

Provisional

**For participants only**

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**International Law Commission**  
**Seventy-third session (second part)**

**Provisional summary record of the 3604th meeting**

Held at the Palais des Nations, Geneva, on Friday, 29 July 2022, at 10 a.m.

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***Present:***

*Chair:* Mr. Tladi  
*Members:* Mr. Argüello Gómez  
Mr. Cissé  
Ms. Escobar Hernández  
Mr. Forteau  
Ms. Galvão Teles  
Mr. Grossman Guiloff  
Mr. Hassouna  
Mr. Hmoud  
Mr. Huang  
Mr. Jalloh  
Mr. Laraba  
Ms. Lehto  
Mr. Murase  
Mr. Murphy  
Mr. Nguyen  
Ms. Oral  
Mr. Ouazzani Chahdi  
Mr. Park  
Mr. Petrič  
Mr. Rajput  
Mr. Ruda Santolaria  
Mr. Saboia  
Mr. Valencia-Ospina  
Mr. Vázquez-Bermúdez  
Sir Michael Wood  
Mr. Zagaynov

***Secretariat:***

Mr. Llewellyn Secretary to the Commission

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

**Tribute to the memory of Christopher Pinto, former member of the Commission**

*At the invitation of the Chair, the members of the Commission observed a minute of silence.*

**Draft report of the Commission on the work of its seventy-third session** *(continued)*

*Chapter V. Protection of the environment in relation to armed conflicts* *(continued)*  
(A/CN.4/L.961 and A/CN.4/L.961/Add.1)

**The Chair** invited the Commission to resume its consideration of chapter V of its draft report, as contained in document [A/CN.4/L.961/Add.1](#), continuing with the commentary to draft principle 13.

*Commentary to draft principle 13 (General protection of the environment during armed conflict)* *(continued)*

*Paragraph (1)* *(continued)*

**Ms. Lehto** (Special Rapporteur) said that she would like to draw attention to a clarification that she was proposing to add to paragraph (1), which had been adopted at the 3603rd meeting. The additional text would read “whether national or international” and should be inserted at the end of the first sentence. In view of the issues that had arisen in the discussion of paragraph (6), she thought that the clarification would be useful.

**The Chair** said he took it that the Commission agreed that the text proposed by the Special Rapporteur should be added to paragraph (1).

*It was so decided.*

*Paragraph (6)* *(continued)*

**Ms. Lehto** (Special Rapporteur), thanking all those who had helped her to arrive at an appropriate solution to the various concerns raised in respect of paragraph (6), said that her proposal was to combine the first two sentences so as to form a new first sentence that would read: “The chapeau recognizes that there are still different views regarding the customary status of both the duty of care and the prohibition as enshrined in Additional Protocol I.” In addition, at the start of the new second sentence, the words “The draft principle” should be replaced with “Paragraph 2”, and the final sentence should be deleted so that the paragraph ended with the footnote marker after the words “the scope of application of Additional Protocol I”.

*Paragraph (6), as amended, was adopted.*

*Commentary to draft principle 14 (Application of the law of armed conflict to the environment)*

*Paragraph (1)*

*Paragraph (1) was adopted.*

*Paragraph (2)*

**Ms. Lehto** (Special Rapporteur) said that, to clarify the text, in the third sentence, the words “of the law of armed conflict” should be inserted after “principles and rules” and the words “in relation to armed conflict” at the end of the sentence should be deleted. The footnote at the end of the first sentence should also be deleted.

*Paragraph (2), as amended, was adopted with minor editorial changes.*

*Paragraph (3)*

**Ms. Lehto** (Special Rapporteur) said that, in the third sentence, the words “is not intrinsically military” should be replaced with “is inherently civilian”.

*Paragraph (3), as amended, was adopted.*

*Paragraph (4)*

*Paragraph (4) was adopted with a minor editorial change.*

*Paragraph (5)*

**Ms. Lehto** (Special Rapporteur) said that she was proposing several adjustments to the first sentence of the paragraph to align the text more closely with the language used in Protocol I Additional to the Geneva Conventions of 1949. As revised, the first sentence would read: “When the rules relating to proportionality are applied in relation to the protection of the environment, a planned attack against a legitimate military objective must not be undertaken if it would cause incidental environmental damage that would be excessive in relation to the advantage anticipated.” In addition, the last sentence should begin with the words “This standard” instead of the pronoun “It”.

**Mr. Park** asked why the Special Rapporteur was proposing to replace the reference to “attacks” in general with a more specific reference to “a planned attack”. Was the intention to limit the scope of the paragraph’s application? He did not recall that the adjective “planned” had been used in that context previously. Furthermore, since attacks were by nature intentional, they were necessarily also planned.

**Mr. Murphy** said that he was in favour of the addition of the adjective “planned”. Its purpose, he believed, was to capture briefly the idea that, as stipulated in article 57 of Protocol I, on precautions in attack, that those who planned or decided upon an attack should take all feasible measures to minimize damage.

**Mr. Grossman Guiloff** suggested that, at the end of the first sentence, the Commission should replace the words “excessive in relation to the advantage anticipated” with the clearer formulation “excessive in relation to the concrete and direct military advantage anticipated”, which was the language used in article 51 (5) (b) of Protocol I.

**Sir Michael Wood** said he tended to agree with Mr. Park that the word “planned” was not needed. He noted that article 57 referred to “those who plan or decide upon an attack” and that, accordingly, even if the adjective “planned” was added, the Commission would be capturing only part of the idea conveyed therein. He therefore preferred the simpler formulation “an attack against a legitimate military objective”. He was in favour of the wording suggested by Mr. Grossman Guiloff for the end of the first sentence, which was used in article 57 of Protocol I as well as in article 51.

**Mr. Murphy** said that he agreed with the changes proposed.

**The Chair** said he took it that the Commission agreed that the first sentence, as revised by the Special Rapporteur, should be further amended to read: “When the rules relating to proportionality are applied in relation to the protection of the environment, an attack against a legitimate military objective must not be undertaken if it would cause incidental environmental damage that would be excessive in relation to the concrete and direct military advantage anticipated.”

*Paragraph (5), as amended, was adopted.*

*Paragraph (6)*

*Paragraph (6) was adopted.*

*Paragraph (7)*

**Ms. Lehto** (Special Rapporteur) said that the text of what was currently paragraph (7) had remained unchanged for a number of years. However, as it had been pointed out that the

mention of “humans” and the inclusion of the adjective “human” before “understanding” were unnecessary, she proposed that those mentions should be deleted.

*Paragraph (7), as amended, was adopted.*

*Paragraphs (8) and (9)*

*Paragraphs (8) and (9) were adopted.*

*Commentary to draft principle 15 (Prohibition of reprisals)*

*Paragraph (1)*

**Ms. Lehto** (Special Rapporteur) proposed that the word “rephrases” should be replaced with “repeats”.

**Mr. Murphy** said that, as he recalled, a decision had been taken not to use the word “repeats” because the draft principle did not repeat article 55 (2) of Protocol I in its entirety; the word “natural” before “environment” in that paragraph of Protocol I had been omitted.

**Sir Michael Wood** suggested that replacing “rephrases” with “is based on” would resolve that issue.

*Paragraph (1), as amended by Sir Michael Wood, was adopted.*

*Paragraph (2)*

**Ms. Lehto** (Special Rapporteur) proposed that the phrase “and has thus been recognized by a significant number of States” should be deleted from the first sentence, with the footnote being retained. For reasons of style, the word “furthermore” should be deleted from the second sentence.

**Mr. Nguyen** pointed out that the first sentence of the footnote simply repeated the content of the first sentence of paragraph (2) and should be deleted.

**Mr. Forteau** suggested that the reference to 174 States parties should be removed from the commentary, as the number might increase in the years to come.

**Ms. Lehto** (Special Rapporteur) said that, although that suggestion was sensible, if both the figure and the reference to “a significant number of States” were deleted from the paragraph, its purpose, which was to establish that the prohibition of reprisals was widely recognized, would be lost. She therefore proposed that the reference to “a significant number of States” should be retained in the main text and that the number of States parties to Protocol I should be mentioned only in the footnote.

**Mr. Jalloh** said that the reference to 174 States parties should remain in the main text; the status of ratification of Protocol I was very important and was one of the focuses of paragraph (3). He was therefore in favour of a simple adjustment to the footnote only, as suggested by Mr. Nguyen.

*Paragraph (2), as amended, was adopted.*

*Paragraph (3)*

**Ms. Lehto** (Special Rapporteur) proposed that, for reasons of style, the word “thus” in the first sentence and the word “nevertheless” in the third sentence should be deleted. In addition, the full title of the relevant International Committee of the Red Cross (ICRC) guidelines, namely the Guidelines on the Protection of the Natural Environment in Armed Conflict, should be inserted at the start of the fourth sentence.

*Paragraph (3), as amended, was adopted.*

*Paragraph (4)*

*Paragraph (4) was adopted.*

*Paragraph (5)*

*Paragraph (5) was adopted with minor editorial changes.*

*Paragraphs (6) to (9)*

*Paragraphs (6) to (9) were adopted.*

*Paragraph (10)*

**Ms. Lehto** (Special Rapporteur) said that, in the first sentence, the words “the Commission acknowledges the uncertainty” should be replaced with “there is uncertainty” and that, in the last sentence, the word “provision” should be replaced with “principle”.

**Mr. Jalloh** suggested that, since the uncertainty referred to was likely to be settled with the passage of time, it would be more accurate to state that “there is, at present, uncertainty”.

*Paragraph (10), as amended, was adopted.*

*Commentary to draft principle 16 (Prohibition of pillage)*

*Paragraphs (1) and (2)*

*Paragraphs (1) and (2) were adopted.*

*Paragraph (3)*

**Ms. Lehto** (Special Rapporteur) said that, in the first sentence of paragraph (3), the words “to Additional Protocol II” should be inserted after the word “commentary”. In the third sentence, the word “such” should be deleted.

*Paragraph (3), as amended, was adopted.*

*Paragraph (4)*

**Ms. Lehto** (Special Rapporteur) said that, in the second sentence of paragraph (4), the word “commentaries” should be amended to the singular form and should be immediately followed by the words “to Additional Protocol II”. In the last sentence of footnote 360, the words “under the law of armed conflict” should be inserted after the word “use”.

**Mr. Forteau** said that, although the appropriation or destruction of property was lawful under a number of provisions of the law of armed conflict, such practices were prohibited under other types of provisions, such as those in the African Charter on Human and Peoples’ Rights, which was referred to in footnote 348. Accordingly, in the last sentence of paragraph (4), the formulation “is lawful” should be amended to read “may be lawful”.

*Paragraph (4), as amended, was adopted.*

*Paragraphs (5) and (6)*

*Paragraphs (5) and (6) were adopted.*

*Paragraph (7)*

**Mr. Jalloh** said that, while paragraph (7) asserted that the notion of illegal exploitation of natural resources had not been defined, a definition had in fact been set out in article 28L *bis* of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol). It could be helpful to add a reference to that instrument in footnote 376 and amend the text of paragraph (7) accordingly.

**Mr. Murphy** said that he would welcome the opportunity to examine the reference to ensure that it was appropriate.

**The Chair** suggested that the Special Rapporteur and any interested members should discuss the matter and, at a subsequent meeting, put before the Commission a proposal that it could immediately adopt without discussion.

*It was so decided.*

*Paragraph (8)*

*Paragraph (8) was adopted.*

*Commentary to draft principle 17 (Environmental modification techniques)*

*Paragraph (1)*

*Paragraph (1) was adopted.*

*Paragraph (2)*

**Ms. Lehto** (Special Rapporteur) said that, in order to clarify the Commission's position on whether the prohibition on the use of the environment as a weapon was a principle of customary international law, in the first sentence of paragraph (2) the formulation "to the extent that the prohibition overlaps with a customary obligation that, according to the ICRC study on customary international humanitarian law, prohibits the use of the environment as a weapon, the obligations under customary international law" should be amended to read "a customary obligation that prohibits the use of the environment as a weapon". In the second sentence, the words "To quote the ICRC study" should be amended to read "According to the ICRC study on customary international humanitarian law". The third sentence should be amended to read: "The ICRC Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict reiterate this obligation." A new sentence should be added, which would read: "The 2020 ICRC Guidelines on the Protection of the Natural Environment in Armed Conflict also contain a rule based on articles I and II of the Convention."

**Mr. Murphy** said that the proposed change to the first sentence would incorrectly suggest that the Commission took the view that the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques was customary international law. According to the ICRC study on customary international humanitarian law, there was a customary obligation not to destroy the natural environment by using it as a weapon, which was a different proposition from that set out in draft principle 17. It would be preferable to retain the original language used in the first sentence of paragraph (2), or to amend it by inserting the words "to any related" before the words "customary obligation".

**Sir Michael Wood** said that the amendments to the first sentence proposed by the Special Rapporteur and by Mr. Murphy would render the text clearer and more direct.

**Ms. Lehto** (Special Rapporteur) said that it had not been her intention to assert that the Environmental Modification Convention had become customary international law. The text that she had proposed had been intended to distinguish the treaty obligations of States parties to the Convention from the customary obligation that prohibited the use of the environment as a weapon.

**Ms. Oral** said that she supported the proposed amendments put forward by the Special Rapporteur and by Mr. Murphy.

*Paragraph (2), as amended, was adopted.*

*Paragraph (3)*

*Paragraph (3) was adopted.*

*Paragraph (4)*

*Paragraph (4) was adopted with minor editorial changes.*

*Paragraphs (5) and (6)*

*Paragraphs (5) and (6) were adopted.*

*Commentary to draft principle 18 (Protected zones)**Paragraph (1)*

**Ms. Lehto** (Special Rapporteur) said that, in the last sentence of paragraph (1), the formulation “as is often the case” should be deleted, and the words “may also be” should be replaced with the words “is also often”.

*Paragraph (1), as amended, was adopted.*

*Paragraph (2)*

**Ms. Lehto** (Special Rapporteur) said that, in the third sentence of paragraph (2), the words “may have been” should be replaced with “may be”. In the fourth sentence, the words “reference to the” should be deleted.

*Paragraph (2), as amended, was adopted.*

*Paragraph (3)*

**Ms. Lehto** (Special Rapporteur) said that, in the last sentence of paragraph (3), the words “shall be” should be replaced with the word “is”.

*Paragraph (3), as amended, was adopted.*

*Paragraph (4)*

*Paragraph (4) was adopted with minor editorial changes.*

*Paragraph (5)*

**Ms. Lehto** (Special Rapporteur) said that, in the sixth sentence of paragraph (5), the words “of protection” should be inserted after the word “form”.

*Paragraph (5), as amended, was adopted.*

*Paragraph (6)*

*Paragraph (6) was adopted.*

*Commentary to Part Four (Principles applicable in situations of occupation)**Paragraph (1)*

**Ms. Lehto** (Special Rapporteur) said that, in the first sentence of paragraph (1), the words “related to” should be replaced with the words “applicable in”. In the second sentence, the words “The new category” should be replaced with “This category”, and the word “deviation” should be replaced with “departure”.

*Paragraph (1), as amended, was adopted.*

*Paragraph (2)*

**Ms. Lehto** (Special Rapporteur) said that, in the first sentence of paragraph (2), the word “effective” should be added before the word “authority”.

*Paragraph (2), as amended, was adopted with minor editorial changes.*

*Paragraph (3)*

**Ms. Lehto** (Special Rapporteur) said that, in the second sentence of paragraph (3), the formulation “may extend” should be replaced with the word “extends”.

**Mr. Forteau** said that control over land territory did not automatically give rise to control over maritime areas or airspace. For example, the 2004 disengagement plan under which Israel had withdrawn its troops from the Gaza Strip had provided for continued control of the airspace and adjacent maritime areas by Israel. In the first and second sentences of



paragraph (3), the formulation “may extend” should be retained, or alternatively should be replaced with the formulation “normally extends”.

**Ms. Lehto** (Special Rapporteur) said that none of the comments submitted by States had questioned the principle under discussion. If Mr. Forteau’s proposed amendments were adopted, it would be necessary to align the references in footnote 394 with the new formulation.

**Mr. Saboia** said that he supported the position of the Special Rapporteur.

**Mr. Forteau** said that he had in mind a situation that was not merely hypothetical but that was actually playing out in reality and was very sensitive both legally and politically. He was not convinced that, if a State invaded the territory of another State, the occupation of the coastline would automatically entail the occupation of the adjacent maritime areas. It would therefore be unwise to give that impression in the commentary.

**Sir Michael Wood** said that Mr. Forteau raised a good, albeit obviously very delicate, point. It might therefore be safer to revert to wording based on the first-reading text of that paragraph, on which States had apparently not made any comments. Trying to simplify or clarify the text further might lead the Commission to fall into the kind of trap that Mr. Forteau had warned against.

**Mr. Murphy** said that, as a practical matter, any belligerent party that occupied land territory would also wish to control the airspace and any adjacent territorial seas; that fact tended to support the Special Rapporteur’s approach. The Commission’s aim was not to expand the occupying Power’s authority in some undesirable way, but to ensure that it acted in an appropriate manner and lived up to its obligations, particularly *vis-à-vis* maritime spaces.

**Mr. Jalloh** said that, while he had no difficulties with the text proposed by the Special Rapporteur, he would support the proposal put forward by Sir Michael Wood, which seemed to address the concerns of some members.

**Mr. Hmoud** said that, regarding the first example cited by Mr. Forteau, it was well settled that the Gaza Strip was occupied territory, since Israel had effective control over its entry and exit points. He shared Mr. Forteau’s preference for the formulation “may extend”.

**Ms. Oral** said she agreed that Mr. Forteau had raised an important point.

**The Chair**, speaking as a member of the Commission, said he agreed with Mr. Murphy that the objective was to emphasize the occupying Power’s obligations. Instead of making normative propositions about what happened in the normal course of events, the Commission should focus on that objective, which was spelled out in the last sentence of paragraph (3).

**Ms. Lehto** (Special Rapporteur) said that, in the written comments received on the text, the main thrust of the paragraph had not been questioned, but there had been some comments regarding the extent of the occupying Power’s authority, and the phrase “at least when the whole territory is occupied” had also been criticized. Nevertheless, she agreed that a combination of the first-reading version and the current text would be appropriate so as to cover different situations. She proposed that the first two sentences of the paragraph should read: “Once established in the territory of an occupied State, at least when the whole territory is occupied, the temporary authority of an Occupying Power extends to the adjacent maritime areas under the territorial State’s sovereignty. Similarly, the authority of the Occupying Power may extend to the airspace over the occupied territory and over the territorial sea.”

*Paragraph (3), as amended, was adopted.*

*Paragraph (4)*

*Paragraph (4) was adopted with minor drafting changes.*

*Paragraph (5)*

*Paragraph (5) was adopted.*

*Paragraph (6)*

*Paragraph 6 was adopted with minor drafting changes.*

*Paragraph (7)*

**Ms. Lehto** (Special Rapporteur) proposed that the words “Given the variety of different situations of occupation” should be deleted from the beginning of the first sentence and that the words “having regard to the variety of different situations of occupation” should be added to the end of the sentence. In the fourth sentence, the word “accorded” should be replaced with “afforded”.

**Mr. Murphy** said that he would welcome clarification of what was meant by the statement “the draft principles in Part Two, which cover measures to be taken with a view to enhancing the protection of the environment in the event of an armed conflict, remain relevant whether or not an armed conflict takes place and whether or not it includes an occupation” in the second sentence.

**Ms. Lehto** (Special Rapporteur) said the point being made was that the many obligations and measures referred to in different draft principles, such as the dissemination of the law of armed conflict, the training of military forces, not locating military installations in indigenous lands and territories, and the designation of protected zones, which were usually carried out before a conflict, were relevant to the protection of the environment whether or not an armed conflict actually broke out.

**Mr. Murphy** said that, in his view, the formulation was somewhat confusing. If the intention was to state that pre-conflict principles remained relevant with respect to situations of occupation, it seemed strange to then say “whether or not it includes an occupation”. He therefore proposed that the words “whether or not an armed conflict takes place and whether or not it includes an occupation” should be deleted.

*Paragraph (7), as amended, was adopted.*

*Commentary to the preamble (continued)**Paragraph (5) (continued)*

**Ms. Lehto** (Special Rapporteur) said it had been brought to her attention that on 28 July 2022 the General Assembly had adopted a resolution on the human right to a clean, healthy and sustainable environment. To her mind, that landmark resolution should be referred to in the commentaries. Such a reference would be best placed alongside the existing reference to the earlier Human Rights Council resolution on the same subject. She therefore proposed that a reference to that resolution should be added to footnote 10, which appeared in paragraph (5) of the commentary to the preamble.

**Mr. Murphy** said that the third sentence of paragraph (5) would also have to be updated, as it currently referred only to the Human Rights Council resolution.

**Ms. Lehto** (Special Rapporteur) said that a reference to the General Assembly resolution would also be added to that sentence. She would submit the necessary amendments to the secretariat in writing.

**The Chair** said he took it that the Commission agreed to add those references to the text of paragraph (5) and to footnote 10.

*It was so decided.*

*Commentary to draft principle 10 (Due diligence by business enterprises) (continued)**Paragraph (11) (continued)*

**Ms. Lehto** (Special Rapporteur) said that the same reference to the recently adopted General Assembly resolution would also have to be added to footnote 222, which appeared in paragraph (11), adopted at the previous meeting.

**The Chair** said he took it that the Commission agreed to add the proposed reference.

*It was so decided.*

*Commentary to draft principle 19 (General environmental obligations of an Occupying Power)*

*Paragraph (1)*

**Mr. Forteau** said that, in the second sentence, it was stated that article 43 of the Regulations respecting the Laws and Customs of War on Land (Hague Regulations) required that the occupying Power “restores and maintains public order and security in the occupied territory”. In footnote 407, however, there was a direct quotation from article 43, which used the formulation “re-establish and insure, as far as possible, public order and safety”. He therefore proposed that the second sentence of paragraph (1) should be aligned with the exact wording of article 43 of the Hague Regulations.

**Ms. Lehto** (Special Rapporteur) said that the second half of the second sentence of paragraph (1) should be amended to read: “article 43 of the Hague Regulations, which requires the Occupying Power to re-establish and insure, as far as possible, public order and security in the occupied territory”.

*Paragraph (1), as amended, was adopted.*

*Paragraph (2)*

*Paragraph (2) was adopted with a minor drafting change.*

*Paragraph (3)*

*Paragraph (3) was adopted with minor drafting changes.*

*Paragraph (4)*

*Paragraph (4) was adopted with a minor drafting change.*

*Paragraph (5)*

**Ms. Lehto** (Special Rapporteur) said that, at the beginning of the second sentence, the words “also” and “more generally” should be deleted. At the end of the fourth sentence, the words “does not have a specific content” should be replaced with “has a general content”. In footnote 420, the reference to the definition of “environmental considerations” in the *Dictionary of Military and Associated Terms* had been updated.

*Paragraph (5), as amended, was adopted.*

*Paragraph (6)*

**Ms. Lehto** (Special Rapporteur) said that further examples concerning the right to food had been added to footnote 428.

*Paragraph (6), as amended, was adopted.*

*Paragraph (7)*

**Mr. Murphy** proposed that footnote 430 should refer to both paragraph (2) and paragraph (6).

*Paragraph (7), as amended, was adopted.*

*Paragraph (8)*

**Mr. Forteau** said that, in the context of the commentary to draft principle 19, which concerned the protection of the environment and therefore the health and well-being of all human beings, the inclusion of the phrase “excluding nationals of the Occupying Power” was perhaps inappropriate and could be construed as being at odds with the humanitarian goal of the draft principle. While he understood the meaning of that phrase in its original context, it should perhaps be removed from paragraph (8).

**Sir Michael Wood** said that, while he shared Mr. Forteau's concern, paragraph (8) addressed a sensitive matter. It was perhaps best to leave the original language unchanged.

*Paragraph (8) was adopted.*

*Paragraph (9)*

**Ms. Lehto** (Special Rapporteur) said that the words "so far as possible" should be inserted at the end of the final sentence. With that amendment, the sentence would read: "These provisions embody the so-called conservationist principle, which underlines the temporary nature of occupation and the need for maintaining the *status quo ante* so far as possible."

**Mr. Forteau** said that the standard set by the phrase "so far as possible" was much more flexible than that set by the phrase "unless absolutely prevented", which was used in article 43 of the Hague Regulations, cited in the penultimate sentence. He wondered whether the Special Rapporteur could provide references to support her proposal.

**Ms. Lehto** (Special Rapporteur) said that the conservationist principle was not codified and it would therefore be inappropriate to state that the principle imposed the "unless absolutely prevented" standard. She was willing to withdraw her proposal if Commission members found it to be problematic.

**Mr. Hmoud** said that he preferred the original language.

*Paragraph (9) was adopted.*

*Paragraph (10)*

*Paragraph (10) was adopted.*

*Paragraph (11)*

**Ms. Lehto** (Special Rapporteur) said that the last sentence of paragraph (11) had been found to be unclear. She proposed that it should be deleted and replaced with a new sentence that more clearly explained the rationale for including the population in decision-making. The new sentence would read: "As part of the maintenance of public order and civil life of the occupied territory, which requires taking care of the welfare of the occupied population, such proactive action should entail engagement of the population of the occupied territory in decision-making." References to relevant materials related to public participation in environmental matters would be added to footnote 447.

*Paragraph (11), as amended, was adopted.*

*Paragraph (12)*

*Paragraph (12) was adopted.*

*Commentary to draft principle 20 (Sustainable use of natural resources)*

*Paragraph (1)*

*Paragraph (1) was adopted.*

*Paragraph (2)*

*Paragraph (2) was adopted with minor drafting changes.*

*Paragraph (3)*

*Paragraph (3) was adopted.*

*Paragraph (4)*

*Paragraph (4) was adopted with minor drafting changes.*

*Paragraphs (5) and (6)*

*Paragraphs (5) and (6) were adopted.*

*Paragraph (7)*

*Paragraph (7) was adopted with minor drafting changes.*

*Paragraphs (8) and (9)*

*Paragraphs (8) and (9) were adopted.*

*Commentary to draft principle 21 (Prevention of transboundary harm)**Paragraph (1)*

**Ms. Lehto** (Special Rapporteur) said that, in order to reflect the nature of the obligation with regard to significant transboundary harm more accurately, the phrase “has an obligation not to cause significant harm” in the first sentence should be amended to read “has an obligation to ensure that significant harm is not caused”. In addition, a reference to the fourth edition of *Birnie, Boyle, and Redgwell’s International Law and the Environment* should be added to footnote 466.

**Ms. Oral** said that the term “significant harm” was not used in the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*, principle 2 of the Rio Declaration on Environment and Development or principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), which referred to a more general principle not to cause harm or damage. For the paragraph to be factually correct, the term “significant harm” should be replaced with the term “harm”.

**Mr. Murphy** said that the term “significant harm” was used in draft principle 21, which could not be rewritten in the commentary. Ms. Oral’s concern might be met by an amendment to footnote 466, which could be redrafted to state that “the issue of transboundary harm has been addressed in principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration”.

**Ms. Oral**, supported by **Mr. Jalloh**, said that one option would be to amend the first sentence of paragraph (1) to read: “Draft principle 21 reflects the general principle that each State has an obligation to ensure that harm is not caused to the environment of other States or to areas beyond national jurisdiction.” That amendment would preserve the integrity of the text while ensuring that it was factually correct. The following paragraphs went on to address the use of the word “significant”.

**Mr. Forteau** proposed that the second sentence of footnote 466 should be amended to read: “The principle is addressed in broader terms in principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration.”

**Ms. Lehto** (Special Rapporteur) said that it was wrong to say that the Court’s advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* did not support the language used in draft principle 21. In that advisory opinion, the Court referred to the broader principle that underpinned draft principle 21. Nonetheless, she supported Ms. Oral’s proposed wording. The following paragraphs addressed the threshold of “significant” harm and provided references to relevant supporting materials.

**Mr. Murphy** said that, in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court did not refer to an obligation to ensure that no harm was caused; rather, it referred to the obligation of States to “respect the environment of other States”. For the sake of clarity, the first sentence of paragraph (1) should essentially reflect what was stated in draft principle 21, and the second sentence should then be amended to read: “Draft principle 21 draws support from the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, in which the Court stated that the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States and of

areas beyond national control constitutes ‘part of the corpus of international law relating to the environment’.”

**Sir Michael Wood** said that he supported the amended wording of the first sentence of paragraph (1) as proposed by the Special Rapporteur. Mr. Forteau’s suggested amendment to footnote 466 was a good one. The proposal to delete the word “significant” risked reopening the substantive debate on the wording of the draft principle, which would not be desirable.

**Ms. Lehto** (Special Rapporteur) said that she was willing to support Mr. Murphy’s proposal that the exact wording of paragraph 29 of the Court’s advisory opinion should be reproduced in the second sentence of the paragraph. She was not convinced, however, that the current language distorted the wording of the advisory opinion.

**Sir Michael Wood** said that any wording revised along the lines suggested by the Special Rapporteur should be clearly presented to the Commission in writing.

**The Chair** said he took it that the Commission wished to leave paragraph (1) in abeyance to allow for informal consultations to be held.

*Paragraph (1) was left in abeyance.*

*Paragraph (2)*

**Ms. Lehto** (Special Rapporteur) said that she wished to propose several amendments to paragraph (2). In the first sentence, the phrase “obligation not to cause” should be replaced with the phrase “obligation to prevent” and the words “sea areas” should be deleted. In the second sentence, the reference to the United Nations Convention on the Law of the Sea should be replaced with a reference to the United Nations Framework Convention on Climate Change. In footnote 467, references to the Vienna Convention for the Protection of the Ozone Layer, the Convention on the Regulation of Antarctic Mineral Resource Activities and the Convention on Environmental Impact Assessment in a Transboundary Context should be inserted.

*Paragraph (2), as amended, was adopted.*

*Paragraphs (3) and (4)*

*Paragraphs (3) and (4) were adopted with minor drafting changes.*

*Paragraph (5)*

*Paragraph (5) was adopted.*

*Paragraph (6)*

**Ms. Lehto** (Special Rapporteur) said that she wished to propose several amendments to paragraph (6) in order to clarify the status of the “significant harm” threshold. The first sentence, which currently began with the words “The ‘no harm’ or due diligence principle in customary international environmental law only applies to harm above a certain threshold, most often indicated as ‘significant harm’”, should be amended to read: “Draft principle 21 reflects the obligation of prevention in customary international environmental law, which only applies to harm above a certain threshold, most often indicated as ‘significant harm’.” If the amendment was agreed to, additional references to supporting materials would be inserted in footnote 477 and language from that footnote would be incorporated into the body of the paragraph, creating a new second sentence that would read: “At the same time, certain treaties incorporate the prevention obligation without the threshold of significant harm.” A new footnote, with references to article 3 of the Convention on Biological Diversity and article 194 (2) of the United Nations Convention on the Law of the Sea, would be inserted at the end of that sentence, together with a quotation from *The South China Sea Arbitration (the Republic of the Philippines v. the People’s Republic of China)*.

**The Chair** said that the Commission would resume its consideration of paragraph (6) at the following meeting.

*The meeting rose at 1 p.m.*