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Enhancing Environmental Protection in Relation to Armed Conflict: An Assessment of the ILC Draft Principles

BY DANIËLLA DAM-DE JONG AND BRITTA SJÖSTEDT*

Abstract: This article examines the outcome of the International Law Commission's (ILC) Study on the Protection of the Environment in relation to Armed Conflict as adopted on first reading. The twenty-eight draft principles, adopted by the ILC in July 2019, aim to enhance environmental protection before, during, and after armed conflict. This article evaluates the strengths and weaknesses of the draft principles and highlights principal innovations of the draft principles. Then this article concludes that the ILC study makes important substantive contributions to enhancing environmental protection, but it also misses opportunities to advance the law in this field. The principal strength of the study is that it brings in many different aspects relating to the environment and armed conflicts under one framework, including legal questions that were hitherto neglected. Its weaknesses relate most notably to the protection of the environment during armed conflict. This article argues that, even though there was limited space for the ILC to develop the applicable law in this field, it nevertheless could have been more ambitious.

I. INTRODUCTION

On July 8, 2019, the International Law Commission (ILC) provisionally adopted, on first reading, a set of twenty-eight draft principles on the protection of the environment in relation to armed conflict.¹ This milestone marks the conclusion of the impressive study conducted by ILC

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1. Int'l Law Comm'n, Rep. on the Work of Its Seventy-First Session, U.N. Doc. A/74/10 ¶ 17, at 5 (2019) [hereinafter *A/74/10*].

Special Rapporteurs Marie Jacobsson (Sweden) and Marja Lehto (Finland) on this topic over the past several years.² It is now up to States in the United Nations (UN) General Assembly's Sixth Committee, international organizations, and others to provide their views on the principles, which will inform the second reading of the principles planned for 2022.

The adoption of the draft principles is timely. Globally, environmental security is high on the international agenda. Recent incidents in northern Iraq have demonstrated the ability for warfare to cause extensive and sometimes irreversible environmental damage.³ Given the threats to ecological integrity resulting from climate change and loss of biodiversity, risks associated with the environment for the (renewed) outbreak of armed conflicts are only growing.⁴ In the past five years, the UN Security Council has held a record number of meetings on environmental security, including on the protection of the environment during armed conflict, water security, climate-related security risks and natural resources as root causes of armed conflict.⁵ Furthermore, the Assembly of UN Environment (or UN Environment Programme (UNEP)) adopted two resolutions addressing environmental protections in conflict situations in 2016 and

2. See Marie G. Jacobsson (Special Rapporteur), *Preliminary Report on the Protection of the Environment in Relation to Armed Conflict*, Int'l Law Comm'n, U.N. Doc. A/CN.4/674 (May 30, 2014) [hereinafter A/CN.4/674]; see also Marie G. Jacobsson (Special Rapporteur), *Second Report on the Protection of the Environment in Relation to Armed Conflicts*, Int'l Law Comm'n, U.N. Doc. A/CN.4/685 (May 28, 2015) [hereinafter A/CN.4/685]; see also Marie G. Jacobsson (Special Rapporteur), *Third Report on the Protection of the Environment in Relation to Armed Conflicts*, Int'l Law Comm'n, U.N. Doc. A/CN.4/700 (June 3, 2016) [hereinafter A/CN.4/700]; see also Marja Lehto (Special Rapporteur), *First Report on the Protection of the Environment in Relation to Armed Conflicts*, Int'l Law Comm'n, U.N. Doc. A/CN.4/720 (Apr. 30, 2018) [hereinafter A/CN.4/720]; see also Marja Lehto (Special Rapporteur), *Second Report on the Protection of the Environment in Relation to Armed Conflicts*, Int'l Law Comm'n, U.N. Doc. A/CN.4/728 (Mar. 27, 2019) [hereinafter A/CN.4/728].

3. See Wim Zwijnenburg & Foeke Postma, *Living Under a Black Sky – Conflict Pollution and Health Concerns in Iraq*, PAX, Dec. 5, 2017, <https://www.paxforpeace.nl/publications/all-publications/living-under-a-black-sky>; see also U.N. Env't Programme [UNEP], *Environmental Issues in Areas Retaken from ISIL Mosul, Iraq: Rapid Scoping Mission July-Aug. 2017 – Technical Note*, (2017), https://www.wedocs.unep.org/bitstream/handle/20.500.11822/22434/environmental_issues_Isil_Iraq.pdf?sequence=1&isAllowed=y.

4. U.N. SCOR, 73d Sess., 8372nd mtg. at 2, U.N. Doc. S/PV.8372 (Oct. 16, 2018) (statement by U.N. Secretary-General, António Guterres); see also Inst. for Econ. & Peace, *Global Peace Index 2019: Measuring Peace in a Complex World*, VISION OF HUMANITY (2019), <https://www.visionofhumanity.org/wpcontent/uploads/2020/10/GPI-2019-Briefingweb-2.pdf>.

5. See, e.g., U.N. SCOR, 71st Sess., 7818th mtg., U.N. Doc. S/PV.7818 (Nov. 22, 2016); see also, e.g., U.N. SCOR, 73d Sess., 8307th mtg., U.N. Doc. S/PV.8307 (July 11, 2018); see also, e.g., S/PV.8372, *supra* note 4; see also, e.g., *Protection of the Environment During Armed Conflict - Security Council Arria-formula meeting*, UN WEB TV (Nov. 6, 2018), <http://www.webtv.un.org/watch/protection-of-the-environment-during-armed-conflict-security-council-arria-formula-meeting/5859032430001/>; see also, e.g., U.N. SCOR, 76d Sess., U.N. Doc. S/2020/929 (Sept. 23, 2020).

2017, respectively, the UN Department of Field Support (DFS) adopted a strategy on environmental protection and management for UN peace-keeping operations in November 2017 and the International Committee of the Red Cross (ICRC) has recently revised its guidelines on the protection of the environment during armed conflict.⁶

The ILC draft principles have the potential to bring coherence to and further develop and clarify the applicable law in this area, based on the ILC's dual mandate to promote "the progressive development of international law and its codification."⁷ With the completion of the ILC study and the provisional adoption of the draft principles, the time has come to take stock of their contribution to their stated purpose of "enhancing the protection of the environment in relation to armed conflict, including through preventive measures for minimizing damage to the environment during armed conflict and through remedial measures."⁸ The objective of this article is to critically assess the strengths and weaknesses of the draft principles and to highlight their principal innovations.

II. CONTEXT, PURPOSE, AND APPROACH

The topic of Protection of the Environment During Armed Conflict was included in the ILC's programme of work at the instigation of a 2009 report prepared by the Assembly of UN Environment and the Environmental Law Institute (ELI) on environmental protection during armed conflict.⁹ This report, which built upon an important body of international legal scholarship,¹⁰ concluded that the international legal framework for the protection of the environment during armed conflict presents several gaps and deficiencies, largely because the relevant rules were developed

6. See, e.g., U.N. Env't Assembly Res. 2/15 (Aug. 4, 2016); see also, e.g., U.N. Env't Assembly Res. 3/1 (Jan. 30, 2018); see also, e.g., U.N. Field Support, DFS Environment Strategy, Executive Summary, (Nov. 2017) https://www.peacekeeping.un.org/sites/default/files/171116_dfs_exec_summary_environment_0.pdf; see also ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict* (2020), <https://www.icrc.org/en/document/guidelines-protection-natural-environment-armed-conflict-rules-and-recommendations-relating>.

7. G.A. Res. 174 (II), art. 1 (Nov. 21, 1947) (amended Nov. 18, 1981). On the ILC's mandate and contribution to international law, see Charles Jalloh, *Introduction*, 13 FIU L. Rev. 975(2019).

8. A/74/10, *supra* note 1, at 216.

9. U.N. Env't Programme [UNEP], *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law* (2009), https://www.wedocs.unep.org/bitstream/handle/20.500.11822/7813/-Protecting%20the%20Environment%20During%20Armed%20Conflict_An%20Inventory%20and%20Analysis%20of%20International%20Law-2009891.pdf?sequence=3&isAllowed=y.

10. See e.g., Yoram Dinstein, *Protection of the Environment in International Armed Conflict*, 5 MAX PLANCK U.N.Y.B. 523 (2001); KAREN HULME, *WAR TORN ENVIRONMENT: INTERPRETING THE LEGAL THRESHOLD* (2004).

between the 1900s and 1970s.¹¹ This was an era in which international environmental law (and the science underlying it) was still in its early stages of development and the law of armed conflict predominantly regulated warfare between (instead of within) States. The report appealed directly to the ILC to “examine the existing international law for protecting the environment during armed conflict and recommend how it can be clarified, codified and expanded.”¹² The ILC was considered to be in a unique position to undertake such a study. First, because its general expertise enables it to undertake a comprehensive study into the applicable international law, going beyond the law of armed conflict proper. Second, because the ILC’s practice of legal codification and development is directly connected to the political process, in the sense that the ILC’s work and outcomes are submitted to and discussed within the UN General Assembly.

The report’s appeal to the ILC was welcomed by ILC member Jacobsson, who suggested the topic be included in the ILC’s long-term programme of work. One of the study’s principal aims would be to “[c]larify the applicability of and the relationship between International Humanitarian Law, International Criminal Law, International Environmental Law and Human Rights Law.”¹³ In this way, the study would seek to further develop the findings of the ILC’s work on the Effect of Armed Conflict on Treaties, which had formulated a general presumption that environmental and human rights treaties continue to apply during armed conflict.¹⁴ A second principal aim of the new study would be to develop proposals “to achieve a uniform and coherent system” for the protection of the environment in relation to armed conflict,¹⁵ thereby building on the ILC’s monumental study on addressing fragmentation in international law.¹⁶

In light of these aims, a temporal approach, examining the three phases of before, during, and after armed conflict, was preferred over a thematic approach to the topic.¹⁷ This methodological choice is also reflected in the title of the topic, which refers to environmental protection

11. Protection of the Environment During in International Armed Conflict, *supra* note 10, at 51-52.

12. *Id.* at 53.

13. Int’l Law Comm’n, Rep. on the Work of Its Sixty-Third Session, U.N. Doc. A/66/10, annex E, at 358 (2011) [hereinafter A/66/10].

14. *Id.* at 357.

15. *Id.* at 358.

16. Martti Koskenniemi (Chairman of the Study Grp.), *Fragmentation of the Int’l Law Difficulties Arising from the Diversification and Expansion of Int’l Law*, Int’l Law Comm’n, U.N. Doc. A/CN.4/L.682 & Corr. 1 (2006).

17. A/CN.4/674, *supra* note 2, ¶ 58.

“in relation” to armed conflict instead of “during” armed conflict, thereby departing from the original proposal of the UNEP 2009 report. This approach was overall well received by the other ILC members,¹⁸ and States in the UN General Assembly’s Sixth Committee.¹⁹ Yet, two main issues were raised. The first issue concerned the study’s proposed focus on the “before” and “after” phases of armed conflict (i.e., obligations of relevance to a potential armed conflict as well as post-conflict measures). Some members of the ILC and multiple States felt that the focus should instead be shifted to the “during” phase.²⁰ However, such a shift would present the risk that the ILC would be forced “to walk on a trodden path, thus questioning the added value [sic.] that the topic could bring.”²¹ The second major concern related to the feasibility of the temporal approach. ILC members cautioned that, due to the overlap of the various phases of an armed conflict, a strict division of the draft principles into distinct phases would risk being artificial.²² This criticism has proven justified as far as the pre-conflict phase is concerned. On first reading, a separate section discussing principles that apply exclusively to this phase is missing. Nonetheless, notwithstanding these limitations, it can be argued that a major strength of the temporal approach is that it facilitates an integrative and unified approach to the topic, which may not have been achieved if a thematic approach had been employed.

A final choice the ILC had to make regarded what form the study would be presented in. In light of the Commission’s broad mandate, several options could have been envisaged for the ultimate form and presentation of the study, including draft articles as a first step towards a new treaty. The Commission, however, opted for draft principles. Several considerations inspired this choice, including the observation that there were stark differences in normative value between the applicable rules. The Commission considered principles to be more appropriate to capture these differences, providing some principles that reflect customary international law and others that set out best practices, often formulated as recommendations.²³ The decision to opt for draft principles arguably reduces the potential impact of the study on State practice, as States may more easily dismiss the principles as being non-binding. It is, however,

18. Int’l Law Comm’n, Rep. on the Work of Its Sixty-Fifth Session, U.N. Doc. A/68/10 ¶ 137 (2013) [hereinafter A/68/10].

19. A/CN.4/674, *supra* note 2, ¶ 14.

20. A/68/10, *supra* note 18, ¶ 137.

21. Int’l Law Comm’n, 70th Sess., 3426th mtg. at 4, U.N. Doc. A/CN.4/SR.3426 (Aug. 8, 2018) (statement by Ambassador Marja Lehto).

22. A/68/10, *supra* note 18, ¶ 137.

23. *Id.* ¶ 79; A/CN.4/674, *supra* note 2, ¶ 89.

also a sign of the times, reflecting a development of the ILC in favor of the codification and progressive development of customary norms over treaty-making.²⁴

III. OVERVIEW OF THE DRAFT PRINCIPLES

The draft principles have been divided into five parts. Part One sets out the scope of the principles and their purpose.²⁵ Part Two contains general principles that pertain to the entire conflict cycle, including principles that are particularly relevant for the prevention phase (phase I).²⁶ Part Three contains principles that apply during conflict (phase II),²⁷ with specialized principles for situations of occupation in Part Four.²⁸ Finally, Part Five formulates principles for the post-conflict phase (phase III).²⁹

A. Part One: Introduction

Principle 1 sets out the scope of application of the draft principles, namely “the protection of the environment before, during or after an armed conflict,” without including definitions of environment nor of armed conflict.³⁰ A principle explaining key terms was suggested but later removed due to disagreements among ILC members on whether such an explanation was necessary.³¹ Also, the ILC has yet to decide whether it will use the term “natural environment” or “environment” in the Part Three provisions applicable to the “during” phase. This appeared to be an important choice for the ILC. Employing the term “natural environment” would be consistent with the law of armed conflict as *lex specialis* during armed conflict, but it could give the impression that other fields of international law are not relevant to the “during” phase.³² Employing the term “environment” instead would be more in line with terminology in other fields of international law, including international environmental law, but it could be interpreted as extending protections under the law of armed conflict to the man-made environment, thereby restricting the conduct of

24. Laurence R. Helfer & Timothy Meyer, *The Evolution of Codification: A Principal-Agent Theory of the International Law Commission's Influence*, in *CUSTOM'S FUTURE: INT'L LAW IN A CHANGING WORLD* 305 (Curtis A. Bradley ed., 2016).

25. A/CN.4/685, *supra* note 2, at 72.

26. A/CN.4/685, *supra* note 2, ¶ 18, at annex I.

27. A/CN.4/685, *supra* note 2, ¶ 19, at annex I; A/CN.4/728, *supra* note 2, at annex I.

28. A/CN.4/720, *supra* note 2, ¶ 99.

29. A/CN.4/674, *supra* note 2, ¶ 59; A/CN.4/700, *supra* note 2, at annex I.

30. A/CN.4/674, *supra* note 2, ¶ 59.

31. A/CN.4/685, *supra* note 2, ¶ 10.

32. A/74/10, *supra* note 1, at 215.

warfare beyond what may be reasonably expected of belligerents. Arguably, this discussion on terminology is mostly of an academic character, as the use of the term “environment” in international environmental law has never resulted in confusion regarding the object of protection, notwithstanding the absence of a definition.

B. Principles of General Application

Principle 3(1) affirms the general obligation under international law for States to take measures within their domestic systems to protect the environment in relation to armed conflicts.³³ This broadly formulated Principle refers to “legislative, administrative, and judicial and other measures to enhance the protection of the environment.”³⁴ Some examples of such obligations are included in the commentary.³⁵ For instance, States are required to: (1) disseminate the content of the law on armed conflict to armed forces as well to the civilian population;³⁶ (2) perform a weapons review to ensure that the employment of new weapons does not violate any rules under international law, including human rights law and international environmental law;³⁷ and (3) record the laying of mines.³⁸ The second paragraph of Principle 3 invites States to take voluntary measures to enhance environmental protection in relation to armed conflict. This paragraph highlights the wide-ranging existing practices States and international organizations undertake that are complementary to their legal obligations to protect the environment in armed conflicts.³⁹

Principle 4 addresses the possibility of designating areas of major ecological and cultural importance as protected zones in case of armed conflict. It encourages States to enter agreements regarding such zones or otherwise designate such areas (in peacetime or during armed conflict).⁴⁰ Meanwhile, the corresponding Principle 17, situated in Part Three (principles applicable during armed conflict), obliges States to protect these

33. A/74/10, *supra* note 1, at 217.

34. *Id.*

35. *Id.*

36. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 83, June 8, 1977, 1125 U.N.T.S. 3.

37. *Id.* at art. 36.

38. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, art. 9, as amended on 3 May 1996 (Protocol II, as amended on 3 May 1996) annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 2048 U.N.T.S. 93 [hereinafter Protocol II to the CCW].

39. A/74/10, *supra* note 1, at 220-21.

40. *Id.* at 221.

zones against attacks, unless they contain a military objective.⁴¹ While the designation of protected zones can be done at any point in time in accordance with Principle 4, Principle 17 only applies when there is an expressed agreement on the designation.⁴² The term “agreement” should be “understood in its broadest sense as including mutual as well as unilateral declarations accepted by the other party, treaties and other types of agreements, as well as agreements with non-State actors.”⁴³ Hence, despite the explicit reference to States in the draft principles, they also encompass agreements concluded by non-State actors.⁴⁴

Principles 4 and 17 build on protection regimes under the law of armed conflict, such as the protection of cultural property,⁴⁵ hospital and safety zones,⁴⁶ neutralized zones,⁴⁷ and demilitarized zones,⁴⁸ on the one hand and existing practices under multilateral environmental agreements on the other. Within international environmental law, the designation of protected areas is a commonly used tool to safeguard *inter alia* important ecosystems, endangered species, or cultural landscapes. The commentary refers to the World Heritage Convention protecting cultural and natural sites, the Convention on Biological Diversity providing for *in situ* conservation of biodiversity, and the Ramsar Convention protecting wetlands of international importance as relevant examples.⁴⁹

Unfortunately, neither the draft principles nor the commentaries clarify whether the relevant environmental treaties remain applicable during armed conflicts. This raises the question as to whether the designation of sites pursuant to these treaties creates obligations for States to protect them in times of armed conflict or whether Principle 17 only applies to areas that have been designated as protected zones under an expressed agreement by the Parties to the armed conflict. In other words, even if the State(s) in question is/are obligated to protect particular areas pursuant to

41. *Id.* at 260.

42. *Id.*

43. *Id.*

44. *Id.*

45. Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, *opened for signature* May 14, 1954, 249 U.N.T.S. 215, 240.

46. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 14, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention No. IV]; JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, [1: RULES] CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 119-20 (reprt. 2009) (2005).

47. Geneva Convention No. IV, *supra* note 46, at art. 15; HENCKAERTS & DOSWALD-BECK, *supra* note 46, at 119-20.

48. Protocol I, *supra* note 36, at art. 60; HENCKAERTS & DOSWALD-BECK, *supra* note 46, at 120-21.

49. A/74/10, *supra* note 1, at 221, 223.

an international treaty, such as the World Heritage Convention, the Principle is silent on the question of whether such obligations extend to situations of armed conflict. The ILC missed an opportunity here to clarify and build further synergies between the law of armed conflict and international environmental law. This is especially unfortunate as the presumption formulated in the Commission's previous study on the Effects of Armed Conflict on Treaties regarding the continued application of environmental treaties was in need of further clarification.⁵⁰

Based on the logic of the law of armed conflict, a protected zone that contains a military objective will lose its protection against attacks. According to the commentary, "the reference to the word 'contain' [...] is intended to denote that it may be the entire zone or only parts thereof" that lose the protection.⁵¹ Furthermore, the commentary states that "the conditional protection is an attempt to strike a balance between military, humanitarian and environmental concerns."⁵² However, it does not explain how a military objective located in the zone affects the protection. From context, the protection of these zones appears to follow the approach in Article 60 in Protocol I regulating demilitarized zones, which revokes the protection if the protected area is used for military purposes.⁵³ In such cases, only the general protection under the law of armed conflict will apply. Principles 4 and 17, therefore, reflect the special protective regimes under the law of armed conflict based on area-defined protection of other special objects. Due to this fallback to the law of armed conflict and because of their failure to resolve the existing uncertainty related to the obligations of States under relevant environmental agreements, the normative contribution of these Principles is questionable.

50. Criticism with respect to the lack of guidance provided by the ILC on the applicability of international environmental treaty obligations in situations of armed conflict is reflected in the statements of various State delegations in the Sixth Committee and by UN Environment. *See e.g.*, Italy, U.N. GAOR, 74th Sess., 28th meeting, ¶ 24, U.N. Doc. A/C.6/74/SR.28 (Nov. 29, 2019); United Nations Environment Programme (UNEP), Comments On International Law Commission (ILC) Draft Principles On Protection Of The Environment In Relation To Armed Conflicts (Nov. 23, 2020), https://www.legal.un.org/ilc/sessions/73/pdfs/english/poe_unep.pdf. *See* Britta Sjøstedt, *The Role Of Multilateral Environmental Agreements: A Reconciliatory Approach To Environmental Protection In Armed Conflict* (2020) (containing a thorough study of the role of MEAs in providing protection to the environment in situations of armed conflict).

51. A/74/10, *supra* note 1, at 260.

52. *Id.*

53. *Id.* The original proposal used the wording "demilitarized zones;" however, during the drafting process this wording was replaced with 'protected zones' to differ from "demilitarized zones." *Id.* at 221. According to the commentary however, demilitarized zones have a special meaning within law of armed conflict as they "are established by the parties to a conflict and imply that the parties are prohibited from extending their military operations to that zone if such extension is contrary to the terms of their agreement." *Id.*

Principle 5, providing specifically for the protection of indigenous peoples' environment in relation to armed conflict, is closely connected to Principles 4 and 17. The ancestral lands of indigenous peoples are often both of major ecological and cultural importance. In the commentary to Principle 4, it is noted how certain "protected area[s] may also serve to conserve the particular culture, knowledge and way of life of the indigenous populations living inside the area concerned."⁵⁴ References are made to indigenous peoples' special relationship with their environment, which has a fundamental importance to their survival.⁵⁵ It is generally recognized that States have obligations under international law to protect the lands of indigenous peoples.⁵⁶ This Principle not only reaffirms these obligations, but it recognizes the effects of armed conflict on indigenous peoples' lands. The relevance of Principle 5 for this topic was contested by several members of the ILC and States.⁵⁷ It is for this reason that the inclusion of the Principle, notwithstanding its recommendatory nature, is a major accomplishment.

Principle 6 addresses agreements concluded between States and international organizations concerning the presence of military forces in relation to armed conflict. It is formulated as a recommendation directed to States to include environmental provisions in such agreements. As stated in the commentary, the purpose of the Principle "is to reflect recent developments whereby States and international organizations have begun addressing matters relating to environmental protection in agreements concerning the presence of military forces concluded with host States."⁵⁸

Principle 7 refers to binding obligations of States and international organizations when involved in peace operations in order to limit their environmental impact. Principle 7 has a broad scope covering any type of peace operation and not necessarily only military forces, as is the case with Principle 6. The commentary to this Principle expressly refers to practice of the UN, European Union (EU), and North Atlantic Treaty Organization (NATO) and the environmental policies, guidelines, and recommendations adopted by these organizations.⁵⁹ Thus, given that the practice supporting this Principle is of the non-binding nature, the formu-

54. *Id.* at 223.

55. *Id.*

56. *See, e.g.*, G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples, at art. 26 (Oct. 2, 2007); Convention (No. 169) Concerning the Indigenous and Tribal Peoples in Independent Countries, art. 4, June 27, 1989, 1650 U.N.T.S. [hereinafter Convention 169].

57. A/CN.4/720, *supra* note 2, ¶ 9.

58. A/74/10, *supra* note 1, at 227.

59. *Id.* at 231.

lation of an obligation is significant and a clear example of the progressive development of the law. As the discussion on this Principle and its relevance for the topic in the Sixth Committee was inconclusive, this Principle will most likely receive attention upon second reading.⁶⁰

Principle 8 deals with the environmental effects of human displacement, which are often of a significant scale. The Principle is formulated as a recommendation for States as well as for international organizations to take measures to prevent and mitigate the environmental adverse effects of displacement while providing relief and assistance. The commentary refers to efforts already being made by aid organizations such as the UN High Commissioner for Refugees (UNHCR) to minimize the environmental impacts of displacement camps.⁶¹ The reference to providing relief connects to the previous work of the ILC on the Protection of Persons in the Event of Disasters, although the adopted draft articles on this topic lack the express consideration of the environment.⁶²

The closing draft principles of this part address various issues of international responsibility for environmental harm. Principle 9 sets out the basic rule that States are responsible for internationally wrongful acts that cause damage to the environment, in accordance with the ILC articles on the Responsibility of States for Internationally Wrongful Acts. It is pertinent to note that in this context responsibility can be shared by a plurality of States, for example when military coalitions have engaged in unlawful acts resulting in environmental damage. Importantly, the Principle does not cover environmental damage resulting from lawful military activities, as these would not constitute breaches of international obligations.⁶³ Principle 9 further determines that States are under an obligation to make full reparation for environmental damage resulting from internationally wrongful acts and - most significantly - that this includes reparation for “damage to the environment in and of itself.”⁶⁴ The Principle

60. A/CN.4/720, *supra* note 2, ¶ 11 (referenced as Principle 8 in Lehto’s draft principles).

61. *See, e.g.*, U.N. High Comm’r. for Refugees [UNHCR], UNHCR Environmental Guidelines (June 1996), <https://www.refworld.org/docid/42a01c9d4.html> [hereinafter UNHCR Guidelines]. It must be noted that the Principle seems to focus on environmental degradation around displacement camps, while damage to the environment is also often caused while people are on the move. Some delegations at the Sixth Committee have therefore proposed to expand the geographical scope of the Principle to include areas that displaced persons transit while looking for safety. *See* Ukraine, U.N. GAOR 74th Sess., 26th meeting ¶ 125, U.N. Doc. A/C.6/74/SR.26 (Nov. 18, 2019); Lebanon, U.N. GAOR 74th Sess., 30th meeting ¶ 105, U.N. Doc. A/C.6/74/SR.30 (Dec. 9, 2019).

62. *See* Int’l Law Comm’n, Rep. on the Work of Its Sixty-Eighth Session, U.N. Doc. A/71/10 ¶ 48 (Sept. 19, 2016).

63. A/CN.4/728, *supra* note 2, ¶ 116. These questions are addressed in Principle 26 on relief and assistance, included in the section that addresses post-conflict. A/74/10, *supra* note 1, at 289.

64. A/74/10, *supra* note 1, at 235.

thereby clearly follows the groundbreaking work of the UN Compensation Commission on environmental liability and the 2018 judgment by the International Court of Justice concerning *Certain Activities Carried Out by Nicaragua in the Border Area*, which adopted an ecosystem approach with respect to compensation for environmental harm.⁶⁵

Principles 10 and 11 address the responsibilities of States to regulate their corporations and to hold them liable for their wrongdoings. Principle 10 addresses States' responsibility to adopt appropriate legislation and to take other measures aimed at ensuring due diligence for corporations and other business entities operating in or from their territories with respect to the protection of the environment in conflict and post-conflict situations. The Principle further stipulates that "such measures include those aimed at ensuring that natural resources are purchased or obtained in an environmentally sustainable manner."⁶⁶ Even though phrased as a recommendation, the inclusion of this Principle is momentous, as it introduces a distinct responsibility for home States to regulate their corporations abroad for the purpose of protecting the environment and, more specifically, for ensuring sustainable supply chains. It thereby aligns with novel developments at the international and domestic levels establishing (both hard and soft) due diligence obligations for corporations.⁶⁷

Principle 11 addresses corporate liability. It formulates a threefold recommendation for States. First, States "should take appropriate legislative and other measures aimed at ensuring that corporations [...] operating in or from their territories can be held liable for harm caused by them to the environment" in conflict and post-conflict situations.⁶⁸ Second, and groundbreaking, the Principle encourages States to pierce the corporate veil by introducing liability for subsidiaries acting under a corporation's

65. *Certain Activities Carried Out by Nicaragua in the Border Area*, (Costa Rica v. Nicar.), Judgment, 2018 I.C.J. Rep. 15, ¶¶ 41-43 (Feb. 2). See GULF WAR REPARATIONS AND THE UN COMPENSATION COMMISSION: ENVIRONMENTAL LIABILITY (Cymie Payne & Peter Sand eds., 2011) (discussing the UN Compensation Commission's work).

66. A/74/10, *supra* note 1, at 238.

67. See e.g., U.N. Off. Of the High Comm'r for Hum. Rts. [OHCHR], Guiding Principles on Business and Human Rights (2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf; see also, e.g., ORGANISATION FOR ECON. COOP. AND DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), <https://www.oecd.org/corporate/mne/1922428.pdf>; see also, e.g., The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); see also, e.g., Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017, 2017 O.J. (L 130/1) (laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas).

68. A/74/10, *supra* note 1, at 243.

de facto control.⁶⁹ Lastly, the Principle determines that “States should provide adequate and effective procedures and remedies, in particular for the victims of such harm.”⁷⁰

Compared to the original proposal submitted by the Special Rapporteur, the Principle has been rephrased in some respects to meet the concerns of ILC members regarding the exercise of extraterritorial jurisdiction by home States and its implications for the policy space of host States. These changes were meant to emphasize on the one hand the non-hortatory character of the Principle and on the other to avoid providing home States a foundation for an aggressive exercise of extraterritorial jurisdiction. It is only in situations in which host States are not in the position to effectively enforce their legislation that “the home State of a multinational enterprise has a particularly important role in providing effective remedy for alleged wrongdoings.”⁷¹

The inclusion of principles addressing corporate responsibility and liability for environmental damage caused in conflict zones is highly relevant, not in the least because of these actors’ (direct or indirect) involvement in environmentally destructive practices such as the illicit exploitation of natural resources. However, as armed groups are also heavily involved in these very same practices, it is all the more remarkable that a principle addressing their responsibility is missing. The absence of such a principle was criticized by some ILC members and States. It was, for example, argued that the effect was “to cast corporations as the lone villains” with respect to illegal exploitation of natural resources during armed conflict, while overlooking “wrongdoers such as insurgencies, militias, criminal organizations and individual criminals.”⁷²

69. It should however be noted that the ILC takes a narrower approach than the UN Guiding Principles on Business and Human Rights on the issue of liability. The UN Guiding Principles also foresee liability for corporations in relation to their business partners. *See* Guiding Principles on Business and Human Rights, *supra* note 67, at 11. For instance, the commentary to Principle 7 of the UN Guiding Principles, addressing the responsibility of home States for corporations operating in conflict zones, encourages States to explore liability for corporations that “[...] commit or contribute to gross human rights abuses” in conflict-affected areas. *Id.* at 10. See also more generally Principle 3, which encourages States, as part of their duty to protect, to “[e]nforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights [...]”. *Id.* at 4. This responsibility to respect is defined in Principle 13 as “[a]void causing or contributing to adverse human rights impacts through their own activities, [...]” as well as to “[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships [...]”. *Id.* at 14.

70. A/74/10, *supra* note 1, at 243.

71. A/CN.4/728, *supra* note 2, ¶ 92.

72. Int’l Law Comm’n, 71st Sess., 3465th mtg. at 12, U.N. Doc. A/CN.4/SR.3465 (June 24, 2019) (statement of Mr. Sean Murphy). *See also* Ukraine, U.N. GAOR 74th Sess., 26th meeting ¶

Although one can be sympathetic to this criticism, it does not do justice to the differences between corporations and armed groups. Where States have the ability to regulate their corporations, armed groups by definition challenge the domestic order and are generally not subject to State regulation. Options to hold armed groups responsible for violations of international law within domestic jurisdictions are therefore limited. Conversely, there is currently no mechanism in international law to hold armed groups directly responsible, as pointed out by Special Rapporteur Lehto in her second report.⁷³ Instead, individual members of armed groups can be held accountable under international criminal law. For example, the prohibition of pillage, as included in the Part addressing the during phase, would be an appropriate mechanism, at least where illegal exploitation is concerned. Furthermore, as discussed in the following Part, the ILC takes the position that the prohibition to cause widespread, long-term and severe damage to the environment - included in the 1977 Additional Protocol I and in Article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court - also applies to non-international armed conflicts as a matter of customary international law. While this development is not yet mirrored in Article 8(2)(e) of the Rome Statute that lists war crimes applicable to non-international armed conflicts, the ILC's position on this can prove a powerful incentive for States wishing to see an enhanced responsibility regime for armed groups to push for an amendment of the Rome Statute.

C. Principles Applicable during Armed Conflict

The *during* phase (phase II) was at the heart of the UN Environment and ELI's original appeal to the ILC to provide recommendations on the ways in which the international legal framework could be "clarified, codified and expanded."⁷⁴ The study's approach to this phase fostered considerable debate in the Sixth Committee. The controversy focused on two aspects: the role of the law of armed conflict as *lex specialis* in relation to the applicability of other fields of international law and the question of whether the effects of particular weapons on the environment should be included in the study.⁷⁵ Special Rapporteur Jacobsson consistently emphasized that the starting point for the Commission's work on the topic

126, U.N. Doc. A/C.6/74/SR.26 (Nov. 18, 2019); United States, U.N. GAOR 74th Sess., 30th meeting ¶ 117, U.N. Doc. A/C.6/74/SR.30 (Dec. 9, 2019).

73. A/CN.4/728, *supra* note 2, at 28.

74. Protection of the Environment During in International Armed Conflict, *supra* note 10, at 53.

75. A/CN.4/685, *supra* note 2, ¶ 19.

was to identify and clarify the guiding principles and obligations that apply to the protection of the environment in situations of armed conflict and not to modify the law of armed conflict.⁷⁶

This decision, which was to a large extent dictated by political realities,⁷⁷ resonates in the proposals put forward by the Special Rapporteur, the majority of which are conservative. Moreover, some of the more progressive proposals were watered down to reflect the outcome of discussions within the ILC and the Sixth Committee. As a result, the draft principles for the protection of the environment *during* armed conflict are largely reminiscent of existing international law. In spite of that, a closer look at the relevant principles reveals that they also contain some innovative aspects, not least because the principles do not distinguish between international and non-international armed conflicts, in line with the ILC's approach in its study on the Effects of Armed Conflict on Treaties.⁷⁸ This choice is progressive and controversial, as the law applicable to non-international armed conflict is less developed than the law applicable to international armed conflict and lacks rules specifically protecting the environment.

The opening Principle 12 reformulates the famous Martens clause included in all major treaties on the law of armed conflict.⁷⁹ Principle 12

76. A/CN.4/674, *supra* note 2, ¶ 62.

77. During the debate in the Sixth Committee on the inclusion of the topic in the ILC's programme of work, it was stressed that the Commission "should not attempt to modify existing obligations." Int'l Law Comm'n, Rep. on the Work of Its Sixty-Third & Sixty-Fifth Sessions, U.N. Doc. A/CN.4/666, at 14 (Jan. 23, 2014).

78. Some States, such as China and Korea, expressed criticism for including non-international armed conflicts in the study. *See* China U.N. GAOR, 70th Sess., 22d mtg. ¶ 74, U.N. Doc. A/C.6/70/SR.22 (Nov. 23, 2015) [hereinafter A/C.6/70/SR.22]; Republic of Korea U.N. GAOR, 70th Sess., 25th mtg. ¶ 82, U.N. Doc. A/C.6/70/SR.25 (Dec. 2, 2015) [hereinafter A/C.6/70/SR.25]; Vietnam, *see id.* ¶ 41. In its statements with respect to the draft principles as adopted on first reading, China reiterated its concerns, yet it no longer explicitly opposed including non-international armed conflicts in the study. *See* U.N. GAOR, 74th Sess., 27th mtg., ¶ 89 U.N. Doc. 89A/C.6/74/SR.27 (Nov. 29, 2019). Other States were in favor of such inclusion such as Austria, *see* U.N. GAOR, 70th Sess., 24th mtg. ¶ 71, U.N. Doc. A/C.6/70/SR.24 (Dec. 4, 2015) [hereinafter A/C.6/70/SR.24]; Croatia, *see id.* ¶ 86; El Salvador, *see id.* ¶ 96; Italy, *see* A/C.6/70/SR.22, ¶ 118; Lebanon, *see* A/C.6/70/SR.24, ¶ 60; New Zealand, *see* A/C.6/70/SR.25, ¶ 101; Portugal, *see* A/C.6/70/SR.24, ¶ 79; Slovenia, *see id.* ¶ 40; and Switzerland, *see* A/C.6/70/SR.25, ¶ 98.

79. The clause was introduced by the Russian diplomat Fyodor Fyodorovich Martens in the preamble of the 1899 Hague Convention and has since been included in various formulations in other treaties. Its original formulation is as follows:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

states that “[i]n cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”⁸⁰ The application of this clause to the protection of the environment is a clear example of progressive development, which truly enhances protection of the environment in situations of armed conflict. The choice is, however, less evident from a systemic perspective. This clause and especially its reference to the principles of humanity clearly denote a humanitarian purpose, which sits uncomfortably with an approach that seeks to protect the integrity of the environment itself, as envisaged by the Special Rapporteur.⁸¹ While the inclusion of the Martens clause was generally welcomed, this particular aspect was criticized by some members of the ILC. The commentary elegantly resolves the controversy. Where there are gaps in the relevant treaties, the “principles of humanity” are understood to provide residual protection to the environment for the purpose of protecting human beings, while the “dictates of public conscience” encompass protection to the environment for its own sake.⁸² This approach may be instrumental in facilitating the acceptance of the clause by the Sixth Committee members.

Principle 13 consists of three paragraphs that contain general rules for the protection of the environment during armed conflict. Principle 13(1) reflects the integrative approach adopted by the principles. It formulates an obligation to respect and protect the environment “in accordance with applicable international law and, in particular, the law of armed conflict.”⁸³ Principle 13 builds on the ILC’s study on the Effects of Armed Conflict on Treaties, adopting its progressive stance with respect to the continued applicability of international environmental law and human rights law in situations of armed conflicts.⁸⁴

See Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land Preamble, July 29, 1899, 32 Stat 1803, <https://ihl-databases.icrc.org/ihl/INTRO/150>.

80. A/74/10, *supra* note 1, at 247.

81. A/CN.4/728, *supra* note 2, ¶ 181. Support for this position can be found inter alia in the U.N. Secretary-General, *United Nations Decade of International Law*, at 49-50, U.N. Doc. A/49/323, annex (Aug. 19, 1994).

82. A/74/10, *supra* note 1, at 247.

83. *Id.* at 250.

84. This position was met with some criticism, notably by the UK. See U.N. GAOR, 60th Sess., 20th mtg. ¶ 1, U.N. Doc. A/C.6/60/SR.20 (Nov. 29, 2005).

Principle 13(2) formulates a duty of care for belligerents to “protect the natural environment against widespread, long-term and severe damage.”⁸⁵ This Principle is both progressive and conservative in some respects. It is progressive as it elevates a treaty rule applicable exclusively to international armed conflicts into a general rule that applies irrespective of the type of armed conflict or the capacity of the belligerents. Its inclusion in the draft principles settled a decade long debate over whether the prohibition to inflict widespread, long-term, and severe damage to the environment, as included in Article 55 of Additional Protocol I, can be considered to constitute customary international law, as posited by the 2005 ICRC customary law study.⁸⁶ It is also conservative, as it retains the threshold set out in Article 55 of Additional Protocol I. This is disappointing as it was precisely the high cumulative threshold of “widespread, long-term and severe” damage contained in that provision that spurred much of the scholarly debate regarding the inadequacy of the law of armed conflict in protecting the environment, which underlies the UN Environment and ELI’s request to the ILC to revisit the international legal framework.⁸⁷ The commentary also does not provide any interpretative guidance with respect to the requisites of the threshold. This is surely a missed opportunity to reinterpret the threshold’s key terms from an ecosystem perspective, as adopted in international environmental law. For this reason, the current authors advocate that the commentary should be amended to clarify that the threshold is to be interpreted in accordance with the most recent scientific insights into the functions of ecosystems. Such an approach would lower the threshold, as it acknowledges that ecosystems are functional units and therefore, that harm to their components has broader implications.⁸⁸

Principle 13(3) determines that the environment is to be treated as a *prima facie* civilian object. It determines that “[n]o part of the natural

85. A/74/10, *supra* note 1, at 250.

86. HENCKAERTS & DOSWALD-BECK, *supra* note 46, at 151-55.

87. See, e.g., Phoebe N. Okowa, *Natural Resources in Situations of Armed Conflict: Is There a Coherent Framework for Protection?*, 9 INT’L CMTY. L. REV. 250 (2007); see also Press Release, Int’l Crim. Tribunal for the former Yugoslavia, Final Rep. to the Prosecutor by the Comm. Established to Rev. the NATO Bombing Campaign Against the Fed. Republic of Yugoslavia ¶¶ 14-25 (June 13, 2000), <https://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal>.

88. See KAREN HULME, WAR TORN ENVIRONMENT: INTERPRETING THE LEGAL THRESHOLD 14 (2004). See also Dutch Delegation to the Sixth Committee, Official Statement on International Law Commission (ILC) Draft Principles on Protection of the Environment in Relation to Armed Conflicts ¶ 7 (Dec. 30, 2020), https://www.legal.un.org/ilc/sessions/73/pdfs/english/poe_netherlands.pdf.

environment may be attacked, unless it is a military objective.”⁸⁹ This is significant, as Principle 13(3) implies that a commander may not deliberately target a part of the environment, unless it is clear that this part, by its location or use, makes an effective contribution to military action.⁹⁰ The reference to “parts” of the environment benefitting from protection instead of to the environment as a whole is also significant. The original proposal for the Principle declared the natural environment as such “civilian in nature.”⁹¹ This formulation was, however, criticized by some ILC members for being overly broad and even contradictory to provisions providing protection to the environment under relevant treaties,⁹² while representatives in the Sixth Committee emphasized the need to “clarify in the commentaries that there was no basis for treating the natural environment in its entirety as a civilian object for the purpose of the law of armed conflicts”⁹³ Thus, the current formulation is a compromise, which seeks to balance the interests of environmental protection with the realities of armed conflict.

Principle 14 elaborates on Principle 13(1), in that it refers to the role of the law of armed conflict and its fundamental principles; namely distinction, proportionality, military necessity, and precautions in attack, in providing environmental protection. This is a typical example of a principle that was watered-down as a result of divergent opinions within the ILC. The original proposal by Special Rapporteur Jacobsson determined that the law of armed conflict and its principles were to be applied “in a manner so as to enhance *the strongest possible protection of the environment*.”⁹⁴ In its revised form, the Principle merely indicates that these principles “shall be applied to the natural environment, *with a view to its protection*.”⁹⁵ It thereby sets a lower standard for protection than envisaged by the Special Rapporteur, although it still does justice to the proposal, which meant to clarify that the cardinal principles of the law of armed

89. HENCKAERTS & DOSWALD-BECK, *supra* note 46, at 143.

90. See Protocol I, *supra* note 37, at art. 52, which defines military objectives as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”

91. See Principle 1 as proposed by the Special Rapporteur, A/CN.4/685, *supra* note 2, at annex I.

92. See Int'l Law Comm'n, 67th Sess., 3264th mtg. at 9-11, U.N. Doc A/CN.4/SR.3264 (May 6, 2016) (statement by Mr. Sean Murphy).

93. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Seventh Session, U.N. Doc. A/CN.4/689, ¶ 62, at 14 (Jan. 28, 2016).

94. See Principle 2 as proposed by the Special Rapporteur (emphasis added), A/CN.4/685, *supra* note 2, at annex I.

95. A/74/10, *supra* note 1, at 254 (emphasis added).

conflict must be applied *for the purpose of* environmental protection. Furthermore, it is relevant to note that this Principle should be read together with the duty of care included in Principle 13(2), which sets the upper limit for permissible environmental damage.

Given the general nature of Principle 14, Principle 15 is confusing. This Principle, which reads “[e]nvironmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity,”⁹⁶ rephrases a famous statement by the International Court of Justice in the *Nuclear Weapons Advisory Opinion* with respect to the protection of the environment during armed conflict.⁹⁷ The stated purpose of this Principle is to introduce an operational perspective,⁹⁸ but its added value, in light of Principle 14, is questionable.

Principle 16 states that “[a]ttacks against the natural environment by way of reprisals are prohibited.”⁹⁹ This Principle is another example of progressive development, as highlighted in the commentary.¹⁰⁰ Not only does it confirm the customary law status of the prohibition included in Article 55(2) of Additional Protocol I, but it also extends it to non-international armed conflicts. This progressive approach can be contrasted with Principle 19 on environmental modification techniques, which merely restates relevant obligations under the ENMOD Convention.¹⁰¹ The phrase “[i]n accordance with their international obligations” in Principle 19 makes it abundantly clear that it applies exclusively to States that are parties to the ENMOD Convention and to other States only to the extent that the prohibition to use the environment as a weapon reflects customary international law.¹⁰²

Lastly, Principle 18, which states that “[p]illage of natural resources is prohibited,” addresses the illegal exploitation of natural resources by

96. *Id.* at 256.

97. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 30 (July 8) (“States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives.”). It is not entirely clear how this statement should be read. The Court refers to the principles of proportionality and necessity in relation to States’ right to self-defense, which would indicate that it refers to *jus ad bellum* and not to *jus in bello*. Yet, it is apparent from the context that the Court intends to address proportionality and necessity as principles of *jus in bello*.

98. A/74/10, *supra* note 1, at 257.

99. *Id.*

100. *Id.* at 259-60. This Principle generated considerable debate within the ILC, both with respect to its customary law status and with its extension to non-international armed conflicts. For a summary of the debate, see *id.* at 257-60.

101. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), *opened for signature* May 18, 1977, 1108 U.N.T.S. 151 [hereinafter ENMOD Convention]; A/74/10, *supra* note 1, at 264.

102. A/74/10, *supra* note 1, at 264.

parties to an armed conflict for the purpose of financing warfare,¹⁰³ a practice that can seriously disrupt the environment and has been a prevalent problem in several contemporary armed conflicts. The inclusion of this Principle is important, as it expressly confirms that the longstanding prohibition of pillage applies to instances of illegal exploitation of natural resources in armed conflicts. It is inspired by relevant judgments by the Nuremberg military tribunals and the 2005 judgment by the International Court of Justice on *Armed activities on the territory of the Congo*, in which the Court held the prohibition of pillage applicable to the looting, plundering, and exploitation of natural resources by members of the Ugandan armed forces on the territory of the Democratic Republic of the Congo.¹⁰⁴

D. Principles Applicable in Situations of Occupation

The three principles applicable to situations of occupation complement those that apply to all belligerents. The commentary clarifies that the inclusion of a separate section on occupation by no means seeks to deviate from the temporal approach adopted by the study. Instead, it seeks to offer “a practical solution reflecting the great variety of circumstances that may qualify as a situation of occupation,” some resembling peacetime conditions, others marked by active hostilities.¹⁰⁵ Arguably, the position of occupying powers further differs in one important respect from that of other belligerents, in the sense that occupying powers assume special responsibilities as *de facto* authorities and administrators of territory. As a consequence, relevant obligations of occupying powers under international human rights law and international environmental law must take more prominence, both independently and with respect to the interpretation of obligations of occupying powers under the law of armed conflict. This position is reflected in the relevant principles. Additionally, it was suggested to include a principle on international organizations as administrators of territory.¹⁰⁶ This suggestion was not followed, as it would go

103. *Id.* at 260-61. It should be noted that “illegal exploitation of natural resources” is used as a descriptive and not as a legal term, as emphasized by the Special Rapporteur. See Int'l Law Comm'n, 71st Sess., 3471st mtg. at 6, U.N. Doc. A/CN.4/SR.3471 (July 8, 2019). The term is used notably in resolutions by the UN Security Council which relate to the trade in natural resources that finance armed conflict. See also Daniëlla Dam-de Jong, *UN Natural Resources Sanctions Regimes: Incorporating Market-Based Responses to Address Market-Driven Problems*, in RSCH. HANDBOOK ON UN SANCTIONS AND INT'L L. 147, 159-61 (Larissa van den Herik ed., 2017).

104. *Armed Activities on the Territory of the Congo*, (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 245 (Dec. 19).

105. A/74/10, *supra* note 1, at 265.

106. *Id.* at 267-68. See e.g., Steven Ratner, *Foreign Occupation and International Territorial Administration: The Challenges of Convergence*, 16 EUR. J. INT'L L. 695 (Sept. 2005); Marten

well beyond the law of occupation proper. Nevertheless, it was understood that the neutral term “occupying power” would leave the door open to subsequent developments in international law.¹⁰⁷

Principle 20 sets out the general obligations of occupying powers with respect to the environment of the occupied territory, as derived from Article 43 of the Hague Regulations attached to the Hague Convention of 1907.¹⁰⁸ It consists of three parts. Principle 20(1) focuses on the obligation of the occupying power to respect and protect the environment in accordance with applicable international law, which includes relevant obligations under international human rights and environmental law. Principle 20(2) elaborates this obligation by requiring an occupying power to “take appropriate measures to prevent significant harm to the environment of the occupied territory that is likely to prejudice the health and well-being of the population of the occupied territory.”¹⁰⁹ This obligation builds on Article 55(1) of Additional Protocol I and international human rights law, while the threshold for environmental harm is derived from international environmental law.¹¹⁰ The Principle was introduced at the instigation of several ILC members who felt that the human rights obligations of occupying powers, including with respect to the right to health, life, and food, should receive more emphasis.¹¹¹ Finally, Principle 20(3) requires the occupying power to respect the law and institutions of the occupied territory concerning the protection of the environment. This obligation resembles the text of Article 43 of the 1907 Hague Regulations, but it includes a more permissible stance with regards to the introduction of changes in the occupied territory’s law and institutions, reflecting evolving standards in the law of occupation.¹¹²

Zwanenburg, *Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation*, 856 INTERNATIONAL REVIEW OF THE RED CROSS 745 (Dec. 2004).

107. *Id.* at 266-68; see also Int’l Law Comm’n, Protection of the Environment in Relation to Armed Conflict, Statement of the Chairperson of the Drafting Committee, Mr. Charles Chernor Jalloh 3 (2018).

108. A/74/10, *supra* note 1, at 266.

109. *Id.* at 268.

110. *Id.* at 272-73. This threshold can be contrasted with the one for environmental harm in situations of armed conflict proper, set out in draft Principle 13(2). This difference reflects the different position adopted by the ILC with respect to situations of occupation as compared to ‘regular’ hostilities.

111. *Id.* at 271; Protection of the Environment in Relation to Armed Conflict, *supra* note 107, at 4-5. Yet, note the fairly puzzling statement by the United Kingdom, which took the view that references to human health “did not fall within the parameters of a study on the protection of the environment”. See U.N. GAOR 74th Sess., 30th meeting ¶ 12, U.N. Doc. A/C.6/74/SR.30 (Dec. 9, 2019).

112. A/74/10, *supra* note 1, at 273-74.

An evolutionary interpretation of the law of occupation, reading international human rights and environmental law into it, also underlies Principle 21 on the sustainable use of natural resources. This Principle is based on Article 55 of the 1907 Hague Regulations, which contains the principle of usufruct.¹¹³ Principle 21 consolidates modern interpretations of the principle of usufruct, accounting for the principle of permanent sovereignty over natural resources (PSNR) and the right to self-determination, reflected in the obligation of the occupying power to administer and use natural resources for the benefit of the population of the occupied territory.¹¹⁴ The Principle also consolidates obligations derived from the concept of sustainable development, namely the obligation to ensure their sustainable use. In this way, the Principle significantly contributes to clarifying the implications of modern developments with respect to the right to self-determination, the principle of PSNR and sustainable development for an occupying power's rights and obligations with respect to the use of natural resources in occupied territories.

Finally, Principle 22 formulates an obligation for the occupying power to exercise due diligence to ensure that activities in the occupied territory do not cause significant harm to the environment in areas beyond the occupied territory.¹¹⁵ This Principle builds on the duty of vigilance, identified by the International Court of Justice in its judgement concerning Armed Activities in the Territory of the DR Congo, and the principle of prevention derived from international environmental law.¹¹⁶

The three principles on occupation are prime examples of how an integrative approach can both consolidate and develop existing obligations under the relevant fields of international law. Interestingly, State delegations in the Sixth Committee interpreted the principles primarily as examples of progressive development.¹¹⁷ Nevertheless, it should be emphasized that the principles to a large extent reflect developments in State

113. *Id.* at 276.

114. The approach of the draft principle regarding the applicability of the principle of PSNR can be contrasted with the 2005 judgment by the International Court of Justice in the Armed Activities on the Territory of the Congo case. *See* Armed Activities on the Territory of the Congo, (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 244 (Dec. 19) (finding the Court dismissed the applicability of the principle of PSNR in the context of pillage by members of the Ugandan army). *See also* Phoebe Okowa, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 55 INT'L AND COMPARATIVE L. Q. 742 (2006).

115. *Id.* at 278.

116. *See* Dem. Rep. Congo v. Uganda, 2005 I.C.J. ¶ 189.

117. *See* A/CN.4/728, *supra* note 2, ¶¶ 2-3.

practice as well as international case law over the past century.¹¹⁸ In this sense, it would be more appropriate to qualify them as codification based on evolutionary interpretation.

E. Principles Applicable after Armed Conflict

Part Five contains six principles applicable *after* armed conflict. The principles address environmental damage related to armed conflict and the procedure for restoration and reparation of such damage. Furthermore, they are largely based on the duty to cooperate with respect to remedying environmental damage in relation to armed conflict. The principles seek to enable engagement of and collaboration with States and international organizations that are in a position to assist in order to prevent, remediate, or restore environmental damage.¹¹⁹

One of the difficulties in the post-conflict phase is to determine which obligations apply, as these situations are transitory: the armed conflict has ended, but peace has not yet been restored. Consequently, peacetime rules, in as far as their application is not hampered by the situation on the ground, co-apply with the law of armed conflict, which remains relevant to a limited extent.¹²⁰ This difficulty may explain why the majority of the principles in Part Five are formulated as recommendations. The co-application of the law of armed conflict, including weapons conventions, further explains why several of the principles refer to “parties to an armed conflict,” which, significantly, also refers to non-State armed groups.¹²¹

Principle 23 calls on parties to an armed conflict to address environmental protection and restoration during a peace process. It also appeals to international organizations to facilitate such steps. The inclusion of the

118. See EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* (2nd ed. 2012); DANIELLA DAM-DE JONG, *INTERNATIONAL LAW AND GOVERNANCE OF NATURAL RESOURCES IN CONFLICT AND POST CONFLICT SITUATIONS* (2015).

119. See generally Christina Leb, *One Step at a Time: International Law and the Duty to Cooperate in the Management of Shared Water Resources*, 40 *WATER INT'L* 21 (2015) (discussing the duty to cooperate).

120. See generally Carsten Stahn, ‘*Jus ad bellum*’, ‘*jus in bello*’. . . ‘*jus post bellum*’?- *Rethinking the Conception of the Law of Armed Force*, 17 *EUR. J. INT'L L.* 921 (2006) (discussing peacemaking as a third branch of the law of armed conflict); see generally Dieter Fleck, *Jus Post Bellum as a Partly Independent Legal Framework*, in *JUS POST BELLUM MAPPING THE NORMATIVE FOUNDATIONS* 43 (Carsten Stahn et al. eds., 2014) (discussing peacemaking in the law of armed conflict); see generally ENVIRONMENTAL PROTECTION AND TRANSITIONS FROM CONFLICT TO PEACE: CLARIFYING NORMS, PRINCIPLES AND PRACTICES (Carsten Stahn et al. eds., 2017).

121. See A/74/10, *supra* note 1, at 282.

Principle is motivated by how environmental considerations are increasingly included in peace processes.¹²² While the Principle itself does not add much from a normative perspective, it is noteworthy from a policy perspective. Recent findings in social sciences scholarship show clear links between environmental degradation and mismanagement of natural resources and conflict relapse.¹²³

Principle 23 highlights the need to remedy and restore environmental damage, as well as manage environmentally related factors, inducing renewed conflicts as part of peace processes. However, as highlighted by Hulme, the Principle could have been accompanied with further environmental guidelines “to inform future peace processes.”¹²⁴

Principle 24 deals with States’ responsibility to share and grant access to relevant information to facilitate remedial measures after an armed conflict. While the duty to *share* information is owed towards other States, the duty to *grant access* to information refers to States’ obligations towards individuals.¹²⁵ The obligations under this Principle may also be extended to third States that are not belligerents but have relevant information for remedial actions.¹²⁶ Furthermore, the Principle includes a reference to States’ existing obligations under international law, which is intended to reflect “that treaties contain obligations relevant in the context of the protection of the environment in relation to armed conflicts, which may be instrumental for the purpose of the taking of remedial measures after an armed conflict.”¹²⁷ This suggests that the Principle itself only serves as a reminder to States to comply with their existing obligations related to the sharing of and granting of access to information. For instance, the commentary to the Principle refers to the duty to keep a record of placement of landmines, booby traps, and other devices as well as for the use of explosive ordnance or abandonment of explosive ordnance, and that after the cessation of the active hostilities, States shall make such

122. A/CN.4/700, *supra* note 2, ¶ 154.

123. See Anis Dresse et al., *Environmental Peacebuilding: Towards a Theoretical Framework*, 54 COOP. AND CONFLICT 99 (2019); see also Tobias Ide, *The Impact of Environmental Cooperation on Peacemaking: Definitions, Mechanisms, and Empirical Evidence* 21 INT’L STUD. REV. 327 (2018) (reviewing empirical studies on environmental peacemaking); see also Florian Krampe, *Toward Sustainable Peace: A New Research Agenda for Post-Conflict Natural Resource Management*, 17 GLOB. ENV’T POL. 1 (2017).

124. Karen Hulme, *The ILC’s Work Stream on Protection of the Environment in Relation to Armed Conflict*, 34 QUESTIONS OF INT’L L. 27, 35 (2016).

125. A/74/10, *supra* note 1, at 285 (emphasis added).

126. *Id.* at 284.

127. *Id.*

information available to other parties to the conflict.¹²⁸ Furthermore, several environmental treaties contain reporting obligations, which may also be directly relevant to restore the environment after armed conflict. With respect to the granting of information, the Principle draws from several legal fields, including the participatory rights enshrined in international environmental and human rights law.¹²⁹ The duty to grant access to information obligates States to gather environmental information and to make it available to the public.¹³⁰ However, the Principle does not provide details on the type of information or the modalities for access, except that it should be “relevant.”¹³¹ The result leaves many uncertainties regarding the rights of local communities with respect to participation in environmental remediation. Finally, the Principle excludes information that is vital to States’ national defence or security.

Principle 25 encourages cooperation among relevant actors with respect to post-armed conflict environmental assessments and remedial measures. Post-conflict environmental assessments (PCEAs) differ from regular environmental impact assessments (EIAs). Whereas EIAs are employed as preventative measures, PCEAs are emerging as tools “to mainstream environmental considerations in the development plans in the post-conflict phase.”¹³² These assessments contribute to discovering environmental risks that may affect “health, livelihoods and security and to provide recommendations to national authorities on how to address them.”¹³³ UN Environment has completed several PCEAs, contributing to a broader understanding of the types of damages caused by armed conflicts and identifying appropriate measures to address them. The commentary to the Principle highlights the importance of ensuring that post-conflict situations are not left unattended, as these can contribute to destabilizing the society and trigger a relapse to armed conflict.¹³⁴ Yet, legal obligations as well as practice addressing post-conflict environmental damage are scarce, which explains the recommendatory character of Principle 25.

128. See Protocol II to the CCW, *supra* note 38, at art. 9.

129. A/74/10, *supra* note 1, at 285.

130. Daniëlla Dam-de Jong, ‘A Rough Trade’? Towards a More Sustainable Minerals Supply Chain, 2 BRILL OPEN L. 8, 15-16 (2019).

131. Hulme, *supra* note 124, at 41.

132. A/74/10, *supra* note 1, at 288.

133. *Id.*

134. *Id.* at 289.

Principle 26 addresses environmental restoration and compensation in situations in which “the source of environmental damage is unidentified or reparation is not available.”¹³⁵ The Principle aims at encouraging States to take measures to remedy the harm, including by means of a voluntary compensation fund. These *ex gratia* responses are based on practice related to the compensation of injury and damage, also resulting from lawful actions. This could be the case when a State does not admit responsibility and perhaps wishes to exclude the possibility of any additional liability by conditioning the compensation.¹³⁶

Principles 27 and 28 address the problem of toxic and hazardous remnants of war, which are a major source of environmental pollution. Principle 27 formulates an obligation for parties to an armed conflict to “seek to remove or render harmless toxic and hazardous remnants of war under their jurisdiction or control that are causing or risk causing damage to the environment.”¹³⁷ Even though formulated as an obligation of conduct, the Principle represents an important step to protect the environment from wartime damage. This general obligation complements existing obligations for parties to an armed conflict with respect to specific remnants of war, such as mines and explosive ordinances, covered by Protocol II and V to the Conventional Weapons Convention, the 2008 Cluster Munitions Convention and the Ottawa Convention.¹³⁸ This follows from the “without prejudice” disclaimer included in Principle 27(3).¹³⁹ Principle 28 is more limited in scope. It addresses the specific problem of remnants of war at sea, including beyond national jurisdiction, and encourages States and international organizations to cooperate to ensure that these remnants do not constitute a danger to the environment. Of course, the UN Convention on the Law of the Sea may provide a relevant legal framework, especially its Part XII on protection and preservation of the marine environment, which contains provisions on global and regional cooperation.¹⁴⁰

IV. CONCLUSION

This article sets out to critically assess the strengths and weaknesses of the draft principles and highlight their principal innovations, in light

135. *Id.*

136. *See id.* at 291 (referring to the U.S. payments in relation to the use of Agent Orange during the Vietnam War).

137. *Id.* at 292.

138. *Id.* at 294 n.1431.

139. *Id.* at 292.

140. *Id.* at 295.

of their objective to enhance the protection of the environment in relation to armed conflict. The ILC's work to take on the study is certainly impressive. It has managed to bring in many different aspects relating to the environment and armed conflicts under one framework. More importantly, the temporal approach has facilitated consideration of legal issues beyond traditional armed conflict situations, including those that have hitherto received little systemic attention. Prime examples include obligations for parties to an armed conflict with respect to toxic remnants of war and the obligations of States with respect to peace operations and corporate responsibility. Further, by employing a dynamic and integrative approach to the interpretation of relevant obligations under the law of armed conflict, international environmental and human rights law, the study has also significantly contributed to clarifying the legal positions of occupying powers with respect to environmental protection.

Yet, the study also presents some weaknesses. These relate most notably to the protection of the environment during armed conflict. Of course, there was limited space for the Commission to develop the applicable law. However, in some respects, it could have been more ambitious. One example concerns the interpretation of the upper threshold for permissible environmental harm. The ILC's decision to refrain from providing guidance on the interpretation of the key terms of this threshold is truly regrettable. It is equally regrettable that the Commission failed to provide guidance regarding the effects of armed conflict on the obligations of States under relevant environmental agreements. It is understandable that the ILC could not assess the applicability of all existing multi-lateral environmental agreements, but it would have been useful if it had analyzed the principal environmental treaties, most notably those listed in the commentaries to Principle 4. These are the World Heritage Convention, the Biological Diversity Convention and the Ramsar Convention on Wetlands.¹⁴¹

Overall, it can therefore be argued that the study has made important substantive contributions to enhancing protection to the environment, but it also missed opportunities to advance the law in this field. Furthermore, the choice for principles instead of articles implies that the ILC's ambitions were modest. The higher level of abstraction that is inherent in principles indicates that they should primarily serve to guide States' actions. This is somewhat at odds with the mandatory character of some of the obligations that have been formulated in the principles. At the same time, the flexible nature of the principles is well suited for addressing topics in

141. A/74/10, *supra* note 1, at 221, 223.

the environmental realm, as environmental obligations are often open-ended and context-based. In this sense, the draft principles may serve as an example for future studies on environmental topics and perhaps will also encourage the Commission to undertake more politically sensitive studies, such as the new study on sea-level rise. In this time of treaty stagnation, there is all the more need for an active Commission reminding States of their existing and emerging obligations under international law.