment and natural resources provided for under local law. Such measures could be essential for the social functions and ordinary transactions that constituted daily life in the occupied territory and thus might be applied in spite of the relevant national law. He agreed in that respect with the Special Rapporteur’s conclusion in

paragraphs 46 and 50 of the report that the occupying Power must respect the national laws in place in the occupied territory and must also respect the environment of the occupied territory and take environmental considerations into account in the administration of such territory. That position applied to the protection of the environment during armed conflict and by extension to the occupied territories, even without applying the special rules on occupation. Such principles of protection also applied in terms of the interplay between rules of international environmental law and of international humanitarian law on occupation as well as in the exercise of the right to life, health, family life and food in occupied territories. Another relevant principle emanating from the application of international environmental protection was the obligation not to cause significant harm to the environment. That principle of due diligence had been recognized since the *Trail Smelter* case as an integral part of environmental protection. The occupying Power was required to respect that principle in its conduct as the occupied territory was an area under its control.

He agreed with the Special Rapporteur that sustainable use was a policy objective and not a legal principle as such, and that customary and conventional law rights and obligations in relation to the environment could be interpreted in light of that policy objective. He further noted that the occupying Power, as administrator of the occupied territory and its natural resources, should take into account the sustainability of such resources and that utilization was for the benefit of the civilian population.

The law on occupation was part of the law of armed conflict and the principles that applied in phase II, during armed conflict, necessarily applied to occupation. While he agreed in essence with the applicability of the content of draft principles 15, 17, 18 and 19 on situations of occupation, that should not in any way be interpreted to mean that occupation could be considered a post-conflict situation. Such a statement would be dangerous and legally incorrect. Thus, if the commentaries to such principles referred to their applicability in an occupation situation, it would have to be made clear that such applicability did not change the status of the occupied territories or the applicability of international humanitarian law on such territories. He was in favour of referring draft principles 19, 20 and 21 to the Drafting Committee, noting and agreeing with the reformulation of draft principle 19 as suggested by the Special Rapporteur in the oral presentation of her report.

Mr. Jalloh said that he agreed with the Special Rapporteur that the point of departure for the Commission's work on the topic should remain the same as that under the previous Special Rapporteur for the topic, namely, that the Commission did not intend, nor was it in a position, to modify the law of armed conflict. To deviate from that initial approach, when the Commission was so close to completing its work on the topic, could be disruptive or damaging for the Commission and also for States and international organizations that followed the Commission's progress, such as the United Nations Environment Programme. In addition to ensuring coherence with the past work of the Commission, it would keep it from expanding into areas that were for States potentially politically sensitive and complex. The temporal approach used in the Commission's previous work on the topic was a sound way of organizing the draft principles, as environmental damage could occur before, during and after armed conflict. However, he noted and agreed with the previous Special Rapporteur's statement that there could not be a strict dividing line between the different phases, as such a line would not be an accurate reflection of how the relevant legal rules operated.

In the Sixth Committee, while the Member States had generally expressed support for the temporal approach, they had also cautioned that it might become difficult to separate the draft principles into particular phrases of an armed conflict, as some might apply to several phases. The Commission must seek to strike a balance so that the temporal approach was not followed so strictly that it created confusion for States and other users of its work with the introduction of the subject of occupation in the draft principles. Whereas the Special Rapporteur had proposed that the application of the relevant rules on occupation to the previous draft principles might be clarified in the commentaries thereto, he preferred the proposal made by Mr. Park that a more general *mutatis mutandis* clause should be

inserted into the proposed draft principles, possibly under draft principle 19. The issue was too important to be relegated to the commentary.

Turning to substantive matters, he said that, first, as rightly noted in paragraph 13 of the report, the main challenge faced when addressing the protection of the environment under the law of occupation was that the protection afforded was mostly “indirect”. The applicable rules could be found in customary international law and widely accepted treaties, including articles 42 to 56 of the Hague Regulations of 1907, articles 27 to 34 and 47 to 78 of the Fourth Geneva Convention of 1949, certain provisions of Additional Protocol I, which dealt with international armed conflicts, and customary international humanitarian law.

Another challenge for the Commission was that, as highlighted in chapter I of the report, many of the instruments in that subfield of the law of armed conflict predated both the emergence of international environmental law as a separate branch of public international law and even the conceptualization of the environment as a subject of legal protection. It might also have been noted in the report that the law of occupation, which had been developed mainly to regulate inter-State relationships and nineteenth-century realities that no longer existed in the twenty-first century, was increasingly under strain. As noted by the International Committee of the Red Cross (ICRC) and States parties to the Geneva Conventions, in several contexts, contemporary occupations had raised a number of important legal questions that were of direct consequence for those living under, and those administering, the occupations. Those questions included when an occupation began and ended, the administration of occupied territories by coalitions, the occupying Power’s rights and duties, the use of force in occupied territory and the potential application of occupation law to the administration of foreign territory by the United Nations. All were difficult issues that States, bodies such as ICRC and the United Nations, civil society and academic experts continued to grapple with. In its work on the topic, the Commission should always keep that broader context in mind.

Consequently, while he agreed with the Special Rapporteur that environmental concerns had permeated most areas of international law — as confirmed by the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* and as evidenced by the Commission’s work on the topic and on related topics, including the topic “Effects of armed conflicts on treaties” — in the limited context of the topic at hand, trying to identify useful principles to protect the environment, the specificities of a situation of occupation and the requirements of the law of occupation might limit the practical application of international environmental obligations. The Commission should remain mindful of that important point throughout its deliberations on the proposed draft principles both in plenary and in the Drafting Committee.

Secondly, regarding the intersectionality of, and complementarity between, protection of the environment and human rights, he personally found the analysis in chapters II and III of the report helpful, although the material might have been easier to digest if the report had more systematically broken down the human rights discussion into the conventional paradigms of civil and political rights, on the one hand, and economic, social and cultural rights, on the other. In any event, he wished to make two brief comments on the substance.

First, he fully endorsed the Special Rapporteur’s introductory assertion that it was widely accepted that modern international human rights law continued to apply in armed conflicts and in situations of occupation. The provisions of the International Bill of Human Rights, which included the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, were relevant in that regard, even if humanitarian law sometimes displaced or at least qualified human rights because it was *lex specialis*. The International Court of Justice had confirmed the concurrent application of the two bodies of law in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, in which it had mentioned, in respect of the Occupied Palestinian Territory, that the protection afforded by human rights conventions did not cease in case of armed conflict. The only qualification to that concerned the effect of provisions for derogation, of the kind found in article 4 of the International Covenant on Civil and

Political Rights, though such derogations were limited in time and to the extent strictly required by the exigencies of the situation. In any case, as was widely known, human rights law applied not only in all areas within the territorial jurisdiction of a State but also in respect of the acts of a State outside the four corners of its territory, and particularly in occupied territories, as confirmed by the International Court of Justice in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*. That position found support from treaty bodies such as the Human Rights Committee, in its general comment No. 26, and in a rich body of jurisprudence from regional human rights courts and tribunals in Africa, the Americas and Europe.

Secondly, he agreed with the argument in paragraph 63 of the report that major human rights treaties, which had largely been developed before concern for the environment had taken front and centre, had increasingly been applied in an environmentally friendly way. In that regard, it was true that human rights bodies had been home to a struggle to merge or at least link human rights with environmental concerns, since environmental degradation was often linked to the violation of human rights, including the rights to life, a family life, privacy, health and food. Indeed, as had been rightly observed by the Court of Justice of the Economic Community of West African States in *Serap v. Federal Republic of Nigeria*, in many ways, the quality of human life depended on the quality of the environment. A similar point had been made by the Inter-American Court of Human Rights in *Yanomami v. Brazil* and in its 2018 advisory opinion on the Environment and Human Rights, and by the European Court of Human Rights in *Öneryıldız v. Turkey*.

That said, he understood the Special Rapporteur's decision — announced in paragraph 64 of the report — to focus on “the right to health as one of the closest links between human rights and the protection of the environment”. The right to health had been incorporated in both international and regional instruments, including article 25 (1) of the Universal Declaration of Human Rights, which was considered customary law; article 12 of the International Covenant on Economic, Social and Cultural Rights; article 13 of the Convention on the Elimination of All Forms of Discrimination against Women; article 24 of the Convention on the Rights of the Child; article 24 of the International Convention on the Elimination of All Forms of Racial Discrimination; article 28 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and article 25 of the Convention on the Rights of Persons with Disabilities. The right to health or to a healthy environment had also been included in article 11 of the American Declaration on the Rights and Duties of Man, article 10 of the Protocol of San Salvador, article 16 of the African Charter on Human and Peoples' Rights, article 14 of the African Charter on the Rights and Welfare of the Child, article 11 of the European Social Charter, articles 38 and 39 of the Arab Charter on Human Rights and paragraph 28 (f) of the Human Rights Declaration of the Association of Southeast Asian Nations.

On the other hand, as the Special Rapporteur herself acknowledged in paragraph 65 of the report, the provisions of the law of occupation concerning health care were “fairly rudimentary”. In fact, they consisted mostly of article 56 of the Fourth Geneva Convention, which established the duty of the occupying State of ensuring and maintaining, to the fullest extent of the means available to it, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to measures to combat the spread of contagious diseases and epidemics.

Bearing in mind the aforementioned human rights instruments and the rich body of jurisprudence that incorporated the right to health, he fully agreed with the conclusion reached in paragraph 70 of the report that the close connection between the rights to health and the environment had been acknowledged worldwide and that the obligations of States in that respect were not limited to providing appropriate health care, but also covered protecting the environment. The right to a clean and healthy environment had been deemed particularly important in Africa, as reflected in the decision of the African Commission on Human and Peoples' Rights in the 2001 *Ogoni* case. In the circumstances, it might have been helpful to have a more in-depth analysis of how fundamental human rights in the context of occupation, including, for instance, the right to life, might be affected by environmental degradation. He appreciated, however, that the word limit for the report

might have been a consideration for the Special Rapporteur. In any event, the issue was important and led back to the question of the relationship between human rights law and the law of armed conflict. In that context, it was useful to refer to article 55 of Additional Protocol I, which spoke to both the right to health and the survival of the population. The point could perhaps be satisfactorily addressed in the commentary to the relevant draft principle. That would not only help to strengthen the Commission's work, including the draft principles, but also provide greater added value for States. Focus, in that regard, could be placed on particularly vulnerable populations in the context of environmental degradation and human rights, such as women, children, persons with disabilities and indigenous peoples.

Before making some specific remarks about the draft principles proposed by the Special Rapporteur, he wished to note that Part Four of the draft principles, unlike the provisionally adopted Parts One, Two and Three, lacked a title. He agreed with Mr. Park's proposal that Part Four should be titled "Principles applicable in situations of occupation", which was consistent with the titles of the previous Parts.

With regard to proposed draft principle 19 (1), although he agreed with the Special Rapporteur's substantive point that occupying States should take into account environmental considerations, the paragraph itself was perhaps too vague. The Commission should clarify what it meant to take into account environmental considerations. In so doing, it would establish a clearer principle that could help to set a standard and indicate to any occupying Power or authority the extent to which environmental considerations should be borne in mind. At the very least, the Commission should clarify in the commentaries what standard it was setting, for the benefit of relevant actors. A related concern was whether to use only the word "State", add the words "or international organization" or even use a broader term such as "entity" or "authority" to provide for circumstances in which non-State armed groups exercised effective control over a given area, since effective control was the key test under the law of occupation. The Commission could also opt for a more general formulation, as suggested by some members, that would avoid the loaded terms "territorial State" and "sovereign rights".

In proposed draft principle 19 (2), the Commission might wish to replace the words "respect the legislation" with "respect and enforce the legislation". It was incumbent on occupying Powers to ensure, to the extent possible, a sense of normality in occupied territories, and it was therefore essential that, especially in cases where the occupied territory did not have a strong government or enforcement mechanism of its own, an obligation was imposed on the occupying Power to enforce legislation pertaining to the protection of the environment. Alternatively, the Commission could align its terminology with the standard language used in the law of armed conflict. He had taken note of the proposed redraft mentioned in the Special Rapporteur's oral introduction to her report and viewed it as an improvement on the existing text.

As to proposed draft principle 20, which concerned the administration of natural resources in an occupied territory, he would prefer to follow the position adopted in the Hague Regulations of 1907, but at the same time reflect developments that had occurred since 1907. In that regard, the impact of decolonization could not be ignored, including with respect to the exploitation of the wealth of local populations under occupation or administration and issues of self-determination, which limited the extent to which outsiders could exploit the natural resources of a given society. The Commission had to be crystal clear in the draft principle that the use of natural resources was permissible only for the benefit of the local population, including their enjoyment of a clean and safe environment, and not for the benefit of the occupier or administering authority. In that regard, even though the International Court of Justice had confirmed, in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, that such resources could be exploited in line with the law of armed conflict, clear limits had to be envisaged. He fully subscribed to the legal arguments put forward by Mr. Hmoud with respect to the issue of self-determination and the question of permanent sovereignty over natural resources.

The words "minimizes environmental harm" could be interpreted in at least two ways. First, as meaning that an occupying Power should, in one way or another, reduce the

environmental harm that could result from its administration of natural resources or, secondly, as meaning that an occupying Power should choose to administer natural resources in a way that caused as little environmental harm as possible. The second option was, in his view, preferable, as the Commission would be setting a higher standard for occupying Powers in terms of the respect due to the resources of occupied territories.

Finally, he agreed with the substance of proposed draft principle 21, which addressed the obligation of due diligence. He supported the suggestion of other members, including Ms. Galvão Teles, to hew closer to the language used by the International Court of Justice in paragraph 29 of its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, in order to produce a more general formulation than had initially been proposed in the report. The formulation could be clarified in the commentary, as could some of the specific language put forward by the Special Rapporteur.

Turning to the issue of future work, he noted that the Special Rapporteur indicated in paragraph 100 of the report that the second report, to be submitted in 2019, would address questions related to the protection of the environment in non-international armed conflicts. The Commission had not distinguished between international and non-international armed conflicts in the draft principles that it had provisionally adopted. The matter had been discussed in the Sixth Committee, with some States asserting that the draft principles should not address non-international conflicts, others asserting the opposite, and yet others asking for clarification as to which draft principles applied to both international and non-international armed conflicts. In accordance with the jurisprudence of the International Tribunal for the Former Yugoslavia in, among other cases, *Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No. IT-94-1-A, which noted an intermediate situation in which a conflict could be partly international and partly non-international, he was not convinced that it would be a helpful distinction to make in the particular context of environmental protection. His key concern was that the Commission should avoid creating a bifurcated system, such as that found in the law of armed conflict, that afforded stronger protection for international armed conflicts than for non-international armed conflicts, particularly given that most modern-day conflicts were classed as non-international. Drawing a distinction might also force the Commission to contemplate the role of non-State actors, who sometimes occupied, and exercised effective control over, a given area. What would be the scope of the obligations imposed on those actors, if any, or on the States whose former territory they occupied?

Having taken into account the content of the report and the statements and suggestions of other members, he supported the referral of all the proposed draft principles to the Drafting Committee for further review and improvement.

Mr. Hassouna said that he wished to thank the Special Rapporteur for preparing and introducing to the Commission her first report on the topic "Protection of the environment in relation to armed conflicts", which built on the reports of her predecessor in the role, Ms. Jacobsson. Despite the difficulty of taking over a topic on which work had already begun, the Special Rapporteur had forged new ground while retaining the temporal approach used in previous reports, which would allow for a cohesive and comprehensive study. The topic remained vital and urgent, as evidenced by the inclusion of an article on armed conflicts in the preliminary draft of the Global Pact for the Environment, namely article 19, which stipulated that "States shall take pursuant to their obligations under international law all feasible measures to protect the environment in relation to armed conflicts".

The substance of the Special Rapporteur's report clearly demonstrated that the topic lay at the intersection of various existing international law regimes, where there existed several similar and overlapping concepts and principles. In her approach to the topic, the Special Rapporteur had successfully analysed and coordinated those principles with a view to applying them to the protection of the environment in relation to occupation. He welcomed the Special Rapporteur's consultations on the topic with other entities, such as ICRC, the United Nations Educational, Scientific and Cultural Organization and the United Nations Environment Programme, and with regional organizations. The work of those organizations was of particular relevance and importance, given that they operated at the intersection of such different fields of international law.

He wished to make a number of general comments about the report. First, many of the sources relied upon by the Special Rapporteur in her analysis were United Nations organizations and Western scholars. It would have been desirable to include sources from a wider variety of regions. In chapter I, in particular, it would have been valuable to take into account the opinions and publications of regional organizations other than the European Union. Those organizations had a more immediate experience of armed conflicts or occupations in their respective regions and, by extension, a better understanding of their history and legal implications.

Secondly, the number of States that had contributed to the most recent debate on the topic in the Sixth Committee had continued to be low, and it was unfortunate that there had once again been no African States among them. The Special Rapporteur's report would hopefully spark greater interest in what was an important topic.

Thirdly, the Special Rapporteur's proposed draft principles addressed the environmental protection obligations of occupying States. While draft principle 19 laid down a case-dependent obligation to take environmental considerations into account and respect existing legislation, the other two draft principles were universal. Draft principle 20 imposed an obligation to use natural resources sustainably, and draft principle 21 dealt with the issue of transboundary harm. All three draft principles flowed from chapter III of the report. The Special Rapporteur had not yet proposed draft principles based on the indirect protection of the environment provided for in the law of occupation, or on the protection of the environment through international human rights law. The result could be described as an underemphasis of the well-being of populations under occupation, which was a central feature of international humanitarian law, human rights law and international environmental law. While the Special Rapporteur noted, in paragraph 28, that the underlying rationale of provisions of the law of occupation was "to ensure property and exploitation rights and economic interests, or the survival and welfare of the civilian population, as the case may be", it would have been more emphatic to assert that "the well-being of an individual is the ultimate object of all law". In that regard, the Special Rapporteur could take guidance from article 1 of the preliminary draft of the Global Pact for the Environment, which established that "every person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment". The notion of "dignity" was particularly important in that context.

The structure of the report would benefit from placing each proposed draft principle at the end of the discussion supporting its inclusion, rather than at the end of the report. Doing so would make it easier for the reader to understand the rationale behind each proposed draft principle and improve the overall flow of the report.

Fourthly, the concept of "protecting Power" under the Geneva Conventions should be clarified. According to article 5 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), parties to a conflict could designate a protecting Power to secure the supervision and implementation of the Geneva Conventions. A protecting Power could be a third State. In certain cases, ICRC or any other organization that "offers all guarantees of impartiality and efficacy" could act as a substitute. The rights and obligations of protecting Powers in situations of occupation should therefore be defined in the commentary.

There had been situations, when the United Nations had been conferred the administration of a territory, as in the cases of the United Nations Interim Administration Mission in Kosovo and the Kosovo Force, in which an international organization had been deployed in the territory of a foreign country and had exercised complete control over that territory. Although the international organization had not been an occupying Power *per se*, it had carried out functions of an occupying Power. Future work on the topic should address the legal implications of international organizations acting in such a role.

Fifthly, the report did not elaborate on the various forms of occupation. As stated in paragraph 45 of the report, "the longer the occupation lasts, the more evident is the need for some changes ... to allow the occupying State to fulfil its duties under the occupation law". The question of whether and how the obligation to protect the environment changed

depending on the nature of the occupation — temporary or prolonged, total or partial, direct or by proxy — was a matter of great importance, given the variety of occupations in different world regions. He recognized that, because of the controversial and politicized nature of the issue, it was difficult to provide a definition of occupation beyond that found in article 42 of the Hague Regulations of 1907, which was cited in paragraph 20 of the report. However, it should be acknowledged in the commentaries that the definition had been further developed by the International Tribunal for the Former Yugoslavia in *Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No. IT-94-I-A to cover contemporary forms of occupation, as noted in paragraph 25 of the report.

Proposed draft principle 19 was based on article 43 of the Hague Regulations, as explained in paragraphs 43 to 50 of the report. Proposed draft principle 19 (1) did not have the same grounding in the Hague Regulations as 19 (2), yet it found support in international human rights law, as discussed in chapter II of the report. 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 interpreted article 43 of the Hague Regulations as requiring occupying States “to secure respect for the applicable rules of international human rights law and international humanitarian law”. In that regard, relevant economic, social and cultural rights, such as the rights to food, water and health, were interrelated with the protection of the environment. The right to food, for example, was reinforced in article 55 of the Fourth Geneva Convention, under which “the Occupying Power has the duty of ensuring the food and medical supplies of the population”. According to paragraph 8 of general comment No. 12 of the Committee on Economic, Social and Cultural Rights, the right to adequate food implied the accessibility of such food “in ways that are sustainable and that do not interfere with the enjoyment of other human rights”.

The right to water was essential for the full enjoyment of life and all human rights. Safe, physically accessible, and affordable water was of the utmost importance in regions experiencing water scarcity. As stated by the High Court of South Africa, “one cannot speak of a dignified human existence if one is denied access to water”. The protection of the rights to food, water and health, which were inherently connected to the protection of the environment, was certainly necessary to preserve the well-being of an occupied population. Consequently, proposed draft principle 19 (1) was a logical development from established international human rights norms.

The Special Rapporteur’s suggested revisions to proposed draft principle 19 (1) were largely acceptable, though the reference to “environmental considerations” could be made more specific. The Special Rapporteur noted that the term was drawn from the Permanent Court of Arbitration’s decision in the *Iron Rhine Railway* case, but that decision had also involved the explicit application of “principles of environmental law”. An allusion to those principles would give States more guidance than a simple reference to environmental “considerations”.

Furthermore, the words “including in any adjacent maritime areas over which the territorial State is entitled to exercise sovereign rights” at the end of draft principle 19 (1) might be unnecessary. During situations of military occupation of a continental territory, the occupying State’s “effective control” extended to adjacent maritime areas, covering “gulfs, bays, roadsteads, ports, and territorial waters”, as stated in article 88 of the *Oxford Manual of the Laws of Naval War*. In such situations, occupation of both maritime and continental territories was subject to articles 42 to 56 of the Hague Regulations. It would be sufficient for the obligations to protect the environment, both on land and in maritime areas, to be discussed in the commentary to draft principle 19 (1), and for it to be noted that effective control did not extend to waters outside the sovereign territory of the occupied State.

The language of proposed draft principle 19 (2) closely tracked that of article 43 of the Hague Regulations, which should be uncontroversial considering the customary nature of that article. Despite imposing a strictly worded obligation to respect national laws “unless absolutely prevented”, the article allowed an occupying Power to legislate in the occupied territory when necessary for the maintenance of public order and civil life. The commentary to draft principle 19 (2) should reflect that wide degree of latitude afforded to States, while also stressing that an occupying Power’s legislative authority was grounded in

the need to serve the interests of the occupied population and maintain the *status quo ante* in view of the temporary nature of the occupation. As noted in the commentary to the Hague Regulations, occupation was an exceptional situation that should come to an end sooner or later, hopefully through peaceful means, allowing the occupied population to determine their own future.

In addition to national legislation, draft principle 19 (2) should reference environmental obligations under customary international law, treaty obligations and local custom. Although it was stated, in paragraph 49 of the report, that “the extent to which [the occupying State] may provide protection to the environment depends on how effectively the environment and natural resources are protected in national legislation”, there were additional sources of obligations that continued to bind States during situations of occupation. As acknowledged elsewhere in the report, the occupying State, unless absolutely prevented, must also respect obligations imposed on all States as a matter of customary international law. For example, the Special Rapporteur acknowledged that customary international environmental law continued to apply in situations of armed conflict in paragraphs 77, 79 and 80 of the report, citing the ICRC Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict and the International Court of Justice’s 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*. Though such obligations were necessarily limited by the law of armed conflict and the law of occupation, there was, at a minimum, an obligation to consider environmental factors in the context of the rules of armed conflict. Any addition to draft principle 19 (2) should be worded carefully, with due attention paid to the conservationist principle.

The relevance of treaty obligations and local custom that had not become a part of national law should also be considered. Proposed draft principle 19 (2) might therefore be reworded to include those additional sources of international obligations, or a new paragraph 3 could be inserted to address obligations stemming from customary international law and local custom.

Proposed draft principle 20 reflected the principle of “sustainable use of natural resources”, which, according to the Special Rapporteur, was “one of the most established components of sustainable development in international law.” While the Special Rapporteur explained that sustainable development was recognized as a “policy objective”, which the International Court of Justice had not recognized as a principle of international law, the use of the word “shall” in the proposed draft principle suggested that it was a legal obligation for States.

Thus, according to the report, a legal obligation of sustainable use existed even though its overarching principle of sustainable development had not achieved that threshold. The Special Rapporteur innovatively argued that sustainable use provided the modern equivalent of “usufruct”. However, under the Hague Regulations usufruct was “a broad principle that does not entail specific obligations for occupying States.” In paragraph 91 of the report, the Special Rapporteur cited the occupation of Japan following the Second World War as an example of State practice. More State practice would be needed to substantiate the proposed link between the two concepts.

The Special Rapporteur’s analysis of usufruct and sustainable use contained in the report would take on even greater importance in any future report on non-international armed conflicts because, as noted by the United Nations Environment Programme, the regulations attached to the special status of occupation, such as qualifying the occupants as “usufructuary”, offered some guiding principles for dealing with similar situations in the context of non-international armed conflict, in which the over-extraction and depletion of valuable natural resources was a common feature.

If the Special Rapporteur’s argument linking usufruct and sustainable use was accepted, the report’s use of the word “minimize” rather than “avoid” in the report should be queried. It had been pointed out in the Sixth Committee debate in the context of draft principle 9 that “the preventive measures should seek not only to minimize but also to avoid damage” to the environment. The issue could be discussed in the Drafting Committee.

Additionally, it should be clarified why the proposed draft principle applied only to the administration of natural resources, to the exclusion of human-made and non-renewable natural resources, which might also be used in an unsustainable fashion that harmed the environment. As it stood, proposed draft principle 20 could be read as accepting the use of oil or infrastructure without regard to minimizing or avoiding environmental harm. The title of draft principle 20 could reflect its intended application, whether limited to the principle of the “sustainable use of natural resources” or covering additional types of resources. Furthermore, the commentary should reflect the importance of sustainable use for the benefit of present and future generations of the occupied population.

Proposed draft principle 21 was based on the fundamental principle of “no harm” or due diligence, which was well established in judicial decisions, treaties and customary international law and was contained in principle 21 of the 1972 Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) and principle 2 of the 1992 Rio Declaration on Environment and Development (Rio Declaration). The Special Rapporteur provided a convincing argument for extending those obligations to situations of occupation in paragraphs 81 to 86 of the report. Where a State was exercising effective control over a territory, the obligation to respect the environment of other States or areas beyond national jurisdiction applied.

However, the wording of proposed draft principle 21 diverged from the Stockholm and Rio Declarations. While those texts referred to a State’s “responsibility to ensure” that activities did not cause environmental damage, proposed draft principle 21 referred to a State using “all the means at its disposal”. Alternatively, article 3 of the Commission’s adopted articles on prevention of transboundary harm from hazardous activities stated that the State of origin should “take all appropriate measures to prevent significant transboundary harm or, at any event, to minimize the risk thereof”.

The report’s phrasing imposed a more substantial obligation upon States by requiring them to use “all means at [their] disposal,” a phrasing which was derived from the judgment of the International Court of Justice in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. However, while that judgment had indicated that such means were needed to avoid causing damage to the environment, proposed draft principle 21 established a stronger obligation to use such means to ensure that activities did not damage the environment.

In his opinion, the Commission should either use wording consistent with existing international obligations, such as that contained in the Stockholm and Rio Declarations, or with previous adopted work of the Commission, or explain the reasons for deviating from the widely accepted language of the aforementioned texts.

The due diligence principle should also be considered outside of the context of occupation, as it applied to armed conflicts generally. The existence of 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 was now part of the corpus of international law relating to the environment. The advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons* recognized that the issue was not whether the treaties relating to the protection of the environment were or were not applicable during an armed conflict, but rather whether the obligations stemming from those treaties were intended to be obligations of total restraint during military conflict. That had been the opinion of the Court. The Drafting Committee might consider expanding the scope of proposed draft principle 21 to all armed conflicts, while including in the commentary its applicability to situations of occupation.

In relation to future work, the Special Rapporteur indicated that her Second Report would address questions related to responsibility and liability for environmental harm in relation to armed conflicts. That should be welcomed. She might also consider the relevance of compensation and reparations for damage caused to the environment, as well as methods for dispute settlement in that regard. The Special Rapporteur could further consider the obligation contained in common article 1 of the Geneva Conventions, which stated that parties should “undertake to respect and to ensure respect” for the Conventions. It was widely accepted that such an obligation bound all States parties and competent

international organizations to ensure universal compliance with the humanitarian principles underlying the Conventions might also be relevant.

Also to be considered in the next report was the protection of the environment in relation to non-international conflicts. The subject of such conflicts had already drawn reactions from States. While some Members States in the Sixth Committee had supported such a discussion, others had expressed hesitation and cautioned against its inclusion. In his view, non-international armed conflicts should be addressed as part of the topic, given that most armed conflicts in the modern world were of a non-international character. The matter should, however, be addressed with caution in view of the complexities involved.

In conclusion, he said that there could be no better testimony to the importance of protecting the environment in an armed conflict than the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*. In that opinion, the Court had recognized that the environment was not an abstraction, but represented the living space, the quality of life and the very health of human beings, including generations unborn.

That approach had been further recognized in article 30 of the Charter on Economic Rights and Duties of States, the predecessor instrument to the above-cited sources, which stipulated that “the protection, preservation and enhancement of the environment for the present and future generations is the responsibility of all States”.

Finally, he wished to recall a principle that dated back to the mandatory system under the League of Nations and quoted in the advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, namely that the well-being and development of people not able to govern themselves formed “a sacred trust of civilization”.

In light of the aforementioned comments, all three draft principles should be referred to the Drafting Committee. He was pleased that no member of the Commission had opposed referral of all the proposed draft principles to the Drafting Committee, which had often not been the case with regard to other topics. The Drafting Committee should give a title to Part Four and the three proposed draft principles so as to be consistent with the structure of the rest of the draft principles and to help clarify in what context they were relevant.

Mr. Saboia said that he wished to congratulate the Special Rapporteur on her excellent report, which drew a clear and richly documented analysis of the ways in which occupation — in its different aspects — might affect the protection of the environment in occupied territories. On the basis of that analysis the report proposed three draft principles. She had undertaken a careful study of the law of occupation, a branch of the law of armed conflicts, in order to identify legal concepts capable of helping in the effort to develop legal standards for the protection of the environment in such a situation.

Chapter I, part A, of the report addressed the concept of occupation, starting from the established understanding of the concept of occupation expressed in article 42 of the Hague Regulations of 1907. The elements and the main characteristics of occupation — namely the existence of effective control by the occupant — as well as the different phases and certain aspects concerning the status of occupied territories which were still controversial were dealt with clearly in paragraphs 19 to 26, supported by reference to case law of the International Court of Justice, the European Court of Human Rights and the International Tribunal for the Former Yugoslavia.

As stated in paragraph 20 of the report, while the 1907 definition was based on the classic notion of belligerent occupation, it now covered a wide range of cases in which the armed forces of a State, or of several States, exercised authority, on a temporary basis, over inhabited territory outside the occupied frontiers of their State. The 1949 Fourth Geneva Convention was equally relevant, particularly its Part III, entitled “Occupied Territories”. Additional Protocol I of 1977 also applied in relation to occupied territories.

As to whether the term “occupation” should be defined in the context of the draft principles, he favoured recourse to a limited number of definitions, such as “armed conflict” and “environment”, which had already been provisionally adopted. Those two

definitions were based on previous work of the Commission. Addressing the definition of “occupation”, which was a central subject of the law of armed conflict, would perhaps go a step beyond the scope of the topic.

Noting that the legal regime of occupation had developed in a period that predated the notion of environment, he said that part B of chapter I showed how certain concepts, mostly regarding property rights, had made it possible to address the protection of natural resources and the environment in the context of the law of occupation. The occupying State was defined in that legal context as a “temporary administrator” of public immovable property. While entitled to use the products of the property, it must preserve the capital and avoid depletion of the resources. Its relationship with that extensive definition of property had been defined as “usufruct”. That old concept of Roman law existed in Brazilian law, both in private law where individuals could contract such a relationship related to property rights, and in public law, the most interesting example of which was the permanent usufruct recognized by the Constitution to Brazilian indigenous peoples regarding the lands they traditionally occupied.

Paragraphs 32 to 35 of the report contained a discussion of how the principle of people’s permanent sovereignty over natural resources had influenced the contemporaneous interpretation of the law of occupation. The principle, which was enshrined in both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, had been proclaimed repeatedly in General Assembly and Security Council resolutions and had been recognized as customary law by the International Court of Justice in the *Armed Activities on the Territory of the Congo* case.

The principle of self-determination was addressed in paragraph 35 of the report. In that context, it was important to stress recognition of the right to self-determination of peoples under occupation and the relation between it and their right to access to and enjoyment of their natural resources, as well as the limitations and obligations incumbent upon the occupying State. That was particularly important in the case of territories that were not part of any established State. Regarding one such territory, the Occupied Palestinian Territory, the International Court of Justice, in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, had stated that the construction of a wall and other measures by the occupying State, “severely impede the exercise by the Palestinian people of its right to self-determination”.

Other relevant advisory opinions of the Court were the *Legal Consequences for States of the Continued Presence of South Africa in Namibia and Western Sahara*. In the *East Timor (Portugal v. Australia)* case of 1995, the Court had affirmed the *erga omnes* nature of the principle of self-determination. The merits of the case, although not adjudicated by the Court, deserved mention, as they were related to matters of access by East Timor to the important oil resources of the Timor Gap.

The conditions and the extent to which an occupying State could seize, use and exploit property in an occupied territory depended on whether the property was public or private, movable or immovable. Some controversy existed regarding the categorization of crude oil as movable or immovable property but, as explained in paragraph 38 of the report, the question of whether the resource concerned bore a necessary connection to military operations was an important consideration.

Private property enjoyed broader protection than public property, a factor that could provide further protection to the environment and natural resources against the negative effects of occupation. Besides the Hague Regulations, provisions establishing limitations that afforded protection to the environment were to be found in the Fourth Geneva Convention. “Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” was defined as grave breaches in the Convention and as a war crime of “pillage” under the Rome Statute of the International Criminal Court. Additional Protocol I provided other grounds for protection of the environment in general.

Chapter I, part C, addressed the question of how the powers and obligations of the occupying State were to be exercised with a view to discharging its duty to maintain, to the extent possible, public order and civil life. According to the Hague Regulations and the

Fourth Geneva Convention, the power of the occupying State in terms of legislation and public policy were to be balanced against the need not to alter significantly the economic and social life of the occupied territory. Currently, however, it was accepted that the occupying State could have a broader mandate to legislate in order to maintain public order and civil life and to change legislation that was contrary to established human rights standards. However, there should be limits to the use of those powers, and the so-called “transformative occupation” was a controversial concept.

In paragraph 50, the Special Rapporteur drew her concluding remarks to chapter I of the report stating that the occupying State had a general obligation to respect the environment of the occupied territory and to take environmental considerations into account in its administration of such territory. Environmental protection was an essential function of the State as it ensured the welfare of the population. He endorsed the statement in the paragraph that the obligation to protect the environment was also supported by human rights law, given the close link between key human rights such as the right to food, health and life and the protection of the environment.

The applicability of human rights law during armed conflict and occupation, in line with the well-known statements by the International Court of Justice and other international and regional courts, was reaffirmed in the report. Other relevant materials were mentioned, such as the important pronouncement of the Human Rights Committee that “the protection of the rights under the International Covenant on Civil and Political Rights, once accorded, devolves with territory and continues to belong to the people, notwithstanding any changes in the administrations of that territory.” As noted by the Special Rapporteur, following an analysis of judgments of the International Tribunal for the Former Yugoslavia and the European Court of Human Rights, “human rights law not only applies to situations of occupation but seems moreover to play a more important role during the occupation than in the phase of hostilities”.

Chapter II, part B, of the report was devoted to the environment and human rights. The connection between human rights and the protection of the environment was widely recognized, as shown by the authorities quoted in the introductory paragraphs of the chapter. Particular emphasis was placed on the right to health, which was broadly considered to have a very close connection with the environment. The human rights courts and treaty bodies, with their experience in processing individual complaints, had played a special role in consolidating those notions and ensuring protection and redress to affected parties.

A slight correction was required in the report regarding the mention, in footnote 246 on page 33, of the *Yanomami v. Brazil* case. Although quoted as being a case before the Inter-American Court of Human Rights, it was actually a complaint dealt with in the context of the Inter-American Commission on Human Rights, which was part of the inter-American human rights system but was not a judicial body. At the time of the case in 1985, Brazil had not yet recognized the contentious competence of the Court, a step it was to take in 1992. It must, however, be recognized that the dialogue between the Commission and Brazil had produced positive results and contributed to consolidating the understanding of the connection between the right to life and a healthy environment.

As noted by the Special Rapporteur, the provisions of the law of occupation concerning health were “fairly rudimentary” and focused mostly on the immediate concerns resulting from hostilities. Nevertheless, the occupying State, as soon as the situation stabilized, must pay attention to the more long-term needs of public health. The report listed the human rights instruments and case law that established relationships between human rights, notably the right to health, and the protection of the environment.

Paragraph 71 to 76 dealt with the question of how to assess the conduct of the occupying State in terms of its obligations with regard to the human right to health and the related duty of protection of the environment. As was noted, those obligations might be subject to restrictions and limitations in line with the law of occupation.

The conclusions drawn in paragraphs 73 to 76 of the report addressed the responsibility of the occupying State according to the different phases of the conflict. He could accept that approach, but it had limitations, as there were health situations that might

take on catastrophic dimensions and require immediate attention. While it was reasonable to think that an occupying State was not required to engage in positive formulation of environmental policies, to state its obligation solely in terms of refraining from acts that caused significant harm to the environment and public health fell short in his view of the standard set by international law even during occupation. Recognizing, as the report did in paragraph 74, that the “public health priorities of the occupying State could include protection of the population from the adverse health effects of pollution through toxic substances, water or oil pollution, or other health risks, related to environmental damage resulting from the armed conflict” was a more positive approach. After a very good analysis, the final part of the conclusions failed to adequately assess the right to health and protection of the environment from a human rights perspective, even under situations of occupation.

While he agreed with the three proposed draft principles and supported their referral to the Drafting Committee, he regretted that the Special Rapporteur had not found it appropriate to propose a draft principle on the relationship between human rights and occupation. There was enough material in her report to substantiate a draft principle, which could in particular emphasize the right to health and its relationship to the environment. He agreed with the statement made earlier by Mr. Hassouna in that connection, proposing that a draft principle on human rights and the environment should be developed. If there was support for the idea, the resulting draft principle could be a provision of significant interest in the context of situations of occupation.

He agreed with the Special Rapporteur’s remarks concerning her future work and the possible conclusion of the first reading of the topic in 2019, as well as the points made concerning the existing draft principles and their relationship with the issue of occupation.

The meeting rose at 11.55 a.m. to enable the enlarged Bureau to meet.