

Chapter VI

Protection of the environment in relation to armed conflicts

A. Introduction

58. At its sixty-fifth session (2013), the Commission decided to include the topic “Protection of the environment in relation to armed conflicts” in its programme of work, and appointed Ms. Marie G. Jacobsson as Special Rapporteur.⁹⁴⁵

59. The Commission received and considered three reports from its sixty-sixth session (2014) to its sixty-eighth session (2016).⁹⁴⁶ At its sixty-sixth session (2014), the Commission considered the preliminary report of the Special Rapporteur.⁹⁴⁷ At its sixty-seventh session (2015), the Commission considered the second report of the Special Rapporteur⁹⁴⁸ and took note of the draft introductory provisions and draft principles, provisionally adopted by the Drafting Committee, which were subsequently renumbered and revised for technical reasons by the Drafting Committee at the sixty-eighth session.⁹⁴⁹ Accordingly, the Commission provisionally adopted draft principles 1, 2, 5, 9, 10, 11, 12 and 13, and commentaries thereto, at that session.⁹⁵⁰ At the same session, the Commission also considered the third report of the Special Rapporteur,⁹⁵¹ and took note of draft principles 4, 6 to 8, and 14 to 18 provisionally adopted by the Drafting Committee,⁹⁵² without provisionally adopting any commentaries.

60. At its sixty-ninth session (2017), the Commission established a Working Group to consider the way forward in relation to the topic, as Ms. Jacobsson was no longer a member of the Commission.⁹⁵³ The Working Group, chaired by Mr. Vázquez-Bermúdez, had before it the draft commentaries prepared by the Special Rapporteur, even though she was no longer a member of the Commission, on draft principles 4, 6 to 8, and 14 to 18 provisionally adopted by the Drafting Committee at the sixty-eighth session, and taken note of by the Commission at the same session. The Working Group recommended to the Commission the appointment of a new Special Rapporteur to assist with the successful completion of its work on the topic.⁹⁵⁴ Following an oral report by the Chair of the Working Group, the Commission decided to appoint Ms. Marja Lehto as Special Rapporteur.⁹⁵⁵

61. At its seventieth session (2018), the Commission established a Working Group, chaired by Mr. Vázquez-Bermúdez, to assist the Special Rapporteur in the preparation of the draft commentaries to draft principles 4, 6 to 8, and 14 to 18, provisionally adopted by the Drafting Committee at the sixty-ninth session, and taken note of by the Commission at the same session.⁹⁵⁶ The Commission provisionally adopted draft principles 4, 6 to 8, and 14 to 18, and commentaries thereto, at that session.⁹⁵⁷ Also at the seventieth session, the

⁹⁴⁵ The decision was made at the 3171st meeting of the Commission, on 28 May 2013 (see *Yearbook ... 2013*, vol. II (Part Two), p. 78, para. 167). For the syllabus of the topic, see *Yearbook ... 2011*, vol. II (Part Two), annex V.

⁹⁴⁶ Documents [A/CN.4/674](#) and [Corr.1](#) (preliminary report), [A/CN.4/685](#) (second report) and [A/CN.4/700](#) (third report).

⁹⁴⁷ *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10 (A/69/10)*, chap. XI.

⁹⁴⁸ *Ibid.*, *Seventieth Session, Supplement No. 10 (A/70/10)*, chap. IX.

⁹⁴⁹ Documents [A/CN.4/L.870](#) and [A/CN.4/L.870/Rev.1](#).

⁹⁵⁰ *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10 (A/71/10)*, para. 188.

⁹⁵¹ *Ibid.*, chap. X.

⁹⁵² Document [A/CN.4/L.876](#).

⁹⁵³ *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10 (A/72/10)*, para. 255.

⁹⁵⁴ *Ibid.*, para. 260.

⁹⁵⁵ *Ibid.*, para. 262.

⁹⁵⁶ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, chap. IX.

⁹⁵⁷ *Ibid.*, para. 218.

Commission considered the first report of the Special Rapporteur⁹⁵⁸ and took note of draft principles 19, 20 and 21, which had been provisionally adopted by the Drafting Committee.⁹⁵⁹

B. Consideration of the topic at the present session

62. At the present session, at its 3455th meeting on 1 May 2019, the Commission provisionally adopted draft principles 19, 20 and 21, which had been provisionally adopted by the Drafting Committee at the seventieth session.

63. At its 3464th to 3471st meetings, from 15 May to 27 May 2019, the Commission considered the second report of the Special Rapporteur ([A/CN.4/728](#)).

64. In her second report, the Special Rapporteur addressed certain questions related to the protection of the environment in non-international armed conflicts, with a focus on how the international rules and practices concerning natural resources may enhance the protection of the environment during and after such conflicts. The second report also addressed certain questions related to the responsibility and liability of States and non-State actors. The Special Rapporteur thus proposed seven draft principles.⁹⁶⁰

65. At its 3471st meeting, on 27 May 2019, the Commission referred draft principles 6 *bis*, 8 *bis*, 13 *bis*, 13 *ter*, 13 *quater*, 13 *quinquies*, and 14 *bis*, as contained in the second report of the Special Rapporteur, to the Drafting Committee, taking into account the plenary debate in the Commission.

66. At its 3475th meeting, on 8 July 2019, the Chair of the Drafting Committee presented⁹⁶¹ the report of the Drafting Committee on “Protection of the environment in relation to armed conflicts” ([A/CN.4/L.937](#)). At the same meeting, the Commission provisionally adopted the entire set of the draft principles on protection of the environment in relation to armed conflicts on first reading (see section C.1 below).

67. At its 3504th to 3506th meetings, on 7 and 8 August 2019, the Commission adopted the commentaries to the draft principles on protection of the environment in relation to armed conflicts (see section C.2 below).

68. At its 3506th meeting, on 8 August 2019, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft principles on protection of the environment in relation to armed conflicts (see sect. C below), through the Secretary-General, to Governments, international organizations, including from the United Nations and its Environment Programme, and others, including the International Committee of the Red Cross and the Environmental Law Institute, for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2020.

69. At its 3506th meeting, on 8 August 2019, the Commission expressed its deep appreciation for the outstanding contribution of the Special Rapporteur, Ms. Marja Lehto, which had enabled the Commission to bring to a successful conclusion its first reading of the draft principles on protection of the environment in relation to armed conflicts. The Commission also reiterated its deep appreciation for the valuable contribution of the previous Special Rapporteur, Ms. Marie G. Jacobsson, to the work on the topic.

⁹⁵⁸ Document [A/CN.4/720](#).

⁹⁵⁹ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, para. 172.

⁹⁶⁰ See second report of the Special Rapporteur ([A/CN.4/728](#)): draft principle 6 *bis* (Corporate due diligence), draft principle 8 *bis* (Martens Clause), draft principle 13 *bis* (Environmental modification techniques), draft principle 13 *ter* (Pillage), draft principle 13 *quater* (Responsibility and liability), draft principle 13 *quinquies* (Corporate responsibility), and draft principle 14 *bis* (Human displacement).

⁹⁶¹ The statement of the Chair of the Drafting Committee is available from the website of the Commission (<http://legal.un.org/ilc>).

C. Text of the draft principles on protection of the environment in relation to armed conflicts, adopted by the Commission on first reading

1. Text of the draft principles

70. The text of the draft principles adopted by the Commission on first reading is reproduced below.

Protection of the environment in relation to armed conflicts

Part One

Introduction

Principle 1

Scope

The present draft principles apply to the protection of the environment before, during or after an armed conflict.

Principle 2

Purpose

The present draft principles are aimed at 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.

Part Two [One]

Principles of general application

Principle 3 [4]

Measures to enhance the protection of the environment

1. States shall, pursuant to their obligations under international law, take effective legislative, administrative, judicial and other measures to enhance the protection of the environment in relation to armed conflict.
2. In addition, States should take further measures, as appropriate, to enhance the protection of the environment in relation to armed conflict.

Principle 4 [I-(x), 5]

Designation of protected zones

States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones.

Principle 5 [6]

Protection of the environment of indigenous peoples

1. States should take appropriate measures, in the event of an armed conflict, to protect the environment of the territories that indigenous peoples inhabit.
2. After an armed conflict that has adversely affected the environment of the territories that indigenous peoples inhabit, States should undertake effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and in particular through their own representative institutions, for the purpose of taking remedial measures.

Principle 6 [7]

Agreements concerning the presence of military forces in relation to armed conflict

States and international organizations should, as appropriate, include provisions on environmental protection in agreements concerning the presence of military forces in relation to armed conflict. Such provisions may include preventive measures, impact assessments, restoration and clean-up measures.

Principle 7 [8]
Peace operations

States and international organizations involved in peace operations in relation to armed conflict shall consider the impact of such operations on the environment and take appropriate measures to prevent, mitigate and remediate the negative environmental consequences thereof.

Principle 8
Human displacement

States, international organizations and other relevant actors should take appropriate measures to prevent and mitigate environmental degradation in areas where persons displaced by armed conflict are located, while providing relief and assistance for such persons and local communities.

Principle 9
State responsibility

1. An internationally wrongful act of a State, in relation to an armed conflict, that causes damage to the environment entails the international responsibility of that State, which is under an obligation to make full reparation for such damage, including damage to the environment in and of itself.
2. The present draft principles are without prejudice to the rules on the responsibility of States for internationally wrongful acts.

Principle 10
Corporate due diligence

States should take appropriate legislative and other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories exercise due diligence with respect to the protection of the environment, including in relation to human health, when acting in an area of armed conflict or in a post-armed conflict situation. Such measures include those aimed at ensuring that natural resources are purchased or obtained in an environmentally sustainable manner.

Principle 11
Corporate liability

States should take appropriate legislative and other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories can be held liable for harm caused by them to the environment, including in relation to human health, in an area of armed conflict or in a post-armed conflict situation. Such measures should, as appropriate, include those aimed at ensuring that a corporation or other business enterprise can be held liable to the extent that such harm is caused by its subsidiary acting under its *de facto* control. To this end, as appropriate, States should provide adequate and effective procedures and remedies, in particular for the victims of such harm.

Part Three [Two]
Principles applicable during armed conflict**Principle 12**
Martens Clause with respect to the protection of the environment in relation to armed conflict

In 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.

Principle 13 [II-1, 9]**General protection of the natural environment during armed conflict**

1. The natural environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.
2. Care shall be taken to protect the natural environment against widespread, long-term and severe damage.
3. No part of the natural environment may be attacked, unless it has become a military objective.

Principle 14 [II-2, 10]**Application of the law of armed conflict to the natural environment**

The law of armed conflict, including the principles and rules on distinction, proportionality, military necessity and precautions in attack, shall be applied to the natural environment, with a view to its protection.

Principle 15 [II-3, 11]**Environmental considerations**

Environmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity.

Principle 16 [II-4, 12]**Prohibition of reprisals**

Attacks against the natural environment by way of reprisals are prohibited.

Principle 17 [II-5, 13]**Protected zones**

An area of major environmental and cultural importance designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective.

Principle 18**Prohibition of pillage**

Pillage of natural resources is prohibited.

Principle 19**Environmental modification techniques**

In accordance with their international obligations, States shall not engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State.

Part Four**Principles applicable in situations of occupation****Principle 20 [19]****General obligations of an Occupying Power**

1. An Occupying Power shall respect and protect the environment of the occupied territory in accordance with applicable international law and take environmental considerations into account in the administration of such territory.
2. An Occupying Power shall 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.
3. An Occupying Power shall respect the law and institutions of the occupied territory concerning the protection of the environment and may only introduce changes within the limits provided by the law of armed conflict.

Principle 21 [20]
Sustainable use of natural resources

To the extent that an Occupying Power is permitted to administer and use the natural resources in an occupied territory, for the benefit of the population of the occupied territory and for other lawful purposes under the law of armed conflict, it shall do so in a way that ensures their sustainable use and minimizes environmental harm.

Principle 22 [21]
Due diligence

An Occupying Power shall exercise due diligence to ensure that activities in the occupied territory do not cause significant harm to the environment of areas beyond the occupied territory.

Part Five [Three]
Principles applicable after armed conflict

Principle 23 [14]
Peace processes

1. Parties to an armed conflict should, as part of the peace process, including where appropriate in peace agreements, address matters relating to the restoration and protection of the environment damaged by the conflict.
2. Relevant international organizations should, where appropriate, play a facilitating role in this regard.

Principle 24 [18]
Sharing and granting access to information

1. To facilitate remedial measures after an armed conflict, States and relevant international organizations shall share and grant access to relevant information in accordance with their obligations under international law.
2. Nothing in the present draft principle obliges a State or international organization to share or grant access to information vital to its national defence or security. Nevertheless, that State or international organization shall cooperate in good faith with a view to providing as much information as possible under the circumstances.

Principle 25 [15]
Post-armed conflict environmental assessments and remedial measures

Cooperation among relevant actors, including international organizations, is encouraged with respect to post-armed conflict environmental assessments and remedial measures.

Principle 26
Relief and assistance

When, in relation to an armed conflict, the source of environmental damage is unidentified, or reparation is unavailable, States are encouraged to take appropriate measures so that the damage does not remain unrepaired or uncompensated, and may consider establishing special compensation funds or providing other forms of relief or assistance.

Principle 27 [16]
Remnants of war

1. After an armed conflict, parties to the conflict shall 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. Such measures shall be taken subject to the applicable rules of international law.
2. The parties shall also endeavour to reach agreement, among themselves and, where appropriate, with other States and with international organizations, on

technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations to remove or render harmless such toxic and hazardous remnants of war.

3. Paragraphs 1 and 2 are without prejudice to any rights or obligations under international law to clear, remove, destroy or maintain minefields, mined areas, mines, booby-traps, explosive ordnance and other devices.

Principle 28 [17]

Remnants of war at sea

States and relevant international organizations should cooperate to ensure that remnants of war at sea do not constitute a danger to the environment.

2. Text of the draft principles on protection of the environment in relation to armed conflicts and commentaries thereto

71. The text of the draft principles and commentaries thereto adopted by the Commission on first reading at its seventy-first session is reproduced below.

Protection of the environment in relation to armed conflicts

Part One

Introduction

Commentary

(1) As is always the case with the Commission's outputs, the draft principles are to be read together with the commentaries.

(2) Structurally, the set of draft principles are divided into five parts, including the initial part entitled "Introduction" which contains draft principles on the scope and purpose of the draft principles. Part Two concerns guidance on the protection of the environment *before* the outbreak of an armed conflict but also contains draft principles of a more general nature that are of relevance for more than one temporal phase: before, during or after an armed conflict. Part Three pertains to the protection of the environment *during* armed conflict, and Part Four pertains to the protection of the environment in situations of occupation. Part Five contains draft principles relative to the protection of the environment *after* an armed conflict.

(3) The provisions have been cast as draft "principles". The Commission has previously chosen to formulate the output of its work as draft principles, both for provisions that set forth principles of international law and for non-binding declarations intended to contribute to the progressive development of international law and provide appropriate guidance to States.⁹⁶² The present set of draft principles contains provisions of different normative value, including those that can be seen to reflect customary international law, and those of a more recommendatory nature.

(4) The draft principles were prepared bearing in mind the intersection between the international law relating to the environment and the law of armed conflict.

(5) As for the use of terms, the Commission will decide at the time of the second reading, whether to use the term "natural environment" or "environment" in those provisions of Part Three that draw on Additional Protocol I to the Geneva Conventions.⁹⁶³

⁹⁶² Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, *Yearbook ... 1950*, vol. II, document [A/1316](#), Part III, p. 374. See also principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook ... 2006*, vol. II (Part Two), paras. 66–67, pp. 58–90; and the guiding principles applicable to unilateral declarations of States capable of creating legal obligations, *Yearbook ... 2006*, vol. II (Part Two), para. 176, p. 161.

⁹⁶³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Additional Protocol I) (Geneva, 8 June 1977), United

Principle 1

Scope

The present draft principles apply to the protection of the environment before, during or after an armed conflict.

Commentary

(1) This provision defines the scope of the draft principles. It provides that they cover three temporal phases: before, during, and after armed conflict. It was viewed as important to signal at the outset that the scope of the draft principles relates to these phases. The disjunctive “or” seeks to underline that not all draft principles would be applicable during all phases. However, it is worth emphasizing that there is, at times, a certain degree of overlap between these three phases. Furthermore, the formulation builds on discussions within the Commission and in the Sixth Committee of the General Assembly.⁹⁶⁴

(2) The division of the principles into the temporal phases described above (albeit without strict dividing lines) sets out the scope *ratione temporis* of the draft principles. It was considered that addressing the topic from a temporal perspective rather than from the perspective of various areas of international law, such as international environmental law, the law of armed conflict and international human rights law, would make the topic more manageable and easier to delineate. The temporal phases would address legal measures taken to protect the environment before, during and after an armed conflict. Such an approach allowed the Commission to identify concrete legal issues relating to the topic that arose at the different stages of an armed conflict, which facilitated the development of the draft principles.⁹⁶⁵

(3) Regarding the scope *ratione materiae* of the draft principles, reference is made to the term “protection of the environment” as it relates to the term “armed conflicts”. No distinction is generally made between international armed conflicts and non-international armed conflicts.

Principle 2

Purpose

The present draft principles are aimed at 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.

Commentary

(1) This provision outlines the fundamental purpose of the draft principles. It makes it clear that the draft principles aim to enhance the protection of the environment in relation to armed conflict and signals the general kinds of measures that would be required to offer the necessary protection. Such measures include preventive measures, which aim to minimize damage to the environment during armed conflict and remedial measures, which aim to restore the environment after damage has already been caused as a result of armed conflict.

(2) Similar to the provision on scope, the present provision covers all three temporal phases. While it has been recognized both within the Commission⁹⁶⁶ and within the Sixth

Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3. See also draft principles 13, 14 and 16 of the present draft principles.

⁹⁶⁴ The topic was put on the long-term programme of work of the Commission in 2011 and moved onto the current programme of work in 2013, see *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10 (A/66/10)*, annex E, and *ibid.*, *Sixty-eighth Session, Supplement No. 10 (A/68/10)*, para. 131.

⁹⁶⁵ See *ibid.*, *Sixty-eighth Session, Supplement No. 10 (A/68/10)*, para. 135, and *ibid.*, *Sixty-ninth Session, Supplement No. 10 (A/69/10)*, paras. 192–213.

⁹⁶⁶ See, e.g., *A/CN.4/685*, para. 18.

Committee of the General Assembly⁹⁶⁷ that the three phases are closely connected,⁹⁶⁸ the reference to “preventive measures for minimizing damage” relates primarily to the situation before and during armed conflict, and the reference to “remedial measures” principally concerns the post-conflict phase. It should be noted that a State may take remedial measures to restore the environment even before the conflict has ended.

(3) The term “remedial measures” was preferred to the term “restorative measures” as it was viewed as clearer and broader in scope, encompassing any measure of remediation that may be taken to restore the environment. This might include, *inter alia*, loss or damage by impairment to the environment, costs of reasonable measures of reinstatement, as well as reasonable costs of clean-up associated with the costs of reasonable response measures.

Part Two

Principles of general application

Principle 3

Measures to enhance the protection of the environment

1. States shall, pursuant to their obligations under international law, take effective legislative, administrative, judicial and other measures to enhance the protection of the environment in relation to armed conflict.

2. In addition, States should take further measures, as appropriate, to enhance the protection of the environment in relation to armed conflict.

Commentary

(1) Draft principle 3 recognizes that States are required to take effective measures to enhance the protection of the environment in relation to armed conflict. Paragraph 1 recalls obligations under international law and paragraph 2 encourages States voluntarily to take further effective measures. The phrase “to enhance the protection of the environment”, included in both paragraphs, corresponds to the purpose of the set of draft principles. Similarly, the phrase “in relation to armed conflict”, also inserted in both paragraphs, is intended to underline the connection of environmental protection to armed conflict.

(2) Paragraph 1 reflects that States have obligations under international law to enhance the protection of the environment in relation to armed conflict and addresses the measures that States are obliged to take to this end. The obligation is denoted by the word “shall”. The requirement is qualified by the expression “pursuant to their obligations under international law”, indicating that the provision does not require States to take measures that go beyond their existing obligations. The specific obligations of a State under this provision will differ according to the relevant obligations under international law by which it is bound.

(3) Consequently, paragraph 1 is formulated broadly in order to cover a wide range of measures. The provision includes examples of the types of measures that can be taken by States, namely, “legislative, administrative, judicial and other measures”. The examples are not exhaustive, as indicated by the open category “other measures”. Instead, the examples aim to highlight the most relevant types of measures to be taken by States.

(4) The law of armed conflict imposes several obligations on States that directly or indirectly contribute to the aim of enhancing the protection of the environment in relation to armed conflict. The notion “under international law” is nevertheless broader and covers also other relevant treaty-based or customary obligations related to the protection of the environment before, during or after an armed conflict, whether derived from international environmental law, human rights law or other areas of law.

(5) As far as the law of armed conflict is concerned, the obligation to disseminate the law of armed conflict to armed forces and, to the extent possible, also to the civilian

⁹⁶⁷ *Ibid.*, footnote 18: Norway (on behalf of the Nordic countries) (A/C.6/69/SR.25, para. 133), Portugal (A/C.6/69/SR.26, para. 6), Singapore (A/C.6/69/SR.26, para. 66), New Zealand (A/C.6/69/SR.27, para. 3) and Indonesia (A/C.6/69/SR.27, para. 67).

⁹⁶⁸ For example, remedial measures might be required during an occupation.

population contributes to the protection of the environment.⁹⁶⁹ A relevant provision to this end is article 83 of Additional Protocol I, which provides that the High Contracting Parties are under the obligation to disseminate information to their forces on, among other provisions, articles 35 and 55.⁹⁷⁰ This obligation can also be linked to common article 1 of the Geneva Conventions, in which States Parties undertake to respect and ensure respect for the Conventions in all circumstances.⁹⁷¹ Such dissemination can take place for instance through the inclusion of relevant information in military manuals,⁹⁷² as encouraged by the International Committee of the Red Cross (ICRC) Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict.⁹⁷³

(6) Common article 1 is also interpreted to require that States, when they are in a position to do so, exert their influence to prevent and stop violations of the Geneva Conventions by parties to an armed conflict.⁹⁷⁴ As far as the protection of the environment

⁹⁶⁹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I) (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, No. 970, p. 31, art. 47; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Convention II) (Geneva, 12 August 1949), *ibid.*, No. 971, p. 85, art. 48; Geneva Convention relative to the Treatment of Prisoners of War (Convention III) (Geneva, 12 August 1949), *ibid.*, No. 972, p. 135, art. 127; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) (Geneva, 12 August 1949), *ibid.*, No. 973, p. 287, art. 144; Additional Protocol I, art. 83; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Additional Protocol II) (Geneva, 8 June 1977), *ibid.*, No. 17513, p. 609, art. 19; Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the adoption of an additional distinctive emblem (Additional Protocol III) (Geneva, 8 December 2005), *ibid.*, vol. 2404, No. 43425, p. 261, art. 7; and 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 (hereinafter, “Convention on Certain Conventional Weapons”) (Geneva, 10 October 1980), *ibid.*, vol. 1342, No. 22495, p. 137, art. 6. See also J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol. I, *Rules* (Cambridge, Cambridge University Press, 2005), rule 143, pp. 505–508.

⁹⁷⁰ Article 35 of Additional Protocol I reads:

- “1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.”

Article 55 reads:

- “1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
2. Attacks against the natural environment by way of reprisals are prohibited.”

⁹⁷¹ Geneva Convention I, art. 1; Geneva Convention II, art. 1; Geneva Convention III, art. 1; Geneva Convention IV, art. 1.

⁹⁷² Examples of States that have introduced such provisions in their military manuals include Argentina, Australia, Belgium, Benin, Burundi, Canada, Central African Republic, Chad, Colombia, Côte d’Ivoire, France, Germany, Italy, Kenya, Netherlands, New Zealand, Peru, the Russian Federation, South Africa, Spain, Sweden, Switzerland, Togo, Ukraine, the United Kingdom of Great Britain and Northern Ireland and the United States of America. Information available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule45 (accessed on 8 July 2019).

⁹⁷³ The Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict (A/49/323, annex) state, in guideline 17, that: “States shall disseminate these rules and make them known as widely as possible in their respective countries and include them in their programmes of military and civil instruction”.

⁹⁷⁴ See the ICRC commentary (2016) on article 1 of Geneva Convention I (the commentaries on the Geneva Conventions of 1949 and the Protocols thereto are available from www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions (accessed on 8 July 2019)). The ICRC study on customary international law provides a broader interpretation, according to which the obligation to respect and ensure respect is not limited to the Geneva Conventions but refers to the entire body of

is concerned, this could entail, for instance, sharing of scientific expertise as to the nature of the damage caused to the natural environment by certain types of weapons, or making available technical advice as to how to protect areas of particular ecological importance or fragility.

(7) A further obligation to conduct “a weapons review” is found in article 36 of Additional Protocol I. According to this provision, a High Contracting Party is under an obligation to determine whether the employment of a new weapon would, in some or all circumstances, be prohibited by Additional Protocol I or by any other applicable rule of international law.⁹⁷⁵ It is notable that the obligation covers the study, development, acquisition or adoption of all means or methods of warfare: both weapons and the way in which they can be used.⁹⁷⁶ According to the ICRC commentary on the Additional Protocols, article 36 “implies the obligation to establish internal procedures for the purpose of elucidating the issue of legality”. A number of States, including States not party to Additional Protocol I, are known to have established such procedures.⁹⁷⁷

(8) The obligation to conduct “a weapons review” binds all High Contracting Parties to Additional Protocol I. The reference to “any other rule of international law” makes it clear that the obligation may go beyond merely studying whether the employment of a certain weapon would be contrary to the law of armed conflict. This means, first, an examination of whether the employment of a new weapon, means or method of warfare would, in some or all circumstances, be prohibited by Additional Protocol I, including articles 35 and 55, which are of direct relevance to the protection of the environment. Second, there is a need to go beyond Additional Protocol I and analyse whether any other rules of the law of armed conflict, treaty or customary, or any other areas of international law might prohibit the employment of a new weapon, means or method of warfare. Such examination will include taking into account any applicable international environmental law and human rights obligations.⁹⁷⁸

(9) While Additional Protocol I applies only to international armed conflict, the weapons review provided for in article 36 also promotes respect for the law in non-international armed conflicts. Furthermore, the use of weapons that are inherently indiscriminate and the use of means or methods of warfare that are of a nature to cause superfluous injury or unnecessary suffering are prohibited under customary international law.⁹⁷⁹ These rules are not limited to international armed conflict.⁹⁸⁰ It follows that new

international humanitarian law binding upon a particular State (Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* ... (footnote 969 above), rule 139, p. 495).

⁹⁷⁵ Additional Protocol I, art. 36.

⁹⁷⁶ C. Pilloud and J. Pictet, “Article 35: Basic rules”, *ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Y. Sandoz, C. Swinarski and B. Zimmerman (eds.) (Geneva, Martinus Nijhoff, 1987), p. 398, para. 1402. The commentary on “Article 36: New weapons” refers to this section for an explanation of means and methods on p. 425, para. 1472.

⁹⁷⁷ States that are known to have in place national mechanisms to review the legality of weapons and that have made the instruments setting up these mechanisms available to ICRC include Australia, Belgium, Canada, Denmark, Germany, the Netherlands, Norway, Sweden, the United Kingdom and the United States. Other States have indicated to ICRC that they carry out reviews pursuant to Ministry of Defence instructions, but these have not been made available. Information received from ICRC on 31 December 2017.

⁹⁷⁸ Some States, such as Sweden, Switzerland and the United Kingdom, see a value in considering international human rights law in the review of military weapons because military personnel may in some situations (e.g. peacekeeping missions) use the weapon to conduct law enforcement missions. For further commentary, see S. Casey-Maslen, N. Corney and A. Dymond-Bass, “The review of weapons under international humanitarian law and human rights law”, *Weapons under International Human Rights Law*, Casey-Maslen (ed.) (Cambridge University Press, Cambridge, 2014).

⁹⁷⁹ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* ... (see footnote 969 above), rules 70 and 71, pp. 237–250.

⁹⁸⁰ By virtue of the customary rule that civilians must not be made the object of attack, weapons that are by nature indiscriminate are also prohibited in non-international armed conflicts. The prohibition of weapons that are by nature indiscriminate is also set forth in several military manuals applicable in non-international armed conflicts, for instance those of Australia, Colombia, Ecuador, Germany,

weapons as well as methods of warfare are to be reviewed against all applicable international law, including the law governing non-international armed conflicts, in particular as far as the protection of civilians and the principle of distinction are concerned. The obligation not to use inherently indiscriminate weapons, means or methods of warfare has the indirect effect of protecting the environment in a non-international armed conflict. Furthermore, the special treaty-based prohibitions of certain weapons (such as biological and chemical weapons) that may cause serious environmental harm must be observed.

(10) States also have the obligation to effectively exercise jurisdiction and prosecute persons suspected of certain war crimes that have a bearing on the protection of the environment in relation to armed conflict, to the extent that such crimes fall within the category of grave breaches of the Geneva Conventions.⁹⁸¹ Examples of grave breaches, the suppression of which provides indirect protection to certain components of the natural environment, include wilfully causing great suffering or serious injury to body or health and extensive destruction and appropriation of property, not justified by military necessity and carried out wantonly and unlawfully.

(11) Yet another treaty-based obligation is for States to record the laying of mines in order to facilitate future clearing of landmines.⁹⁸²

(12) Paragraph 2 of the draft principle addresses voluntary measures that would further enhance the protection of the environment in relation to armed conflict. This paragraph is therefore less prescriptive than paragraph 1 and the word “should” is used to reflect this difference. The phrases “[i]n addition” and “further measures” both serve to indicate that this provision goes beyond the measures that States shall take pursuant to their obligations under international law, which are addressed in paragraph 1. Like the measures referred to in paragraph 1, the measures taken by States may be of legislative, judicial, administrative or other nature. Furthermore, they could include special agreements providing additional protection to the natural environment in situations of armed conflict.⁹⁸³

(13) In addition to encouraging States to take voluntary measures to enhance the protection of the environment in relation to armed conflict beyond their current obligations under international law, the paragraph captures the recent developments in the practice of States to this end.⁹⁸⁴ One example of how States can continue this development is through providing more explicit guidelines on environmental protection in their military manuals.⁹⁸⁵ Such guidelines may, for instance, aim to ensure training of military personnel involved in peace operations on the environmental aspects of the operation, as well as the conduct of

Nigeria and the Republic of Korea. Information available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule71#Fn_1_19 (accessed on 8 July 2019).

⁹⁸¹ Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146.

⁹⁸² See, for example, the amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices 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 (Geneva, 3 May 1996) (hereinafter, “amended Protocol II to the Convention on Certain Conventional Weapons”), United Nations, *Treaty Series*, vol. 2048, No. 22495, p. 93.

⁹⁸³ For special agreements, see Geneva Convention I, art. 6; Geneva Convention II, art. 6; Geneva Convention III, art. 6; Geneva Convention IV, art. 7. See also common art. 3 of the Geneva Conventions.

⁹⁸⁴ See, e.g., Slovenia, Rules of Service in the Slovenian Armed Forces, item 210; Paraguay, National Defence Council, *Política de Defensa Nacional de la Republica de Paraguay* [National Defence Policy of the Republic of Paraguay], 7 October 1999, para. I (A); and Netherlands, note verbale dated 20 April 2016 from the Permanent Mission of the Netherlands to the United Nations addressed to the Secretariat, para. 5. See also contributions in the Sixth Committee from Croatia (A/C.6/70/SR.24), para. 89, Cuba (*ibid.*), para. 10, Czech Republic (*ibid.*), para. 45), New Zealand (A/C.6/70/SR.25), para. 102, and Palau (*ibid.*), para. 27.

⁹⁸⁵ Examples of States that have done so include Australia, Burundi, Cameroon, Côte d’Ivoire, the Netherlands, Republic of Korea, Switzerland, Ukraine, the United Kingdom and the United States. Information available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule44 (accessed on 8 July 2019). For further examples, see A/CN.4/685, paras. 69–76 and A/CN.4/700, para. 52.

environmental assessments.⁹⁸⁶ Other measures that should be taken by States can aim at enhancing cooperation, as appropriate, with other States, as well as with relevant international organizations.

(14) The overall development that paragraph 2 aims to capture and encourage has its basis also in the practice of international organizations. One example of such practice is the United Nations initiative “Greening the Blue Helmets”, which aims to function as an environmental, sustainable management programme.⁹⁸⁷ A further example of this development is the joint environmental policy developed by the United Nations Department of Peacekeeping Operations and Department of Field Services. The policy includes obligations to develop environmental baseline studies and adhere to a number of multilateral environmental agreements. References are made to treaties and instruments, including the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),⁹⁸⁸ the World Charter for Nature,⁹⁸⁹ the Convention on International Trade in Endangered Species of Wild Fauna and Flora,⁹⁹⁰ the Convention on Biological Diversity⁹⁹¹ and the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention),⁹⁹² as standards to be considered when a mission establishes its environmental objectives and procedures.⁹⁹³

Principle 4 **Designation of protected zones**

States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones.

Commentary

(1) Draft principle 4 is entitled “Designation of protected zones” and provides that States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones. Part Two (“Principles of general application”), where this provision is placed, deals with the pre-conflict stage, when peace is prevailing, but also contains principles of a more general nature that are relevant to more than one temporal phase. Draft principle 4 therefore does not exclude instances in which such areas could be designated either during or soon after an armed conflict. In addition, draft principle 4 has a corresponding draft principle (draft principle 17) which is placed in Part Three “Principles applicable during armed conflict”.

(2) A State may already be taking the necessary measures to protect the environment in general. Such measures may include, in particular, preventive measures in the event that an armed conflict might occur. It is not uncommon that physical areas are assigned a special legal status as a means to protect and preserve a particular area. This can be done through international agreements or through national legislation. In some instances such areas are not only protected in peacetime, but are also immune from attack during an armed conflict.⁹⁹⁴ As a rule, this is the case with demilitarized and neutralized zones. It should be noted that the term “demilitarized zones” has a special meaning in the context of the law of armed conflict. Demilitarized zones are established by the parties to a conflict and imply

⁹⁸⁶ See the information on the United Nations Environment Programme website regarding post-crisis environmental recovery, available at www.unenvironment.org/explore-topics/disasters-conflicts/what-we-do/recovery (accessed on 8 July 2019).

⁹⁸⁷ United Nations Environment Programme, *Greening the Blue Helmets Environment, Natural Resources and UN Peacekeeping Operations* (Nairobi, 2012).

⁹⁸⁸ *Report of the United Nations Conference on the Human Environment (A/CONF.48/14/Rev.1*; United Nations publication, Sales No. E.73.II.A.14), chap. I.

⁹⁸⁹ General Assembly resolution 37/7 of 28 October 1982, annex.

⁹⁹⁰ Washington, 3 March 1975, United Nations, *Treaty Series*, vol. 993, No. 14537, p. 243.

⁹⁹¹ Convention on Biological Diversity (Rio de Janeiro, 5 June 1992), *ibid.*, vol. 1760, No. 30619, p. 79.

⁹⁹² Ramsar, 2 February 1971, *ibid.*, vol. 996, No. 14583, p. 245.

⁹⁹³ United Nations, Department of Peacekeeping Operations and the Department of Field Support, “Environmental Guidelines for UN Field Missions”, 24 July 2009. See also the Department of Field Support website, available at <https://fieldsupport.un.org/en/environment> (accessed on 8 July 2019).

⁹⁹⁴ *A/CN.4/685*, para. 210.

that the parties are prohibited from extending their military operations to that zone if such an extension is contrary to the terms of their agreement.⁹⁹⁵ Demilitarized zones can also be established and implemented in peacetime.⁹⁹⁶ Such zones can cover various degrees of demilitarization, ranging from areas that are fully demilitarized to ones which are partially demilitarized, such as nuclear weapon-free zones.⁹⁹⁷

(3) When designating protected zones under this draft principle, particular weight should be given to the protection of areas of major environmental importance that are susceptible to the adverse consequences of hostilities.⁹⁹⁸ Granting special protection to areas of major ecological importance was suggested at the time of the drafting of the Additional Protocols to the Geneva Conventions.⁹⁹⁹ While the proposal was not adopted, it should be recognized that it was put forward at a relatively early stage in the development of international environmental law. Other types of zones are also relevant in this context, and will be discussed below.

(4) The areas referred to in this draft principle may be designated by agreement or otherwise. The reference to “agreement or otherwise” is intended to introduce some flexibility. The types of situations foreseen may include, *inter alia*, an agreement concluded verbally or in writing, reciprocal and concordant declarations, as well as those created through a unilateral declaration or designation through an international organization. It should be noted that the reference to the word “State” does not preclude the possibility of agreements being concluded with non-State actors. The area declared has to be of “major environmental and cultural importance”. The formulation leaves open the precise meaning of this requirement on purpose, to allow room for development. While the designation of protected zones could take place at any time, it should preferably be before or at least at the outset of an armed conflict.

(5) It goes without saying that under international law, an agreement cannot, in principle, bind a third party without its consent.¹⁰⁰⁰ Thus two States cannot designate a protected area in a third State. The fact that States cannot regulate areas outside their sovereignty or jurisdiction in a manner that is binding on third States, whether through agreements or otherwise, was also outlined in the second report of the Special Rapporteur.¹⁰⁰¹

(6) Different views were initially expressed as to whether or not the word “cultural” should be included. Ultimately, the Commission opted for the inclusion of the term. It was noted that it is sometimes difficult to draw a clear line between areas which are of

⁹⁹⁵ See Additional Protocol I, art. 60. See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* ... (footnote 969 above), rule 36, p. 120. The ICRC study on customary law considers that this constitutes a rule under customary international law and is applicable in both international and non-international armed conflicts.

⁹⁹⁶ See e.g. Antarctic Treaty (Washington, 1 December 1959), United Nations, *Treaty Series*, vol. 402, No. 5778, p. 71, art. I. See, e.g., the definition found in M. Björklund and A. Rosas, *Ålandsöarnas Demilitarisering och Neutralisering* (Åbo, Åbo Academy Press, 1990). The Åland Islands are both demilitarized and neutralized. Björklund and Rosas list as further examples of demilitarized and neutralized areas Spitzbergen, Antarctica and the Strait of Magellan (*ibid.*, p. 17). See also L. Hannikainen, “The continued validity of the demilitarized and neutralized status of the Åland Islands”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 54 (1994), p. 614, at p. 616.

⁹⁹⁷ *Ibid.*

⁹⁹⁸ See A/CN.4/685, para. 225. See also C. Droege and M.-L. Tougas, “The protection of the natural environment in armed conflict – existing rules and need for further legal protection”, *Nordic Journal of International Law*, vol. 82 (2013), pp. 21–52, at p. 43.

⁹⁹⁹ The working group of Committee III of the Conference submitted a proposal for a draft article 48 *ter* providing that “publicly recognized nature reserves with adequate markings and boundaries declared as such to the adversary shall be protected and respected except when such reserves are used specifically for military purposes”. See C. Pilloud and J. Pictet, “Article 55: Protection of the natural environment” in *ICRC Commentary on the Additional Protocols* ..., Sandoz *et al.* (footnote 976 above), p. 664, paras. 2138–2139.

¹⁰⁰⁰ As recognized by the Permanent Court in the case concerning the *Factory At Chorzów, P.C.I.J., Series A, No. 17*, p. 45 and reflected in article 34 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

¹⁰⁰¹ A/CN.4/685, para. 218.

environmental importance and areas which are of cultural importance. This is also recognized in the Convention concerning the Protection of the World Cultural and Natural Heritage (hereinafter the World Heritage Convention).¹⁰⁰² The fact that the heritage sites under this Convention are selected on the basis of a set of ten criteria, including both cultural and natural (without differentiating between them) illustrates this point.¹⁰⁰³

(7) It should be recalled that prior to an armed conflict, States parties to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict¹⁰⁰⁴ (hereinafter the 1954 Hague Convention) and its Protocols, are under the obligation to establish inventories of cultural property items that they wish to enjoy protection in the case of an armed conflict, in accordance with article 11, paragraph 1, of the 1999 Protocol to the Convention.¹⁰⁰⁵ In peacetime, State parties are required to take other measures that they find appropriate to protect their cultural property from anticipated adverse impacts of armed conflicts, in accordance with article 3 of the Convention.

(8) The purpose of the present draft principle is not to affect the regime of the 1954 Hague Convention, which is separate in its scope and purpose. The Commission underlines that the 1954 Hague Convention and its Protocols are the special regime that governs the protection of cultural property both in times of peace, and during armed conflict. It is not the intention of the present draft principle to replicate that regime. The idea here is to protect areas of major “environmental importance”. The term “cultural” is used in this context to indicate the existence of a close linkage to the environment. The draft principle does not extend to cultural objects *per se*. The term would nevertheless include, for example, ancestral lands of indigenous peoples, who depend on the environment for their sustenance and livelihood.

(9) The designation of the areas foreseen by this draft principle can be related to the rights of indigenous peoples, particularly if the protected area also serves as a sacred area which warrants special protection. In some cases, the protected area may also serve to conserve the particular culture, knowledge and way of life of the indigenous populations living inside the area concerned. The importance of preserving indigenous culture and knowledge has now been formally recognised in international law under the Convention on Biological Diversity. Article 8 (j) states that each Contracting Party shall, as far as possible and as appropriate: “Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices”. In addition, the United Nations Declaration on the Rights of Indigenous Peoples,¹⁰⁰⁶ although not a binding instrument, refers to the right to manage, access and protect religious and cultural sites.

(10) The protection of the environment as such and the protection of sites of cultural and natural importance sometimes correspond or overlap. The term “cultural importance”, which is also used in draft principle 17, builds on the recognition of the close connection between the natural environment, cultural objects and characteristics in the landscape in environmental protection instruments such as the 1993 Convention on Civil Liability for

¹⁰⁰² Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) (Paris, 16 November 1972), *ibid.*, vol. 1037, No. 15511, p. 151.

¹⁰⁰³ UNESCO, Operational Guidelines for the Implementation of the World Heritage Convention (8 July 2015) WHC.15/01, para. 77.1. At present, 197 sites representing natural heritage across the world are listed on the World Heritage List. A number of these also feature on the List of World Heritage in Danger in accordance with article 11, para. 4, of the World Heritage Convention.

¹⁰⁰⁴ Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954), United Nations, *Treaty Series*, vol. 249, No. 3511, p. 240.

¹⁰⁰⁵ Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999 Second Protocol) (The Hague, 26 March 1999), *ibid.*, vol. 2253, No. 3511, p. 172.

¹⁰⁰⁶ General Assembly resolution 61/295, annex, art. 12.

Damage Resulting from Activities Dangerous to the Environment.¹⁰⁰⁷ Article 2, paragraph 10, defines the term “environment” for the purpose of the Convention to include: “natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of cultural heritage; and characteristic aspects of the landscape”. In addition, article 1, paragraph 2, of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes stipulates that “effects on the environment include effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors”.¹⁰⁰⁸

(11) Moreover, the Convention on Biological Diversity speaks to the cultural value of biodiversity. The preamble of the Convention on Biological Diversity reaffirms that the parties are: “Conscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components.”¹⁰⁰⁹ Similarly, the first paragraph of annex I to the Convention on Biological Diversity highlights the importance of ensuring protection for ecosystems and habitats “containing high diversity, large numbers of endemic or threatened species, or wilderness; required by migratory species; of social, economic, cultural or scientific importance; or, which are representative, unique or associated with key evolutionary or other biological processes”.

(12) In addition to these binding instruments, a number of non-binding instruments use a lens of cultural importance and value to define protected areas. For instance, the draft convention on the prohibition of hostile military activities in internationally protected areas (prepared by the IUCN Commission on Environmental Law and the International Council of Environmental Law) defines the term “protected areas” as follows: “natural or cultural area [*sic*] of outstanding international significance from the points of view of ecology, history, art, science, ethnology, anthropology, or natural beauty, which may include, *inter alia*, areas designated under any international agreement or intergovernmental programme which meet these criteria”.¹⁰¹⁰

(13) A few examples of domestic legislation referring to the protection of both cultural and environmental areas can also be mentioned in this context. For example, the Act on the Protection of Cultural Property of 29 August 1950 of Japan, provides for animals and plants which have a high scientific value to be listed as “protected cultural property”.¹⁰¹¹ The National Parks and Wildlife Act of 1974 of New South Wales in Australia may apply to any area of natural, scientific or cultural significance.¹⁰¹² Finally, the Italian Protected Areas Act of 6 December 1991 defines “nature parks” as areas of natural and environmental value constituting homogeneous systems characterised by their natural components, their landscape and aesthetic values and the cultural tradition of the local populations.¹⁰¹³

¹⁰⁰⁷ Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993), Council of Europe, *European Treaty Series*, No. 150. For more information on the applicability of multilateral environmental agreements in connection to areas of particular environmental interest, see B. Sjöstedt, *Protecting the Environment in Relation to Armed Conflict: The Role of Multilateral Environmental Agreements* (PhD thesis, Lund University 2016).

¹⁰⁰⁸ Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992), United Nations, *Treaty Series*, vol. 1936, No. 33207, p. 269.

¹⁰⁰⁹ Convention on Biological Diversity, preamble.

¹⁰¹⁰ International Union for Conservation of Nature, draft convention on the prohibition of hostile military activities in internationally protected areas (1996), art. 1.

¹⁰¹¹ Japan, Law for the Protection of Cultural Property, Law No. 214, 30 May 1950. Available from www.unesco.org/culture/natlaws/media/pdf/japan/japan_lawprotectionculturalproperty_engtof.pdf (accessed on 8 July 2019).

¹⁰¹² Australia, New South Wales Consolidated Acts, National Parks and Wildlife Act, Act 80 of 1974. Available from www.austlii.edu.au/au/legis/nsw/consol_act/npawa1974247/ (accessed on 8 July 2019).

¹⁰¹³ Italy, Act No. 394 laying down the legal framework for protected areas, 6 December 1991. Available from <http://faolex.fao.org>.

Principle 5

Protection of the environment of indigenous peoples

1. States should take appropriate measures, in the event of an armed conflict, to protect the environment of the territories that indigenous peoples inhabit.
2. After an armed conflict that has adversely affected the environment of the territories that indigenous peoples inhabit, States should undertake effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and in particular through their own representative institutions, for the purpose of taking remedial measures.

Commentary

(1) Draft principle 5 recognizes that States should, due to the special relationship between indigenous peoples and their environment, take appropriate measures to protect such an environment in relation to an armed conflict. It further recognizes that where armed conflict has adversely affected the environment of indigenous peoples' territories, States should attempt to undertake remedial measures. In the light of the special relationship between indigenous peoples and their environment, these steps should be taken in a manner that consults and cooperates with such peoples, respecting their relationship and through their own leadership and representative structures.

(2) The special relationship between indigenous peoples and their environment has been recognized, protected and upheld by international instruments such as the Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization and the United Nations Declaration on the Rights of Indigenous Peoples,¹⁰¹⁴ as well as in the practice of States and in the jurisprudence of international courts and tribunals. To this end, the land of indigenous peoples has been recognized as having a "fundamental importance for their collective physical and cultural survival as peoples".¹⁰¹⁵

(3) Paragraph 1 is based, in particular, on article 29, paragraph 1, of the United Nations Declaration on the Rights of Indigenous Peoples, which expresses the right of indigenous peoples to "the conservation and protection of the environment and the productive capacity of their lands or territories and resources",¹⁰¹⁶ and article 7, paragraph 4, of ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), which recognizes that "Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit".

¹⁰¹⁴ See International Labour Organization (ILO), Convention concerning Indigenous and Other Tribal Peoples in Independent Countries (Geneva, 27 June 1989) (Indigenous and Tribal Peoples Convention, 1989 (No. 169)), which revised the Indigenous and Tribal Populations Convention, 1957 (No. 107); United Nations Declaration on the Rights of Indigenous Peoples, General Assembly resolution 61/295 of 13 September 2007, annex, art. 26. The reports of the Special Rapporteur on the rights of indigenous peoples, and the Special Rapporteur on human rights and the environment (formerly the Independent Expert on human rights and the environment) provide an overview of the application of the rights of indigenous peoples in connection to the environment and natural resources (see, for example, [A/HRC/15/37](#) and [A/HRC/4/32](#), respectively).

¹⁰¹⁵ See, for example, *Río Negro Massacres v. Guatemala*, in which the Inter-American Court of Human Rights recognized "the culture of the members of the indigenous communities corresponds to a specific way of being, seeing and acting in the world, constituted on the basis of their close relationship with their traditional lands and natural resources, not only because these are their main means of subsistence, but also because they constitute an integral component of their cosmovision, religious beliefs and, consequently, their cultural identity". *Río Negro Massacres v. Guatemala*, Judgment (Preliminary Objection, Merits, Reparations and Costs), Series C, Case No. 250, 4 September 2012, para. 177, footnote 266. *C.f. Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs), Series C, Case No. 125, 17 June 2005, para. 135, and *Case of Chitay Nech et al. v. Guatemala*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), Series C, Case No. 212, 25 May 2010, para. 147, footnote 160.

¹⁰¹⁶ See also American Declaration on the Rights of Indigenous Peoples, adopted on 15 June 2016, Organization of American States, General Assembly, *Report of the Forty-Sixth Regular Session, Santo Domingo, Dominican Republic, June 13–15, 2016*, XLVI-O.2, *Proceedings*, vol. I, resolution AG/RES. 2888 (XLVI-O/16), art. XIX, para. 4.

(4) The specific rights of indigenous peoples over certain lands or territories may be the subject of different legal regimes in different States. Further, in international instruments concerning the rights of indigenous peoples, various formulations are used to refer to the lands or territories connected to indigenous peoples, and over which they have various rights and protective status.¹⁰¹⁷

(5) Armed conflict may have the effect of increasing existing vulnerabilities to environmental harm or creating new types of environmental harm on the territories concerned and thereby affecting the survival and well-being of the peoples connected to it. Under paragraph 1, in the event of an armed conflict, States should take appropriate measures to protect the relationship that indigenous peoples have with their ancestral lands. The appropriate protective measures referred to in paragraph 1 may be taken, in particular, before or during an armed conflict. The wording of the paragraph is broad enough to allow for the measures to be adjusted according to the circumstances.

(6) For example, the concerned State should take steps to ensure that military activities do not take place in the lands or territories of indigenous peoples unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous people concerned.¹⁰¹⁸ This could be achieved through avoiding placing military installations in indigenous peoples' lands or territories, and by designating their territories as protected areas, as set out in draft principle 4. In general, the concerned State should consult effectively with the indigenous peoples concerned prior to using their lands or territories for military activities.¹⁰¹⁹ During an armed conflict, the rights, lands and territories of indigenous peoples also enjoy the protections provided by the law of armed conflict and applicable human rights law.¹⁰²⁰

(7) Paragraph 2 focuses on the phase after an armed conflict has ended. The purpose of this provision is to facilitate the taking of remedial measures in the event that an armed conflict has adversely affected the environment of the territories that indigenous peoples inhabit.¹⁰²¹ In doing so, it seeks to ensure the participatory rights of indigenous peoples in

¹⁰¹⁷ See, for example, "lands or territories, or both as applicable, which they occupy or otherwise use" used in art. 13, 1, of ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), or "lands, territories and resources" used in the preamble of United Nations Declaration on the Rights of Indigenous Peoples.

¹⁰¹⁸ See United Nations Declaration on the Rights of Indigenous Peoples, art. 30:

"1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous people concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities."

¹⁰¹⁹ *Ibid.*

¹⁰²⁰ See the American Declaration on the Rights of Indigenous Peoples, art. XXX, paras. 3 and 4, which read:

"3. Indigenous peoples have the right to protection and security in situations or periods of internal or international armed conflict, in accordance with international humanitarian law.

4. States, in compliance with international agreements to which they are party, in particular those of international humanitarian law and international human rights law, including the Geneva Convention relative to the Protection of Civilian Persons in Time of War, and Protocol II thereof relating to the protection of victims of non-international armed conflicts, shall, in the event of armed conflicts, take adequate measures to protect the human rights, institutions, lands, territories, and resources of indigenous peoples and their communities ...".

¹⁰²¹ According to the United Nations Declaration on the Rights of Indigenous Peoples, article 28, "[i]ndigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent". Similarly, the American Declaration on the Rights of Indigenous Peoples, art. XXXIII, states: "Indigenous peoples and individuals have the right to effective and suitable remedies, including prompt judicial remedies, for the reparation of any violation of their collective and individual rights. States, with full and effective

issues relating to their territories in a post-conflict context, while focusing on States as the subjects of the paragraph.

(8) In such instance, the concerned States should undertake effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and, in particular, through their own representative institutions. In doing so, States should consider the special nature of the relationship between indigenous peoples and their territories – in its social, political, spiritual, cultural and other aspects. Further, States should consider that this relationship is often of a “collective” nature.¹⁰²²

(9) The need to proceed through appropriate procedures and representative institutions of indigenous peoples has been included to acknowledge the diversity of the existing procedures within different States that allow for effective consultation and cooperation with indigenous peoples, and the diversity of their modes of representation in order to obtain their free, prior and informed consent before adopting measures that may affect them.¹⁰²³

Principle 6
Agreements concerning the presence of military forces in relation to armed conflict

States and international organizations should, as appropriate, include provisions on environmental protection in agreements concerning the presence of military forces in relation to armed conflict. Such provisions may include preventive measures, impact assessments, restoration and clean-up measures.

Commentary

(1) Draft principle 6 addresses agreements concluded by States among themselves and between States and international organizations, concerning the presence of military forces in relation to armed conflict. The phrase “in relation to armed conflict” reflects the purpose of the draft principles: to enhance the protection of the environment in relation to armed conflict. Consequently, the provision does not refer to situations in which military forces are being deployed without any relation to an armed conflict, since such situations are outside the scope of the topic.

(2) The draft principle is cast in general terms to refer to “agreements concerning the presence of military forces in relation to armed conflict”. The specific designation and purpose of such agreements can vary, and may, depending on the particular circumstances, include status-of-forces and status-of-mission agreements. The purpose of the draft 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.¹⁰²⁴ The word “should”

participation of indigenous peoples, shall provide the necessary mechanisms for the exercise of this right.”

¹⁰²² For example, see article 13 of ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), which states that “In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship”. Though specific to that Convention’s application, it explicitly notes the collective aspects of the relationship that indigenous peoples have with their lands or territories.

¹⁰²³ See for instance, United Nations Declaration on the Rights of Indigenous Peoples, art. 19. The Inter-American Court of Human Rights has established safeguards requiring States to obtain the “free, prior, and informed consent [of indigenous peoples], according to their customs and traditions”. See *Case of the Saramaka People v. Suriname*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), Series C, No. 172, 28 November 2007, para. 134.

¹⁰²⁴ The Agreement between the European Union and the former Yugoslav Republic of Macedonia on the status of the European Union-led forces in the former Yugoslav Republic of Macedonia (*Official Journal* L 082, 29/03/2003 P. 0046 – 0051, annex; hereinafter, “*Concordia* status-of-forces agreement”), art. 9, provided a duty to respect international norms regarding, *inter alia*, the sustainable use of natural resources. See Agreement between the European Union and the Former Yugoslav Republic of Macedonia on the status of the European Union-led forces in the former

indicates that this provision is not mandatory in nature, but rather aims at acknowledging and encouraging this development.

(3) Examples of environmental provisions in agreements concerning the presence of military forces in relation to armed conflict include the United States-Iraq agreement on the withdrawal from and temporary presence of United States forces in Iraq, which contains an explicit provision on the protection of the environment.¹⁰²⁵ Another example is the status-of-forces agreement between the North Atlantic Treaty Organization (NATO) and Afghanistan, in which the parties agree to pursue a preventative approach to environmental protection.¹⁰²⁶ The status-of-mission agreement under the European Security and Defence Policy also makes several references to environmental obligations.¹⁰²⁷ Relevant treaty practice includes also the agreement between Germany and other NATO States, which states that potential environmental effects shall be identified, analysed and evaluated, in order to avoid environmental burden.¹⁰²⁸ Moreover, the Memorandum of Special Understanding between the United States and the Republic of Korea contains provisions on environmental protection.¹⁰²⁹ Reference can further be made to arrangements applicable to short-term presence of foreign armed forces in a country for the purpose of exercises, transit by land or training.¹⁰³⁰

(4) Reference can also be made to other agreements, including those concerning the presence of military forces with a less clear relation to armed conflict, such as the status-of-forces agreement between the United States and Australia, which contains a relevant provision on damage claims,¹⁰³¹ and the Enhanced Defence Cooperation Agreement

Yugoslav Republic of Macedonia, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22003A0329\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22003A0329(01)) (accessed on 8 July 2019).

- ¹⁰²⁵ Agreement between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during their Temporary Presence in Iraq (Baghdad, 17 November 2008), art. 8 (hereinafter, “United States-Iraq Agreement”). Available at https://www.dcaf.ch/sites/default/files/publications/documents/US-Iraqi_SOFA-en.pdf (accessed on 8 July 2019).
- ¹⁰²⁶ Agreement between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO personnel conducting mutually agreed NATO-led activities in Afghanistan (Kabul, 30 September 2014), *International Legal Materials*, vol. 54 (2015), pp. 272–305, art. 5, para. 6, art. 6, para. 1, and art. 7, para. 2.
- ¹⁰²⁷ Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in article 17, paragraph 2, of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (EU SOFA) (Brussels, 17 November 2003). Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A42003A1231%2801%29> (accessed on 8 July 2019).
- ¹⁰²⁸ Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany (Bonn, 3 August 1959), United Nations, *Treaty Series*, vol. 481, No. 6986, p. 329, amended by the Agreements of 21 October 1971 and 18 March 1993 (hereinafter, “NATO-Germany Agreement”), art. 54A. See also Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces of 19 June 1951, art. XV.
- ¹⁰²⁹ Memorandum of Special Understandings on Environmental Protection, concluded between the United States and the Republic of Korea (Seoul, 18 January 2001) (hereinafter, “United States-Republic of Korea Memorandum”). Available at www.usfk.mil/Portals/105/Documents/SOFA/A12_MOSU.Environmental.Protection.pdf (accessed on 8 July 2019).
- ¹⁰³⁰ See, e.g., Memorandum of Understanding between Finland and NATO regarding the provision of host nation support for the execution of NATO operations/exercises/similar military activity (4 September 2014). Available at www.defmin.fi/files/2898/HNS_MOU_FINLAND.pdf (accessed on 8 July 2019), reference HE 82/2014. According to art. 5.3 (g), sending nations must follow host nation environmental regulations as well as any host nation’s regulations for the storage, movement, or disposal of hazardous materials.
- ¹⁰³¹ Agreement concerning the Status of United States Forces in Australia (Canberra, 9 May 1963), United Nations, *Treaty Series*, vol. 469, No. 6784, p. 55 (hereinafter, “United States-Australia Agreement”), art. 12, para. 7 (e) (i).

between the United States and the Philippines, which contains provisions seeking to prevent environmental damage and provides for a review process.¹⁰³²

(5) The draft principle also provides a non-exhaustive list of provisions on environmental protection that may be included in agreements concerning the presence of military forces in relation to armed conflict. Thus the second sentence of the draft principle mentions “preventive measures, impact assessments, restoration and clean-up measures” as examples of what provisions of environmental protection may address. The presence of military forces may risk having an adverse impact on the environment.¹⁰³³ In order to avoid such adverse impact to the extent possible, measures of a preventive nature are of a great importance. Impact assessments are necessary to determine the kind of restoration and clean-up measures that may be needed at the conclusion of the presence of military forces.

(6) The measures referred to in the draft principle may address a variety of relevant aspects. Some precise examples that deserve specific mention as reflected in treaty practice are: the recognition of the importance of environmental protection, including the prevention of pollution from facilities and areas granted to the deploying State;¹⁰³⁴ an understanding that the agreement will be implemented in a manner consistent with protecting the environment;¹⁰³⁵ cooperation and sharing of information between the host State and the sending State regarding issues that could affect the health and environment for citizens;¹⁰³⁶ measures to prevent environmental damage;¹⁰³⁷ periodic environmental performance assessments;¹⁰³⁸ review processes;¹⁰³⁹ application of the environmental laws of the host State¹⁰⁴⁰ or, similarly, a commitment by the deploying State to respect the host State’s environmental laws, regulations and standards;¹⁰⁴¹ a duty to respect international norms regarding the sustainable use of natural resources;¹⁰⁴² the taking of restorative measures where detrimental effects are unavoidable;¹⁰⁴³ and the regulation of environmental damage claims.¹⁰⁴⁴

(7) The phrase “as appropriate” signals two different considerations. First, agreements on the presence of military forces in relation to armed conflict are sometimes concluded under urgent circumstances in which it may not be possible to address issues of environmental protection. Second, sometimes it may be especially important that the agreement contains provisions on environmental protection. One such example is provided by a protected zone at risk of being affected by the presence of military forces. The phrase “as appropriate” therefore provides nuance to this provision and allows it to capture different situations.

¹⁰³² Agreement between the Philippines and the United States on enhanced defense cooperation (hereinafter, “United States-Philippines Agreement”) (Quezon City, 28 April 2014). Available at www.officialgazette.gov.ph/2014/04/29/document-enhanced-defense-cooperation-agreement/ (accessed on 8 July 2019).

¹⁰³³ See e.g. D.L. Shelton and I. Cutting, “If you break it, do you own it?”, *Journal of International Humanitarian Legal Studies*, vol. 6 (2015), pp. 201–246, at pp. 210–211, and J. Taylor, “Environment and security conflicts: The U.S. Military in Okinawa”, *Geographical Bulletin*, vol. 48 (2007), pp. 3–13, at pp. 6–7.

¹⁰³⁴ See United States-Republic of Korea Memorandum.

¹⁰³⁵ See United States-Iraq Agreement, art. 8.

¹⁰³⁶ See United States-Republic of Korea Memorandum.

¹⁰³⁷ See United States-Philippines Agreement, art. IX, para. 3, and NATO-Germany Agreement, art. 54A.

¹⁰³⁸ These assessments could identify and evaluate the environmental aspects of the operation and can be accompanied by a commitment to plan, program and budget for these requirements accordingly, as in done the United States-Republic of Korea Memorandum.

¹⁰³⁹ See United States-Philippines Agreement, art. IX, para. 2.

¹⁰⁴⁰ See NATO-Germany Agreement, art. 54A, and United States-Australia Agreement, art. 12, para. 7 (e) (i).

¹⁰⁴¹ See United States-Iraq agreement, art. 8.

¹⁰⁴² As is done in art. 9 of the *Concordia* status-of-forces agreement.

¹⁰⁴³ See NATO-Germany Agreement, art. 54A.

¹⁰⁴⁴ NATO-Germany Agreement, art. 41, and United States-Australia Agreement, art. 12, para. 7 (e) (i).

Principle 7

Peace operations

States and international organizations involved in peace operations in relation to armed conflict shall consider the impact of such operations on the environment and take appropriate measures to prevent, mitigate and remediate the negative environmental consequences thereof.

Commentary

(1) Peace operations can relate to armed conflict in multiple ways. Previously, many peace operations were deployed following the end of hostilities and the signing of a peace agreement.¹⁰⁴⁵ As the High-level Independent Panel on Peace Operations noted, today many missions operate in environments where no such political agreements exist, or where efforts to establish one have failed.¹⁰⁴⁶ Moreover, modern United Nations peacekeeping missions are multidimensional and address a range of peacebuilding activities, from providing secure environments to monitoring human rights, or rebuilding the capacity of a State.¹⁰⁴⁷ Mandates also include the protection of civilians.¹⁰⁴⁸ Draft principle 7 intends to cover all such peace operations that may relate to multifarious parts or aspects of an armed conflict, and may vary in temporal nature.

(2) The words “in relation to armed conflict” delineate the scope of the draft principle. They make clear the connection to armed conflict so as to ensure that the obligations are not to be interpreted too broadly (i.e. as potentially applying to every action of an international organization related to the promotion of peace). While the term is to be understood from a broad perspective in the context of the draft principle, it is recognized that not all such operations have a direct link to armed conflict.

(3) The present draft principle covers operations where States and international organizations are involved in peace operations related to armed conflict and where multiple actors may be present. All these actors will have some effect on the environment. For example, the Department of Peacekeeping Operations and the Department of Field Support recognize the potential damage by peacekeeping operations to the local environment.¹⁰⁴⁹

(4) The environmental impact of a peace operation may stretch from the planning phase through its operational part, to the post-operation phase. The desired goal is that peace operations should undertake their activities in such a manner that the impact of their activities on the environment is minimized. The draft principle thus focuses on activities to be undertaken in situations where the environment would be negatively affected by a peace operation. At the same time, it is understood that “appropriate” measures to be taken may differ in relation to the context of the operation. The relevant considerations may include, in

¹⁰⁴⁵ Report of the High-level Independent Panel on Peace Operations on uniting our strengths for peace: politics, partnership and people (contained in [A/70/95-S/2015/446](#)), para. 23.

¹⁰⁴⁶ *Ibid.*

¹⁰⁴⁷ V. Holt and G. Taylor, *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges*, independent study jointly commissioned by the Department of Peacekeeping Operations and the Office for the Coordination of Humanitarian Affairs (United Nations publication, Sales No. E.10.III.M.1), pp. 2–3.

¹⁰⁴⁸ See for example the following mandates of United Nations-led missions found in Security Council resolutions: United Nations Mission in Sierra Leone (1289 (2000)); United Nations Observer Mission in the Democratic Republic of the Congo (1291 (2000)); United Nations Mission in Liberia (1509 (2003) and 2215 (2015)); United Nations Operation in Burundi (1545 (2004)); United Nations Stabilization Mission in Haiti (1542 (2004)); United Nations Operation in Côte d’Ivoire (1528 (2004) and 2226 (2015)); United Nations Mission in the Sudan (1590 (2005)); African Union-United Nations Hybrid Operation in Darfur (1769 (2007)); and United Nations Mission in the Central African Republic and Chad (1861 (2009)).

¹⁰⁴⁹ See United Nations, Department of Peacekeeping Operations and the Department of Field Support, “DFS Environment Strategy” (2017). Available at https://peacekeeping.un.org/sites/default/files/171116_dfs_exec_summary_environment_0.pdf (accessed on 8 July 2019). The strategy is complemented by an environmental policy and environmental guidelines on environment for United Nations field missions (see footnote 993 above).

particular, whether such measures relate to the pre-, in-, or post- armed conflict phase, and what measures are feasible under the circumstances.

(5) The draft principle reflects the stronger recognition on the part of States and international organizations such as the United Nations, the European Union,¹⁰⁵⁰ and NATO,¹⁰⁵¹ of the environmental impact of peace operations and the need to take necessary measures to prevent, mitigate and remediate negative impacts. For example, some United Nations field missions have dedicated environmental units to develop and implement mission-specific environmental policies and oversee environmental compliance.¹⁰⁵²

(6) There is no clear or definitive definition for “peace operation” or “peacekeeping” in existing international law. The current draft principle is intended to cover broadly all such peace operations that relate to armed conflict. The Agenda for Peace highlighted that “peacemaking” was action to bring hostile parties to agreement, especially through peaceful means;¹⁰⁵³ “peacekeeping” was the deployment of a United Nations presence in the field, involving military and/or police personnel, and frequently civilians as well;¹⁰⁵⁴ while “peacebuilding” was to take the form of cooperative projects in a mutually beneficial undertaking to enhance the confidence fundamental to peace.¹⁰⁵⁵ The report of the High-level Independent Panel on Peace Operations includes, for its purposes, “a broad suite of tools ... from special envoys and mediators; political missions, including peacebuilding missions; regional preventive diplomacy offices; observation missions, including both ceasefire and electoral missions; to small, technical-specialist missions such as electoral support missions; multidisciplinary operations”.¹⁰⁵⁶ The term “peace operations” aims to cover all these types of operations, and operations broader than United Nations peacekeeping operations, including peace enforcement operations and operations by regional organizations. There is no reference in the text to “multilateral” peace operations, as it was considered unnecessary to address this expressly in the draft principle. The general understanding of the term “peace operations” is nevertheless that it concerns multilateral operations.

(7) “Prevent” has been used in acknowledgement of the fact that peace operations are not isolated in nature, and that in planning their actions, States and international organizations should plan or aim to minimize negative environmental consequences. While the prevention obligation requires action to be taken at an early stage, the notion of “mitigation” refers to reduction of harm that has already occurred. The notion of “remediation”, in turn, has been used in the same sense as “remedial measures” in draft principle 2, encompassing any measure that may be taken to restore the environment.

(8) Draft principle 7 is distinct in character from draft principle 6. Peace operations, unlike agreements concerning the presence of military forces in relation to armed conflict, do not necessarily involve armed forces or military personnel. Other types of actors such as civilian personnel and various types of specialists may also be present and covered by such operations. Draft principle 7 is also intended to be broader and more general in scope, and to direct focus on the activities of such peace operations.

(9) It is understood that the draft principle also encompasses reviews of concluded operations that would identify, analyse and evaluate any detrimental effects of those operations on the environment. This would be a “lessons learned” type of exercise to seek

¹⁰⁵⁰ See, e.g., European Union, “Military Concept on Environmental Protection and Energy Efficiency for EU-led military operations”, 14 September 2012, document EEAS 01574/12.

¹⁰⁵¹ See, e.g., NATO, “Joint NATO doctrine for environmental protection during NATO-led military activities”, 8 March 2018, document NSO(Joint)0335(2018)EP/7141.

¹⁰⁵² “The future of United Nations peace operations: implementation of the recommendations of the High-level Independent Panel on Peace Operations”, Report of the Secretary-General (A/70/357-S/2015/682), para. 129.

¹⁰⁵³ “An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping” (A/47/277-S/24111), para. 20. See also the supplement thereto, a position paper by the Secretary-General on the occasion of the fiftieth anniversary of the United Nations (A/50/60-S/1995/1).

¹⁰⁵⁴ *Ibid.*

¹⁰⁵⁵ *Ibid.*, para. 56.

¹⁰⁵⁶ A/70/95-S/2015/446, para. 18.

to avoid or minimize the negative effects of future peace operations on the environment and ensure that mistakes are not repeated.

Principle 8 **Human displacement**

States, international organizations and other relevant actors should take appropriate measures to prevent and mitigate environmental degradation in areas where persons displaced by armed conflict are located, while providing relief and assistance for such persons and local communities.

Commentary

(1) Draft principle 8 addresses the inadvertent environmental effects of conflict-related human displacement. The draft principle recognizes the interconnectedness of providing relief for those displaced by armed conflict and reducing the impact of displacement on the environment. The draft principle covers both international and internal displacement.

(2) Population displacement typically follows the outbreak of an armed conflict, giving rise to significant human suffering as well as environmental damage.¹⁰⁵⁷ The United Nations Environment Programme has reported on “the massive movement of refugees and internally displaced people ... across the country” as perhaps “the most immediate consequence of the conflict [in Liberia]”,¹⁰⁵⁸ as well as of “clear and significant” “links between displacement and the environment” in the Sudan.¹⁰⁵⁹ In Rwanda, the population displacement and resettlement related to the 1990–1994 conflict and genocide “had a major impact on the environment, substantially altering land cover and land use in many parts of the country”,¹⁰⁶⁰ as well as causing extensive environmental damage in the neighbouring Democratic Republic of the Congo.¹⁰⁶¹

(3) Reference can also be made to a 2014 study on the protection of the environment during armed conflict, which emphasizes the humanitarian and environmental impacts of displacement in various conflicts.¹⁰⁶² The study notes with reference to the Democratic Republic of the Congo that “massive conflict-induced displacement of civilian populations associated with protracted conflict may have even more destructive effects [on] the environment than actual combat operations”.¹⁰⁶³ Non-international armed conflicts, in particular, have caused important effects in terms of displacement, including the environmental strain in the affected areas.¹⁰⁶⁴ In a similar manner, research based on the post-conflict environmental assessments conducted since the 1990s by the United Nations Environment Programme, the United Nations Development Programme and the World Bank has identified human displacement as one of the six principal pathways for direct environmental damage in conflict.¹⁰⁶⁵

¹⁰⁵⁷ See Office of the United Nations High Commissioner for Refugees (UNHCR), *UNHCR Environmental Guidelines* (Geneva, 2005). Available at www.refworld.org/docid/4a54bbd10.html (accessed on 8 July 2019).

¹⁰⁵⁸ United Nations Environment Programme, *Desk Study on the Environment in Liberia* (United Nations Environment Programme, 2004), p. 23. Available at <http://wedocs.unep.org/handle/20.500.11822/8396> (accessed on 8 July 2019).

¹⁰⁵⁹ United Nations Environment Programme, *Sudan Post-Conflict Environmental Assessment* (Nairobi, 2007), p. 115. Available at <http://wedocs.unep.org/handle/20.500.11822/22234> (accessed on 8 July 2019).

¹⁰⁶⁰ United Nations Environment Programme, *Rwanda: From Post-Conflict to Environmentally Sustainable Development* (Nairobi, 2011), p. 74. Available at https://postconflict.unep.ch/publications/UNEP_Rwanda.pdf (accessed on 8 July 2019).

¹⁰⁶¹ As more than 2 million people moved in and out of the country, up to 800,000 people in camps along the border to the Democratic Republic of the Congo had to rely on firewood from the nearby Virunga national park. *Ibid.*, pp. 65–66.

¹⁰⁶² International Law and Policy Institute, *Protection of the Natural Environment in Armed Conflict: An Empirical Study*, Report 12/2014 (Oslo, 2014).

¹⁰⁶³ *Ibid.*, p. 5.

¹⁰⁶⁴ *Ibid.*, p. 6.

¹⁰⁶⁵ D. Jensen and S. Lonergan, “Natural resources and post-conflict assessment, remediation, restoration and reconstruction: lessons and emerging issues”, in Jensen and Lonergan (eds.), *Assessing and*

(4) As the Office of the United Nations High Commissioner for Refugees (UNHCR) has pointed out, considerations relating to access to water, the location of refugee camps and settlements, as well as food assistance by relief and development agencies, “all have a direct bearing on the environment”.¹⁰⁶⁶ Uninformed decisions concerning the siting of a refugee camp in or near a fragile or internationally protected area may result in irreversible – local and distant – impacts on the environment. Areas of high environmental value suffer particularly serious impacts that may be related to the area’s biological diversity, its function as a haven for endangered species or for the ecosystem services these provide.¹⁰⁶⁷ The United Nations Environment Programme¹⁰⁶⁸ and the United Nations Environmental Assembly have similarly drawn attention to the environmental impact of displacement.¹⁰⁶⁹

(5) The African Union Convention for the Protection of Internally Displaced Persons in Africa, also known as the Kampala Convention, stipulates that State Parties shall “[t]ake necessary measures to safeguard against environmental degradation in areas where internally displaced persons are located, either within the jurisdiction of the State Parties, or in areas under their effective control”.¹⁰⁷⁰ The Kampala Convention applies to internal displacement “in particular as a result of or in order to avoid the effects of armed conflict, situation of generalized violence, violations of human rights or natural or human-made disasters”.¹⁰⁷¹

(6) Other recent developments related to displacement and the environment include the Task Force on Displacement, which was set up at the Conference of the Parties to the United Nations Framework Convention on Climate Change, and mandated to produce recommendations on integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change.¹⁰⁷² In 2015, States adopted the Sendai Framework for Disaster Risk Reduction, which calls, *inter alia*, for the promotion of transboundary cooperation to build resilience and reduce the risk of disasters and the risk of displacement.¹⁰⁷³ The more recent Global Compact for Safe, Orderly and Regular Migration likewise includes a section on the relationship between migration and environmental degradation.¹⁰⁷⁴ Although these developments focus on the environmental reasons for – rather than the environmental effects of – displacement, they are indicative of a recognition among States of the nexus between environment and displacement, and the need to foster cooperation and regulation in that field.

Restoring Natural Resources in Post-Conflict Peacebuilding (Abingdon, Earthscan from Routledge, 2012), pp. 411–450, p. 414.

¹⁰⁶⁶ UNHCR *Environmental Guidelines* (footnote 1057 above), p. 5. See also G. Lahn and O. Grafham, “Heat, light and power for refugees: saving lives, reducing costs” (Chatham House, 2015).

¹⁰⁶⁷ *Ibid.*, p. 7.

¹⁰⁶⁸ See United Nations Environment Programme, *Rwanda: From Post-Conflict to Environmentally Sustainable Development* (footnote 1060 above). See also United Nations Environment Programme, *Sudan Post-Conflict Environmental Assessment* (footnote 1059 above).

¹⁰⁶⁹ See United Nations Environmental Assembly resolution 2/15 of 27 May 2016 on “Protection of the environment in areas affected by armed conflict” (UNEP/EA.2/Res.15), para. 1.

¹⁰⁷⁰ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala, 23 October 2009), art. 9, para. 2 (j). Available at <https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa>. The Convention entered into force on 6 December 2012.

¹⁰⁷¹ *Ibid.*, art. 1 (k).

¹⁰⁷² Conference of the Parties of the United Nations Framework Convention on Climate Change, Decision 1/CP.21 “Adoption of the Paris Agreement”, para. 49, in Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, Addendum (FCCC/CP/2015/10/Add.1). See also the Nansen Initiative, *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change*, vol. 1 (2015). Available at <https://nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf> (accessed on 8 July 2019).

¹⁰⁷³ Sendai Framework for Disaster Risk Reduction 2015–2030, para. 28 (adopted at the Third United Nations World Conference on Disaster Risk Reduction and endorsed by the General Assembly in resolution 69/283 of 3 June 2015). Available at www.unisdr.org/we/inform/publications/43291 (accessed on 8 July 2019).

¹⁰⁷⁴ General Assembly resolution 73/195 of 19 December 2018, annex.

(7) Draft principle 8 addresses States, international organizations and other relevant actors. International organizations involved in the protection of displaced people, and the environment, in conflict-affected areas include UNHCR, the United Nations Environment Programme and other United Nations agencies, as well as the European Union, the African Union, and NATO. “Other relevant actors” referred to in the draft principle may include, *inter alia*, international donors, ICRC, and international non-governmental organizations. All these actors are to take appropriate measures to prevent and mitigate environmental degradation in areas where persons displaced by armed conflict are located, while providing relief and assistance for such persons and local communities. The terms “relief and assistance” refer generally to the kind of assistance involved where human displacement occurs. These terms are not intended to convey any different meaning from how these terms are understood in humanitarian work.

(8) Draft principle 8 includes a reference to relief for displaced persons and local communities. The UNHCR Environmental Guidelines note in this regard that the “state of the environment ... will have a direct bearing on the welfare and well-being of people living in that vicinity, whether refugees, returnees or local communities”.¹⁰⁷⁵ Providing livelihoods for displaced people is intimately connected to preserving and protecting the environment in which local and host communities are located. Better environmental governance increases resilience for host communities, displaced persons, and the environment as such.

(9) Similarly, the International Organization for Migration has highlighted the importance of “reducing the vulnerability of displaced persons as well as their impacts on the receiving society and ecosystem” as an emerging issue that requires addressing,¹⁰⁷⁶ and has developed an Atlas of Environmental Migration.¹⁰⁷⁷ The World Bank, furthermore, has drawn attention to the issue in its 2009 report “Forced displacement – The development challenge”.¹⁰⁷⁸ The report highlights the development impacts that displacement can have on environmental sustainability and development, including through environmental degradation.¹⁰⁷⁹ Reference can also be made to the Draft International Covenant on Environment and Development of the International Union for Conservation of Nature, which includes a paragraph on displacement reading as follows: “Parties shall take all necessary measures to provide relief for those displaced by armed conflict, including internally displaced persons, with due regard to environmental obligations”.¹⁰⁸⁰

(10) The reference to “providing relief” to persons displaced by conflict and to local communities in draft principle 8 should also be read in the light of the Commission’s previous work on the topic “Protection of persons in the event of disasters”.¹⁰⁸¹ As explained in the relevant commentary, the draft articles would apply in situations of displacement that, because of their magnitude, can be viewed as “complex emergencies”, including where a disaster occurs in an area where there is an armed conflict.¹⁰⁸²

¹⁰⁷⁵ UNHCR *Environmental Guidelines* (footnote 1057 above), p. 5.

¹⁰⁷⁶ International Organization for Migration, *Compendium of Activities in Disaster Risk Reduction and Resilience* (Geneva, 2013), as referenced in *IOM Outlook on Migration, Environment and Climate Change* (Geneva, 2014), p. 82.

¹⁰⁷⁷ D. Ionesco, D. Mokhnacheva, F. Gemenne, *The Atlas of Environmental Migration* (Abingdon, Routledge 2019).

¹⁰⁷⁸ A. Christensen and N. Harild, “Forced displacement – The development challenge” (Social Development Department, The World Bank Group, Washington, D.C., 2009).

¹⁰⁷⁹ *Ibid.*, pp. 4 and 11.

¹⁰⁸⁰ International Union for Conservation of Nature, Draft International Covenant on Environment and Development (2015), art. 40, on military and hostile activities (formerly art. 38). Available from www.iucn.org.

¹⁰⁸¹ Draft articles on the protection of persons in the event of disasters, *Official Records of the General Assembly, Seventy-first session, Supplement No. 10 (A/71/10)*, paras. 48–49.

¹⁰⁸² Para. (9) of the commentary to draft art. 18, para. 2, *ibid.*, at p. 73. See also draft art. 3 (a): “disaster” was defined, for the purposes of the draft articles, as “a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society”. *Ibid.*, at p. 14.

(11) Draft principle 8 is located in Part Two given that conflict-related human displacement is a phenomenon that may have to be addressed both during and after an armed conflict.

Principle 9
State responsibility

1. An internationally wrongful act of a State, in relation to an armed conflict, that causes damage to the environment entails the international responsibility of that State, which is under an obligation to make full reparation for such damage, including damage to the environment in and of itself.
2. The present draft principles are without prejudice to the rules on the responsibility of States for internationally wrongful acts.

Commentary

(1) Draft principle 9 concerns the international responsibility of States for damage caused to the environment in relation to armed conflicts. Paragraph 1 restates the general rule that every internationally wrongful act of a State entails its international responsibility and gives rise to an obligation to make full reparation for the damage that may be caused by the act. The paragraph furthermore reaffirms the applicability of this principle to internationally wrongful acts in relation to armed conflict as well as to environmental damage, including damage caused to the environment in and of itself.

(2) Paragraph 1 has been modelled on articles 1 and 31, paragraph 1, of the articles on responsibility of States for internationally wrongful acts. Although no reference is made to other articles, the draft principle shall be applied in accordance with the rules on the responsibility of States for internationally wrongful acts, including those specifying the conditions for internationally wrongful acts. This means, *inter alia*, that conduct amounting to an internationally wrongful act may consist of action or omission. Furthermore, for the international responsibility of a State to arise in relation to armed conflict, the act or omission must be attributable to that State and amount to a violation of its international obligation.¹⁰⁸³

(3) An act or omission attributable to a State that causes harm to the environment in relation to an armed conflict is wrongful if two conditions are met. First, the act or omission in question violates one or more of the substantive rules of the law of armed conflict providing protection to the environment,¹⁰⁸⁴ or other rules of international law applicable in the situation, including but not limited to the law of the use of force (*jus ad bellum*) and international human rights law.¹⁰⁸⁵ Second, such a rule, or rules, are binding on the State. The scope of the responsibility of the State as well as the threshold for compensable environmental harm depend on the applicable primary rules.

(4) The rules of the law of armed conflict concerning the responsibility of States are clear and well-established. As *lex specialis* in armed conflict, the law of armed conflict extends the responsibility of a State party to an armed conflict to “all acts committed by

¹⁰⁸³ Art. 1 of the articles on responsibility of States for internationally wrongful acts (hereinafter, “articles on State responsibility”): “Every internationally wrongful act of a State entails the international responsibility of that State”, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, pp. 32–34.

¹⁰⁸⁴ This includes articles 35, paragraph 3, and 55 of Additional Protocol I and their customary counterparts, the principles of distinction, proportionality, military necessity and precautions in attack, as well as other rules concerning the conduct of hostilities, and the law of occupation, also reflected in the present draft principles.

¹⁰⁸⁵ Furthermore, to the extent that international criminal law provides protection to the environment in armed conflict, the relevant international crimes may trigger State responsibility. See art. 1 of the articles on State responsibility”, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, and para. (3) of the commentary to art. 58, *ibid.*, at p. 142. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Judgment*, *I.C.J. Reports 2007*, p. 43, at p. 116, para. 173.

persons forming part of its armed forces”, including their private acts.¹⁰⁸⁶ As far as the law of the use of force is concerned, a violation of Article 2, paragraph 4, of the Charter of the United Nations entails responsibility for damage caused by that violation, whether or not resulting from a violation of the law of armed conflict.¹⁰⁸⁷ A further basis for responsibility for conflict-related environmental harm – in particular but not exclusively – in situations of occupation may be found in international human rights obligations. Degradation of environmental conditions may violate a number of specific human rights, including the right to life, the right to health and the right to food, as has been established in the jurisprudence of regional human rights courts and human rights treaty bodies.¹⁰⁸⁸

(5) Environmental damage caused in armed conflict was first recognized as compensable under international law by the United Nations Compensation Commission (UNCC), which was established by the Security Council in 1991 to deal with claims concerning the Iraqi invasion and occupation of Kuwait.¹⁰⁸⁹ The UNCC jurisdiction was based on Security Council resolution 687 (1991), which reaffirmed the responsibility of Iraq under international law “for any direct loss or damage – including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait”.¹⁰⁹⁰

(6) The experience of UNCC in dealing with environmental claims has been groundbreaking in the area of reparations for wartime environmental harm, and an important point of reference beyond armed conflicts.¹⁰⁹¹ One example is related to how environmental damage can be quantified. UNCC did not attempt to define the concepts of “direct environmental damage” and “depletion of natural resources” in Security Council

¹⁰⁸⁶ Convention (IV) respecting the laws and customs of war on land (Hague Convention IV) (The Hague, 18 October 1907), J.B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed. (New York, Oxford University Press, 1915), p. 100, art. 3: “[a] belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.” See also Additional Protocol I, art. 91. See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), rule 150, p. 537: “A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused”. This special rule also applies to private acts of members of armed forces.

¹⁰⁸⁷ See Eritrea-Ethiopia Claims Commission, Decision No. 7, Guidance Regarding Jus ad Bellum Liability, 26 UNRIAA (2009), p. 631, para. 13; ICRC commentary (1987) to Additional Protocol I, art. 91, para. 3650. See also M. Sassòli, “State responsibility for violations of international humanitarian law”, *International Review of the Red Cross*, vol. 84 (2002), pp. 401–434; C. Greenwood, “State responsibility and civil liability for environmental damage caused by military operations”, in R.J. Grunawalt, J.E. King and R.S. McClain (eds.), “Protection of the environment during armed conflict”, *International Law Studies*, vol. 69 (1996), pp. 397–415, at pp. 405–406.

¹⁰⁸⁸ See *Yanomami v. Brazil*, Case No. 12/85, Inter-American Commission on Human Rights, resolution No. 12/85, Case-No. 7615, 5 March 1985; *Öneryildiz v. Turkey*, Application No. 48939/99, Judgment, European Court of Human Rights, 30 November 2004, ECHR 2004-XII; *Powell and Rayner v. the United Kingdom*, Application No. 9310/81, Judgment, European Court of Human Rights, 21 February 1990; *López Ostra v. Spain*, Application No. 16798/90, Judgment, European Court of Human Rights, 9 December 1994; *Guerra and Others v. Italy*, Application No. 116/1996/735/532, Judgment, European Court of Human Rights, 19 February 1998; *Fadeyeva v. Russia*, Application No. 55723/00, Judgment, European Court of Human Rights, 9 June 2005. See also R. Pavoni, “Environmental jurisprudence of the European and Inter-American Courts of Human Rights: comparative insights”, in B. Boer, *Environmental Law Dimensions of Human Rights* (Oxford, Oxford University Press, 2015), pp. 69–106. See also “Mapping human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment”, individual report of the General Assembly and the Human Rights Council, including the universal periodic review process, Report No. 6, December 2013, part III C.

¹⁰⁸⁹ Security Council resolution 692 (1991) of 20 May 1991.

¹⁰⁹⁰ Security Council resolution 687 (1991) of 3 April 1991, para. 16.

¹⁰⁹¹ D.D. Caron, “The profound significance of the UNCC for the environment”, in C.R. Payne and P.H. Sand (eds.), *Gulf War Reparations and the UN Compensation Commission Environmental Liability* (Oxford, Oxford University Press, 2011), pp. 265–275; P. Gautier, “Environmental damage and the United Nations Claims Commission: new directions for future international environmental cases?”, in T.M. Ndiaye and R. Wolfrum (eds.), *Law of the Sea, Environmental Law, and Settlement of Disputes. Liber Amicorum Judge Thomas A. Mensah* (Leiden, Martinus Nijhoff, 2007), pp. 177–214; P.H. Sand, “Compensation for environmental damage from the 1991 Gulf War”, *Environmental Policy and Law*, vol. 35 (2005), pp. 244–249.

resolution 687 (1991) but put forward a non-exhaustive list of compensable losses or expenses resulting from:

(a) Abatement and prevention of environmental damage, including expenses directly relating to fighting oil fires and stemming from the flow of oil in coastal and international waters;

(b) Reasonable measures already taken to clean and restore the environment or future measures which can be documented as reasonably necessary to clean and restore the environment;

(c) Reasonable monitoring and assessment of the environmental damage for the purposes of evaluating and abating the harm and restoring the environment;

(d) Reasonable monitoring of public health and performing medical screenings for the purposes of investigation and combating increased health risks as a result of the environmental damage; and

(e) Depletion of or damage to natural resources.¹⁰⁹²

(7) Paragraph 1 of draft principle 9 reaffirms the compensability under international law of damage to the environment *per se*. This statement is in line with the Commission's earlier work on State responsibility¹⁰⁹³ as well as on the allocation of loss in the case of transboundary harm arising out of hazardous activities.¹⁰⁹⁴ Reference can also be made to the statement of UNCC that "there is no justification for the contention that general international law precludes compensation for pure environmental damage".¹⁰⁹⁵ Paragraph 1 of the draft principle is furthermore inspired by the judgment of the International Court of Justice in the *Certain Activities (Costa Rica v. Nicaragua)* case, in which the Court found that "it is consistent with the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation is due for damage caused to the environment, in and of itself".¹⁰⁹⁶

(8) The notion of "the environment in and of itself" has been explained to refer to "pure environmental damage".¹⁰⁹⁷ The latter term was used by UNCC in the above citation. Both concepts, as well as the notion of "harm to the environment *per se*" that the Commission used in the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities have the same meaning. They refer to harm to the environment that does not, or not only, cause material damage but leads to the impairment or loss of the

¹⁰⁹² Decision taken by the Governing Council of the United Nations Compensation Commission during its third session, at the 18th meeting, held on 28 November 1991, as revised at the 24th meeting held on 16 March 1992 (S/AC.26/1991/7/Rev.1), para. 35.

¹⁰⁹³ Para. (15) of the commentary to art. 36 of the articles on State responsibility, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, at p. 101: "environmental damage will often extend beyond that which can be readily quantified in terms of clean-up costs or property devaluation. Damage to such environmental values (biodiversity, amenity, etc. – sometimes referred to as 'non-use values') is, as a matter of principle, no less real and compensable than damage to property, though it may be difficult to quantify".

¹⁰⁹⁴ Para. (6) of the commentary to principle 3 of the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook ... 2006*, vol. II (Part Two), paras. 66–67, at p. 73: "it is important to emphasize that damage to environment *per se* could constitute damage subject to prompt and adequate compensation".

¹⁰⁹⁵ United Nations Compensation Commission, Governing Council, Report and recommendations made by the Panel of Commissioners concerning the fifth instalment of "F4" claims (S/AC.26/2005/10), para. 58.

¹⁰⁹⁶ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica, International Court of Justice, 2 February 2018, General List No. 150, para. 41.

¹⁰⁹⁷ *Ibid.*, Separate Opinion of Judge Donoghue, para. 3: "Damage to the environment can include not only damage to physical goods, such as plants and minerals, but also to the 'services' that they provide to other natural resources (for example, habitat) and to society. Reparation is due for such damage, if established, even though the damaged goods and services were not being traded in a market or otherwise placed in economic use. Costa Rica is therefore entitled to seek compensation for 'pure' environmental damage, which the Court calls 'damage caused to the environment, in and of itself'."

ability of the environment to provide ecosystem services such as sequestration of carbon from the atmosphere, air quality services and biodiversity.¹⁰⁹⁸

(9) Paragraph 2 of draft principle 9 clarifies that the draft principles are without prejudice to the rules on the responsibility of States for internationally wrongful acts.

(10) Draft principle 9 is located in Part Two containing draft principles related to the phase before armed conflict, and draft principles that are applicable to more than one phase, including provisions of general applicability. Draft principle 9 belongs to the latter category.

Principle 10 **Corporate due diligence**

States should take appropriate legislative and other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories exercise due diligence with respect to the protection of the environment, including in relation to human health, when acting in an area of armed conflict or in a post-armed conflict situation. Such measures include those aimed at ensuring that natural resources are purchased or obtained in an environmentally sustainable manner.

Commentary

(1) Draft principle 10 recommends that States take appropriate legislative and other measures to ensure that corporations operating in or from their territories exercise due diligence with respect to the protection of the environment, including in relation to human health, in areas of armed conflict or in post-conflict situations. The second sentence of draft principle 10 specifies that such measures include those aimed at ensuring that natural resources are purchased or obtained in an environmentally sustainable manner. The draft principle does not reflect a generally binding legal obligation and has been phrased accordingly as a recommendation.

(2) The concept of “corporate due diligence” refers to a wide network of normative frameworks that seek to promote responsible business practices, including respect for human rights and international environmental standards. Such frameworks include non-binding guidelines as well as binding regulation at the national or regional level, and extend to codes of conduct created by the businesses themselves. Draft principle 10 builds on and seeks to complement the existing regulatory frameworks which do not always display a clear environmental focus, or a focus on areas of armed conflict and post-armed conflict situations.

(3) The United Nations Guiding Principles on Business and Human Rights¹⁰⁹⁹ are based on the obligations of States to respect, protect and fulfil human rights and fundamental freedoms, and their implementation largely relies on State action.¹¹⁰⁰ The Guiding Principles propose a number of measures that States can take to ensure that business enterprises operating in conflict-affected areas are not involved with gross human rights abuses.¹¹⁰¹ This includes “[e]nsuring that their current policies, legislation, regulations and

¹⁰⁹⁸ See J.B. Ruhl and J. Salzman, “The law and policy beginnings of ecosystem services”, *Journal of Land Use and Environmental Law*, vol. 22 (2007), pp. 157–172. See also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation Owed (footnote 1096 above), para. 75.

¹⁰⁹⁹ Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (A/HRC/17/31, annex). The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.

¹¹⁰⁰ So far, 21 States have published national action plans on the implementation of the Guiding Principles, 23 are in the process of preparing such a plan or have committed to preparing one. In nine other States, either the national human rights institute or civil society has taken steps towards preparing a national action plan. Information available at www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx (accessed on 8 July 2019).

¹¹⁰¹ Guiding Principles on Business and Human Rights, principle 7.

enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses”.¹¹⁰²

(4) The Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises¹¹⁰³ expressly address environmental concerns, recommending that enterprises “take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development”.¹¹⁰⁴ The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas of 2016,¹¹⁰⁵ *inter alia*, encourage companies operating in or sourcing minerals from conflict-affected and high-risk areas to assess and avoid the risk of being involved in serious human rights violations.¹¹⁰⁶ Regulatory frameworks more specifically related to natural resources and areas of armed conflict also include the Certification Mechanism of the International Conference of the Great Lakes Region¹¹⁰⁷ and the Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains.¹¹⁰⁸ Due diligence frameworks have also been created for specific businesses, including extractive industries, in cooperation between States, businesses and civil society.¹¹⁰⁹

(5) In some cases, such initiatives have provided the impetus for States to incorporate similar standards into their national legislation, making them binding on corporations subject to their jurisdiction that operate in or deal with conflict-affected areas. Legally binding instruments have also been developed at the regional level. Examples of such legally binding frameworks, either at the regional or national level, include the US Dodd-Frank Act of 2010,¹¹¹⁰ The Lusaka Protocol of the International Conference on the Great Lakes Region,¹¹¹¹ the regulation of the European Union on conflict minerals¹¹¹² and the European Union timber regulation.¹¹¹³

¹¹⁰² *Ibid.*, principle 7, para. (d).

¹¹⁰³ OECD, *OECD Guidelines for Multinational Enterprises*. The updated guidelines and the related decision were adopted by the 42 Governments adhering thereto on 25 May 2011. Available at www.oecd.org/corporate/mne (accessed on 8 July 2019).

¹¹⁰⁴ *Ibid.*, chap. VI “Environment”, p. 42.

¹¹⁰⁵ OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 3rd ed. (Paris, 2016). Available at www.oecd.org/daf/inv/mne/mining.htm (accessed on 8 July 2019).

¹¹⁰⁶ *Ibid.*, p. 16.

¹¹⁰⁷ See www.icglr-rinr.org/index.php/en/certification (accessed on 8 July 2019).

¹¹⁰⁸ China, Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters, *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains*. The guidelines apply to all Chinese companies extracting and/or using mineral resources and their related products and come into play at any point in the supply chain of minerals. Available at <http://mneguidelines.oecd.org/chinese-due-diligence-guidelines-for-responsible-mineral-supply-chains.htm> (accessed on 8 July 2019).

¹¹⁰⁹ For Extractive Industries Transparency Initiative, which aims at increasing transparency in the management of oil, gas, and mining revenues, see <http://eiti.org>; for Voluntary Principles on Security and Human Rights for extractive industry companies, see at www.voluntaryprinciples.org; for the Equator Principles of the financial industry for determining, assessing and managing social and environmental risk in project financing, see www.equator-principles.com.

¹¹¹⁰ An Act to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end “too big to fail”, to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes (Dodd–Frank Act), 11 July, 2010, Pub.L. 111–203, 124 Stat. 1376–2223. Section 1502 of the Dodd-Frank Act on conflict minerals originating from the Democratic Republic of the Congo requires that companies registered in the United States exercise due diligence on certain minerals originating from the Democratic Republic of the Congo.

¹¹¹¹ Protocol against the Illegal Exploitation of Natural Resources of the International Conference on the Great Lakes Region (Nairobi, 30 November 2006), available at https://ungreatlakes.unmissions.org/sites/default/files/icglr_protocol_against_the_illegal_exploitation_of_natural_resourceess.pdf (accessed on 8 July 2019). Art. 17, para. 1, requires States parties to establish the liability of legal entities for participating in the illegal exploitation of natural resources.

¹¹¹² Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 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, *Official Journal of the European Union*, L130, p. 1 (European Union conflict minerals regulation). The regulation will enter into force

(6) The language of draft principle 10 builds on the existing frameworks of corporate due diligence, *inter alia* regarding how natural resources are purchased and obtained. At the same time, in accordance with the scope of the topic, it specifically focuses on the protection of the environment in areas of armed conflict as well as in post-armed conflict situations. Reference can in this regard be made to the concept of “conflict-affected and high-risk areas” used in the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals, as well as in the conflict minerals regulation of the European Union. The OECD Due Diligence Guidance defines this concept in terms of “the presence of armed conflict, widespread violence or other risks of harm to people”.¹¹¹⁴ The European Union conflict minerals regulation gives the following definition: “areas in a state of armed conflict or fragile post-conflict as well as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systematic violations of international law, including human rights abuses”.¹¹¹⁵ The relevance of the notion of “conflict-affected and high-risk areas” for draft principle 10 was acknowledged. The Commission nevertheless chose to refer to “area of armed conflict” and “post-armed conflict situation” as these terms are more closely aligned to the terminology used in the draft principles. They should be understood in the sense of the concepts of “armed conflict”¹¹¹⁶ and “post-armed conflict”¹¹¹⁷ as used in the draft principles.

(7) The first sentence of draft principle 10 refers to “legislative and other measures”. It is usual that international instruments relying on implementation at the national level refer explicitly to legislative measures,¹¹¹⁸ and seeking to ensure corporate due diligence would usually require legislative action. “[O]ther measures” may be wide ranging and include, *inter alia*, judicial and administrative measures. A further qualification, “appropriate”, indicates that the measures taken at the national level may differ from one country to

on 1 January 2021. The regulation lays down supply chain due diligence obligations for European Union importers of certain minerals originating from conflict-affected and high-risk areas.

¹¹¹³ Regulation (EU) No. 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down obligations of operators who place timber and timber products on the market (12 November 2010), *Official Journal of the European Union*, L 295, p. 23. The timber regulation requires that operators exercise due diligence so as to minimize the risk of placing illegally harvested timber, or timber products containing illegally harvested timber, on the European Union market.

¹¹¹⁴ *OECD Due Diligence Guidance ...* (footnote 1105 above), p. 13. The Guidance explains that “Armed conflict may take a variety of forms such as a conflict of international or non-international character, which may involve two or more States, or may consist of wars of liberation, or insurgencies, civil wars, etc. High-risk areas may include areas of political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure and widespread violence. Such areas are often characterised by widespread human rights abuses and violations of national or international law.”

¹¹¹⁵ European Union conflict minerals regulation (footnote 1112 above), art. 2, para. (f).

¹¹¹⁶ See para. (7) of the commentary to draft principle 13 below.

¹¹¹⁷ More frequently referred to as “after an armed conflict”. This phrase has not been defined. It is nevertheless clear that it cannot, for the purpose of the protection of the environment, be limited to the immediate aftermath of an armed conflict.

¹¹¹⁸ See, e.g. International Covenant on Economic, Social and Cultural Rights (New York, 19 December, 1966), United Nations, *Treaty Series*, vol. 993, No. 14531, p. 3, art. 2, para. 1, which refers explicitly to *legislative measures*, similarly Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul, 11 May 2011), Council of Europe, *Treaty Series*, No. 210, art. 5, para. 2. See also International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999), United Nations, *Treaty Series*, vol. 2178, No. 38349, p. 197, art. 18, as well as United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), *ibid.*, vol. 2225, No. 39574, p. 209, art. 7, referring to “comprehensive domestic regulatory and supervisory regime... within [a State’s] competence”. Reference can in this regard also be made to the International Law Association’s work on due diligence, which expresses a clear preference for legislative measures as means to implement the human rights obligation to protect, and points out, with regard to the International Tribunal for the Law of the Sea *Seabed* advisory opinion (*Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Seabed Dispute Chamber, International Tribunal of the Law of the Sea, Case No. 17, 1 February 2011), that States’ due diligence obligations are fulfilled and proven if the State has put in place legislative and regulatory framework. ILA Study Group on Due Diligence in International Law, First Report, 7 March 2014, pp. 17 and 26. Available at www.ila-hq.org/index.php/study-groups (accessed on 8 July 2019).

another. Such measures should in any event be aimed at ensuring that corporations and other business enterprises operating in or from the country in question exercise due diligence with respect to the protection of the environment when acting in an area of armed conflict or in a post-armed conflict situation.

(8) There is no uniform practice on how to refer to the business entities for which the due diligence guidance is addressed. The different regulatory frameworks use terms ranging from “transnational corporations”¹¹¹⁹ to “multinational enterprises”,¹¹²⁰ “business enterprises”¹¹²¹ or “companies”.¹¹²² The reference to “corporations and other business enterprises” was chosen for the draft principle as a broad notion that would not be unnecessarily limitative. How this notion is interpreted would primarily depend on the national law of each State. There are similarly several ways to describe the connection between a corporation or other business enterprise and a State.¹¹²³ The phrase “operating in or from their territories” is the standard phrase in the OECD Due Diligence Guidance.¹¹²⁴

(9) The notion of “due diligence” as used in the draft principle refers to due diligence expected of corporations and other business entities when acting in areas of armed conflict or in post-armed conflict situations. This notion is not used differently from the due diligence frameworks referred to in paragraphs (2) to (4) above. As for its content, reference can be made to the parameters of “human rights due diligence” as explained in the Guiding Principles on Business and Human Rights:

Human rights due diligence:

- (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
- (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
- (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve.¹¹²⁵

The European Union conflict minerals regulation defines supply chain due diligence in similar terms as “an ongoing, proactive and reactive process through which economic operators monitor and administer their purchases and sales with a view to ensuring that they do not contribute to conflict or the adverse impacts thereof”.¹¹²⁶ Furthermore, the OECD Guidelines for Multinational Enterprises and the related documentation include detailed guidance on international environmental standards.¹¹²⁷

¹¹¹⁹ Human Rights Council resolution 26/9 of 26 June 2014 setting up a Working Group to elaborate a legally binding instrument on transnational corporations and other business entities.

¹¹²⁰ *OECD Guidelines for Multinational Enterprises* (footnote 1103 above).

¹¹²¹ Guiding Principles on Business and Human Rights.

¹¹²² *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains* (footnote 1108 above).

¹¹²³ For instance, the Guiding Principles on Business and Human Rights use the notion “business enterprises domiciled in their territory and/or jurisdiction”, see e.g. principle 2.

¹¹²⁴ *OECD Due Diligence Guidance* (footnote 1105 above), p. 9; and Recommendation of the Council on the OECD Due Diligence Guidance for Responsible Business Conduct (2018), pp. 92–94, available at <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0443> (accessed on 8 July 2019). See also OECD, *Implementing the OECD Due Diligence Guidance, Executive Summary* (Paris, 28 May 2018), p. 6, para. 16. Available at https://tuac.org/wp-content/uploads/2018/05/140PS_E_10_duediligence.pdf (accessed on 8 July 2019).

¹¹²⁵ Guiding Principles on Business and Human Rights, principle 17.

¹¹²⁶ See European Union conflict minerals regulation (footnote 1112 above), eleventh preambular para. See also *OECD Due Diligence Guidance ...* (footnote 1105 above), p. 13: “Due diligence is an ongoing, proactive and reactive process through which companies can ensure that they respect human rights and do not contribute to conflict”.

¹¹²⁷ *OECD Guidelines for Multinational Enterprises* (footnote 1103 above), part I, chap. VI “Environment”, pp. 42–46. See also OECD, “Environment and the OECD Guidelines for Multinational Enterprises. Corporate tools and approaches”. Available at <https://oecd.org/env/34992954.pdf> (accessed on 8 July 2019).

(10) The phrase “including in relation to human health” underlines the close link between environmental degradation and human health as affirmed by international environmental instruments,¹¹²⁸ regional treaties and case law,¹¹²⁹ the work of the Committee on Economic, Social and Cultural Rights,¹¹³⁰ as well as of the Special Rapporteur on human rights and the environment.¹¹³¹ The phrase thus refers to “human health” in the context of the protection of the environment.

(11) According to the second sentence of draft principle 10, the measures to be taken include those aimed at ensuring that natural resources are purchased or obtained in an environmentally sustainable manner. The requirement of responsible sourcing is included in a number of documents referred to above. The OECD Guidance, for instance, recommends that States promote the observance of the Guidance by companies operating from their territories and sourcing minerals from conflict-affected and high-risk areas “with the aim of ensuring that they respect human rights, avoid contributing to conflict and successfully contribute to sustainable, equitable and effective development”.¹¹³² The Chinese guidelines require that companies identify and assess the risks of contributing to

¹¹²⁸ For instance, the following instruments refer to “human health and the environment”: Convention on Long-Range Transboundary Air Pollution (Geneva, 13 November 1979), United Nations, *Treaty Series*, vol. 1302, No. 21623, p. 217, art. 7 (d); Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985), *ibid.*, vol. 1513, No. 26164, p. 293, preamble and art. 2, para. 2 (a); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel, 22 March 1989), *ibid.*, vol. 1673, No. 28911, p. 57, preamble, art. 2, paras. 8 and 9, art. 4, paras. 2 (c), (d) and (f) and para. 11, art. 10, para. 2 (b), art. 13, paras. 1 and 3 (d), art. 15, para. 5 (a); Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal (Izmir, 1 October 1996), *ibid.*, vol. 2942, No. 16908, p. 155, art. 1 (j) and (k); Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam, 10 September 1998), *ibid.*, vol. 2244, No. 39973, p. 337, preamble, art. 1 and art. 15, para. 4; Stockholm Convention on Persistent Organic Pollutants (Stockholm, 22 May 2001), *ibid.*, vol. 2256, No. 40214, p. 119, preamble, art. 1, art. 3, para. 2 (b) (iii) a, art. 6, para. 1, art. 11, para. 1 (d), art. 13, para. 4; Minamata Convention on Mercury (Kumamoto, 10 October 2013), text available from <https://treaties.un.org> (Status of Multilateral Treaties Deposited with the Secretary General, chap. XXVII.17), preamble, art. 1, art. 3, para. 6 (b) (i), art. 12, paras. 2 and 3 (c), art. 18, para. 1 (b), art. 19, para. 1 (c); Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú, 4 March 2018) (Escazú Agreement), text available from <https://treaties.un.org> (Status of Multilateral Treaties Deposited with the Secretary General, chap. XXVII.18), art. 6, para. 12.

¹¹²⁹ For instance, the African Charter on Human and Peoples’ Rights incorporates both the right to health and the explicit right to a healthy environment. See African Charter on Human and Peoples’ Rights (Nairobi, 27 June 1981), United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217, art. 16, para. 1 (the right to health), and art. 24 (“the right to a general satisfactory environment favourable to [each person’s] development”). These rights were resorted to in *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Federal Republic of Nigeria*, Communication No. 155/96, Decision, African Commission on Human and Peoples’ Rights, 27 May 2002, and *Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria*, Judgment No. ECW/CCJ/JUD/18/12, Community Court of Justice, Economic Community of West African States, 14 December 2012. Similarly, the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (San Salvador, 17 November 1988), Organization of American States, *Treaty Series*, No. 69, includes the right to health. The regional jurisprudence acknowledges that the right to health includes an element of environmental protection, such as a pollution-free environment. See Inter-American Commission on Human Rights, Annual Report 1984–1985, chap. V “Areas in which further steps are needed to give effect to the human rights set forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights”, OEA/Ser.L/V/II.66; see also Inter-American Commission on Human Rights, Report on the situation of human rights in Cuba, 4 October 1983, OEA/Ser.L/V/II.61, Doc. 29 rev. 1, chap. XIII “The right to health”, para. 41; Inter-American Commission on Human Rights, resolution No. 12/85 in Case No. 7615, 5 March 1985; Inter-American Court of Human Rights, *Indigenous Community Yakye Axa v. Paraguay* (footnote 1015 above), para. 167.

¹¹³⁰ Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000) on the right to the highest attainable standard of health (art. 12), *Official Records of the Economic and Social Council, 2001, Supplement No. 2 (E/2001/22-E/C.12/2000/21)*, annex IV, para. 30.

¹¹³¹ See the Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (A/HRC/37/59).

¹¹³² *OECD Due Diligence Guidance* (footnote 1105 above), recommendation, pp. 7–9.

conflict and serious human rights abuses associated with extracting, trading, processing, and exporting resources from conflict-affected and high-risk areas,¹¹³³ as well as risks associated with serious misconduct in environmental, social and ethical issues.¹¹³⁴ The European Union conflict minerals regulation defines “supply chain due diligence” as meaning “the obligations of Union importers ... in relation to their management systems, risk management, independent third-party audits and disclosure of information with a view to identifying and addressing actual and potential risks linked to conflict-affected and high-risk areas to prevent or mitigate adverse impacts associated with their sourcing activities”.¹¹³⁵

(12) A view was expressed that the second sentence of draft principle 10 should recommend that natural resources be purchased or obtained “equitably” and in an environmentally sustainable manner. While the established understanding of the concept of sustainability as encompassing environmental, economic and social aspects, or the importance of all these aspects for corporate due diligence was not questioned, the Commission did not include the word “equitably” as it was felt that it could create confusion in the context of draft principle 10.

(13) Draft principle 10 refers to corporate activities in areas of armed conflict or in post-armed conflict situations but addresses what are essentially preventive measures. The draft principle is therefore located in Part One which includes principles relating to the time before conflict, and principles that are applicable in more than one phase including general principles not tied to any particular phase.

Principle 11 **Corporate liability**

States should take appropriate legislative and other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories can be held liable for harm caused by them to the environment, including in relation to human health, in an area of armed conflict or in a post-armed conflict situation. Such measures should, as appropriate, include those aimed at ensuring that a corporation or other business enterprise can be held liable to the extent that such harm is caused by its subsidiary acting under its *de facto* control. To this end, as appropriate, States should provide adequate and effective procedures and remedies, in particular for the victims of such harm.

Commentary

(1) Draft principle 11 is closely related to draft principle 10 concerning corporate due diligence. The purpose of draft principle 11 is to address situations in which harm has been caused to the environment, including in relation to human health, in areas of armed conflict or in post-conflict situations. States are invited to take appropriate legislative and other measures aimed at ensuring that corporations or other business enterprises operating in or from the State’s territory can be held liable for having caused such harm. The concepts of “legislative and other measures”, “corporations and other business enterprises”, “the environment, including in relation to human health”, “operating in or from their territories” and “in an area of armed conflict or in a post-armed conflict situation” are to be interpreted in the same way as in draft principle 10.

(2) The notions of “harm” and “caused by them” are to be interpreted in accordance with the applicable law, which may be the law of the home State of the corporation or other business enterprise, or the law of the State in which the harm has been caused. In this regard, reference can be made to the legal regime applicable in the European Union¹¹³⁶ which provides that the law applicable to a claim shall in general be that of the State in

¹¹³³ *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains* (see footnote 1108 above), sect. 5.1.

¹¹³⁴ *Ibid.*, sect. 5.2.

¹¹³⁵ European Union conflict minerals regulation (footnote 1112 above), art. 2 (d).

¹¹³⁶ As well as in Iceland, Norway and Switzerland.

which the damage occurred.¹¹³⁷ As for the term “cause”, the Guiding Principles on Business and Human Rights, in the context of human rights due diligence, refer to adverse impacts that the business enterprise “may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships”.¹¹³⁸

(3) The second sentence of draft principle 11 follows the wording of draft principle 10 in that it begins with a reference to the preceding sentence and adds a further consideration that is included within its remit. The phrase “as appropriate” which does not appear in draft principle 10 provides nuance as to how the elements of the provision are to be applied at the national level. The second sentence of draft principle 11 recommends measures aimed at ensuring that a corporation or other business enterprise can, under certain circumstances, be held liable if its subsidiary has caused harm to the environment including in relation to human health in armed conflict or a post-armed conflict situation. More specifically, this should be possible when and to the extent that the subsidiary acts under the *de facto* control of the parent company. To illustrate the importance of such control, reference can be made to the statement of the United Kingdom Supreme Court in the *Vedanta v. Lungowe* case regarding the possible liability of the British multinational group Vedanta Resources for the release of toxic substances to a watercourse in Zambia by its subsidiary: “Everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary.”¹¹³⁹

(4) The concept of *de facto* control is to be interpreted in accordance with the requirements of each national jurisdiction. The OECD Guidelines for Multinational Enterprises point out in this regard that the companies or other entities forming a multinational enterprise may coordinate their operations in different ways. “While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another.”¹¹⁴⁰

(5) Reference can in this regard also be made to national judicial cases that have shed light on the relevant aspects of the relationship between the parent company and its subsidiary. For instance, in the *Bowoto v. Chevron* case,¹¹⁴¹ the United States District Court for the Northern District of California, paid particular attention to: (a) the degree and content of the communication between the parent and the subsidiary; (b) the degree to which the parent set or participated in setting policy, particularly security policy, for the subsidiary; (c) the officers and directors whom the parent and the subsidiary had in common; (d) the reliance on the subsidiary for revenue production and its importance in the overall success of the parent’s operations; and (e) the extent to which the subsidiary, if acting as the agent of the defendants, was acting within the scope of its authority.¹¹⁴² In a further case,¹¹⁴³ the United States District Court for the Southern District of New York stated that one corporation may be held legally accountable for the actions of the other if the corporate relationship between a parent and its subsidiary is sufficiently close.¹¹⁴⁴

¹¹³⁷ Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July on the law applicable to non-contractual obligations (Rome II Regulation), *Official Journal of the European Union*, L 199, p. 40, art. 4, para. 1. See also Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Lugano, 30 October 2007), *Official Journal of the European Union*, L 339, p. 3.

¹¹³⁸ Guiding Principles on Business and Human Rights, principle 17, para. (a).

¹¹³⁹ *Vedanta Resources PLC and another v Lungowe and others*, Judgment, 10 April 2019, Hilary Term [2019] UKSC 20, On appeal from [2017] EWCA Civ 1528, para. 49.

¹¹⁴⁰ *OECD Guidelines for Multinational Enterprises* (footnote 1103 above), chap. I, para. 4, p. 17.

¹¹⁴¹ *Bowoto v. Chevron Texaco Corp.*, 312 F.Supp.2d 1229 (N.D. Cal. 2004). The case was related to Chevron-Texaco Corporation’s alleged involvement in human rights abuses in Nigeria.

¹¹⁴² *Ibid.*, p. 1243.

¹¹⁴³ *In re South African Apartheid Litigation*, 617 F. Supp.2d 228 (S.D.N.Y. 2009). In this case, South African plaintiffs sued Daimler AG and Barclays National Bank Ltd. for aiding and abetting the Government of South Africa in its apartheid policy.

¹¹⁴⁴ *Ibid.*, p. 246.

Relevant factors in determining whether this was the case included disregard of corporate formalities, intermingling of funds and overlap of ownership, officers, directors and personnel.¹¹⁴⁵ In the *Chandler v. Cape* case, the England and Wales Court of Appeal concluded that, in appropriate circumstances, the parent company may have a duty of care in relation to the health and safety of the employees of its subsidiary. That may be the case, for instance, when the business of the parent and the subsidiary are in a relevant aspect the same and the parent has, or ought to have, superior knowledge of the relevant aspects of health and safety in the particular industry as well as of the shortcomings in the subsidiary's system of work.¹¹⁴⁶

(6) The third sentence of draft principle 11 concerns to both the first and the second sentences of the draft principle. Its purpose is to recall that States should provide adequate and effective procedures and remedies for the victims of environmental and health-related harm caused by corporations or other business enterprises or their subsidiaries in areas of armed conflict or in post-armed conflict situations. The sentence thus refers to situations, in which the host State may not be in the position to effectively enforce its legislation. Reference can in this regard also be made to the general comment of the Committee on Economic, Social and Cultural Rights which interprets the obligation to protect as extending to corporate wrongdoing abroad, "especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective".¹¹⁴⁷

(7) It may be recalled that the collapse of State and local institutions is a common consequence of armed conflict and one that often casts a long shadow in the aftermath of conflict, undermining law enforcement and the protection of rights as well as the integrity of justice. The important role that home States of corporations and other business enterprises can play in such situations is illustrated by a reference to the *Katanga Mining* case,¹¹⁴⁸ in which the dispute related to events in the Democratic Republic of the Congo. The company Katanga Mining Ltd. was incorporated in Bermuda and resident in Canada for tax purposes¹¹⁴⁹ and had all its actual business operations in the Democratic Republic of the Congo.¹¹⁵⁰ The parties had furthermore agreed in a previous contract that any disputes would be settled in the Court of Great Instance of Kolwezi (Democratic Republic of the Congo). The English Court nevertheless decided, in view of the situation in which "attempted interference with the integrity of justice" was "apparently widespread and endemic",¹¹⁵¹ that the Democratic Republic of the Congo would not be "a forum in which the case may be tried suitably for the interests of all the parties and for the ends of justice".¹¹⁵²

¹¹⁴⁵ *Ibid.*, p. 251.

¹¹⁴⁶ *Chandler v. Cape PLC*, [2012] EWCA (Civ) 525 (Eng.), para. 80. It was furthermore required that the parent company knew or ought to have known that the subsidiary or its employees relied on it for protection. See also R. McCorquodale, "Waving not drowning: *Kiobel* outside the United States", *American Journal of International Law*, vol. 107 (2013), pp. 846–51. See also *Lubbe and others v. Cape PLC Afrika and others v. Same*, 20 July 2000, 1 Lloyd's Rep. 139, as well as P. Muchlinski, "Corporations in international litigation: problems of jurisdiction and United Kingdom *Asbestos* cases", *International and Comparative Law Quarterly*, vol. 50 (2001), pp. 1–25. See also *Akpan v. Royal Dutch Shell PLC*, The Hague District Court, case No. C/09/337050/HA ZA 09-1580 (ECLI:NL:RBDHA:2013:BY9854), 30 January 2013.

¹¹⁴⁷ Committee on Economic, Social and Cultural Rights, general comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (E/C.12/GC/24), para. 30. The general comment links such measures to the obligation to protect Covenant rights.

¹¹⁴⁸ *Alberta Inc. v. Katanga Mining Ltd.* [2008] EWHC 2679 (Comm), 5 November 2008 (Tomlinson J.).

¹¹⁴⁹ *Ibid.*, para. 19.

¹¹⁵⁰ *Ibid.*, para. 20.

¹¹⁵¹ *Ibid.*, para. 34.

¹¹⁵² *Ibid.*, para. 33. Similarly, in the United States case of *In re Xe Services*, the District Court dismissed the private military company's claim that Iraq would be an appropriate forum and held that it was not shown that an alternative forum existed. See *In re Xe Services Alien Tort Litigation*, 665 F. Supp. 2d 569 (E.D. Va. 2009).

(8) The human rights treaty bodies within the United Nations have also addressed the issue in their comments on the situation in individual States. The Human Rights Committee, for instance, has encouraged the relevant State party “to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations” and “to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad”.¹¹⁵³ Similarly, the Committee on the Elimination of Racial Discrimination has drawn attention to instances where the rights of indigenous peoples to land, health, environment and an adequate standard of living have been adversely affected by the operations of transnational corporations. In that context, it has encouraged the relevant State party to “ensure that no obstacles are introduced in the law that prevent the holding of ... transnational corporations accountable in the State party’s courts when [violations of the Covenant] are committed outside the State party.”¹¹⁵⁴

(9) Reference can furthermore be made to the Montreux Document which refers to the obligations that home States of private military and security companies have under international human rights law.¹¹⁵⁵ To give effect to such obligations, States “have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of [private military and security companies] and their personnel”.¹¹⁵⁶

(10) The term “victims” refers to persons, whose health or livelihood has been harmed by the environmental damage referred to in draft principle 11. Environmental damage may also affect other human rights such as the right to life and the right to food.¹¹⁵⁷ The phrase “in particular for the victims” indicates, in the first place, that the adequate and effective remedies should be available for the victims of the environmental harm. In the second place, the phrase acknowledges that such remedies may also be available on a broader basis depending on the national legislation. This may be a case of public interest litigation by environmental associations or groups of persons who cannot allege a violation of their individual rights or interests.¹¹⁵⁸ Furthermore, environmental damage can also give rise to civil claims in which the term “victim” would not be normally used.

¹¹⁵³ Human Rights Committee, concluding observations on the report of Germany (CCPR/C/DEU/CO/6), para. 16.

¹¹⁵⁴ Committee on the Elimination of Racial Discrimination, concluding observations on the report of the United Kingdom (CERD/C/GBR/CO/18-20), para. 29.

¹¹⁵⁵ “Montreux Document on pertinent legal obligations and good practices for States related to operations of private military and security companies during armed conflict” (Montreux, ICRC, 2008). Fifty-four States support the Montreux Document, and the European Union endorsed it on 27 July 2012.

¹¹⁵⁶ *Ibid.*, para. 15. See also Federal Department of Foreign Affairs of Switzerland and Geneva Centre for the Democratic Control of Armed Forces (DCAF), “Legislative guidance tool for States to regulate private military and security companies” (Geneva, 2016), which contains also examples of best practices, available at www.dcaf.ch/sites/default/files/publications/documents/Legislative-Guidance-Tool-EN_1.pdf (accessed on 8 July 2019). For national legislation, see also the Office of the United Nations High Commissioner for Human Rights (OHCHR) study, available at www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/NationalLegislationStudies.aspx (accessed on 8 July 2019). See also *Al-Quraishi et al. v. Nahkla and L-3 Services*, 728 F Supp 2d 702 (D Md 2010) at 35–37, 29 July 2010. A settlement was reached in this case, after years of litigation, in 2012.

¹¹⁵⁷ See footnotes 1304 and 1306 below.

¹¹⁵⁸ See L. Rajamani, “Public interest environmental litigation in India: exploring issues of access, participation, equity, effectiveness and sustainability”, *Journal of Environmental Law*, vol. 19 (2007), pp. 293–321. Available at www.researchgate.net/publication/316876795_Public_Interest_Environmental_Litigation_in_India_Exploring_Issues_of_Access_Participation_Equity_Effectiveness_and_Sustainability (accessed on 8 July 2019). See also India Environmental Portal, Public Interest Litigation, at www.indiaenvironmentportal.org.in/category/1255/thesaurus/public-interest-litigation-pil (accessed on 8 July 2019). See also the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) (Aarhus, Denmark, 25 June 1998), United Nations, *Treaty Series*, vol. 2161, No. 37770, p. 447, art. 6, as well as Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing

(11) The words “adequate and effective procedures and remedies” are general in nature and, together with the phrase “as appropriate”, allow States a certain flexibility when applying this provision at the national level.

(12) Draft principle 11 is located in Part Two as a provision of general application for the same reasons as draft principle 10.

Part Three **Principles applicable during armed conflict**

Principle 12 **Martens Clause with respect to the protection of the environment in relation to armed conflict**

In 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.

Commentary

(1) Draft principle 12 is inspired by the Martens Clause, which originally appeared in the preamble to the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land,¹¹⁵⁹ and has been restated in several later treaties.¹¹⁶⁰ The Martens Clause provides, in essence, that even in cases not covered by specific international agreements, civilians and combatants remain 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.¹¹⁶¹ The International Court of Justice has stated that the clause forms part of customary international law.¹¹⁶² While originally conceived in the context of belligerent occupation, the clause has today a broader application, covering all areas of the law of armed conflict.¹¹⁶³

(2) The function of the Martens Clause is generally seen as providing residual protection in cases not covered by a specific rule.¹¹⁶⁴ The International Court of Justice referred to the Martens Clause in Its Advisory Opinion on the *Legality of Nuclear Weapons*

for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

¹¹⁵⁹ Convention (II) with Respect to the Laws and Customs of War on Land (The Hague, 29 July 1899), J.B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907* (see footnote 1086 above). The 1899 Martens Clause reads: “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.” For a general overview, see memorandum by the Secretariat on the effect of armed conflicts on treaties: an examination of practice and doctrine (A/CN.4/550), paras. 140–142.

¹¹⁶⁰ See Geneva Convention I, art. 63; Geneva Convention II, art. 62; Geneva Convention III, art. 142; Geneva Convention IV, art. 158. Additional Protocol I, art. 1, para. 2, and Additional Protocol II, preamble, para. 4. See also 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 (Geneva, 10 October 1980), United Nations, *Treaty Series*, vol. 1342, No. 22495, p. 137, preamble, para. 5.

¹¹⁶¹ Additional Protocol I, art. 1, para. 2.

¹¹⁶² *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, para. 84.

¹¹⁶³ T. Meron, “The Martens Clause, principles of humanity, and dictates of public conscience”, *American Journal of International Law*, vol. 94 (2000), pp. 78–89, at p. 87.

¹¹⁶⁴ Para. (3) of the commentary to art. 29 of the articles on the law of the non-navigational uses of international watercourses with commentaries and resolution on transboundary confined groundwater, *Yearbook ... 1994*, vol. II (Part Two), at p. 131; para. (3) of the commentary to art. 18 of the articles on the law of transboundary aquifers, *Yearbook... 2008*, vol. II (Part Two), paras. 53–54, at p. 43: “In cases not covered by a specific rule, certain fundamental protections are afforded by the ‘Martens clause’”.

to strengthen the argument about the applicability of international humanitarian law to the threat or use of nuclear weapons.¹¹⁶⁵ Similarly, the ICRC Commentary to Geneva Convention I mentioned, as a dynamic aspect of the clause, that it confirms “the application of the principles and rules of humanitarian law to new situations or to developments in technology, also when those are not, or not specifically, addressed in treaty law”.¹¹⁶⁶ The clause thus prevents the argument that any means or methods of warfare that are not explicitly prohibited by the relevant treaties¹¹⁶⁷ are permitted, or, in a more general manner, that acts of war not expressly addressed by treaty law, customary international law, or general principles of law, are *ipso facto* legal.¹¹⁶⁸

(3) Further than that, however, views differ as to the legal consequences of the Martens Clause. It has been seen as a reminder of the role of customary international law in the absence of applicable treaty law, and of the continued validity of customary law beside treaty law.¹¹⁶⁹ The Martens Clause has also been seen to provide additional interpretative guidance “whenever the legal regulation provided by a treaty or customary rule is doubtful, uncertain or lacking in clarity”.¹¹⁷⁰ A further interpretation links the Martens Clause to a method of identifying customary international law in which particular emphasis is given to *opinio juris*.¹¹⁷¹ The inclusion of the present draft principle in the set of draft principles does not mean, or imply, that the Commission is taking a position on the various interpretations regarding the legal consequences of the Martens Clause.

(4) Draft principle 12 is entitled “Martens Clause with respect to the protection of the environment in relation to armed conflict”. The title draws attention to the environmental focus of the draft principle, the purpose of which is to provide subsidiary protection to the environment in relation to armed conflict.

(5) This is not the first time the Martens Clause has been invoked in the context of the protection of the environment in armed conflict.¹¹⁷² The ICRC Guidelines on the Protection

¹¹⁶⁵ “Finally, the Court points to the Martens Clause, whose continuing existence and applicability is not to be doubted, as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons”, *Legality of the Threat or Use of Nuclear Weapons* (see footnote 1162 above), para. 87.

¹¹⁶⁶ ICRC commentary (2016) to the Geneva Convention I, art. 63, para. 3298. See also C. Greenwood, “Historical developments and legal basis”, in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (Oxford, Oxford University Press, 2008), pp. 33–34, at p. 34: “as new weapons and launch systems continue to be developed, incorporating ever more sophisticated robotic and computer technology, the venerable Martens Clause will ensure that the technology will not outpace the law.”

¹¹⁶⁷ ICRC commentary (1987) to Additional Protocol I, art. 1, para. 2, para. 55; ICRC commentary to the Geneva Convention I (2016), para. 3297.

¹¹⁶⁸ According to the German Military Manual, “[i]f an act of war is not expressly prohibited by international agreements or customary law, this does not necessarily mean that it is actually permissible”. See Federal Ministry of Defence, *Humanitarian Law in Armed Conflicts – Manual*, para. 129 (ZDv 15/2, 1992).

¹¹⁶⁹ Greenwood, “Historical developments and legal basis” (footnote 1166 above), p. 34. See also the ICRC commentary 2016 to the Geneva Convention I, art. 63, para. 3296, which characterizes this as the minimum content of the clause.

¹¹⁷⁰ A. Cassese, “The Martens Clause: half a loaf or simply pie in the sky?”, *European Journal of International Law*, vol. 11 (2000), pp. 187–216, at pp. 212–213; G. Distefano and E. Henry, “Final provisions, including the Martens Clause”, in A. Clapham, P. Gaeta and M. Sassóli (eds.), *The 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, 2015), pp. 155–188, at pp. 185–186. See also *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgment, 14 January 2000, paras. 525 and 527.

¹¹⁷¹ Cassese, “The Martens Clause: half a loaf or simply pie in the sky?” (see previous footnote), p. 214; Meron, “The Martens Clause, principles of humanity, and dictates of public conscience” (see footnote 1163 above), p. 88.

¹¹⁷² See P. Sands *et al.*, *Principles of International Environmental Law*, 4th ed. (Cambridge, Cambridge University Press, 2018), p. 832: “In modern international law, there is no reason why [the dictates of public conscience] should not encompass environmental protection”. Similarly M. Bothe *et al.*, “International law protecting the environment during armed conflict: gaps and opportunities”, *International Review of the Red Cross*, vol. 92 (2010), pp. 569–592, at pp. 588–589; Droegge and Tougas, “The protection of the natural environment in armed conflict: existing rules and need for further legal protection” (footnote 998 above), pp. 39–40; M. Tignino, “Water during and after armed

of the Environment in Armed Conflict of 1994 include a provision stating the following: “In cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, the principles of humanity and the dictates of public conscience.”¹¹⁷³ In 1994, the General Assembly invited all States to disseminate the revised guidelines widely and to “give due consideration to the possibility of incorporating them into their military manuals and other instructions addressed to their military personnel”.¹¹⁷⁴ The second IUCN World Conservation Congress, furthermore, in 2000 urged Member States of the United Nations to endorse a policy reading as follows:

Until a more complete international code of environmental protection has been adopted, in cases not covered by international agreements and regulations, the biosphere and all its constituent elements and processes remain under the protection and authority of the principles of international law derived from established custom, from dictates of the public conscience, and from the principles and fundamental values of humanity acting as steward for present and future generations.¹¹⁷⁵

The recommendation was adopted by consensus¹¹⁷⁶ and was meant to apply during peacetime as well as during armed conflicts.¹¹⁷⁷

(6) The present draft principle follows the wording of the Martens Clause in Additional Protocol I to the Geneva Conventions (art. 1, para. 2), which states: “In cases not covered by this Protocol or by other international agreements, civilians and combatants remain 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.” The Commission agreed that in particular the reference to “the dictates of public conscience”, as a general notion not intrinsically limited to one specific meaning, justified the application of the Martens Clause to the environment. In this regard, reference can be made to the importance, as generally recognized, of environmental protection, as well as to the growth and consolidation of international environmental law. More specifically, the understanding of the environmental impacts of conflict has developed considerably since the adoption of the treaties codifying the law of armed conflict.

(7) Another essential component of the Martens Clause, the reference to “the principles of humanity”, displays a more indirect relationship to the protection of the environment. It has even been asked whether the environment can remain under the protection of “the principles of humanity”, given that the function of such principles is to specifically serve human beings. That reference was retained given that humanitarian and environmental concerns are not mutually exclusive, as pointed out by the International Court of Justice: “The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn”.¹¹⁷⁸ The intrinsic link between the survival of people and the environment in which they live has also been recognized in other authoritative statements.¹¹⁷⁹ Similarly, modern definitions of the

conflicts: what protection in international law?”, *Brill Research Perspectives in International Water Law*, vol. 1.4 (2016), pp. 1–111, at pp. 26, 28 and 41.

¹¹⁷³ ICRC, Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict (footnote 973 above), guideline 7.

¹¹⁷⁴ General Assembly resolution 49/50 of 9 December 1994, para. 11.

¹¹⁷⁵ World Conservation Congress, resolution 2.97, entitled “A Martens Clause for environmental protection” (Amman, 4–11 October 2000).

¹¹⁷⁶ The United States and United States agency members did not join the consensus.

¹¹⁷⁷ D. Shelton and A. Kiss, “Martens Clause for environmental protection”, *Environmental Policy and Law*, vol. 30 (2000), pp. 285–286, at p. 286.

¹¹⁷⁸ See *Legality of the Threat or Use of Nuclear Weapons* (footnote 1162 above), p. 241, para. 29.

¹¹⁷⁹ The World Charter for Nature stated that “[m]ankind is a part of nature and life depends on the uninterrupted functioning of natural systems”. General Assembly resolution 37/7 of 28 October 1982, annex, preamble. The Special Rapporteur on human rights and the environment has furthermore linked human dignity with the environment as a “minimum standard of human dignity”: “Without a healthy environment, we are unable to fulfil our aspirations or even live at a level commensurate with minimum standards of human dignity.” See, OHCHR, “Introduction”, available at www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SREnvironmentIndex.aspx (accessed on 8 July 2019).

environment as an object of protection do not draw a strict dividing line between the environment and human activities but encourage definitions that include components of both.¹¹⁸⁰ Moreover, the retention of that notion was seen as appropriate to protect the integrity of the Martens Clause. Additionally, the phrase “principles of humanity” can be taken to refer more generally to humanitarian standards that are found not only in international humanitarian law but also in international human rights law,¹¹⁸¹ which provides important protections to the environment.¹¹⁸²

(8) As originally proposed by the Special Rapporteur, the draft principle included a reference to “present and future generations”. This reference was ultimately not retained so as to stay as close to the established language of the Martens Clause as possible. The view was also expressed that the term “public conscience” could be seen to encompass the notion of intergenerational equity as an important part of the ethical basis of international environmental law.

(9) Draft principle 12 is located in Part Three containing draft principles applicable during an armed conflict. It also applies in situations of occupation.

Principle 13

General protection of the natural environment during armed conflict

1. The natural environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.
2. Care shall be taken to protect the natural environment against widespread, long-term and severe damage.
3. No part of the natural environment may be attacked, unless it has become a military objective.

Commentary

(1) Draft principle 13 comprises three paragraphs which broadly provide for the protection of the natural environment during armed conflict. It reflects the obligation to respect and protect the natural environment, the duty of care and the prohibition of attacks against any part of the environment, unless it has become a military objective.

¹¹⁸⁰ See Sands, *Principles of International Environmental Law* (footnote 1172 above), p. 14: The concept of the environment, however, encompasses “both the features and the products of the natural world and those of human civilisation.” See also C.R. Payne, “Defining the environment: environmental integrity”, in C. Stahn, J. Iverson and J. Easterday (eds.), *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices* (Oxford, Oxford University Press, 2017), pp. 40–70, at p. 69, calling for a consideration of “how human activities and environment function as an interactive system”, not focusing exclusively on one element.

¹¹⁸¹ Cassese, “The Martens Clause: half a loaf or simply pie in the sky?” (footnote 1170 above), p. 212, refers to “general standards of humanity” as deduced from international human rights standards. Principles of humanity can furthermore be equated with “elementary considerations of humanity” which, according to the International Court of Justice, are “even more exacting in peace than in war”. See *Corfu Channel case, Judgment of April 9th 1949, I.C.J. Reports 1949*, p. 4, at p. 22. See also P.-M. Dupuy, “‘Les considérations élémentaires d’humanité’ dans la jurisprudence de la Cour internationale de Justice”, in L.-A. Sicilianos and R.-J. Dupuy (eds.), *Mélanges en l’honneur de Nicolas Valticos: Droit et justice* (Paris, Pedone, 1998), pp. 117–130.

¹¹⁸² Several courts and tribunals have explicitly recognized the interdependence between human beings and the environment by affirming that environmental harm affects the right to life. *Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria*, Judgment No. ECW/CCJ/JUD/18/12, Community Court of Justice, Economic Community of West African States, 14 December 2012; *Öneryıldız v. Turkey*, Application No. 48939/99, Judgment, European Court of Human Rights, 30 November 2004, ECHR 2004-XII, para. 71. As the most recent such ruling, the advisory opinion of the Inter-American Court of Human Rights *Medio Ambiente y Derechos Humanos* established that there is an inalienable relationship between human rights and environmental protection. Inter-American Court of Human Rights, Advisory Opinion No. OC 23-17, *Medio Ambiente y Derechos Humanos* [The environment and human rights], 15 November 2017, Series A, No. 23. See also the resolution of the Inter-American Commission of Human Rights in *Yanomami v. Brazil*, resolution No. 12/85, Case No. 7615, 5 March 1985.

(2) Paragraph 1 sets out the general position that in relation to armed conflict, the natural environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.

(3) The words “respected” and “protected” were considered fitting for use in this draft principle as they have been used in several law of armed conflict, international environmental law and international human rights law instruments.¹¹⁸³ The International Court of Justice in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* held that “respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principle of necessity” and that States have a duty “to take environmental considerations into account in assessing what is necessary and proportionate in the pursuit of legitimate military objectives”.¹¹⁸⁴

(4) As far as the use of the term “law of armed conflict” is concerned, it should be emphasized that traditionally there was a distinction between the terms “law of armed conflict” and “international humanitarian law”.¹¹⁸⁵ International humanitarian law could be viewed narrowly as only referring to the part of the law of armed conflict which aims at protecting victims of armed conflict; whereas the law of armed conflict can be seen as more of an umbrella term covering the protection of victims of armed conflict as well as regulating the means and methods of war.¹¹⁸⁶ The terms are often seen as synonyms in international law.¹¹⁸⁷ However, the term “law of armed conflict” was preferred due to its broader meaning and to ensure consistency with the Commission’s previous work on the draft articles on effects of armed conflict on treaties, in which context it was pointed out that the law of armed conflict also includes the law of occupation and the law of neutrality.¹¹⁸⁸ The relationship between the present topic and the topic on the effects of armed conflict on treaties should be emphasized.

(5) As far as the term “applicable international law” is concerned, it must be noted that the law of armed conflict is *lex specialis* during times of armed conflict, but that other rules of international law providing environmental protection, such as international environmental law and international human rights law, remain relevant.¹¹⁸⁹ Paragraph 1 of draft principle 13 is therefore relevant during all three phases (before, during and after armed conflict) to the extent that the law of armed conflict applies. This paragraph highlights the fact that the draft principles are intended to build on existing references to the protection of the environment in the law of armed conflict together with other rules of international law in order to enhance the protection of the environment in relation to armed conflict overall.

¹¹⁸³ A considerable number of instruments on the law of armed conflict, environmental law and human rights law which contain the terms “respect” and “protect”. Of most relevance is the World Charter of Nature, General Assembly resolution 37/7 of 28 October 1982, in particular the preamble and principle 1, and Additional Protocol I, art. 48, para. 1, which provides that civilian objects shall be respected and protected. See also, for example, the International Covenant on Civil and Political Rights (New York, 16 December 1964), United Nations, *Treaty Series*, vol. 999, p. 171, art. 2; Additional Protocol I, art. 55, and the Rio Declaration on Environment and Development (Rio Declaration), *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992, vol. I, Resolutions adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex I, principle 10.

¹¹⁸⁴ *Legality of the Threat or Use of Nuclear Weapons* (footnote 1162 above), para. 30. See also *ibid.*, p. 253, para. 63.

¹¹⁸⁵ For a description of the semantics, see Y. Dinstein (ed.), *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd ed. (Cambridge, Cambridge University Press, 2010), at paras. 35–37 and 41–43.

¹¹⁸⁶ See e.g., R. Kolb and R. Hyde, *An Introduction to the International Law of Armed Conflicts* (Oxford, Hart, 2008), pp. 16–17.

¹¹⁸⁷ *Ibid.*

¹¹⁸⁸ *Official Records of the General Assembly, Sixty-Sixth Session, Supplement No. 10 (A/66/10)*, Commentary on art. 2, p. 182.

¹¹⁸⁹ *Legality of the Threat or Use of Nuclear Weapons* (see footnote 1162 above), pp. 240–242, paras. 25 and 27–30.

(6) Paragraph 2 is inspired by article 55 of Additional Protocol I, which provides the rule that care shall be taken to protect the environment against widespread, long term and severe damage in international armed conflicts.¹¹⁹⁰ The term “care shall be taken” should be interpreted as indicating that there is a duty on the parties to an armed conflict to be vigilant of the potential impact that military activities can have on the natural environment.¹¹⁹¹

(7) Similar to article 55, draft principle 13 also uses the word “and” which indicates a triple cumulative standard. However, draft principle 13 differs from article 55 as regards applicability and generality. First, draft principle 13 does not make a distinction between international and non-international armed conflicts, with the understanding that the draft principles are aimed at applying to all armed conflicts.¹¹⁹² This includes international armed conflicts, understood in the traditional sense of an armed conflict fought between two or more States, as well as armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination; as well as non-international armed conflicts, which are fought either between a State and organized armed group(s) or between organized armed groups within the territory of a State.¹¹⁹³

(8) The terms “widespread”, “long-term” and “severe” are not defined in Additional Protocol I. The same terms are used in the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.¹¹⁹⁴ However, the Convention does not contain the triple cumulative requirement as required by Additional Protocol I, as it uses the word “or” instead of “and”, and also that the context of the Convention is far narrower than Additional Protocol I.

(9) Second, draft principle 13 differs from article 55 of Additional Protocol I in that it is of a more general nature. Unlike article 55, draft principle 13 does not explicitly prohibit the use of methods or means of warfare which are intended or may be expected to cause damage to the natural environment and thereby prejudice the health or survival of the population. Concerns that this exclusion may weaken the text of the draft principles should be considered in light of the general nature of the draft principles. Paragraph 2 should be read together with draft principle 14, which deals with the application of principles and rules of the law of armed conflict to the natural environment with the aim of providing environmental protection.

(10) Paragraph 3 of draft principle 13 is based on the fundamental rule that a distinction must be made between military objectives and civilian objects.¹¹⁹⁵ It underlines the inherently civilian nature of the natural environment. Paragraph 3 of draft principle 13 can

¹¹⁹⁰ Article 55 – Protection of the natural environment reads:

“1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

2. Attacks against the natural environment by way of reprisals are prohibited.”

¹¹⁹¹ Pilloud and Pictet, “Article 55: Protection of the natural environment” (see footnote 999 above), p. 663, para. 2133. See also K. Hulme, “Taking care to protect the environment against damage: a meaningless obligation?” in *International Review of the Red Cross*, vol. 92 (2010), pp. 675–691.

¹¹⁹² See A/CN.4/674, paras. 69–78.

¹¹⁹³ Geneva Convention I; Geneva Convention II; Geneva Convention III; Geneva Convention IV, common articles 2 and 3; Additional Protocol I, art. 1; and Additional Protocol II, art. 1.

¹¹⁹⁴ Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (New York, 10 December 1976), United Nations, *Treaty Series*, vol. 1108, No. 17119, p. 151, art. 2. In the understanding relating to article I thereof, the terms “widespread”, “long-term” and “severe” are understood as follows: “‘widespread’: encompassing an area on the scale of several hundred square kilometers”; “‘long-lasting’: lasting for a period of months, or approximately a season”; “‘severe’: involving serious or significant disruption or harm to human life, natural and economic resources or other assets” (*Report of the Conference of the Committee on Disarmament, Official Records of the General Assembly, Thirty-first Session, Supplement No. 27 (A/31/27)*, vol. I, pp. 91–92).

¹¹⁹⁵ See, in general, Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), rule 7 and rule 43, pp. 25–29 and 143.

be linked to article 52, paragraph 2, of Additional Protocol I, which defines the term “military objective” as:

... [T]hose 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.¹¹⁹⁶

The term “civilian object” is defined as “all objects which are not military objectives”.¹¹⁹⁷ In terms of the law of armed conflict, attacks may only be directed against military objectives, and not civilian objects.¹¹⁹⁸ There are several binding and non-binding instruments which indicate that this rule is applicable to parts of the natural environment.¹¹⁹⁹

(11) Paragraph 3 is, however, temporally qualified with the words “has become”, which emphasizes that this rule is not absolute: the environment may become a military objective in certain instances, and could thus be lawfully targeted.¹²⁰⁰

(12) Paragraph 3 is based on the first paragraph of rule 43 of the ICRC study on customary international humanitarian law. However, the other parts of rule 43 were not included in its current formulation, which raised some concerns. In this regard, it is useful to reiterate that the draft principles are general in nature. Accordingly, both paragraph 2 and paragraph 3 must be read together with draft principle 14, which specifically references the application of the law of armed conflict rules and principles of distinction, proportionality, military necessity and precautions in attack.

¹¹⁹⁶ Additional Protocol I, art. 52, para. 2. A similar definition is provided in the following protocols to the Convention on Certain Conventional Weapons: Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices annexed to the Convention on Certain Conventional Weapons (Geneva, 10 October 1980) (Protocol II to the Convention on Certain Conventional Weapons), United Nations, *Treaty Series*, vol. 1342, No. 22495, p. 137, at p. 168; amended Protocol II to the Convention on Certain Conventional Weapons and Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons, 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 (Protocol III to the Convention on Certain Conventional Weapons), *ibid.*, vol. 1342, No. 22495, p. 171 as well as the 1999 Second Protocol.

¹¹⁹⁷ See art. 52, para. 1, of Additional Protocol I, as well as art. 2, para. 5 of the Protocol II to the Convention on Certain Conventional Weapons; art. 2, para. 7, of the amended Protocol II to the Convention on Certain Conventional Weapons; and art. 1, para. 4, of the Protocol III to the Convention on Certain Conventional Weapons.

¹¹⁹⁸ See, in general, Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), rule 7, pp. 25–29. The principle of distinction is codified, *inter alia*, in article 48 and 52, paragraph 2, of Additional Protocol I, as well as the Amended Protocol II and Protocol III to the Convention on Certain Conventional Weapons. It is recognized as a rule of customary international humanitarian law in both international and non-international armed conflict.

¹¹⁹⁹ The following instruments have been cited, *inter alia*: art. 2, para. 4, of Protocol III to the Convention on Certain Conventional Weapons, the Guidelines on the Protection of the Environment in Times of Armed Conflict, the Final Declaration adopted by the International Conference for the Protection of War Victims, General Assembly resolutions 49/50 and 51/157, annex, the military manuals of Australia and the United States, as well as national laws of Nicaragua and Spain. See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), rule 43, pp. 143–144.

¹²⁰⁰ See e.g. M. Bothe *et al.*, “International law protecting the environment during armed conflict: gaps and opportunities” (footnote 1172 above), at p. 576; R. Rayfuse, “Rethinking international law and the protection of the environment in relation to armed conflict” in *War and the Environment: New Approaches to Protecting the Environment in Relation to Armed Conflict*, R. Rayfuse (ed.) (Leiden, Brill Nijhoff, 2015) p. 6; see also C. Droegge and M.-L. Tougas, “The protection of the natural environment in armed conflict ...” (footnote 998 above), pp. 17–19; D. Fleck, “The protection of the environment in armed conflict: legal obligations in the absence of specific rules”, *ibid.*, pp. 47–52; E. Koppe, “The principle of ambiguity and the prohibition against excessive collateral damage to the environment during armed conflict”, *ibid.*, pp. 76–82; and M. Bothe, “The ethics, principles and objectives of protection of the environment in times of armed conflict”, *ibid.*, p. 99.

(13) Draft principle 13 strikes a balance: creating guiding principles for the protection of the environment in relation to armed conflict without reformulating rules and principles already recognized by the law of armed conflict.

Principle 14

Application of the law of armed conflict to the natural environment

The law of armed conflict, including the principles and rules on distinction, proportionality, military necessity and precautions in attack, shall be applied to the natural environment, with a view to its protection.

Commentary

(1) Draft principle 14 is entitled “Application of the law of armed conflict to the natural environment” and deals with the application of principles and rules of the law of armed conflict to the natural environment with a view to its protection. Draft principle 14 is placed in Part Two of the draft principles indicating that it is intended to apply during armed conflict. The overall aim of the draft principle is to strengthen the protection of the environment in relation to armed conflict, and not to reaffirm the law of armed conflict.

(2) The words “law of armed conflict” were chosen instead of “international humanitarian law” for the same reasons explained in the commentary on draft principle 13. The use of this term also highlights the fact that draft principle 14 deals exclusively with the law of armed conflict as *lex specialis*, and not other branches of international law.

(3) Draft principle 14 lists some specific principles and rules of the law of armed conflict, namely the principles and rules of distinction, proportionality, military necessity and precautions in attack.¹²⁰¹ The draft principle itself is of a general character and does not elaborate on how these well-established principles and rules under the law of armed conflict should be interpreted. They are explicitly included in draft principle 14 because they have been identified as being the most relevant principles and rules relating to the protection of the environment in relation to armed conflict.¹²⁰² However, this reference should not be interpreted as indicating a closed list, as all other rules under the law of armed conflict which relate to the protection of the environment in relation to armed conflict remain applicable and cannot be disregarded.¹²⁰³

(4) One of the cornerstones of the law of armed conflict¹²⁰⁴ is the principle of distinction which obliges parties to an armed conflict to distinguish between civilian objects and military objectives at all times, and that attacks may only be directed against military objectives.¹²⁰⁵ This is considered a rule under customary international law, applicable in

¹²⁰¹ The reference to the rule of military necessity rather than to the principle of necessity reflects the view of some States that military necessity is not a general exemption, but needs to have its basis in an international treaty provision.

¹²⁰² See R. Rayfuse, “Rethinking international law and the protection of the environment in relation to armed conflict” (footnote 1200 above), p. 6; United Nations Environment Programme, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law* (Nairobi, United Nations Environment Programme, 2009), pp. 12–13.

¹²⁰³ These include, *inter alia*, arts. 35 and 55 of Additional Protocol I. Other provisions of Additional Protocol I and Additional Protocol II, as well as other instruments of the law of armed conflict which may indirectly contribute to protecting the environment such as those prohibiting attacks against works and installations containing dangerous forces (Additional Protocol I, art. 56; Additional Protocol II, art. 15), those prohibiting attacking objects indispensable to the civilian population (Additional Protocol I, art. 54; Additional Protocol II, art. 14); the prohibition against pillage (Regulations respecting the laws and customs of war on land (The Hague, 18 October 1907) (the Hague Regulations), art. 28); Additional Protocol II, art. 4, para. 2 (g) and the prohibition on the forced movement of civilians (Additional Protocol II, art. 17). See also United Nations Environment Programme, *Environmental Considerations of Human Displacement in Liberia: A Guide for Decision Makers and Practitioners* (2006).

¹²⁰⁴ *Legality of the Threat or Use of Nuclear Weapons* (see footnote 1162 above), para. 78; M.N. Schmitt, “Military necessity and humanity in international humanitarian law: preserving the delicate balance”, *Virginia Journal of International Law*, vol. 50 (2010), pp. 795–839, at p. 803.

¹²⁰⁵ The principle of distinction is now codified in arts. 48, 51, para. 2, and 52, para. 2, of Additional Protocol I; art. 13, para. 2, of Additional Protocol II; amended Protocol II to the Convention on

both international and non-international armed conflict.¹²⁰⁶ As explained in the commentary on draft principle 13, the natural environment is not intrinsically military in nature and should be treated as a civilian object. However, there are certain circumstances in which parts of the environment may become a military objective, in which case such parts may be lawfully targeted.

(5) The principle of proportionality establishes that an attack against a legitimate military target is prohibited if it may be expected to cause incidental damage to civilians or civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated.¹²⁰⁷

(6) The principle of proportionality is an important rule under the law of armed conflict also because of its relation to the rule of military necessity.¹²⁰⁸ It is codified in several instruments of the law of armed conflict, and the International Court of Justice has also recognized its applicability in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*.¹²⁰⁹ It is considered a rule under customary international law, applicable in both international and non-international armed conflict.¹²¹⁰

(7) As the environment is often indirectly rather than directly affected by armed conflict, rules relating to proportionality are of particular importance in relation to the protection of the natural environment in armed conflict.¹²¹¹ The particular importance of the principle of proportionality in relation to the protection of the natural environment in armed conflict has been emphasized by the ICRC customary law study, which found that the potential effect of an attack on the environment needs to be assessed.¹²¹²

(8) If the rules relating to proportionality are applied in relation to the protection of the natural environment, it means that attacks against legitimate military objectives must be refrained from if such an attack would have incidental environmental effects that exceed the value of the military objective in question.¹²¹³ On the other hand, the application of the principle of proportionality also means that “if the target is sufficiently important, a greater

Certain Conventional Weapons; Protocol III to the Convention on Certain Conventional Weapons; and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Oslo, 18 September 1997), United Nations, *Treaty Series*, vol. 2056, No. 35597, p. 211.

¹²⁰⁶ See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), rule 7, p. 25.

¹²⁰⁷ Art. 51, para. 5 (b), of Additional Protocol I. See also Y. Dinstein, “Protection of the environment in international armed conflict” *Max Planck Yearbook of United Nations Law*, vol. 5 (2001), pp. 523–549, at pp. 524–525. See also L. Doswald-Beck, “International humanitarian law and the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons”, *International Review of the Red Cross*, vol. 37 (1997), pp. 35–55, at p. 52.

¹²⁰⁸ Schmitt, “Military necessity and humanity ...” (footnote 1204 above), p. 804.

¹²⁰⁹ Additional Protocol I, arts. 51 and 57, Additional Protocol II, and amended Protocol II to the Convention on Certain Conventional Weapons as well as the Statute of the International Criminal Court, art. 8, para. 2 (b) (iv). See also *Legality of the Threat or Use of Nuclear Weapons* (footnote 1162 above), at p. 242, para. 30.

¹²¹⁰ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), rule 14, p. 46.

¹²¹¹ *Ibid.*, rule 44, p. 150; Droegge and Tougas, “The protection of the natural environment in armed conflict ...” (footnote 998 above), p. 19; see also United Nations Environment Programme, *Desk Study on the Environment in Liberia* (footnote 1058 above) and United Nations Environment Programme, *Environmental Considerations of Human Displacement in Liberia ...* (footnote 1203 above).

¹²¹² Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), rule 44, p. 150.

¹²¹³ See also Dinstein, “Protection of the environment ...” (footnote 1207 above), pp. 524–525; Doswald-Beck, “International humanitarian law and the advisory opinion of the International Court of Justice ...” (footnote 1207 above); United Nations Environment Programme, *Protecting the Environment During Armed Conflict ...* (footnote 1202 above), p. 13; Rayfuse, “Rethinking international law and the protection of the environment in relation to armed conflict” (footnote 1200 above), p. 6; Droegge and Tougas, “The protection of the natural environment ...” (footnote 998 above), pp. 19–23.

degree of risk to the environment may be justified”.¹²¹⁴ It therefore accepts that “collateral damage” to the natural environment may be lawful in certain instances.

(9) Under the law of armed conflict, military necessity allows “measures which are actually necessary to accomplish a legitimate military purpose and are not otherwise prohibited”.¹²¹⁵ It means that an attack against a legitimate military objective which may have negative environmental effects will only be allowed if such an attack is actually necessary to accomplish a specific military purpose and is not covered by the prohibition against the employment of methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment,¹²¹⁶ or other relevant prohibitions, and meets the criteria contained in the principle of proportionality.¹²¹⁷

(10) The rule concerning precautions in attack lays out that care must be taken to spare the civilian population, civilians and civilian objects from harm during military operations; and also that all feasible precautions must be taken to avoid and minimize incidental loss of civilian life, injury to civilians as well as damage to civilian objects which may occur. The rule is codified in several instruments of the law of armed conflict¹²¹⁸ and is also considered to be a customary international law rule in both international and non-international armed conflict.¹²¹⁹

(11) The fundamental rule concerning precautions in attack obliges parties to an armed conflict to take all feasible precautions in planning and deciding an attack. Therefore in relation to the protection of the environment, it means that parties to an armed conflict are obliged to take all feasible precautions to avoid and minimize collateral environmental damage.¹²²⁰

(12) Lastly, the words “shall be applied to the natural environment, with a view to its protection” introduces an objective which those involved in armed conflict or military operations should strive towards, and thus it goes further than simply affirming the application of the rules of armed conflict to the environment.

Principle 15 **Environmental considerations**

Environmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity.

Commentary

(1) Draft principle 15 is entitled “Environmental considerations” and provides that environmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity.

(2) The text is drawn from and inspired by the Advisory Opinion of the International Court of Justice on *Legality of the Threat or Use of Nuclear Weapons*, which held that: “States must take environmental considerations into account when assessing what is

¹²¹⁴ International Criminal Tribunal for the Former Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, para. 19. Available from www.icty.org/x/file/Press/nato061300.pdf (accessed on 8 July 2019). See also Dinstein, “Protection of the environment ...” (footnote 1207 above), pp. 524–525.

¹²¹⁵ M. Sassoli, A. Bouvier and A. Quintin, “How does law protect in war: online glossary”. Available from <https://casebook.icrc.org/glossary/military-necessity> (accessed on 8 July 2019).

¹²¹⁶ Additional Protocol I, art. 35, para. 3.

¹²¹⁷ *Ibid.*, art. 51, para. 5 (b).

¹²¹⁸ The principle of precautions in attack is codified in art. 2, para. 3, of the Convention (IX) of 1907 concerning Bombardment by Naval Forces in Time of War (The Hague, 18 October 1907), J. B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907* (see footnote 1086 above); art. 57, para. 1, of Additional Protocol I, as well as amended Protocol II to the Convention on Certain Conventional Weapons, and the 1999 Second Protocol.

¹²¹⁹ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), rule 15, p. 51.

¹²²⁰ *Ibid.*, rule 44, p. 147.

necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that goes into assessing whether an action is in conformity with the principles of necessity and proportionality”.¹²²¹

(3) Draft principle 15 is closely linked with draft principle 14. The added value of this draft principle in relation to draft principle 14 is that it provides specificity with regard to the application of the principle of proportionality and the rules of military necessity. It is therefore of operational importance. However, a view was expressed that it should be deleted altogether.

(4) Draft principle 15 aims to address military conduct and does not deal with the process of determining what constitutes a military objective as such. This is already regulated under the law of armed conflict, and is often reflected in military manuals and domestic law of States.¹²²² The words “*when applying* the principle” were specifically chosen to make this point clear. Also for purposes of clarity and in order to emphasize the link between draft principles 14 and 15, it was decided to refer explicitly to the principle of proportionality and the rules on military necessity. These principles have been discussed in the commentary to draft principle 14 above.

(5) Draft principle 15 becomes relevant once the legitimate military objective has been identified. Since knowledge of the environment and its eco-systems is constantly increasing, better understood and more widely accessible to humans, it means that environmental considerations cannot remain static over time, they should develop as human understanding of the environment develops.

Principle 16 **Prohibition of reprisals**

Attacks against the natural environment by way of reprisals are prohibited.

Commentary

(1) Draft principle 16 is entitled “Prohibition of reprisals” and is identical to paragraph 2 of article 55 of Additional Protocol I.

(2) Although the draft principle on the prohibition of reprisals against the natural environment was welcomed and supported by some members, other members raised several issues concerning its formulation and were of the view that it should not have been included in the draft principles at all. The divergent views centred around three main points: (a) the link between draft principle 16 and article 51 of Additional Protocol I; (b) whether or not the prohibition of reprisals against the environment reflected customary law; and (c) if so, whether both international and non-international armed conflicts were covered by such a customary law rule.

(3) Those who expressed support for the inclusion of the draft principle stressed the link between draft principle 16 and article 51 of Additional Protocol I. In their view, article 51 (which is placed under the section “General protection against effects of hostilities”) is one of the most fundamental articles of Additional Protocol I. It codifies the customary rule that civilians must be protected against danger arising from hostilities, and, in particular, also provides that “attacks against the civilian population or civilians by way of reprisals are

¹²²¹ *Legality of the Threat or Use of Nuclear Weapons* (see footnote 1162 above), at p. 242, para. 30.

¹²²² See Additional Protocol I, arts. 48, 50, 51 (in particular para. 4), 52 (in particular para. 2) and 57, para. 2, and Additional Protocol II, art. 13, para. 2. See Y. Dinstein, “Legitimate military objectives under the current *jus in bello*”, *International Law Studies*, vol. 78 (2002), p. 139, and L.R. Blank, “Extending positive identification from persons to places: terrorism, armed conflict, and the identification of military objectives”, *Utah Law Review*, No. 5 (2013), pp. 1227–1261. See, e.g., United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford, Oxford University Press, 2004), para. 5.4; Canada, National Defence, *Law of Armed Conflict at the Operational and Tactical Levels* (2001) B-GJ-005-104/FP-021, pp. 405–427; United States, Department of Defense, *Law of War Manual* (Office of General Counsel, Washington D.C., 2015).

prohibited".¹²²³ This made the inclusion of draft principle 16 essential. In their view, if the environment, or part thereof, became an object of reprisals, it would be tantamount to an attack against the civilian population, civilians or civilian objects, and would thus violate the laws of armed conflict.

(4) In this context, some members took the view that the prohibition of reprisals forms part of customary international law. However, other members questioned the existence of this rule, and were of the view that the rule exists only as a treaty obligation under Additional Protocol I.¹²²⁴

(5) Concerns were raised that including draft principle 16 as a copy of article 55, paragraph 2, of Additional Protocol I risked the draft principles going against their main aim, which is to apply generally. Although Additional Protocol I is widely ratified and thus the prohibition of reprisals against the environment is recognized by many States, Additional Protocol I is not universally ratified.¹²²⁵ Some members were concerned that reproducing article 55, paragraph 2, verbatim in draft principle 16 could therefore be misinterpreted as trying to create a binding rule on non-State parties. It was also pointed out in this regard that paragraph 2 of article 55 has been subject to reservations and declarations by some States parties.¹²²⁶

¹²²³ Additional Protocol I, art. 51, in particular para. 6. See C. Pilloud and J. Pictet, "Article 51: Protection of the civilian population" in *ICRC Commentary on the Additional Protocols ...*, Sandoz and others (footnote 976 above), p. 615, para. 1923.

¹²²⁴ For a discussion on the customary law status of reprisals, see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), rules 147–149, pp. 523–530; Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law and its Interaction with International Human Rights Law* (Leiden, Martinus Nijhoff, 2009), pp. 285–289; M. A. Newton, "Reconsidering reprisals" *Duke Journal of Comparative and International Law*, vol. 20 (2010), pp. 361–388; S. Darcy, *Collective Responsibility and Accountability under International Law* (Leiden, Brill, 2007) pp. 154–156.

¹²²⁵ There are currently 174 State parties to Additional Protocol I. See the ICRC website (www.icrc.org/ihl/INTRO/470 (accessed on 8 July 2019)).

¹²²⁶ For a description of declarations, statements and reservations made by States in connection with regard to, *inter alia*, article 55, see A/CN.4/685, paras. 129 and 130. It should also be noted that the United Kingdom declared that: "The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise there to and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result." The text of the reservation is available on the ICRC website www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument (accessed on 8 July 2019), at para. (m). The conditions under which belligerent reprisals against the natural environment may be taken are partly described in United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict ...* (footnote 1222 above), paras. 16.18–16.19.1. For declarations that relate to the understanding of whether Additional Protocol I is applicable only to conventional weapons and not to nuclear weapons, see A/C.N/4/685, para. 130. See declarations and reservations of Ireland: "Article 55: In ensuring that care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage and taking account of the prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment thereby prejudicing the health or survival of the population, Ireland declares that nuclear weapons, even if not directly governed by Additional Protocol I, remain subject to existing rules of international law as confirmed in 1996 by the International Court of Justice in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*. Ireland will interpret and apply this Article in a way which leads to the best possible protection for the civilian

(6) It is therefore worth summarizing the position of article 55, paragraph 2 (as a treaty provision), as follows: the prohibition of attacks against the natural environment by way of reprisals is a binding rule for the 174 State parties to Additional Protocol I. The extent to which States have made declarations or reservations that are relevant to its application must be evaluated on a case by case basis, since only a few States have made an explicit reference to paragraph 2 of article 55.¹²²⁷

(7) Another contentious issue raised which merits discussion is the fact that there is no corresponding rule to article 55, paragraph 2, in common article 3 to the four Geneva Conventions or in Additional Protocol II which explicitly prohibits reprisals in non-international armed conflicts (including against civilians, the civilian population, or civilian objects). The drafting history of Additional Protocol II reveals that at the time of drafting, some States were of the view that reprisals of any kind are prohibited under all circumstances in non-international armed conflicts.¹²²⁸ There are, however, also valid arguments that reprisals may be permitted in non-international armed conflicts in certain situations.¹²²⁹

(8) In the light of this uncertainty, some members expressed concern that by not differentiating between the position in international armed conflicts and non-international armed conflicts, draft principle 16 would attempt to create a new international law rule. It was therefore suggested that the principle be redrafted with appropriate caveats, or excluded from the draft principles altogether.

(9) Concerning reprisals against the natural environment in particular, it is worth mentioning that the International Criminal Tribunal for the Former Yugoslavia considered that the prohibition against reprisals against civilian populations constitutes a customary international law rule “in armed conflicts of any kind”.¹²³⁰ As the environment should be considered as a civilian object unless parts of it becomes a military objective, some members expressed the view that reprisals against the environment in non-international armed conflicts are prohibited.

(10) Given the controversy surrounding the formulation of this draft principle, various suggestions were made regarding ways in which the principle could be rephrased to address the issues in contention. However, it was ultimately considered that any formulation other than the one adopted could be interpreted as weakening the existing rule under the law of armed conflict. This would be an undesirable result, given the fundamental importance of the existing rules of the law of armed conflict. Despite the concerns raised during drafting, including a draft principle on the prohibition of reprisals against the natural environment

population.” The declaration is available on the ICRC website at www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?documentId=27BBCD34A4918BFBC1256402003FB43A&action=OpenDocument (accessed on 8 July 2019). It should also be noted that in the *Legality of the Threat or Use of Nuclear Weapons* (see footnote 1162 above), at p. 246, para. 46, the Court stated that: “Certain States asserted that the use of nuclear weapons in the conduct of reprisals would be lawful. The Court does not have to examine, in this context, the question of armed reprisals in time of peace, which are considered to be unlawful. Nor does it have to pronounce on the question of belligerent reprisals save to observe that in any case any right of recourse to such reprisals would, like self-defence, be governed *inter alia* by the principle of proportionality.”

¹²²⁷ France, Ireland and the United Kingdom.

¹²²⁸ See *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Geneva, 1974–1977) vol. IX, available from www.loc.gov/tr/frd/Military_Law/RC-dipl-conference-records.html (accessed on 8 July 2019), most notably the statements made by Canada (p. 428), Greece (p. 429), the Islamic Republic of Iran (p. 429), Iraq (p. 314), Mexico (p. 318). See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), rule 148, p. 528.

¹²²⁹ See V. Bílková, “Belligerent reprisals in non-international armed conflicts”, *International and Comparative Law Quarterly*, vol. 63 (2014), p. 31; S. Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford, Oxford University Press, 2012), pp. 449–457.

¹²³⁰ *Prosecutor v. Duško Tadić*, case No. IT-94-1-A72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, of 2 October 1995, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 1994–1995*, vol. I, p. 353, at pp. 475–478, paras. 111–112. See also in general Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), pp. 526–529.

was viewed as being particularly relevant and necessary, given that the overall aim of the draft principles is to enhance environmental protection in relation to armed conflict. In the light of the comments made above, the inclusion of this draft principle can be seen as promoting the progressive development of international law, which is one of the mandates of the Commission.

Principle 17
Protected zones

An area of major environmental and cultural importance designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective.

Commentary

(1) This draft principle corresponds with draft principle 4. It provides that an area of major environmental and cultural importance designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective. Unlike the earlier draft principle, it only covers areas that are designated by agreement. There has to be an express agreement on the designation. Such an agreement may have been concluded in peacetime or during armed conflict. The reference to 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. Such zones are protected from attack during armed conflict. The reference to the word “contain” in the phrase “as long as it does not contain a military objective” is intended to denote that it may be the entire zone, or only parts thereof. Moreover, the protection afforded to a zone ceases if one of the parties commits a material breach of the agreement establishing the zone.

(2) As mentioned above, a designated area established in accordance with draft principle 4 may lose its protection if a party to an armed conflict has military objectives within the area, or uses the area to carry out any military activities during an armed conflict. The term “military objective” in the present draft principle frames the description of military objectives as “so long as it does not contain a military objective”, which is different from draft principle 13, paragraph 3, which stipulates “unless it has become a military objective”. The relationship between these two principles is that principle 17 seeks to enhance the protection established in draft principle 13, paragraph 3.

(3) The conditional protection is an attempt to strike a balance between military, humanitarian, and environmental concerns. This balance mirrors the mechanism for demilitarized zones as established in article 60 of Additional Protocol I to the Geneva Conventions. Article 60 states that if a party to an armed conflict uses a protected area for specified military purposes, the protected status shall be revoked.

(4) Under the 1954 Hague Convention referred to above, State parties are similarly under the obligation to not destroy property that has been identified as cultural property in accordance with article 4 of the Convention. However, the protection can only be granted as long as the cultural property is not used for military purposes.

(5) The legal implications of designating an area as a protected area will depend on the origin and contents, as well as the form, of the proposed protected area. For example, the *pacta tertiis* rule will limit the application of a formal treaty to the parties. As a minimum, the designation of an area as a protected zone could serve to alert parties to an armed conflict that they should take this into account when applying the principle of proportionality or the principle of precautions in attack. In addition, preventive and remedial measures may need to be tailored so as to take the special status of the area into account.

Principle 18
Prohibition of pillage

Pillage of natural resources is prohibited.

Commentary

(1) The purpose of draft principle 18 is to restate the prohibition of pillage as well as its applicability to natural resources. Illegal exploitation of natural resources has been a driving force for many, in particular non-international, armed conflicts in recent decades,¹²³¹ and has caused severe environmental strain in the affected areas.¹²³² In this context, the prohibition of pillage was identified as one of the provisions of the law of armed conflict that provide protection to the environment in armed conflict.

(2) Pillage is an established violation of the law of armed conflict and a war crime. Geneva Convention IV contains an absolute prohibition of pillage, both in the territory of a party to an armed conflict, and in an occupied territory.¹²³³ Additional Protocol II to the Geneva Conventions confirms the applicability of this general prohibition in non-international armed conflicts meeting the criteria set out in the Protocol and, in that context, “at any time and in any place whatsoever”.¹²³⁴ The prohibition has been widely incorporated into national legislation as well as in military manuals.¹²³⁵ There is considerable case law from both post-Second World War and modern international criminal tribunals confirming the criminal nature of pillage.¹²³⁶ The war crime of pillaging is also

¹²³¹ According to the United Nations Environment Programme, 40 per cent of internal armed conflicts over the past 60 years were related to natural resources, and since 1990, at least 18 armed conflicts have been fuelled directly by natural resources. See *Renewable Resources and Conflict: Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflicts* (New York, United Nations Interagency Framework Team for Preventive Action, 2012), p. 14. Available at www.un.org/en/land-natural-resources-conflict/renewable-resources.shtml (accessed on 8 July 2019).

¹²³² Interim report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo (S/2002/565), para. 52. See also United Nations Environment Programme, *The Democratic Republic of the Congo: Post-Conflict Environmental Assessment. Synthesis Report for Policy Makers* (Nairobi, United Nations Environment Programme, 2011), pp. 26–28, available at <http://wedocs.unep.org/handle/20.500.11822/22069> (accessed on 8 July 2019); Report of the Panel of Experts pursuant to paragraph 25 of Security Council resolution 1478 (2003) concerning Liberia (S/2003/779), para. 14; United Nations Environment Programme, *Desk Study on the Environment in Liberia* (footnote 1058 above), pp. 16–18 and 42–51; C. Nellemann *et al.* (eds.), *The Rise of Environmental Crime – A Growing Threat to Natural Resources Peace, Development and Security* (United Nations Environment Programme–INTERPOL, 2016), p. 69.

¹²³³ Geneva Convention IV, art. 33, para. 2. See also Geneva Convention I, art. 15, first para., according to which “At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage”.

¹²³⁴ Additional Protocol II, art. 4, para. 2 (g). See also African Charter on Human and Peoples’ Rights, art. 21, para. 2: “In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation”. Furthermore, the Lusaka Protocol of the International Conference on the Great Lakes Region reproduces the same provision, see Protocol Against the Illegal Exploitation of Natural Resources of the International Conference on the Great Lakes Region art. 3, para. 2.

¹²³⁵ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), rule 52, “Pillage is prohibited”, pp. 182–185.

¹²³⁶ See, e.g., *In re Krupp and Others*, Judgment of 30 June 1948, *Trials of War Criminals before the Nürnberg Military Tribunals*, Vol. IX, p. 1337–1372; *U.S.A. v. von Weizsäcker et al. (Ministries case)*, *Trials of War Criminals before the Nürnberg Military Tribunals*, vol. XIV, p. 741; *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-T, Judgment, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, 14 December 1999; *The Prosecutor v. Zejnil Delalić, Zdravko Mucić a/k/a “Pavo”, Hazim Delić and Esad Landžo a/k/a “Zenga”*, Case No. IT-96-21-T, Judgement, International Criminal Tribunal for the Former Yugoslavia, 16 November 1998, and Sentencing Judgement, International Criminal Tribunal for the Former Yugoslavia, 9 October 2001; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgement (with Declaration of Judge Shahabuddeen), Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, 3 March 2000, *Judicial Reports 2000*; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgement, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, 26 February 2001; *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T-1234, Judgment, Trial Chamber, Special Court for Sierra Leone, 2 March 2009; *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-1-T, Judgment, 18 May 2012 (*Taylor Trial Judgment*);

prosecutable under the Rome Statute, in both international and non-international conflicts.¹²³⁷ The prohibition of pillage has been found to constitute a customary rule of international law.¹²³⁸

(3) According to the ICRC commentary, the prohibition applies to all categories of property, whether public or private.¹²³⁹ The scope of the present draft principle is limited to the pillage of natural resources, which is a common phenomenon in armed conflicts, and one that leads to severe environmental impacts. While such pillage only applies to natural resources that can be subject to ownership and constitute “property”, this requirement is easily met for high-value natural resources. The prohibition covers pillage of natural resources, whether owned by the State, communities or private persons.¹²⁴⁰ The applicability of the prohibition of pillage to natural resources has been confirmed by the International Court of Justice, which found in the *Armed Activities* judgment, that Uganda was internationally responsible “for acts of looting, plundering and exploitation of the [Democratic Republic of the Congo]’s natural resources” committed by members of the Ugandan Armed Forces in the territory of the Democratic Republic of the Congo.¹²⁴¹

(4) Pillage is a broad term that applies to any appropriation of property in armed conflict that violates the law of armed conflict. At the same time, the law of armed conflict provides a number of exceptions under which appropriation or destruction of property is lawful.¹²⁴² According to the ICRC commentaries, the prohibition of pillage covers both organized pillage and individual acts,¹²⁴³ whether committed by civilians or military personnel.¹²⁴⁴ Acts of pillage do not necessarily involve the use of force or violence.¹²⁴⁵

(5) The terminology used for illegal appropriation of property, including natural resources, in armed conflict has not been consistent. The International Court of Justice, in the *Armed Activities* judgment, referred to “looting, plundering and exploitation”,¹²⁴⁶ the Statute of the International Criminal Tribunal for the Former Yugoslavia referred to “plunder”,¹²⁴⁷ while the African Charter uses the term “spoliation”.¹²⁴⁸ Research shows, however, that the terms “pillage”, “plunder”, “spoliation” and “looting” have a common

Prosecutor against Charles Ghankay Taylor, Case No. SCSL-03-01-A, Judgment, Appeals Chamber, Special Court for Sierra Leone, 26 September 2013.

¹²³⁷ Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3, art. 8, para. 2 (b) (xvi) and (e) (v).

¹²³⁸ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above) rule 52, pp. 182–185.

¹²³⁹ ICRC commentary (1987) on Additional Protocol II, art. 4, para. 2 (g), para. 4542 of the commentary. See also ICRC commentary (1958) to Geneva Convention IV, art. 33, para. 2.

¹²⁴⁰ Property rules have also been widely used at the national level “for settling disputes concerning access, use and control of resources” and constitute therefore “a critical mechanism for environmental protection”. T. Hardman Reis, *Compensation for Environmental Damage under International Law. The Role of the International Judge* (Alphen aan den Rijn, Wolters Kluwer, 2011), p. 13.

¹²⁴¹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *I.C.J. Reports 2005*, p. 168, at p. 253, para. 250.

¹²⁴² For capture of an adversary’s movable public property that can be used for military purposes, see Geneva Convention I, art. 50. Adversary’s property can also be lawfully destroyed or appropriated if required by imperative military necessity; see the Hague Regulations (1907), art. 23 (g). See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), rule 50, pp. 175–177. For the lawful use by an Occupying Power of the resources of the occupied territory for the maintenance and needs of the army of occupation, see commentary to draft principle 21 below.

¹²⁴³ ICRC commentary (1987) on Additional Protocol II, art. 4, para. 2 (g), para. 4542 of the commentary. See also ICRC commentary (1958) on Geneva Convention IV, art. 33, para. 2.

¹²⁴⁴ ICRC commentary (2016) on Geneva Convention I, art. 15, para. 1495.

¹²⁴⁵ *Ibid.*, para. 1494.

¹²⁴⁶ *Armed Activities on the Territory of the Congo* (see footnote 1241 above), para. 248.

¹²⁴⁷ Art. 3 (e). Originally adopted by Security Council resolution 827 (1993) on 25 May 1993. The updated Statute is available at www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (accessed on 8 July 2019).

¹²⁴⁸ African Charter on Human and Peoples’ Rights, art. 21, para. 2.

legal meaning and been used interchangeably by international courts and tribunals.¹²⁴⁹ The Nürnberg Judgment thus used “pillage” and “plunder” as synonyms.¹²⁵⁰ While the post-Second World War jurisprudence preferred the term “spoliation”, it confirmed that the term was synonymous with “plunder”, which was the term appearing in Control Council Law No. 10.¹²⁵¹ The jurisprudence of the modern international criminal courts and tribunals has further confirmed that “pillage”, “plunder” and “looting” all signify unlawful appropriation of public or private property in armed conflict.¹²⁵²

(6) The term “pillage” has been used in the Hague Regulations¹²⁵³ and Geneva Convention IV,¹²⁵⁴ Additional Protocol II¹²⁵⁵ and the Rome Statute.¹²⁵⁶ The Nürnberg Charter¹²⁵⁷ used the term “plunder”. The concept of pillage has been defined in the ICRC Commentaries to the Geneva Conventions and Additional Protocol II, as well as in the jurisprudence of the international criminal tribunals. It has therefore been deemed appropriate to use the term “pillage” in the draft principle.

(7) Pillage of natural resources is part of the broader context of illegal exploitation of natural resources that thrives in areas of armed conflict and in post-armed conflict situations. The Security Council and the General Assembly have drawn attention in this regard to the connections between transnational criminal networks, terrorist groups and armed conflicts, including in relation to illicit trade in natural resources.¹²⁵⁸ Frequently characterized by poor governance, widespread corruption and weak protection of resource rights, post-armed conflict situations are vulnerable to exploitation through transnational environmental crime.¹²⁵⁹ “Illegal exploitation of natural resources”, as used in the relevant Security Council resolutions¹²⁶⁰ is a general notion that may cover the activities of States, non-State

¹²⁴⁹ J.G. Stewart, *Corporate War Crimes. Prosecuting the Pillage of Natural Resources* (Open Society Foundations, 2011), pp. 15–17.

¹²⁵⁰ *Trial of the Major War Criminals before the International Military Tribunal*, vol. I (Washington D.C., Nürnberg Military Tribunals, 1945), p. 228.

¹²⁵¹ See *United States v. Krauch et al.* in *Trials of War Criminals before the Nuernberg Military Tribunals (The I.G. Farben Case)*, vols. VII-VIII (Washington D.C., Nürnberg Military Tribunals, 1952), p. 1081, at p. 1133.

¹²⁵² *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgment, 16 November 1998 (see footnote 1236 above), para. 591: “the offence of the unlawful appropriation of public and private property in armed conflict has varyingly been termed ‘pillage’, ‘plunder’ and ‘spoliation’. ... The Trial Chamber reaches this conclusion on the basis of its view that [plunder], as incorporated in the Statute of the International Criminal Tribunal, should be understood to embrace all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as ‘pillage’”. See also *Prosecutor v. Alex Tamba Brima et al.*, Case No. SCSL-04-16-T, Judgment, Special Court for Sierra Leone, 20 June 2007, para. 751; and *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-T, Judgment, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, 17 October 2003, para. 98.

¹²⁵³ Arts. 28 and 47 of the 1907 Hague Regulations.

¹²⁵⁴ Art. 33, para. 2, of Geneva Convention IV.

¹²⁵⁵ Art. 4, para. 2(g), of Additional Protocol II.

¹²⁵⁶ Rome Statute, art. 8, para. 2 (b) (xvi), and art. 8, para. 2 (e) (v), referring to “pillaging”.

¹²⁵⁷ Nürnberg Charter, art. 6 (b).

¹²⁵⁸ Security Council resolution 2195 (2014) of 19 December 2014, para. 3; General Assembly resolution 69/314 of 30 July 2015, paras. 2–5. See also Security Council resolutions 2134 (2014) of 28 January 2014 and 2136 (2014) of 30 January 2014 on the Security Council’s sanctions against persons and entities involved in wildlife poaching and trade. See also United Nations Environmental Assembly resolution 2/15 of 27 May 2016 on “Protection of the environment in areas affected by armed conflict” (UNEP/EA.2/Res.15), para. 4, and resolution 3/1 of 6 December 2017 on “Pollution mitigation and control in areas affected by armed conflict or terrorism”, paras. 2–3.

¹²⁵⁹ Corruption has been identified as the most important enabling factor behind illegal trade in wildlife and timber. See Nellemann *et al.*, *The Rise of Environmental Crime ...* (footnote 1232 above), p. 25: transnational environmental crime thrives in permissive environments. See also C. Cheng and D. Zaum, “Corruption and the role of natural resources in post-conflict transitions”, in C. Bruch, C. Muffett, and S.S. Nichols (eds.), *Governance, Natural Resources, and Post-Conflict Peacebuilding* (Abingdon, Earthscan from Routledge, 2016), pp. 461–480.

¹²⁶⁰ See, e.g., Security Council resolution 1457 (2003) of 24 January 2003, para. 2, in which the Council “[s]trongly condemns the illegal exploitation of the natural resources of the Democratic Republic of the Congo”.

armed groups, or other non-State actors, including private individuals. Accordingly, the notion may refer to illegality under international or national law. While the notion of “illegal exploitation of natural resources” is partly overlapping with the concept of pillage, it has not been defined¹²⁶¹ and may also refer to environmental crime, whether in times of armed conflict or in times of peace. This broader context underscores the application of the prohibition of pillage to natural resources.

(8) Draft principle 18 is located in Part Three containing draft principles applicable during an armed conflict. It also applies in situations of occupation.

Principle 19
Environmental modification techniques

In accordance with their international obligations, States shall not engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State.

Commentary

(1) Draft principle 19 has been modelled on article 1, paragraph 1, of the 1976 Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques.¹²⁶² The Convention prohibits military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects.¹²⁶³ Environmental modification techniques are defined in the convention as “any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space”.¹²⁶⁴ The present draft principle uses the concept of environmental modification technique in the same sense.

(2) The mention of international obligations in the draft principle refers to the treaty obligations of States parties to the Convention and, 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. To quote the ICRC study, “there is sufficiently widespread, representative and uniform practice to conclude that the destruction of the natural environment may not be used as a weapon”, and this irrespective of whether the provisions of the Convention are themselves customary.¹²⁶⁵ The ICRC Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict also contain a guideline based on articles I and II of the Convention.¹²⁶⁶

(3) The Convention does not spell out clearly whether the prohibition of the use of environmental modification techniques could be applicable in a non-international armed conflict. The formulation of paragraph 1 of article I only prohibits environmental modification that causes damage to another State Party to the Convention. It has been argued that this condition could nevertheless also be fulfilled in a non-international armed conflict provided that a hostile use of an environmental modification technique by a State in the context of such a conflict causes environmental or other damage in the territory of another State party.¹²⁶⁷ The environmental modification techniques addressed in the

¹²⁶¹ The term “illegal exploitation of natural resources” appears in Lusaka Protocol of the International Conference on the Great Lakes Region, art. 17, para. 1, but has not been defined.

¹²⁶² Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (New York, 10 December 1976), United Nations, *Treaty Series*, vol. 1108, No. 17119, p. 151.

¹²⁶³ *Ibid.*, art. I, para. 1.

¹²⁶⁴ *Ibid.*, art. II.

¹²⁶⁵ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (see footnote 969 above), p. 156.

¹²⁶⁶ ICRC, Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict (see footnote 973 above), guideline 12.

¹²⁶⁷ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (see footnote 969 above) rule 44, commentary, p. 148: “it can be argued that the obligation to pay due regard to the

Convention – capable of causing “earthquakes, tsunamis, an upset in the ecological balance of a region, changes in weather patterns (clouds, precipitation, cyclones of various types and tornadic storms); changes in climate patterns; changes in ocean currents; changes in the state of the ozone layer, and changes in the state of the ionosphere”¹²⁶⁸ – could well be expected to produce transboundary effects.

(4) The Convention only addresses the hostile or military use of environmental modification techniques by States, excluding hostile use of such techniques by non-State actors. The ICRC study on customary international humanitarian law concludes that the prohibition of the destruction of the natural environment as a weapon is a norm of customary international law “applicable in international armed conflicts and arguably also in non-international armed conflicts”.¹²⁶⁹

(5) Draft principle 19 has been located in Part Three, which contains draft principles applicable during armed conflict. This location reflects the most likely situations in which the Convention would be applied, even though the prohibition of the convention is broader, and also covers other hostile uses of environmental modification techniques.

(6) The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques deserves particular attention in the context of the present draft principles as the first and, so far, the only international treaty to specifically address means and methods of environmental warfare. The inclusion of draft principle 19 in the set of draft principles is without prejudice to the existing conventional or customary rules of international law regarding specific weapons that have serious impacts on the environment.

Part Four Principles applicable in situations of occupation

Introduction

Commentary

(1) The three draft principles related to situations of occupation are placed in a separate Part Four. The new category of draft principles is not intended as a deviation from the temporal approach chosen for the topic but as a practical solution reflecting the great variety of circumstances that may qualify as a situation of occupation. While military occupation under the law of armed conflict is a specific form of international armed conflict,¹²⁷⁰ situations of occupation differ from armed conflicts in many respects. Most notably, occupations are typically not characterized by active hostilities and can even take place in situations in which the invading armed forces meet no armed resistance.¹²⁷¹ A

environment also applies in non-international armed conflicts if there are effects in another State.” See also Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd ed. (Cambridge, Cambridge University Press, 2010), p. 243, referring to cross-border damage caused by environmental modification techniques. See also T. Meron, “Comment: protection of the environment during non-international armed conflicts”, in J.R. Grunawalt, J.E. King and R.S. McClain (eds.), *International Law Studies*, vol. 69, *Protection of the Environment during Armed Conflicts* (Newport, Rhode Island, Naval War College, 1996), pp. 353–358, stating, at p. 354, that the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques “is applicable in all circumstances”.

¹²⁶⁸ Understanding relating to article II, *Official Records of the General Assembly, Thirty-first Session, Supplement No. 27 (A/31/27)*, p. 92.

¹²⁶⁹ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law ...* (footnote 969 above), explanation of rule 45, p. 151. See also Part 2 of the ICRC Customary International Humanitarian Law Study (available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule45) and related practice.

¹²⁷⁰ It is worth recalling in this context that the end of an international armed conflict is determined by the general close of military operations or, in the case of occupation, the termination of the occupation. See Geneva Convention IV, art. 6, and Additional Protocol I, art. 3 (b). See also United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict ...* (footnote 1222 above), p. 277, para. 11.8, and R. Kolb and S. Vité, *Le droit de l’occupation militaire. Perspectives historiques et enjeux juridiques actuels* (Brussels, Bruylant, 2009), p. 166.

¹²⁷¹ Geneva Convention IV, art. 2.

stable occupation shares many characteristics with a post-conflict situation and may with time even come to “approximating peacetime” conditions.¹²⁷² Occupations can nevertheless also be volatile and conflict-prone. The Occupying Power may confront armed resistance during the occupation and even temporarily lose control of part of the occupied territory without this affecting the characterization of the situation as one of occupation.¹²⁷³ Furthermore, the beginning of an occupation does not necessarily coincide with the beginning of an armed conflict, nor is there any necessary concurrence between the cessation of active hostilities and the termination of an occupation. Parallels can therefore be drawn between occupations and armed conflicts, on the one hand, and occupations and post-conflict circumstances, on the other, depending on the nature of the occupation.

(2) In spite of this variety, all occupations display certain common characteristics, namely that the authority over a certain territory is transferred from a territorial State, without its consent, to the Occupying Power. The established understanding of the concept of occupation is based on article 42 of the Hague Regulations,¹²⁷⁴ which stipulates that a territory is considered occupied “when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.” According to the judgment in *Armed Activities on the Territory of the Congo* case, it was necessary “that the Ugandan armed forces in the [Democratic Republic of the Congo] were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government”.¹²⁷⁵ Authority in this context is a fact-based concept: occupation “does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty”.¹²⁷⁶

(3) 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 over which the territorial State is entitled to exercise sovereign rights. Similarly, the authority of the Occupying Power may extend to the airspace over the occupied territory and over the territorial sea. Such authority underscores the obligation of the Occupying Power to take appropriate steps to prevent transboundary environmental harm.¹²⁷⁷

(4) The status of a territory as occupied is often disputed, including in situations in which the Occupying Power relies on a local surrogate, transitional government or rebel

¹²⁷² A. Roberts, “Prolonged military occupation: the Israeli-occupied territories since 1967”, *American Journal of International Law*, vol. 84 (1990), pp. 44–103, p. 47. The article mentions several cases of occupations lasting more than five years in the period since the Second World War.

¹²⁷³ ICRC commentary (2016) to Geneva Convention I, art. 2, para. 302. See, similarly, United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict ...* (footnote 1222 above), p. 277, para. 11.7.1.

¹²⁷⁴ Hague Regulations, art. 42. The definition contained in art. 42 has been confirmed by the International Court of Justice and the International Criminal Tribunal for the Former Yugoslavia, which have referred to it as the exclusive standard for determining the existence of a situation of occupation under the law of armed conflict. See, respectively, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 167, para. 78, and *Prosecutor v. Mladen Naletilić, aka “TUTA” and Vinko Martinović, aka “STELA”*, Case No. IT-98-34-T, Judgment of 31 March 2003, Trial Chamber, para. 215. See also ICRC commentary (2016) to Geneva Convention I, art. 2, para. 298.

¹²⁷⁵ *Armed Activities on the Territory of the Congo* (see footnote 1241 above), para. 173; see also United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict ...* (footnote 1222 above), p. 275, para. 11.3.

¹²⁷⁶ United States, Department of Defence, *Law of War Manual* (see footnote 1222 above), sect. 11.4, pp. 772–774. See also H.-P. Gasser and K. Dörmann, “Protection of the civilian population”, in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (footnote 1165 above), pp. 231–320, at p. 274, para. 529.

¹²⁷⁷ *Manual of the Laws of Naval War* (Oxford, 9 August 1913), sect. VI, art. 88. Available from <https://ihl-databases.icrc.org/ihl/INTRO/265?OpenDocument> (accessed on 8 July 2019). See also Y. Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press, 2009), p. 47; E. Benvenisti, *The International Law of Occupation*, 2nd ed. (Oxford University Press, 2012), p. 55, referring to the practice of several occupants, and M. Sassòli, “The concept and the beginning of occupation”, in A. Clapham, P. Gaeta and M. Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press, 2015), pp. 1389–1419, at p. 1396.

group for the purposes of exercising control over the occupied territory.¹²⁷⁸ It is widely acknowledged that the law of occupation applies to such cases provided that the local surrogate acting on behalf of a State exercises effective control over the occupied territory.¹²⁷⁹ The possibility of such an “indirect occupation” has been acknowledged by the International Criminal Tribunal for the Former Yugoslavia,¹²⁸⁰ the International Court of Justice,¹²⁸¹ and the European Court of Human Rights.¹²⁸²

(5) The law of occupation is applicable to situations that fulfil the factual requirements of effective control of a foreign territory irrespective of whether the Occupying Power invokes the legal regime of occupation.¹²⁸³ It also extends to territories with unclear status that are placed under foreign rule.¹²⁸⁴ Similarly, and in accordance with the fundamental distinction between *jus ad bellum* and *jus in bello*, the law of occupation applies equally to all occupations, whether or not they result from a use of force that is lawful in the sense of *jus ad bellum*.¹²⁸⁵ The law of occupation may also be applicable to territorial administration by an international organization, provided that the situation meets the criteria of article 42 of the Hague Regulations.¹²⁸⁶ Even where this is not the case, as in operations relying on the

¹²⁷⁸ Roberts, “Prolonged military occupation ...” (see footnote 1272 above), p. 95; Gasser and Dörmann, “Protection of the civilian population” (see footnote 1276 above), p. 272.

¹²⁷⁹ Benvenisti, *The International Law of Occupation* (see footnote 1277 above), pp. 61–62. Similarly, ICRC, “Occupation and other forms of administration of foreign territory”, Report of an expert meeting (2012), pp. 10 and 23 (the theory of “indirect effective control” was met with approval). See also United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict ...* (footnote 1222 above), p. 276, para. 11.3.1 (“likely to be applicable”). See also Kolb and Vité, *Le droit de l’occupation militaire ...* (footnote 1270 above), p. 181, as well as ICRC commentary (2016) to Geneva Convention I, art. 2, paras. 328–332.

¹²⁸⁰ See *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Trial Judgment, 7 May 1997, *Judicial Reports 1997*, para. 584, which refers to circumstances, in which “the foreign Power ‘occupies’ or operates in certain territory solely through the acts of local de facto organs or agents”. See also *Prosecutor v. Tihomir Blaskić*, Case No. IT-95-14-T, Judgment, 3 March, 2000, *Judicial Reports 2000*, paras. 149–150.

¹²⁸¹ The Court seems to have accepted in the *Armed Activities* case that Uganda would have been an occupying power in the areas controlled and administered by Congolese rebel movements, had these non-State armed groups been “under the control” of Uganda. See *Armed Activities on the Territory of the Congo* (footnote 1241 above), p. 231, para. 177. See also the separate opinion of Judge Kooijmans, *ibid.*, p. 317, para. 41.

¹²⁸² The European Court of Human Rights has confirmed that the obligation of a State party to the European Convention on Human Rights to secure the rights and freedoms set out in the Convention in an area outside its national territory, over which it exercises effective control, “derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration”, see *Loizidou v. Turkey*, Judgment (Merits), 18 December 1996, *Reports of Judgments and Decisions 1996-VI*, para. 52.

¹²⁸³ *The Hostages Trial: Trial of Wilhelm List and Others*, Case No. 47, United States Military Tribunal at Nuremberg, *Law Reports of Trial of War Criminals*, vol. VIII (London, United Nations War Crimes Commission, 1949, London), p. 55: “[w]hether an invasion has developed into an occupation is a question of fact”. See also *Armed Activities on the Territory of the Congo* (footnote 1241 above), p. 230, para. 173; *Naletilić and Martinović* (footnote 1274 above), para. 211; and ICRC commentary (2016) to Geneva Convention I, art. 2, para. 300.

¹²⁸⁴ *Legal Consequences of the Construction of a Wall* (see footnote 1274 above), pp. 174–175, para. 95.

¹²⁸⁵ See ICRC, “Occupation and other forms of administration of foreign territory” (footnote 1279 above), Foreword by K. Dörmann, p. 4. Similarly, the war crime trials after the Second World War relied on and interpreted the Hague Regulations and customary law.

¹²⁸⁶ M. Sassöli, “Legislation and maintenance of public order and civil life by Occupying Powers”, *European Journal of International Law*, vol. 16 (2005), pp. 661–694, at p. 688; T. Ferraro, “The applicability of the law of occupation to peace forces”, ICRC and International Institute of Humanitarian Law, *International Humanitarian Law, Human Rights and Peace Operations*, G.L. Beruto (ed.), 31st Round Table on Current Problems of International Humanitarian Law, San Remo, 4–6 September 2008, *Proceedings*, pp. 133–156; D. Shraga, “The applicability of international humanitarian law to peace operations, from rejection to acceptance”, *ibid.* pp. 90–99; S. Wills, “Occupation law and multi-national operations: problems and perspectives”, *British Yearbook of International Law*, vol. 77 (2006), pp. 256–332; Benvenisti, *The International Law of Occupation* (see footnote 1277 above), p. 66; See also ICRC, “Occupation and other forms of administration of foreign territory” (footnote 1279 above), pp. 33–34. See, however, also Dinstein, *The International Law of Belligerent Occupation* (footnote 1277 above), p. 37 for a more reserved view.

consent of the territorial State, the law of occupation may provide guidance and inspiration for international territorial administration entailing the exercise of functions and powers over a territory that are comparable to those of an Occupying Power under the law of armed conflict.¹²⁸⁷ The term “Occupying Power” as used in the present draft principles is sufficiently broad to cover such cases.

(6) While the type and duration of occupation do not affect the applicability of the law of occupation as *lex specialis*, the obligations of the Occupying Power under the law of occupation are, to a certain extent, context specific. As has been pointed in the ICRC commentary to common article 2 of the Geneva Conventions, negative obligations – mostly prohibitions – under the law of occupation apply immediately, whereas the implementation of positive obligations depends on “the level of control exerted, the constraints prevailing in the initial phases of the occupation, and the resources available to the foreign forces”.¹²⁸⁸ Certain flexibility is thus recognized in the implementation of the law of occupation, and the exact scope of the respective obligations depends on the nature and duration of the occupation. In other words, the responsibilities falling on the Occupying Power are “commensurate with the duration of the occupation”.¹²⁸⁹ Furthermore, while protracted occupations remain governed by the law of occupation, other bodies of law, such as human rights law and international environmental law, gain more importance as time goes by.

(7) Given the variety of different situations of occupation, the draft principles in Parts Two, Three and Five apply *mutatis mutandis* to situations of occupation. For instance, 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. To the extent that periods of intense hostilities during an occupation are governed by the rules concerning the conduct of hostilities, the draft principles in Part Three concerning the protection of the environment in the “during” phase are directly relevant. Additionally, the environment of an occupied territory continues to enjoy the protection accorded to the environment during an armed conflict in accordance with applicable international law and as reflected in draft principle 13. The draft principles in Part Five addressing post-armed conflict situations would primarily have relevance for situations of prolonged occupation. For each part, the draft principles may require some adjustment, hence the phrase *mutatis mutandis*.

Principle 20

General obligations of an Occupying Power

1. An Occupying Power shall respect and protect the environment of the occupied territory in accordance with applicable international law and take environmental considerations into account in the administration of such territory.
2. An Occupying Power shall 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.
3. An Occupying Power shall respect the law and institutions of the occupied territory concerning the protection of the environment and may only introduce changes within the limits provided by the law of armed conflict.

Commentary

(1) Paragraph 1 of draft principle 20 sets forth the general obligation of an Occupying Power to respect and protect the environment of the occupied territory and to take environmental considerations into account in the administration of such territory. The

¹²⁸⁷ Gasser and Dörmann, “Protection of the civilian population” (see footnote 1276 above), p. 267; Arai-Takahashi, *The Law of Occupation ...* (see footnote 1224 above), p. 605; M. Zwanenburg, “Substantial relevance of the law of occupation for peace operations”, ICRC and International Institute of Humanitarian Law, *International Humanitarian Law, Human Rights and Peace Operations* (see previous footnote), pp. 157–167.

¹²⁸⁸ ICRC commentary (2016) to Geneva Convention I, art. 2, para. 322.

¹²⁸⁹ *Ibid.*

provision is based on the Occupying Power's obligation to take care of the welfare of the occupied population, derived from article 43 of the Hague Regulations which requires that the Occupying Power restores and maintains public order and security in the occupied territory.¹²⁹⁰ The obligation to ensure that the occupied population lives as normal a life as possible in the prevailing circumstances¹²⁹¹ entails environmental protection as a widely recognized public function of the modern State. Moreover, environmental concerns relate to an essential interest of the territorial sovereign,¹²⁹² which the occupying State as a temporary authority must respect.

(2) The law of occupation is a subset of the law of armed conflict, and draft principle 20 shall be read in the context of draft principle 13, which provides that the "natural environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict". Both draft principles refer to the obligation to "respect and protect" the environment in accordance with applicable international law, although draft principle 20 does so in the more specific context of occupation.¹²⁹³

(3) The term "applicable international law" refers, in particular, to the law of armed conflict, but also to the law of the environment and international human rights law. Concurrent application of human rights law is of particular relevance in situations of occupation. The International Court of Justice has notably interpreted respect for the applicable rules of international human rights law to be part of the obligations of the Occupying Power under article 43 of the Hague Regulations.¹²⁹⁴ As for the application of

¹²⁹⁰ Hague Regulations, art. 43: "The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." The authentic French text of article 43 uses the expression "*l'ordre et la vie publics*", and the provision has been accordingly interpreted to refer not only to physical safety but also to the "social functions and ordinary transactions which constitute daily life", in other words, to the entire social and economic life of the occupied region", see M. S. McDougal and F.P. Feliciano, *Law and Minimum World Public Order: the Legal Regulation of International Coercion* (New Haven, Yale University, 1961), p. 746. See also Dinstein, *The International Law of Belligerent Occupation* (footnote 1277 above), p. 89, and Sassòli, "Legislation and maintenance of public order..." (footnote 1286 above). This interpretation is also supported by the *travaux préparatoires*: in the Brussels Conference of 1874, the term "vie publique" was interpreted as referring to "des fonctions sociales, des transactions ordinaires, qui constituent la vie de tous les jours". See Belgium, Ministry of Foreign Affairs, *Actes de la Conférence de Bruxelles de 1874 sur le projet d'une convention internationale concernant la guerre*, p. 23. Available from <https://babel.hathitrust.org/>.

¹²⁹¹ T. Ferraro, "The law of occupation and human rights law: some selected issues", in R. Kolb and G. Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law* (Cheltenham, Edward Elgar, 2013), pp. 273–293, p. 279.

¹²⁹² *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, para. 53.

¹²⁹³ Reference can furthermore be made to the Rio Declaration, which states that "[t]he environment and natural resources of people under oppression, domination and occupation shall be protected". See the Rio Declaration, principle 23.

¹²⁹⁴ *Armed Activities on the Territory of the Congo* (see footnote 1241 above), p. 231, para. 178. See also p. 243, para. 216, in which the Court confirms that international human rights arguments are applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory, "particularly in occupied territories". See also *Legal Consequences of the Construction of a Wall* (footnote 1274 above), pp. 177–181, paras. 102–113. The International Criminal Tribunal for the Former Yugoslavia, likewise, has stated that the distinction between a phase of hostilities and a situation of occupation "imposes more onerous duties on an occupying power than on a party to an international armed conflict", see *Naletilić, and Martinović* (footnote 1274 above), para. 214. See also the European Court of Human Rights: *Loizidou v. Turkey* (Preliminary Objections), Judgment, 23 March 1995, Series A, No. 310, para. 62, and Judgment (Merits), 18 December 1996 (footnote 1282 above), para. 52; and *Al-Skeini and others v. United Kingdom* [Grand Chamber], Application No. 55721/07, *Reports of Judgments and Decisions 2011*, para. 94, in which reference was made to the Inter-American Court of Human Rights case *Mapiripán Massacre v. Colombia*, Judgment, 15 September 2005, Series C, No. 134, in support of the duty to investigate alleged violations of the right to life in situations of armed conflict and occupation. The applicability of human rights during occupation has been further recognized by the Human Rights Committee, see, general comment No. 26 (1997) on continuity of obligations, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 40*, vol. I (A/53/40 (Vol. I)), annex VII, para. 4; general comment No. 29 (2001) on

environmental law, reference can be made to the 1996 Advisory Opinion of the International Court of Justice on *Legality of the Threat or Use of Nuclear Weapons* which provides important support to the claim that customary international environmental law and treaties on the protection of the environment continue to apply in situations of armed conflict.¹²⁹⁵ Similarly, the Commission's 2011 articles on the effects of armed conflicts on treaties indicate that treaties relating to the international protection of the environment, treaties relating to international watercourses or aquifers, and multilateral law-making treaties may continue in operation during armed conflict.¹²⁹⁶ Furthermore, to the extent that multilateral environmental agreements address environmental problems that have a transboundary nature, or a global scope, and the treaties have been widely ratified, it may be difficult to conceive of suspension only between the parties to a conflict.¹²⁹⁷ Obligations established under such treaties protect a collective interest and are owed to a wider group of States than the ones involved in the conflict or occupation.¹²⁹⁸

(4) Paragraph 1 is also related to draft principle 15 entitled "Environmental considerations". The reference to environmental considerations in both provisions is drawn from and inspired by the advisory opinion of the International Court of Justice on *Legality of the Threat or Use of Nuclear Weapons*. While the statement referred to in the

derogation during a state of emergency, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40*, vol. I (A/56/40 (Vol. I)), annex VI, para. 3; general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, para. 10. See also Committee on Economic, Social and Cultural Rights, concluding observations: Israel, E/C.12/1/Add.69, 31 August 2001; and concluding observation: Israel, E/C.12/ISR/CO/3, 16 December 2011, as well as the report on the situation of human rights in Kuwait under Iraqi occupation, prepared by Mr. Walter Kälin, Special Rapporteur of the Commission on Human Rights, in accordance with Commission resolution 1991/67, E/CN.4/1992/26, 16 June 1992. Such applicability has also been widely endorsed in scholarly writings: see, for example, Dinstein, *The International Law of Belligerent Occupation* (footnote 1277 above), pp. 69–71; Kolb and Vité, *Le droit de l'occupation militaire ...* (footnote 1270 above), pp. 299–332; A. Roberts, "Transformative military occupation: applying the laws of war and human rights", *American Journal of International Law*, vol. 100 (2006), pp. 580–622; J. Cerone, "Human dignity in the line of fire: the application of international human rights law during armed conflict, occupation, and peace operations", *Vanderbilt Journal of Transnational Law*, vol. 39 (2006), pp. 1447–1510; Benvenisti, *The International Law of Occupation* (see footnote 1277 above), pp. 12–16; Arai-Takahashi, *The Law of Occupation ...* (footnote 1224 above); N. Lubell, "Human rights obligations in military occupation", *International Review of the Red Cross*, vol. 94 (2012), pp. 317–337; Ferraro, "The law of occupation and human rights law ..." (footnote 1291 above), pp. 273–293; and M. Bothe, "The administration of occupied territory", in Clapham, Gaeta and Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary* (see footnote 1277 above), pp. 1455–1484. See, differently, M.J. Dennis, "Application of human rights treaties extraterritorially in times of armed conflict and military occupation", *American Journal of International Law*, vol. 99 (2005), pp. 119–141.

¹²⁹⁵ *Legality of the Threat or Use of Nuclear Weapons* (see footnote 1162 above), at pp. 241–243, paras. 27–33.

¹²⁹⁶ Draft articles on the effects of armed conflicts on treaties, *Yearbook ... 2011*, vol. II (Part Two), pp. 106–130, paras. 100–101. See also ICRC, *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict* (footnote 973 above), guideline 5, which states that "[i]nternational environmental agreements and relevant rules of customary law may continue to be applicable in times of armed conflict to the extent that they are not inconsistent with the applicable law of armed conflict. Obligations concerning the protection of the environment that are binding on States not party to an armed conflict (e.g. neighbouring States) and that relate to areas beyond the limits of national jurisdiction (e.g. the high seas) are not affected by the existence of the armed conflict to the extent that those obligations are not inconsistent with the applicable law of armed conflict".

¹²⁹⁷ K. Bannelier-Christakis, "International Law Commission and protection of the environment in times of armed conflict: a possibility for adjudication?", *Journal of International Cooperation Studies*, vol. 20 (2013), pp. 129–145, at pp. 140–141; D. Dam-de Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* (Cambridge, Cambridge University Press, 2015), pp. 110–111.

¹²⁹⁸ In the sense of art. 48, para. 1 (a), of the articles on responsibility of States for internationally wrongful acts, the relevant commentary, para. (7), mentions environmental treaties in this context. See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, pp. 26–143, at p. 126.

commentary to draft principle 15 is related to the principle of proportionality and rules of military necessity, the Court also held more generally that “the existing international law relating to the protection and safeguarding of the environment ... indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict”.¹²⁹⁹ The Arbitral Tribunal, furthermore, has stated that “where a State exercises a right under international law within the territory of another State, considerations of environmental protection also apply”.¹³⁰⁰ The term “environmental considerations” as used in paragraph 1 is comparable to the phrases “environmental factors” or “considerations of environmental protection” in that it does not have a specific content. It is a generic notion that is widely used but rarely defined.¹³⁰¹ Furthermore, environmental considerations are context dependent¹³⁰² and evolving: they cannot remain static over time but have to reflect the development of the human understanding of the environment and its ecosystems.¹³⁰³

(5) Paragraph 2 provides that an Occupying Power shall 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. This provision should be read in the context of the general obligation in paragraph 1. The purpose of paragraph 2 is to indicate that significant harm to the environment of an occupied territory may have adverse consequences for the population of the occupied territory, in particular with respect to the enjoyment of certain human rights, such as the right to life,¹³⁰⁴ right to health,¹³⁰⁵ or right to food.¹³⁰⁶ There is in general a close link

¹²⁹⁹ *Legality of the Threat or Use of Nuclear Weapons* (see footnote 1162 above), at p. 243, para. 33.

¹³⁰⁰ Award in the Arbitration regarding the *Iron Rhine (“Ijzeren Rijn”) Railway* between the Kingdom of Belgium and the Kingdom of the Netherlands, 24 May 2005, *Reports of International Arbitral Awards* (UNRIAA), vol. XXVII, pp. 35–131 (*Iron Rhine*), at paras. 222–223. See also Final Award regarding the *Indus Waters Kishenganga* Arbitration between Pakistan and India, 20 December 2013, UNRIAA, vol. XXXI, pp. 1–358, e.g. at paras. 101, 104 and 105. Available at <https://cpa.org/en/cases/20/> (accessed on 8 July 2019).

¹³⁰¹ See, however, United States, Department of Defense, *Dictionary of Military and Associated Terms* (2005), p. 186: “Environmental considerations: The spectrum of environmental media, resources, or programs that may impact on, or are affected by, the planning and execution of military operations. Factors may include, but are not limited to, environmental compliance, pollution prevention, conservation, protection of historical and cultural sites, and protection of flora and fauna”. Available from www.jcs.mil/Doctrine/Joint-Doctrine-Pubs/Reference-Series/ (accessed on 8 July 2019).

¹³⁰² For practical examples of environmental considerations in the context of an armed conflicts, see D.E. Mosher *et al.*, *Green Warriors: Army Environmental Considerations for Contingency Operations from Planning Through Post-Conflict* (RAND Corporation, 2008), pp. 71–72: “given the importance placed on military expedience during combat, a unit’s environmental responsibilities are fairly limited. Experience in recent contingency operations has shown that environmental considerations are significantly more important in other areas, including base camps, stability and reconstruction, and the movement of forces and materiel”; p. 75: “The movement of forces and materiel ... can involve significant environmental considerations”; p. 121: “Balancing environmental considerations with other factors that contribute to mission success is a constant undertaking and requires better awareness, training, information, doctrine, and guidelines”; p. 126: “For example, experience in Iraq ... points to the need for high-quality information about environmental conditions and infrastructure before an operation is initiated”. See also *UNHCR Environmental Guidelines* (footnote 1057 above), p. 5: “Environmental considerations need to be taken into account in almost all aspects of UNHCR’s work with refugees and returnees.” See furthermore European Commission, “Integrating environmental considerations into other policy areas – a stocktaking of the Cardiff process”, document COM(2004) 394 final.

¹³⁰³ See para. (5) of the commentary to draft principle 15 above.

¹³⁰⁴ See International Covenant on Civil and Political Rights, art. 6, para. 1. See also Human Rights Committee, general comment No. 36 (2018), para. 26 [this general comment has not yet been published so citations and paragraph numbers may be subject to change in the final version], in which the Committee lists “degradation of the environment” among general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. See also Human Rights Committee, concluding observations: Israel (CCPR/C/ISR/CO/3), para. 18. See also Convention on the Rights of the Child (New York, 20 November 1989), United Nations, *Treaty Series* vol. 1577, No. 27531, p. 3, art. 6, para. 1, which provides that “States Parties recognize that every child has the inherent right to life”. In general comment No. 16, the Committee on the Rights of the Child has related the child’s right to life with environmental degradation and

between key human rights, on the one hand, and the protection of the quality of the soil and water, as well as biodiversity to ensure viable and healthy ecosystems, on the other.¹³⁰⁷

(6) The formulation of paragraph 2 is based on article 55, paragraph 1, of Additional Protocol I to the Geneva Conventions¹³⁰⁸ and international human rights law. Unlike article 55, paragraph 1, which refers to “the health or survival” of the population, the present paragraph uses the formulation “health and well-being”. Reference can in this regard be made to the common objectives between economic, social and cultural rights, such as the right to health, on the one hand, and the law of occupation, on the other, such as the well-being of the population. The notion of “health and well-being” is furthermore consistently used by the World Health Organization, which recalls that health and well-being affect both

contamination resulting from business activities, see general comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights (CRC/C/GC/16), para. 19. See further African Charter on Human and Peoples’ Rights (Nairobi, 27 June 1981), United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217, art. 4 which stipulates i.e. that human beings are entitled to respect for their life. In *SERAP v. Nigeria* case, the Community Court of Justice of the Economic Community of West African States affirmed that that “[t]he quality of human life depends on the quality of the environment”. See *Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria*, Judgment No. ECW/CCJ/JUD/18/12, 14 December 2012, para. 100. See also American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, 2 May 1948, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OAS/Ser.L/V/I.4 Rev. 9 (2003), art. 1; American Convention on Human Rights (San José, 22 November 1969), United Nations, *Treaty Series*, vol. 1144, No. 17955, art. 4, para. 1, as well as *Yanomami v. Brazil*, Case No. 7615, Inter-American Commission on Human Rights, resolution No. 12/85, 5 March 1985, which acknowledged that a healthy environment and the right to life are interlinked. See also Inter-American Court of Human Rights, *Medio Ambiente y Derechos Humanos* (footnote 1182 above), paras. 55 and 59.

¹³⁰⁵ See Universal Declaration of Human Rights, art. 25, para. 1; International Covenant on Economic, Social and Cultural Rights, art. 12. See also Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000) on the right to the highest attainable standard of health (art. 12), *Official Records of the Economic and Social Council, 2001, Supplement No. 2 (E/2001/22-E/C.12/2000/21)*, annex IV, para. 4. See also Committee on the Rights of the Child, general comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (CRC/C/GC/15), paras. 49–50. Similarly, the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador) includes the right to health, and the regional jurisprudence acknowledges the connection between the right to health and environmental protection in the context of the universal periodic reviews. See Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights and Office of the United Nations High Commissioner for Human Rights, “Mapping human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: individual report on the General Assembly and the Human Rights Council, including the universal periodic review process”, Report No. 6, December 2013, part III C. See also the Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (A/HRC/37/59).

¹³⁰⁶ See International Covenant on Economic, Social and Cultural Rights, art. 11. See also Committee on Economic, Social and Cultural Rights, general comment No. 12 (1999) on the right to adequate food (art. 11), *Official Records of the Economic and Social Council, 2001, Supplement No. 2 (E/C.12/2000/22-E/C.12/1999/11)*, annex V, para. 7, which determines that the concept of adequacy is interlinked with the notion of sustainability, meaning that food must also be available for the future generations. See also paras. 8 and 10, which require that available food must be free from adverse substances. Moreover, the right to food has been related to the depletion of natural resources traditionally possessed by indigenous communities. *Official Records of the Economic and Social Council, 2001, Supplement No. 2 (E/2000/22-E/C.12/1999/11)*, para. 337; *ibid.*, 2010, *Supplement No. 2 (E/2010/22-E/C.12/2009/3)*, para. 372; *ibid.*, 2012, *Supplement No. 2 (E/2012/22-E/C.12/2011/3)*, para. 268; *ibid.*, 2008, *Supplement No. 2 (E/2008/22-E/C.12/2007/3)*, para. 436.

¹³⁰⁷ See, for example, World Health Organization, “Our planet, our health, our future: human health and the Rio Conventions: Biological Diversity, Climate Change and Desertification”, discussion paper, 2012, p. 2, acknowledging the role of biodiversity as the “foundation for human health”. Available at www.who.int/globalchange/publications/reports/health_riocventions.pdf (accessed on 8 July 2019).

¹³⁰⁸ See Additional Protocol I, art. 55, para. 1: “Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.”

the society at present and future generations and are dependent on a healthy environment.¹³⁰⁹ Reference can also be made to the Stockholm Declaration, which reaffirms “the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being”.¹³¹⁰

(7) As for the standard of “significant harm” in paragraph 2, reference can be made to the Commission’s earlier work on the prevention of transboundary harm from hazardous activities¹³¹¹ and the allocation of loss in the case of such harm.¹³¹² “Significant harm” is thus “something more than ‘detectable’ but need not be at the level of ‘serious’ or ‘substantial’”.¹³¹³ Such harm must lead to real detrimental effects on the environment. At the same time, “the determination of ‘significant damage’ involves both factual considerations and objective criteria, and a value determination”, which is dependent on the circumstances of the particular case.¹³¹⁴ In the context of paragraph 2, harm that is likely to prejudice the health and well-being of the population of the occupied territory would amount to “significant harm”. The two phrases in paragraph 2 should thus not be read as two cumulative thresholds.

(8) Paragraph 2 refers to “the population of the occupied territory” in general terms. This wording has been aligned with article 55, paragraph 1, of Additional Protocol I, which refers to “population” without the qualifying adjective “civilian”. This omission, according to the ICRC commentary, “serves to emphasize the fact that damage caused to the environment may continue for a long time and affect the whole population without any distinction”.¹³¹⁵ Similarly, health and well-being affect society at present as well as future generations.¹³¹⁶

(9) Paragraph 3 of draft principle 20 provides that an Occupying Power shall respect the law and institutions of the occupied territory concerning the protection of the environment

¹³⁰⁹ According to the Constitution of the World Health Organization, “[h]ealth is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”. The Constitution was adopted by the International Health Conference held in New York from 19 June to 22 July 1946, and has been amended in 1977, 1984, 1994 and 2005, the consolidated text is available at www.who.int/governance/eb/who_constitution_en.pdf (accessed on 8 July 2019).

¹³¹⁰ Stockholm Declaration, principle 1. See also *UNHCR Environmental Guidelines* (footnote 1057 above), p. 5: “The state of the environment ... will have a direct bearing on the welfare and well-being of people living in that vicinity”.

¹³¹¹ Paras. (1)–(7) of the commentary to draft art. 2 of draft articles on prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 97–98, at pp. 152–153.

¹³¹² Paras. (1)–(3) of the commentary to principle 2 of the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities *Yearbook ... 2006*, vol. II (Part Two), paras. 66–67, at pp. 64–65.

¹³¹³ Para. (4) of the commentary to draft art. 2 of the draft articles on prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 97–98, at p. 152 (emphasis removed).

¹³¹⁴ Para. (3) of the commentary to principle 2 of the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook ... 2006*, vol. II (Part Two), paras. 66–67, at p. 65. In the context of the Convention on the Law of the Non-navigational Uses of International Watercourses ((New York, 21 May 1997), *Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49)*, vol. III, resolution 51/229, annex), “significant harm” has been similarly defined as “the real impairment of a use, established by objective evidence. For harm to be qualified as significant it must not be trivial in nature but it need not rise to the level of being substantial; this is to be determined on a case by case basis”. See “No significant harm rule”, User’s Guide Fact Sheet, No. 5. Available at www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule.pdf (accessed on 8 July 2019).

¹³¹⁵ ICRC commentary (1987) to Additional Protocol I, art. 55, para. 1, p. 663, para. 2134. See also Payne, “Defining the environment: environmental integrity” (footnote 1180 above), p. 58: “the word ‘population’ was used without its usual qualifier of ‘civilian’ because the future survival or health of the population in general, whether or not combatants, might be at stake” and “[t]he population might be that of today or that of tomorrow, in the sense that both short-term and long-term survival was contemplated”.

¹³¹⁶ See Health 2020, *Health and well-being – a common purpose, a shared responsibility* (World Health Organization Regional Office for Europe, 2012), p. 1.

and may only introduce changes within the limits provided by the law of armed conflict.¹³¹⁷ The term “law and institutions” is intended to also cover the international obligations of the occupied State.¹³¹⁸ The paragraph is based on the last phrase of article 43 of the Hague Regulations, “while respecting, unless absolutely prevented, the laws in force in the country”, as well as on article 64 of Geneva Convention IV.¹³¹⁹ These provisions embody the so-called conservationist principle, which underlines the temporary nature of occupation and the need for maintaining the *status quo ante*.

(10) In spite of their strict wording, the two provisions have been interpreted to allow the Occupying Power the competence to legislate when necessary for the maintenance of public order and civil life and to change legislation that is contrary to established human rights standards.¹³²⁰ The ICRC commentary to article 47 of Geneva Convention IV points out that some changes to the institutions “might conceivably be necessary and even an improvement” and explains that the object of the text in question was “to safeguard human beings and not to protect the political institutions and government machinery of the State as such”.¹³²¹ It is furthermore evident that “civil life” and “orderly government” are evolving concepts, comparable to the notions of “well-being and development”, or “sacred trust” which the International Court of Justice described in the *Namibia* Advisory Opinion as “by definition evolutionary”.¹³²² The longer the occupation lasts, the more evident is the need

¹³¹⁷ Environmental rights have been recognized at national level in the constitutions of more than a hundred States. There are nevertheless considerable variations in how the respective rights and duties are conceived. See P. Sands, *Principles of International Environmental Law* (footnote 1172 above), p. 816. A list of relevant constitutions is available in Earthjustice, *Environmental Rights Report 2008*, at <http://earthjustice.org/sites/default/files/library/reports/2008-environmental-rights-report.pdf>, Appendix (accessed on 8 July 2019).

¹³¹⁸ Major multilateral environmental agreements have attracted a high number of ratifications. See <https://research.un.org/en/docs/environment/treaties>.

¹³¹⁹ Art. 64 of Geneva Convention IV reads as follows:

“The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

“The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.” The ICRC commentary points out that, in spite of the reference to penal law, occupation authorities are bound to respect the whole of the law in the occupied territory, see ICRC commentary (1958) to Geneva Convention IV, art. 64, p. 335; see also Sassòli, *Legislation and maintenance of public order ...*” (footnote 1286 above), p. 669; similarly, Dinstein, *The International Law of Belligerent Occupation* (footnote 1277 above), p. 111; Benvenisti, *The International Law of Occupation* (footnote 1277 above), p. 101; Kolb and Vité, *Le droit de l'occupation militaire ...* (footnote 1270 above), pp. 192–194.

¹³²⁰ Sassòli, “Legislation and maintenance of public order...” (see footnote 1286 above), p. 663. See also United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict ...* (footnote 1222 above), p. 284, para. 11.25, acknowledging that new legislation may be necessitated by the exigencies of armed conflict, the maintenance of order, or the welfare of the population. Similarly, McDougal and Feliciano, *Law and Minimum World Public Order ...* (footnote 1290 above), p. 757.

¹³²¹ ICRC commentary (1958) to Geneva Convention IV, art. 47, p. 274.

¹³²² *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 31, para. 53. Similarly *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3, at p. 32, para. 77, in which the Court stated that the meaning of certain generic terms was “intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time”. See also World Trade Organization, *United States-Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R* (Appellate Body Report), 6 November 1998, *Dispute Settlement Reports*, vol. VII (1998), p. 2755, at para. 129, according to which the expression “exhaustible natural resources” had to be interpreted in the light of contemporary concerns about the protection and conservation of the environment. Available at <https://docs.wto.org>; Permanent Court of Arbitration, Award in the Arbitration regarding the *Iron Rhine* (footnote 1300 above), at paras. 79–81. See also the Commission’s work on subsequent agreements and subsequent practice, commentary to draft conclusion 3 (Interpretation of treaty terms

for proactive action and to allow the Occupying Power to fulfil its duties under the law of occupation, including for the benefit of the population of the occupied territory.¹³²³ At the same time, the Occupying Power is not supposed to take over the role of a sovereign legislator.

(11) Paragraph 3 takes into account that armed conflict may have caused significant stress on the environment of the occupied State and resulted in institutional collapse, which is a common feature of many armed conflicts,¹³²⁴ and recognizes that an Occupying Power may have to take proactive measures to address immediate environmental problems. The more protracted the occupation, the more diversified measures are likely to be required for the protection of the environment. Furthermore, as the objectives of such proactive action are limited, it would be appropriate in a prolonged occupation to engage the population of the occupied territory in decision-making.¹³²⁵

(12) While some active interference in the law and institutions concerning the environment of the occupied territory may thus be required, the Occupying Power may not introduce permanent changes in fundamental institutions of the country and shall be guided by a limited set of considerations: the concern for public order, civil life, and welfare in the occupied territory.¹³²⁶ The phrase “within the limits provided by the law of armed conflict” in paragraph 3 also refers to article 64 of Geneva Convention IV. According to this provision, local laws may be changed when it is essential: (a) to enable the Occupying Power to fulfil its obligations under the Convention; (b) to maintain the orderly government of the territory; or (c) to ensure the security of occupying forces or administration.¹³²⁷

as capable of evolving over time), *Official Records of the General Assembly, Sixty-eighth session, Supplement No. 10 (A/68/10)*, para. 39, at pp. 24–30.

¹³²³ E.H. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Washington, D.C., Carnegie Endowment for International Peace, 1942), p. 49, who pointed to the need to modify tax legislation in an occupation that lasts through several years, noting that “[a] complete disregard of these realities may well interfere with the welfare of the country and ultimately with ‘public order and safety’ as understood in Article 43”. Similarly, McDougal and Feliciano, *Law and Minimum World Public Order ...* (footnote 1290 above), p. 746. See also ICRC, “Occupation and other forms of administration of foreign territory” (footnote 1279 above), p. 58, stressing the ability of the occupant to legislate to fulfil its obligations under Geneva Convention IV or to enhance civil life in the occupied territory. Sassòli, “Legislation and maintenance of public order...” (see footnote 1286 above), p. 676, nevertheless holds that the occupant should “introduce only as many changes as is absolutely necessary under its human rights obligations”.

¹³²⁴ See Jensen and Lonergan, “Natural resources and post-conflict assessment, remediation, restoration and reconstruction: lessons and emerging issues” (footnote 1065 above), p. 415. See also K. Conca and J. Wallace, “Environment and peacebuilding in war-torn societies: lessons from the UN Environment Programme’s experience with post-conflict assessment” in *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding* (footnote 1065 above), pp. 63–84.

¹³²⁵ See the *Rio Declaration*, principle 10: “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.” See also Framework principles on human rights and the environment (A/HRC/37/59, annex), principle 9: “States should provide for and facilitate public participation in decision-making related to the environment and take the views of the public into account in the decision-making process.” See further Aarhus Convention.

¹³²⁶ Feilchenfeld, *The International Economic Law of Belligerent Occupation* (footnote 1323 above), p. 89. See also Ferraro, “The law of occupation and human rights law ...” (footnote 1291 above), pp. 273–293; see similarly the Supreme Court of Israel: H.C. 351/80, *The Jerusalem District Electricity Company Ltd. v. (a) Minister of Energy and Infrastructure, (b) Commander of the Judea and Samaria Region* 35(23), Piskei Din 673, partly reprinted in *Israel Yearbook on Human Rights* (1981), pp. 354–358.

¹³²⁷ Geneva Convention IV, art. 64.

Principle 21

Sustainable use of natural resources

To the extent that an Occupying Power is permitted to administer and use the natural resources in an occupied territory, for the benefit of the population of the occupied territory and for other lawful purposes under the law of armed conflict, it shall do so in a way that ensures their sustainable use and minimizes environmental harm.

Commentary

(1) The purpose of draft principle 21 is to set forth the obligations of an Occupying Power with respect to the sustainable use of natural resources. As indicated in the first part of the sentence, the draft principle applies “to the extent that an Occupying Power is permitted to administer and use the natural resources in an occupied territory”. The phrase refers to the various limitations set forth by the law of armed conflict and other international law to the exploitation of the wealth and natural resources of the occupied territory.

(2) The provision is based on article 55 of the Hague Regulations, which regards the Occupying Power “only as administrator and usufructuary” of immovable public property in the occupied territory.¹³²⁸ This description has traditionally been interpreted to forbid “wasteful or negligent destruction of the capital value, whether by excessive cutting or mining or other abusive exploitation”.¹³²⁹ A similar limitation deriving from the nature of occupation as temporary administration of the territory prevents the Occupying Power from using the resources of the occupied country or territory for its own domestic purposes.¹³³⁰ Furthermore, any exploitation of property is permitted only to the extent required to cover the expenses of the occupation, and “these should not be greater than the economy of the country can reasonably be expected to bear”.¹³³¹

(3) The second sentence of the draft principle mentions explicitly that the Occupying Power’s administration and use of natural resources in the occupied territory may only be “for the benefit of the population of the occupied territory and for other lawful purposes under the law of armed conflict”.¹³³² The reference to “the population of the occupied territory” is to be understood in this context in the sense of article 4 of Geneva Convention

¹³²⁸ See Hague Regulations, art. 55: “The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.”

¹³²⁹ J. Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes- and War-Law* (London, Stevens and Sons Limited, 1954), p. 714. See also G. von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (Minneapolis, University of Minnesota Press, 1957), p. 177, who emphasizes that the Occupying Power “is not permitted to exploit immovable property beyond normal use, and may not cut more timber than was done in pre-occupation days” and L. Oppenheim, *International Law: A Treatise*, vol. II, *War and Neutrality*, 2nd ed. (London, Longmans, Green and Co., 1912), p. 175, pointing out that the Occupying Power “is ... prohibited from exercising his right in a wasteful or negligent way that would decrease the value of the stock and plant” and “must not cut down a whole forest unless the necessities of war compel him”.

¹³³⁰ Singapore, Court of Appeal, *N.V. de Bataafsche Petroleum Maatschappij and Others v. The War Damage Commission*, 13 April 1956, Reports: 1956 Singapore Law Reports, p. 65; reprint in *International Law Reports*, vol. 23 (1960), pp. 810–849, p. 822 (*Singapore Oil Stocks* case); *In re Krupp and Others*, Judgment of 30 June 1948, *Trials of War Criminals before the Nürnberg Military Tribunals*, vol. IX, p. 1340.

¹³³¹ *The United States of America and Others v. Goering and Others*, Judgment of 1 October 1946, in *Trial of the Major War Criminals before the International Military Tribunal*, vol. I (Nuremberg, 1947), p. 239.

¹³³² As summarized by the Institute of International Law, “the occupying power can only dispose of the resources of the occupied territory to the extent necessary for the current administration of the territory and to meet the essential needs of the population”. See Institute of International Law, *Yearbook*, vol. 70, Part II, Session of Bruges (2003), pp. 285 *et seq.*; available from www.idi-iil.org, Declarations, at p. 288.

IV, which defines protected persons as “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or Occupying Power of which they are not nationals”.¹³³³

(4) A further limitation that provides protection to the natural resources and certain other components of the environment of the occupied territory is contained in the general prohibition of destruction or seizure of property, whether public or private, movable or immovable, in the occupied territory unless such destruction or seizure is rendered absolutely necessary by military operations (or, with respect to seizure of movable public property, is necessary for military operations).¹³³⁴ The prohibition of pillage of natural resources is furthermore applicable in situations of occupation.¹³³⁵ An “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” is also defined as a grave breach in article 147 of Geneva Convention IV (see also article 53) and as a war crime of “pillage” in the Rome Statute of the International Criminal Court.¹³³⁶

(5) The principle of permanent sovereignty over natural resources also has a bearing on the interpretation of article 55 of the Hague Regulations. According to this principle, as enshrined in both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.¹³³⁷ The International Court of Justice has confirmed the customary nature of the principle.¹³³⁸ Similarly, the principle of self-determination may be invoked in relation to the exploitation of natural resources in territories under occupation, particularly in the case of territories that are not part of any established State.¹³³⁹

(6) While the right of usufruct has traditionally been regarded as applicable to the exploitation of all kinds of natural resources, including non-renewable ones,¹³⁴⁰ the various limitations outlined above serve to curtail the Occupying Power’s rights to exploit the natural resources of the occupied territory. These limitations are also reflected in the use of “permitted”.

(7) The last sentence of draft principle 21 addresses situations in which an Occupying Power is permitted to administer and use the natural resources in an occupied territory. It

¹³³³ Geneva Convention IV, art. 4. See also ICRC commentary (1958) to Geneva Convention IV, art. 4, p. 45, according to which there are two main classes of civilians whose “protection against arbitrary action on the part of the enemy was essential in time of war – on the one hand, persons of enemy nationality living in the territory of a belligerent State, and on the other, the inhabitants of occupied territories.”

¹³³⁴ Art. 23 (g) and art. 53 of the Hague Regulations, and art. 53 of Geneva Convention IV.

¹³³⁵ See draft principle 18 and the commentary thereto above.

¹³³⁶ Rome Statute, art. 8, para. 2 (a) (iv) and (b) (xiii).

¹³³⁷ International Covenant on Civil and Political Rights, art. 1, para. 2; International Covenant on Economic, Social and Cultural Rights, art. 1, para. 2. See also General Assembly resolutions 1803 (XVII) of 14 December 1962; 3201 (S-VI) of 1 May 1974 (Declaration on the Establishment of a New International Economic Order); 3281 (XXIX) of 12 December 1974 (Charter of Economic Rights and Duties of States).

¹³³⁸ *Armed Activities on the Territory of the Congo* (footnote 1241 above), at p. 251, para. 244.

¹³³⁹ In the *Wall* Advisory Opinion, the International Court of Justice stated that the construction of the wall, as well as other measures by the occupying State, “severely impedes the exercise by the Palestinian people of its right to self-determination”: *Legal Consequences of the Construction of a Wall* (see footnote 1274 above), at p. 184, para. 122. The right to self-determination was also referred to in the *Namibia, Advisory Opinion* (see footnote 1322 above), p. 31, paras. 52–53, in *Western Sahara, Advisory Opinion*, *I.C.J. Reports 1975*, p. 12, at pp. 32–33, paras. 56–59, as well as in the *East Timor* case, in which the Court affirmed the *erga omnes* nature of the principle, see *East Timor (Portugal v. Australia)*, *Judgment*, *I.C.J. Reports 1995*, p. 90, at p. 102, para. 29.

¹³⁴⁰ Feilchenfeld, *The International Economic Law of Belligerent Occupation* (see footnote 1323 above), p. 55. See also Oppenheim, *International Law ...* (footnote 1329 above), p. 175, and Von Glahn, *The Occupation of Enemy Territory ...* (footnote 1329 above), p. 177. Similarly, United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict ...* (footnote 1222 above), p. 303, para. 11.86.

sets forth an obligation to do so in a way that ensures the sustainable use of such resources and minimizes environmental harm. This requirement is based on the Occupying Power's duty under article 55 of the Hague Regulations to safeguard the capital of public immovable property, which has for long been interpreted to entail certain obligations with regard to the protection of the natural resources in the occupied territory. In the light of the development of the international legal framework for the exploitation and conservation of natural resources, environmental considerations and sustainability are to be seen as integral elements of the duty to safeguard the capital. Reference can in this respect be made to the *Gabčíkovo-Nagymaros* judgment, in which the International Court of Justice, in interpreting a treaty that predated certain recent norms of environmental law, accepted that "the Treaty is not static, and is open to adapt to emerging norms of international law".¹³⁴¹ An arbitral tribunal has furthermore stated that principles of international environmental law must be taken into account even when interpreting treaties concluded before the development of that body of law.¹³⁴²

(8) The notion of sustainable use of natural resources can in this regard be seen as the modern equivalent of the concept of "usufruct", which is in essence a standard of good housekeeping, according to which the Occupying Power "must not exceed what is necessary or usual"¹³⁴³ when exploiting the relevant resource. This entails that the Occupying Power should exercise caution in the exploitation of non-renewable resources, not exceeding pre-occupation levels of production, and exploit renewable resources in a way that ensures their long-term use, and capacity for regeneration.

(9) The notion of minimization of environmental harm follows from the purpose of the draft principles. Draft principle 2 notably states that the draft principles are aimed at 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. While the obligation to ensure the sustainable use of natural resources is most relevant in a long-term perspective, the use of natural resources, and the need to minimize environmental harm, is relevant both in short-term and more protracted occupations.

Principle 22

Due diligence

An Occupying Power shall exercise due diligence to ensure that activities in the occupied territory do not cause significant harm to the environment of areas beyond the occupied territory.

¹³⁴¹ *Gabčíkovo-Nagymaros* (see footnote 1292 above), pp. 67–68, para. 112. See also p. 78, para. 140, in which the Court rules that, whenever necessary for the application of a treaty, "new norms have to be taken into consideration, and ... new standards given proper weight." Further, see Permanent Court of Arbitration, Award in the Arbitration regarding the *Iron Rhine* (footnote 1300 above), in which the Court applied concepts of customary international environmental law to treaties dating back to the mid-nineteenth century.

¹³⁴² *Indus Waters Kishenganga* (see footnote 1300 above), para. 452, in which the Court held that: "It is established that principles of international environmental law must be taken into account even when ... interpreting treaties concluded before the development of that body of law ... It is therefore incumbent upon this Court to interpret and apply this 1960 Treaty in light of the customary international principles for the protection of the environment in force today". Furthermore, the International Law Association has suggested that treaties and rules of customary international law should be interpreted in the light of the principles of sustainable development unless doing so would conflict with a clear treaty provision or be otherwise inappropriate: "[I]nterpretations which might seem to undermine the goal of sustainable development should only take precedence where to do otherwise would be to undermine ... fundamental aspects of the global legal order, would otherwise infringe the express wording of a treaty or would breach a rule of *jus cogens*." See International Law Association, Committee on International Law on Sustainable Development, Resolution No. 7 (2012), annex (Sofia Guiding Statement), para. 2.

¹³⁴³ *The Law of War on Land Being Part III of the Manual of Military Law* (Great Britain, War Office, 1958), sect. 610. Similarly, United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict ...* (footnote 1222 above), p. 303, para. 11.86.

Commentary

(1) Draft principle 22 contains the established principle that each State has an obligation not to cause significant harm to the environment of other States or to areas beyond national jurisdiction. The International Court of Justice referred to this principle in the *Legality of the Threat or Use of Nuclear Weapons* case and confirmed its customary nature, stating 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”.¹³⁴⁴

(2) The obligation not to cause significant harm to the environment of other States has an established status in a transboundary context and has been particularly relevant with regard to shared natural resources, such as sea areas, international watercourses and transboundary aquifers. This obligation is explicitly contained in the Convention on the Law of the Non-navigational Uses of International Watercourses and in the Convention on the Protection and Use of Transboundary Watercourses and International Lakes as well as in the United Nations Convention on the Law of the Sea.¹³⁴⁵ Numerous regional treaties establish corresponding obligations of prevention, cooperation, notification or compensation with regard to damage caused to rivers or lakes.¹³⁴⁶ The principle has also been confirmed and clarified in international and regional jurisprudence.¹³⁴⁷

(3) Furthermore, the Commission has included this principle in its draft articles on prevention of transboundary harm from hazardous activities.¹³⁴⁸ According to the commentary thereto, the obligation of due diligence can be deduced from a number of international conventions as the standard basis for the protection of the environment from harm.¹³⁴⁹

(4) As regards the applicability of this principle in the specific context of occupation, reference can be made to the International Court of Justice’s Advisory Opinion in the

¹³⁴⁴ *Legality of the Threat or Use of Nuclear Weapons* (see footnote 1162 above), pp. 241–242, para. 29. The principle is also contained in principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration: see Stockholm Declaration, principle 21: “States have, in accordance with the Charter of the United Nations and the principles of international law ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.” See furthermore Sands, *Principles of International Environmental Law* (footnote 1172 above), p. 206, as well as U. Beyerlin, “Different types of norms in international environmental law: policies, principles and rules”, in D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (Oxford, Oxford University Press, 2008), pp. 425–448, p. 439.

¹³⁴⁵ Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997), text available from <https://treaties.un.org> (Status of Multilateral Treaties Deposited with the Secretary-General, chap. XXVII), art.7; Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992), United Nations, *Treaty Series*, vol. 1936, No. 33207, p. 269, art. 2; United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, p. 397, art. 194, para. 2.

¹³⁴⁶ See, e.g., Convention on the Protection of the Rhine (1999), Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System (1987); Agreement on Co-operation for the Sustainable Development of the Mekong River Basin (1995), all available at www.ecolex.org; Revised Great Lakes Water Quality Agreement (United States, Canada, 2012), available at <https://ijc.org>.

¹³⁴⁷ Several of the cases in which the International Court of Justice has clarified environmental obligations have been related to the use and protection of water resources such as wetlands or river; e.g., the *Construction of a Road (Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, p. 665) and *Pulp Mills (Pulp Mills on the River Uruguay (Argentina v. Uruguay))*, Judgment, I.C.J. Reports 2010, p. 14) cases, as well as the case of *Gabčíkovo-Nagymaros* (see footnote 1292 above). See also *Indus Waters Kishenganga* (see footnote 1300 above), paras. 449–450. Regional jurisprudence is widely available at www.ecolex.org.

¹³⁴⁸ Art. 3 of the articles on prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 97–98, at p. 146: “The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof”.

¹³⁴⁹ Para. (8) of the commentary to art. 3, *ibid.*, at p. 154.

Namibia case, in which the Court underlined the international obligations and responsibilities of South Africa towards other States while exercising its powers in relation to the occupied territory, stating that “[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States”.¹³⁵⁰ Furthermore, the Court has referred to the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control in its judgment concerning the *Pulp Mills on the River Uruguay* case,¹³⁵¹ as well as in the joint cases of *Certain Activities* and *Construction of a Road*.¹³⁵²

(5) The Commission’s draft articles on prevention of transboundary harm from hazardous activities state that this obligation applies to activities carried out within the territory or otherwise under the jurisdiction or control of a State.¹³⁵³ It should be recalled that the Commission has consistently used this formulation to refer not only to the territory of a State but also to activities carried out in other territories under the State’s control. As explained in the commentary to draft article 1, “it covers situations in which a State is exercising *de facto* jurisdiction, even though it lacks jurisdiction *de jure*, such as in cases of unlawful intervention, occupation and unlawful annexation”.¹³⁵⁴

(6) 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”,¹³⁵⁵ and it is an obligation of conduct that requires in situations of occupation that the Occupying Power takes all measures it can reasonably be expected to take.¹³⁵⁶ The notion of significant harm is the same as referred to above in the commentary to draft principle 20.¹³⁵⁷

(7) The wording of draft principle 22 is different from the established precedents in that it refers to “the environment of areas beyond the occupied territory”. The consideration behind this formulation was related to situations in which the occupied territory extends to only a part of the territory of a State and not its entirety. The concern was expressed that the term “to the environment of another State or to areas beyond national jurisdiction” could be interpreted as excluding the territory of other parts of the occupied State. It was therefore decided to indicate that the territorial scope of the provision should cover “areas beyond the occupied territory”. Furthermore, the reference to the conduct required of the Occupying Power to ensure that activities in the occupied territory do not cause significant transboundary harm was replaced by the term “due diligence”. A view was nevertheless expressed that language commonly used in international instruments would be preferable.

Part Five

Principles applicable after armed conflict

Principle 23

Peace processes

1. Parties to an armed conflict should, as part of the peace process, including where appropriate in peace agreements, address matters relating to the restoration and protection of the environment damaged by the conflict.
2. Relevant international organizations should, where appropriate, play a facilitating role in this regard.

¹³⁵⁰ *Namibia, Advisory Opinion* (see footnote 1322 above), p. 54, para. 118.

¹³⁵¹ *Pulp Mills* (see footnote 1347 above), pp. 55–56, para. 101.

¹³⁵² See footnote 1347 above.

¹³⁵³ Para. (10) of the commentary to art. 2 (use of terms) of the articles on prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 97–98, at p. 153.

¹³⁵⁴ Para. (12) of the commentary to art. 1, *ibid.*, at p. 151.

¹³⁵⁵ See, for instance, K. Hulme, *War Torn Environment: Interpreting the Legal Threshold* (Leiden, Martinus Nijhoff, 2004), p. 68, pointing out that in case of environmental harm, it is common to use the standard of “significant” damage. See similarly T. Koivurova, “Due diligence”, *Max Planck Encyclopedia of Public International Law*, p. 241, para. 23. Available from www.mpepil.com.

¹³⁵⁶ Second report of the International Law Association, Study Group on Due Diligence in International Law, July 2016, p. 8.

¹³⁵⁷ See para. (5) of the commentary to para. 2 of draft principle 20 above.

Commentary

(1) Draft principle 23 aims to reflect that environmental considerations are, to a greater extent than before, being taken into consideration in the context of peace processes, including through the regulation of environmental matters in peace agreements. Reference can also be made to the heavy environmental impact of non-international armed conflicts that has led a growing number of States to include measures to protect and restore the environment in transitional justice processes.¹³⁵⁸

(2) Including the term “peace process” in the draft principle is intended to broaden its scope to cover the entire peace process, as well as any formal peace agreements concluded.¹³⁵⁹ Modern armed conflicts have a variety of outcomes that do not necessarily take the form of formal agreements. For example, at the end of an armed conflict, a ceasefire agreement, an armistice or a situation of *de facto* peace with no agreement could be reached. A peace process may also begin well before the actual end of an armed conflict. The conclusion of a peace agreement thus represents only one aspect, which, if at all, may take place several years after the cessation of hostilities. For this purpose, and to also avoid any temporal *lacuna*, the words “as part of the peace process” have been employed. The outcome of a peace process often involves different steps and the adoption of a variety of instruments.

(3) The phrase “[p]arties to an armed conflict” is used in paragraph 1 to indicate that the provision covers both international and non-international armed conflicts. This is in line with the general understanding that the draft principles apply to international, as well as non-international armed conflicts.

(4) The word “should” is used to reflect the normative ambition of the provision, while also recognizing that it does not correspond to any existing legal obligation.

(5) The draft principle is cast in general terms to accommodate the wide variety of situations that may exist after an armed conflict. The condition of the environment after an

¹³⁵⁸ “[T]ransitional justice ... comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof”, Report of the Secretary-General on “The rule of law and transitional justice in conflict and post-conflict societies” (S/2004/616), para. 8; numerous countries affected by post-conflict crises have adopted transitional justice mechanisms to enhance their environmental protection and restoration, some under assistance of the United Nations Environment Programme: see, for instance, United Nations Environment Programme, “Reporting on the state of the environment in Afghanistan: workshop report” (2019); United Nations Environment Programme, *South Sudan: First State of the Environment and Outlook Report 2018* (Nairobi, 2018); A. Salazar *et al.*, “The ecology of peace: preparing Colombia for new political and planetary climates”, *Frontiers in Ecology and the Environment* (September 2018), available at http://www.researchgate.net/publication/327605932_The_ecology_of_peace_preparing_Colombia_for_new_political_and_planetary_climates/download (accessed on 8 July 2019); United Nations Environment Programme, “Addressing the role of natural resources in conflict and peacebuilding” (Nairobi, 2015); United Nations Environment Programme, *Rwanda: From Post-Conflict to Environmentally Sustainable Development* (footnote 1060 above); United Nations Environment Programme, “Sierra Leone: environment, conflict and peacebuilding assessment” (Geneva, 2010); Cambodia, Ministry of Environment, “Cambodia environment outlook” (2009); Sierra Leone, *An Agenda for Change* (2008); United Nations Environment Programme, *Environmental assessment of the Gaza Strip following the escalation of hostilities in December 2008–January 2009* (Nairobi, 2009).

¹³⁵⁹ The United Nations peace agreements database, a “reference tool providing peacemaking professionals with close to 800 documents that can be understood broadly as peace agreements and related material”, contains a huge variety of documents, such as “formal peace agreements and sub-agreements, as well as more informal agreements and documents such as declarations, communiqués, joint public statements resulting from informal talks, agreed accounts of meetings between parties, exchanges of letters and key outcome documents of some international or regional conferences ... The database also contains selected legislation, acts and decrees that constitute an agreement between parties and/or were the outcome of peace negotiations”. Selected resolutions of the Security Council are also included. The database is available at <http://peacemaker.un.org/document-search>.

armed conflict can vary greatly depending on a number of factors.¹³⁶⁰ In some instances, the environment may have suffered serious and severe damage which is immediately apparent and which may need to be addressed as a matter of urgency; whereas, in others, the damage the environment has suffered may not be so significant as to warrant urgent restoration.¹³⁶¹ Some environmental damage may only become apparent months or even years after the armed conflict has ended.

(6) The draft principle aims to cover all formal peace agreements, as well as other instruments or agreements concluded or adopted at any point during the peace process, whether concluded between two or more States, between State(s) and non-State armed group(s), or between two or more non-State armed group(s). Such agreements and instruments may take different forms, such as sub-agreements to formal peace agreements, informal agreements, declarations, communiqués, joint public statements resulting from informal talks, agreed accounts of meetings between parties, as well as relevant legislation, acts and decrees that constitute an agreement between parties and/or were the outcome of peace negotiations.¹³⁶²

(7) Some modern peace agreements contain environmental provisions.¹³⁶³ The types of environmental matters that have been addressed in the instruments concluded during the

¹³⁶⁰ For example, the intensity and duration of the conflict as well as the weapons used can all influence how much environmental damage is caused in a particular armed conflict.

¹³⁶¹ Well-known examples of environmental damage caused in armed conflict is the damage caused by the United States Armed Forces' use of Agent Orange in the Viet Nam War and the burning of Kuwaiti oil wells by Iraqi troops in the Gulf War, which are well documented. Instances of environmental damage, which range in severity, have also been documented in other armed conflicts, such as the conflicts in Colombia, as well as in the Democratic Republic of the Congo, Iraq and Syria. See United Nations Environment Programme Colombia, "UN Environment will support environmental recovery and peacebuilding for post-conflict development in Colombia", available at www.unenvironment.org/news-and-stories/story/un-environment-will-support-environmental-recovery-and-peacebuilding-post (accessed on 8 July 2019); United Nations Environment Programme, "Post-conflict environmental assessment of the Democratic Republic of the Congo", available at https://postconflict.unep.ch/publications/UNEP_DRC_PCEA_EN.pdf (accessed on 8 July 2019); United Nations Environment Programme, "Post-conflict environmental assessment, clean-up and reconstruction in Iraq", available at https://wedocs.unep.org/bitstream/handle/20.500.11822/17462/UNEP_Iraq.pdf?sequence=1&isAllowed=y (accessed on 8 July 2019); "Lebanon Environmental Assessment of the Syrian Conflict" (supported by UNDP and EU), available at www.undp.org/content/dam/lebanon/docs/Energy%20and%20Environment/Publications/EASC-WEB.pdf (accessed on 8 July 2019). See also International Law and Policy Institute, "Protection of the natural environment in armed conflict: an empirical study" (Oslo, 2014), pp. 34–40.

¹³⁶² See C. Bell, "Women and peace processes, negotiations, and agreements: operational opportunities and challenges", Norwegian Peacebuilding Resource Centre, Policy Brief, March 2013, available at <http://noref.no> under "Publications", p. 1.

¹³⁶³ Such instruments are predominantly concluded in non-international armed conflicts, between a State and a non-State actor and include the following: Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace between the National Government of Colombia and the Revolutionary Armed Forces of Colombia – People's Army (FARC-EP), (Bogotá, 24 November 2016), available at <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf> (in Spanish) and at <http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf> (in English) (accessed on 5 August, 2019); Agreement on Comprehensive Solutions between the Government of the Republic of Uganda and Lord's Resistance Army/Movement (Juba, 2 May 2007), available from https://peacemaker.un.org/sites/peacemaker.un.org/files/UG_070502_AgreementComprehensiveSolutions.pdf (accessed on 5 August 2019), para. 14.6; Darfur Peace Agreement (Abuja, 5 May 2006), available from <http://peacemaker.un.org/node/535> (accessed on 5 August 2019), chap. 2, at p. 21, art. 17, para. 107 (g) and (h), and at p. 30, art. 20; Final Act of the Inter-Congolese Political Negotiations (Sun City, 2 April 2003), available from <http://peacemaker.un.org/drc-suncity-agreement2003> (accessed on 5 August 2019), resolution No. DIC/CEF/03, pp. 40–41, and resolution No. DIC/CHSC/03, pp. 62–65; Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army (Machakos, 20 July 2002), available from <http://peacemaker.un.org/node/1369> (accessed on 5

peace process or in peace agreements include, for example, obligations for or encouragement to parties to cooperate regarding environmental issues, and provisions that set out in detail the authority that will be responsible for matters relating to the environment, such as preventing environmental crimes and enforcing national laws and regulations on natural resources and the sharing of communal resources.¹³⁶⁴ The present draft principle aims to encourage parties to consider including such provisions in the agreements.

(8) Paragraph 2 aims to encourage relevant international organizations to take environmental considerations into account when they act as facilitators in peace processes. The wording of the paragraph is intended to be broad enough to cover situations where Chapter VII resolutions of the United Nations Security Council have been passed, as well as situations where relevant international organizations play a facilitating role at the consent of the relevant State or parties to an armed conflict in question.

(9) Paragraph 2 refers to “relevant international organizations” to signal that not all organizations are suited to address this particular issue. The organizations that are envisioned as being relevant in the context of this draft principle include those that have been recognized as playing an important role in the peace processes of various armed conflicts in the past, *inter alia*, the United Nations and its organs in particular, as well as the African Union, the European Union and the Organization of American States.¹³⁶⁵ The draft principle also includes the words “where appropriate” to reflect the fact that the involvement of international organizations for this purpose is not always required, or wanted by the parties.

August 2019), chap. V, p. 71 and chap. III, p. 45, which set out as guiding principles that “the best known practices in the sustainable utilization and control of natural resources shall be followed” (para. 1.10) – further regulations further regulations on oil resources are found in paras. 3.1.1 and 4; Arusha Peace and Reconciliation Agreement for Burundi (Arusha, 28 August 2000), available from <http://peacemaker.un.org/node/1207> (accessed on 5 August 2019), Additional Protocol III, at p. 62, art. 12, para. 3 (e), and Additional Protocol IV, at p. 81, art. 8 (h); Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lomé, 7 July 1999), available from <https://peacemaker.un.org/sierraleone-lome-agreement99> (accessed on 5 August 2019), S/1999/777, annex, art. VII; Interim Agreement for Peace and Self-Government in Kosovo (Rambouillet Accords) (Paris, 18 March 1999), S/1999/648, annex; Peace Agreement between the Government of El Salvador and the Frente Farabundo Martí para la Liberación Nacional (Chapultepec Agreement) (Mexico City, 16 January 1992), A/46/864, annex, chap. II.

¹³⁶⁴ Chapultepec Agreement, chap. II. Further regulations are found in art. 13 contained in annex II to the Peace Agreement; they prescribe that it is the role of the Environment Division of the National Civil Police to “be responsible for preventing and combating crimes and misdemeanours against the environment”. The Arusha Peace and Reconciliation Agreement for Burundi, Protocol III, at p. 62, art. 12, para. 3 (e), and at p. 81, art. 8 (h), contains several references to the protection of the environment, one of which prescribes that one of the missions of the intelligence services is “[t]o detect as early as possible any threat to the country’s ecological environment”. Furthermore, it states that “[t]he policy of distribution or allocation of new lands shall take account of the need for environmental protection and management of the country’s water system through protection of forests”.

¹³⁶⁵ The United Nations has acted as a facilitator in numerous armed conflicts, *inter alia* the armed conflicts in Angola, the Democratic Republic of the Congo, Libya and Mozambique. Regional organizations have also played a facilitating role in the peace processes across the world. For example, the African Union has been involved in aspects of the peace processes in, *inter alia*, Comoros, Côte d’Ivoire, Guinea-Bissau, Liberia and Somalia. See Chatham House, Africa Programme, “The African Union’s role in promoting peace, security and stability: from reaction to prevention?”, meeting summary, available from www.chathamhouse.org, p. 3. The Organization of American States was involved in the peace process in, *inter alia*, the Plurinational State of Bolivia and Colombia. See P.J. Meyer, “Organization of American States: background and issues for Congress” (Congressional Research Service, 2014), available at www.fas.org, p. 8. See also African Union and Centre for Humanitarian Dialogue, *Managing Peace Processes: Towards more inclusive processes*, vol. 3 (2013), p. 106. The European Union has been involved in the peace processes in armed conflicts in, *inter alia*, the Middle East and Northern Ireland. See also Switzerland, Federal Department of International Affairs, “Mediation and facilitation in today’s peace processes: centrality of commitment, coordination and context”, presentation by Thomas Greminger, a retreat of the International Organization of la Francophonie, 15–17 February 2007, available from www.swisspeace.ch, under “Publications”.

Principle 24

Sharing and granting access to information

1. To facilitate remedial measures after an armed conflict, States and relevant international organizations shall share and grant access to relevant information in accordance with their obligations under international law.
2. Nothing in the present draft principle obliges a State or international organization to share or grant access to information vital to its national defence or security. Nevertheless, that State or international organization shall cooperate in good faith with a view to providing as much information as possible under the circumstances.

Commentary

(1) Draft principle 24 refers generally to “States”, as this term is broader than “parties to an armed conflict”. States not parties to an armed conflict may be affected as third States, and may have relevant information useful for the taking of remedial measures that could usefully be provided to other States or international organizations. This obligation applies to States, even though non-State actors are addressed in other draft principles, and the set of draft principles covers both international and non-international armed conflicts.

(2) While States are typically the most relevant subjects, the draft principle also refers to international organizations, with the addition of the qualifier “relevant”. The specific term “national defence” applies only to States. For some international organizations, confidentiality requirements may also affect the extent of information that they can share or grant access to in good faith.¹³⁶⁶

(3) Draft principle 24 consists of two paragraphs. Paragraph 1 refers to the obligations States and international organizations may have under international law to share and grant access to information with a view to facilitating remedial measures after an armed conflict. Paragraph 2 refers to security considerations to which such access may be subject.

(4) The expression “in accordance with their obligations under international law” reflects 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,¹³⁶⁷ such as, for instance, keeping a record of the placement of landmines. Obligations to grant access to and/or share information which provide protection for the environment in relation to armed conflicts have been listed above. Also relevant is paragraph 2 of article 9 on “Recording and use of information on minefields, mined areas, mines, booby-traps and other devices” of Protocol II to the Convention on Certain Conventional Weapons, as well as article 4, paragraph 2, on “Recording, retaining and transmission of information” of Protocol V to the Convention on Certain Conventional Weapons.

(5) Furthermore, this expression reflects that the obligations to grant access to and/or share information as contained in the relevant treaties are commonly accompanied by exceptions or limitations regarding grounds for which the disclosure of information may be refused. Such grounds relate, *inter alia*, to “national defence and public security” or situations in which the disclosure would make it more likely that the environment to which such information related would be damaged.¹³⁶⁸

¹³⁶⁶ Cf. e.g. UNHCR, *Policy on the Protection of Personal Data of Persons of Concern to UNHCR* (2015), available at www.refworld.org/pdfid/55643c1d4.pdf (accessed on 8 July 2019).

¹³⁶⁷ Additional Protocol I, art. 33; Geneva Convention I, art. 16; Geneva Convention II, arts. 19 and 42; Geneva Convention III, art. 23; Geneva Convention IV, art. 137.

¹³⁶⁸ See Aarhus Convention, art. 4, para. 4 (b); Convention for the Protection of the Marine Environment of the North-East Atlantic (Paris, 22 September 1992), United Nations, *Treaty Series*, vol. 2354, No. 42279, p. 67, art. 9, para. 3 (g). See also the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), article 5, paragraph 6 (b).

(6) While the term “share” refers to information provided by States and international organizations in their mutual relations and as a means of cooperation, the term “granting access” refers primarily to allowing access to individuals for example to such information, and thus signifies a more unilateral relationship.

(7) The obligation to share and grant access to information pertaining to the environment can be found in numerous sources of international law, both at global and regional level.

(8) The origins of the right to access to information in modern international human rights law can be found in article 19 of the Universal Declaration of Human Rights,¹³⁶⁹ as well as in article 19 of the International Covenant on Civil and Political Rights.¹³⁷⁰ General comment No. 34 on article 19 of the International Covenant on Civil and Political Rights provides that article 19, paragraph 2, should be read as including a right to access to information held by public bodies.¹³⁷¹

(9) A right to environmental information has also developed within the context of the European Convention on Human Rights as exemplified in the case of *Guerra and Others v. Italy*,¹³⁷² in which the European Court of Human Rights decided that the applicants had a right to environmental information on the basis of article 8 of the Convention (the right to family life and privacy). Reference can also be made to the European Union directive on public access to environmental information and to a related judgment of the European Court of Justice of 2011.¹³⁷³ In addition to the right to privacy, a right to environmental information has also been based on the right to freedom of expression (as in e.g. *Claude-Reyes et al. v. Chile* before the Inter-American Court of Human Rights).¹³⁷⁴

(10) Principle 10 of the 1992 Rio Declaration also provides that individuals shall have appropriate access to information, including on hazardous materials. The recently adopted Sustainable Development Goal 16 on peaceful and inclusive societies calls upon States to ensure public access to information concerning the environment and protect fundamental freedoms, in accordance with national legislation and international agreements.¹³⁷⁵

(11) Article 2 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) defines “environmental information” as any information pertaining to the state of elements of the environment, factors affecting or likely to affect elements of the environment, as well as the state of human health and safety insofar as it may be affected by these elements.¹³⁷⁶ Article 4 of the Aarhus Convention stipulates that State parties must “make such [environmental] information available to the public, within the framework of national legislation”. Such a right necessarily entails a duty for States to collect such environmental information for the purposes of making it available to the public if and when requested to do so. In addition, the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), adopted on 4 March 2018, comprises similar provisions.

(12) The United Nations Framework Convention on Climate Change addresses access to information in its article 6, noting that the Parties shall “[p]romote and facilitate at the national and, as appropriate, subregional and regional levels, and in accordance with national laws and regulations, and within their respective capacities: ... public access to

¹³⁶⁹ General Assembly resolution 217 (III) A of 10 December 1948.

¹³⁷⁰ New York, 16 December 1966, United Nations, *Treaty Series*, vol. 993, No. 14531, p. 3.

¹³⁷¹ Human Rights Committee, general comment No. 34 (2011) on article 19 (freedoms of opinion and expression), *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40*, vol. I (A/66/40 (Vol. I), annex V, para. 18.

¹³⁷² *Guerra and Others v. Italy*, 19 February 1998, *Reports of Judgments and Decisions* 1998-I.

¹³⁷³ Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information; *Office of Communications v. Information Commissioner*, case C-71/10, judgment of 28 July 2011.

¹³⁷⁴ *Case of Claude-Reyes et al. v. Chile*, Inter-American Court of Human Rights, Judgement of 19 September 2006 (merits, reparations and costs), Series C, No. 151 (2006).

¹³⁷⁵ General Assembly resolution 70/1 of 25 September 2015.

¹³⁷⁶ Aarhus Convention, art. 2.

information on climate change and its effects”.¹³⁷⁷ In addition, the Cartagena Protocol on Biosafety to the Convention stipulates that Parties shall promote and facilitate access to information on living modified organisms.¹³⁷⁸ Both the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade,¹³⁷⁹ and the Stockholm Convention on Persistent Organic Pollutants¹³⁸⁰ contain provisions on access to information. Similarly, article 18 of the 2013 Minamata Convention on Mercury¹³⁸¹ stipulates that Parties shall “promote and facilitate” access to such information. The recently concluded Paris Agreement similarly addresses access to information in numerous paragraphs and articles, e.g. as part of the responsibility for States to provide intended nationally determined contributions in article 4, paragraph 8, of the Agreement, and more generally regarding climate change education and public access to information in article 12.¹³⁸²

(13) In accordance with the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, Parties thereto shall make information on desertification “fully, openly and promptly available”.¹³⁸³ Similarly, the 2010 Bali Guidelines provide that “affordable, effective and timely access to environmental information held by public authorities upon request” should be ensured.¹³⁸⁴

(14) Within the particular regime of humanitarian demining and remnants of war, a number of instruments contain requirements on providing environmental information. For instance, a request to extend the deadline for completing the clearance and destruction of cluster munition remnants under the Convention on Cluster Munitions must outline any potential environmental and humanitarian impacts of such an extension.¹³⁸⁵ Similarly, in connection to the destruction of cluster munitions, the “location of all destruction sites and the applicable safety and environmental standards” must be outlined.¹³⁸⁶ Similar obligations are contained in the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.¹³⁸⁷ Reference can also be made to the International Mine Action Standard 10.70, which states, *inter alia*, that national mine action authorities should “promulgate information about significant environmental incidents to other demining organizations within the programme”.¹³⁸⁸

(15) Regarding the practice of international organizations, the Environmental Policy for United Nations Field Missions of 2009 stipulates that peacekeeping missions shall assign an Environmental Officer with the duty to “[p]rovide environmental information relevant to the operations of the mission and take actions to promote awareness on environmental

¹³⁷⁷ United Nations Framework Convention on Climate Change (New York, 9 May 1992), *ibid.*, vol. 1771, No. 30882, p. 107.

¹³⁷⁸ Cartagena Protocol on Biosafety to the Convention on Biological Diversity, art. 23.

¹³⁷⁹ Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, art. 15.

¹³⁸⁰ Stockholm Convention on Persistent Organic Pollutants, art. 10.

¹³⁸¹ Text available from <https://treaties.un.org> (*Status of Multilateral Treaties Deposited with the Secretary-General*, chap. XXVII.17).

¹³⁸² Report of the Conference of the Parties to the United Nations Framework Convention on Climate Change on its twenty-first session, held in Paris from 30 November to 13 December 2015, addendum: decisions adopted by the Conference of the Parties (FCCC/CP/2015/10/Add.1), decision 1/CP.21, annex.

¹³⁸³ United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (Paris, 14 October 1994), United Nations, *Treaty Series*, vol. 1954, No. 33480, p. 3, art. 16, also art. 19.

¹³⁸⁴ United Nations Environment Programme, Guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters, adopted by the Governing Council of the United Nations Environment Programme in decision SS.XI/5, part A, of 26 February 2010. Available from www.unep.org, under “Resources”.

¹³⁸⁵ Art. 4, para. 6 (*h*).

¹³⁸⁶ Art. 7 (transparency measures), para. 1 (*e*).

¹³⁸⁷ Art. 5.

¹³⁸⁸ IMAS 10.70, 1 October 2007, “Safety and occupational health, protection of the environment”, para. 12.1 (*a*). Available from www.mineactionstandards.org.

issues".¹³⁸⁹ The policy also contains a requirement to disseminate and study information on the environment, which would presuppose access to information that can in fact be disseminated and that thus is not classified.

(16) Moreover, the ICRC Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict contain a provision on protection of organizations,¹³⁹⁰ which could include environmental organizations gathering environmental data as a means of "contributing to prevent or repair damage to the environment".¹³⁹¹

(17) In connection with post-armed conflict environmental assessments, it is worth recalling that the United Nations Environment Programme guidelines on integrating environment in post-conflict assessments include a reference to the importance of public participation and access to information, as "natural resource allocation and management is done in an *ad-hoc*, decentralized, or informal manner" in post-conflict contexts.¹³⁹²

(18) The obligation to *share information* and to cooperate in this context is reflected in the Convention on the Law of the Non-navigational Uses of International Watercourses.¹³⁹³ Moreover, the Convention on Biological Diversity contains a provision on exchange of information in its article 14, requiring that each Contracting Party shall, as far as possible and as appropriate, promote "notification, exchange of information and consultation on activities under their jurisdiction or control which are likely to significantly affect adversely the biological diversity of other States or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral, regional or multilateral arrangements, as appropriate".¹³⁹⁴ In addition, article 17 of the Convention calls upon the Parties to facilitate the exchange of information relevant to the conservation and sustainable use of biological diversity.

(19) Previous work of the Commission of relevance to this aspect of the draft principle includes the articles on nationality of natural persons in relation to the succession of States (1999),¹³⁹⁵ the articles on prevention of transboundary harm from hazardous activities (2001),¹³⁹⁶ the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (2006)¹³⁹⁷ and the articles on the law of transboundary aquifers (2008).¹³⁹⁸

(20) Paragraph 2 serves a similar purpose in the context of draft principle 24. The exception to the obligation set out under paragraph 1 concerns information vital to the national defence of a State or the security of a State or an international organization. This exception is not absolute. The second sentence of the paragraph provides that States and international organizations shall provide as much information as possible under the

¹³⁸⁹ United Nations, Department of Peacekeeping Operations and Department of Field Support, "Environmental Policy for UN Field Missions", 2009, para. 23.5.

¹³⁹⁰ See ICRC, Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict (footnote 973 above), guideline 19, referring to Geneva Convention IV, art. 63, para. 2, and Additional Protocol I, arts. 61–67.

¹³⁹¹ It should be noted that guideline 19 refers to pursuant to special agreements between the parties concerned or permission granted by one of them.

¹³⁹² United Nations Environment Programme, Guidance Note, *Integrating Environment in Post-Conflict Needs Assessments* (Geneva, 2009), available from http://postconflict.unep.ch/publications/environment_toolkit.pdf (accessed on 8 July 2019) (as referenced in para. 144 and footnote 237 of A/CN.4/700).

¹³⁹³ Convention on the Law of the Non-navigational Uses of International Watercourses, arts. 9, 11, 12, 14–16, 19, 30, 31 and 33, para. 7.

¹³⁹⁴ Art. 14, para. 1 (c).

¹³⁹⁵ General Assembly resolution 55/153 of 12 December 2000, annex, art. 18. The draft articles and the commentaries thereto are reproduced in *Yearbook ... 1999*, vol. II (Part Two), paras. 47–48.

¹³⁹⁶ Arts. 8, 12–14 and 17.

¹³⁹⁷ General Assembly resolution 61/36 of 4 December 2006, annex, principle 5. The draft principles and the commentaries thereto are reproduced in *Yearbook ... 2006*, vol. II (Part Two), paras. 66–67.

¹³⁹⁸ General Assembly resolution 63/124 of 11 December 2008, annex, arts. 8, 13, 15, 17 and 19. The draft articles adopted by the Commission and commentaries thereto are reproduced in *Yearbook ... 2008*, vol. II (Part Two), paras. 53–54.

circumstances, through cooperation in good faith. Paragraph 2 is based on provisions contained in the Convention on the Law of the Non-navigational Uses of International Watercourses. Article 31 of the Convention provides that a watercourse State is not obliged to provide data and information vital to its national defence or security, while noting that obligation to cooperate in good faith is still applicable. The articles on prevention of transboundary harm from hazardous activities¹³⁹⁹ and the articles on the law of transboundary aquifers¹⁴⁰⁰ contain a similar exception.

(21) Draft principle 24 is closely linked to the duty to cooperate, as well as draft principle 25 on post-armed conflict environmental assessments and remedial measures.

Principle 25

Post-armed conflict environmental assessments and remedial measures

Cooperation among relevant actors, including international organizations, is encouraged with respect to post-armed conflict environmental assessments and remedial measures.

Commentary

(1) The purpose of draft principle 25 is to encourage relevant actors to cooperate in order to ensure that environmental assessments and remedial measures can be carried out in post-conflict situations. The draft principle is closely linked to draft principle 8.

(2) The reference to “relevant actors” includes both State and non-State actors. Not only States, but also a wide range of actors, including international organizations and non-State actors, have a role to play in relation to environmental assessments and remedial measures. The phrase “are encouraged” is hortatory in nature and is to be seen as an acknowledgment of the scarcity of practice in this field.

(3) The term “environmental assessment” is distinct from an “environmental impact assessment”, which is typically undertaken *ex ante* as a preventive measure.¹⁴⁰¹ Such impact assessments play an important role in the preparation and adoption of plans, programmes, and policies and legislation, as appropriate. This may involve the evaluation of the likely environmental, including health, effects, in a plan or programme.¹⁴⁰²

(4) It is in this context that a post-conflict environmental assessment has emerged as a tool to mainstream environmental considerations in the development plans in the post-conflict phase. Such assessments are typically intended to identify major environmental risks to health, livelihoods and security and to provide recommendations to national authorities on how to address them.¹⁴⁰³ A post-conflict environmental assessment is intended to meet various needs and policy processes, which, depending on the requirements, are distinct in scope, objective and approach.¹⁴⁰⁴ Such post-conflict environmental assessment, undertaken at the request of a State, may take the form of: (a) a needs assessment;¹⁴⁰⁵ (b) a quantitative risk assessment;¹⁴⁰⁶ (c) a strategic assessment;¹⁴⁰⁷ or (d) a

¹³⁹⁹ Art. 14.

¹⁴⁰⁰ Art. 19.

¹⁴⁰¹ See, for instance, Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991), United Nations, *Treaty Series*, vol. 1989, No. 34028, p. 309.

¹⁴⁰² Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, available at www.unepce.org/fileadmin/DAM/env/eia/documents/legaltexts/protocolenglish.pdf (accessed on 8 July 2019).

¹⁴⁰³ Post-crisis environmental assessment, available at www.unenvironment.org/explore-topics/disasters-conflicts/what-we-do/preparedness-and-response/post-crisis-environmental (accessed on 8 July 2019).

¹⁴⁰⁴ D. Jensen, “Evaluating the impact of UNEP’s post conflict environmental assessments”, *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding*, Jensen and S. Lonergan (eds.). Available at https://environmentalpeacebuilding.org/assets/Documents/LibraryItem_000_Doc_061.pdf (accessed on 8 July 2019), p. 18.

¹⁴⁰⁵ A needs assessment and desk study can be done during or after a conflict, based on a collection pre-existing secondary information on environmental trends and natural resource management, challenges from international and national sources. Such information, with limited verification field visits, is then compiled into a desk study report that attempts to identify and prioritize environmental needs. *Ibid.*, pp. 18–19.

comprehensive assessment.¹⁴⁰⁸ The comprehensive assessment of Rwanda, for example, involved a scientific expert evaluation and assessment, covering a range of activities, including scoping, desk study, field work, environmental sampling, geographic information system modelling, analysis and reporting and national consultations. It is readily acknowledged that “conflicts often have environmental impacts, direct or indirect, that affect human health and livelihoods as well as ecosystem services”.¹⁴⁰⁹

(5) Such assessments are encouraged because, if the environmental impacts of armed conflict are left unattended, there is strong likelihood that they may lead to “further population displacement and socio-economic instability”, thereby “undermining recovery and reconstruction in post-conflict zones” and “triggering a vicious cycle”.¹⁴¹⁰

(6) In order to align the text with other draft principles, in particular draft principle 2, the term “remedial” is used in the present principle even though “recovery” has a more prominent usage in the practice. Once an assessment is completed, the challenge is to ensure that environmental recovery programmes are in place that aim at strengthening the national and local environmental authorities, rehabilitate ecosystems, mitigate risks and ensure sustainable utilization of resources in the context of the concerned State’s development plans.¹⁴¹¹ The term “remedial measures” has a more limited remit than “recovery”.

Principle 26 **Relief and assistance**

When, in relation to an armed conflict, the source of environmental damage is unidentified, or reparation is unavailable, States are encouraged to take appropriate measures so that the damage does not remain unrepaired or uncompensated, and may consider establishing special compensation funds or providing other forms of relief or assistance.

Commentary

(1) The purpose of draft principle 26 is to encourage States to take appropriate measures aimed at repairing and compensating environmental damage caused during armed conflict. More specifically, it addresses relief and assistance in situations where the source of environmental damage is unidentified or reparation is not available. Such a situation may arise because of different reasons. The particular features of environmental damage may complicate the establishment of responsibility: the damage may result from a chain of events rather than from a single act, and extend over the course of many years, which makes it difficult to establish a causal link to specific acts.¹⁴¹² The presence of multiple

¹⁴⁰⁶ A quantitative risk assessment, involving field visits, laboratory analysis and satellite imagery, focuses on the direct environmental impact of conflicts caused by bombing and destruction of buildings, industrial sites, and public infrastructure. *Ibid.*, pp. 19–20.

¹⁴⁰⁷ A strategic assessment evaluates the indirect impact of the survival and coping strategies of local people and the institutional problems caused by the breakdown of governance and capacity. These tend to be longer in duration. *Ibid.*, p. 20.

¹⁴⁰⁸ A comprehensive assessment seeks to provide a detailed picture of each natural resource sector and the environmental trends, governance challenges, and capacity needs. Based on national consultations with stakeholders, comprehensive assessments attempt to identify priorities and cost the required interventions over the short, medium, and long term. *Ibid.*, p. 20.

¹⁴⁰⁹ DAC Network on Environment and Development Cooperation (ENVIRONET), “Strategic environment assessment and post-conflict development SEA toolkit” (2010), p. 4, available at http://content-ext.undp.org/aplaws_publications/2078176/Strategic%20Environment%20Assessment%20and%20Post%20Conflict%20Development%20full%20version.pdf (accessed on 8 July 2019).

¹⁴¹⁰ *Ibid.*

¹⁴¹¹ United Nations Environment Programme, “Disasters and Conflicts Programme”, p. 3. Available at www.un.org/en/events/environmentconflictday/pdf/UNEP_conflict_and_disaster_brochure.pdf (accessed on 8 July 2019).

¹⁴¹² “First, the distance separating the source from the place of damage may be dozens or even hundreds of miles, creating doubts about the causal link even where polluting activities can be identified.”; “Second, the noxious effects of a pollutant may not be felt until years or decades after the act.”;

State and non-State actors in contemporary conflicts may further complicate the allocation of responsibility.¹⁴¹³ Environmental damage in armed conflict may moreover result from lawful activities,¹⁴¹⁴ and there may be no means of establishing the responsibility and claiming reparation.¹⁴¹⁵

(2) It is furthermore not uncommon that States and international organizations use *ex gratia* payments to make amends for wartime injury and damage without acknowledging responsibility, and possibly also excluding further liability. Such payments serve different purposes and may be available for damage and injury caused by lawful action.¹⁴¹⁶ In most cases, amends are paid for civilian injury or death, or damage to civilian property, but they may also entail remediation of harm to the environment. Victims assistance is a broader and

“Third, some types of damage occur only if the pollution continues over time”; and “Fourth, the same pollutant does not always produce the same detrimental effects due to important variations in physical circumstances.”. A.C. Kiss and D. Shelton, *Guide to International Environmental Law* (Leiden, Martinus Nijhoff, 2007), pp. 20–21. See also P.-M. Dupuy, “L’État et la réparation des dommages catastrophiques”, in F. Francioni and T. Scovazzi (eds.), *International Responsibility for Environmental Harm* (Boston, Graham and Trotman, 1991), pp. 125–147, p. 141, who describes the inherent characteristics of ecological damage as follows: “au-delà de ses incidences immédiates et souvent spectaculaires, il pourra aussi être diffus, parfois différé, cumulatif, indirect” [beyond its immediate and often spectacular consequences, it could also be pervasive, sometimes deferred, cumulative, indirect]. See also C.R. Payne, “Developments in the law of environmental reparations. A case study of the UN Compensation Commission”, in C. Stahn, J. Iverson, and J.S. Easterday (eds.), *Environmental Protection and Transitions from Conflict to Peace* (footnote 1180 above), pp. 329–366, p. 353. For the definition of environmental harm, see Sands, *Principles of International Environmental Law* (footnote 1172 above), pp. 741–748.

¹⁴¹³ See ICRC, “International humanitarian law and the challenges of contemporary armed conflicts”, document prepared for the 32nd International Conference of the Red Cross and Red Crescent (2015), *International Review of the Red Cross*, vol. 97 (2015), pp. 1427–1502, at pp. 1431–1432.

¹⁴¹⁴ This would arguably be the case with most environmental harm in conflict, given that the specific prohibitions in the law of armed conflict “do not address normal operational damage to the environment that is left after hostilities cease, from sources such as the use of tracked vehicles on fragile desert surfaces; disposal of solid, toxic, and medical waste; depletion of scarce water resources; and incomplete recovery of ordnance”, as pointed out by C.R. Payne, “The norm of environmental integrity in post-conflict legal regimes”, in C. Stahn, J.S. Easterday and J. Iverson (eds.), *Jus Post Bellum: Mapping the Normative Foundation* (Oxford, Oxford University Press, 2014), pp. 502–518, at p. 511. See draft principle 14 and para. (8) of the commentary thereto above.

¹⁴¹⁵ For the history of wartime reparations, see P. d’Argent, *Les réparations de guerre en droit international public. La responsabilité internationale des États à l’épreuve de la guerre* (Brussels, Bruylant, 2002). See also ICRC commentary (1987) to Additional Protocol I, art. 91, para. 3651: “On the conclusion of a peace treaty, the Parties can in principle deal with the problems relating to war damage in general and those relating to the responsibility for starting the war, as they see fit.” The United Nations Compensation Commission’s experience was groundbreaking in the area of reparations for wartime environmental harm (see footnote 1091 above). The other relevant international instances of either addressing wartime environmental damage or having the potential to do so include: the Eritrea-Ethiopia Claims Commission that was established in 2000 (see Agreement on Cessation of Hostilities between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (Algiers, 18 June 2000), United Nations, *Treaty Series*, vol. 2138, No. 37273, p. 85, and Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea for the resettlement of displaced persons, as well as rehabilitation and peacebuilding in both countries (Algiers, 12 December 2000), *ibid.*, No. 37274, p. 93); and the 2004 Advisory Opinion of the International Court of Justice concerning the construction of a wall in the Occupied Palestinian Territories, see *Legal Consequences of the Construction of a Wall* (footnote 1274 above), p. 189, para. 131, and p. 192, para. 136. See also *Armed Activities on the Territory of the Congo* (footnote 1241 above), p. 257, para. 259.

¹⁴¹⁶ University of Amsterdam and Center for Civilians in Conflict, “Monetary payments for civilian harm in international and national practice” (2015). See also United States, Government Accountability Office, “Military operations. The Department of Defense’s use of solatia and condolence payments in Iraq and Afghanistan”, Report, May 2007; and W.M. Reisman, “Compensating collateral damage in elective international conflict”, *Intercultural Human Rights Law Review*, vol. 8 (2013), pp. 1–18.

more recent concept used in relation to armed conflicts – but also in other contexts – to respond to harm caused to individuals or communities, *inter alia* by military activities.¹⁴¹⁷

(3) An example of environmental remediation in a situation in which the establishment or implementation of State responsibility is not possible is provided by the assistance to Lebanon following the bombing of the Jiyeh power plant in 2006. After the strike on the power plant on the Lebanese coast by Israeli Armed Forces, an estimated 15,000 tons of oil were released into the Mediterranean Sea.¹⁴¹⁸ Following requests for assistance from the Government of Lebanon, the Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea provided remote and on-site technical assistance in the cleanup. Assistance was provided pursuant to the 2002 Protocol concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea, one of protocols to the Barcelona Convention.¹⁴¹⁹ The amends related to the use of Agent Orange (a herbicide containing the toxic substance dioxin), by the United States in the Viet Nam War provide an example of *ex gratia* response to environmental and health effects of armed conflict.¹⁴²⁰

(4) The term “reparation” is used in the draft principle as a general notion that covers different forms of reparation for an internationally wrongful act.¹⁴²¹ The context, however, is one in which reparation is unavailable, including where there has been no wrongful act. The term “unrepaired” similarly refers to the lack of any reparative measures, while “uncompensated” refers specifically to the lack of monetary compensation. These terms define the specific circumstances in which States are encouraged to take appropriate measures of relief and assistance. Such measures may include establishment of a compensation fund.¹⁴²² The terms “relief” and “assistance” should also be read as including remedial measures in the sense in which the term has been used in the present draft

¹⁴¹⁷ See, e.g., Handicap International, “Victim Assistance in the context of mines and explosive remnants of war”, Handicap International (July 2014). Available at https://handicap-international.ch/files/documents/files/assistance-victimes-mines-reg_anglais.pdf (accessed on 8 July 2019). See also International Human Rights Clinic, Harvard Law School, “Environmental remediation under the treaty on the prohibition of nuclear weapons” (April 2018). Available at <http://hrp.law.harvard.edu/wp-content/uploads/2018/04/Environmental-Remediation-short-5-17-18-final.pdf> (accessed on 8 July 2019). See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147 of 16 December 2005, annex. Principle 9 states that “[a] person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted”.

¹⁴¹⁸ United Nations Environment Programme, *Lebanon Post-Conflict Environmental Assessment* (2007), pp. 42–45. Available at https://postconflict.unep.ch/publications/UNEP_Lebanon.pdf (accessed on 8 July 2019). See also Office for the Coordination of Humanitarian Affairs, “Environmental emergency response to the Lebanon crisis”. Available at www.unocha.org/sites/dms/Documents/Report_on_response_to_the_Lebanon_Crisis.pdf (accessed on 8 July 2019).

¹⁴¹⁹ Protocol concerning Cooperation in Preventing Pollution from ships and, in cases of emergency, combating pollution of the Mediterranean Sea (Valetta, 25 January 2002), United Nations, *Treaty Series*, vol. 2942, annex A, No. 16908, p. 87.

¹⁴²⁰ See United States, Congressional Research Service, “U.S. Agent Orange/Dioxin Assistance to Vietnam” (updated on 21 February 2019). Available at <https://fas.org/sgp/crs/row/R44268.pdf> (accessed on 8 July 2019).

¹⁴²¹ Art. 34 and commentary thereto of the articles on State responsibility, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, at pp. 95–96.

¹⁴²² Draft principle 26 has been modelled after article 12 on “Collective reparation” of the Institute of International Law resolution on responsibility and liability under international law for environmental damage from 1997 reading as follows: “Should the source of environmental damage be unidentified or compensation be unavailable from the entity liable or other back-up sources, environmental regimes should ensure that the damage does not remain uncompensated and may consider the intervention of special compensation funds or other mechanisms of collective reparation, or the establishment of such mechanisms where necessary”. International Law Institute, resolution on “Responsibility and liability under international law for environmental damage”, *Yearbook*, vol. 67, Part II, Session of Strasbourg (1997), p. 486, at p. 499.

principles, encompassing any measure of remediation that may be taken to restore the environment.¹⁴²³

(5) Draft principle 26 is closely linked to draft principle 25 on “Post-armed conflict environmental assessments and remedial measures” as well as to draft principle 24 on “Sharing and granting access to information”. All three draft principles address situations in which damage has been caused to the environment in relation to an armed conflict, and they all refer generally to “States” rather than the parties to a conflict. Unlike draft principles 24 and 25, however, the present draft principle, which has a specific focus on relief and assistance provided by States, makes no express reference to international organizations. It is nevertheless understood that States may channel such relief and assistance through international organizations.

(6) Draft principle 26 has been located in Part Five containing draft principles applicable after an armed conflict. While it was recognized that it could be preferable to take measures to address environmental damage already during an armed conflict, given that environmental damage accumulates and restoration becomes more challenging with time, the draft principle was seen as primarily relevant in post-armed conflict situations.

Principle 27 **Remnants of war**

1. After an armed conflict, parties to the conflict shall 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. Such measures shall be taken subject to the applicable rules of international law.

2. The parties shall also endeavour to reach agreement, among themselves and, where appropriate, with other States and with international organizations, on technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations to remove or render harmless such toxic and hazardous remnants of war.

3. Paragraphs 1 and 2 are without prejudice to any rights or obligations under international law to clear, remove, destroy or maintain minefields, mined areas, mines, booby-traps, explosive ordnance and other devices.

Commentary

(1) Draft principle 27 aims to strengthen the protection of the environment in a post-conflict situation. It seeks to ensure that toxic and hazardous remnants of war that are causing or that may cause damage to the environment are removed or rendered harmless after an armed conflict. This draft principle covers toxic and hazardous remnants of war on land, as well as those which have been placed or dumped at sea, as long as they fall under the jurisdiction or control of a former party to the armed conflict. The measures taken shall be subject to the applicable rules of international law.

(2) Paragraph 1 is cast in general terms. Remnants of war take various forms. They consist of not only explosive remnants of war but also other hazardous material and objects. Some remnants of war are not dangerous to the environment at all or may be less dangerous

¹⁴²³ See para. (3) of the commentary to draft principle 2 above. See also para. (6) of the commentary to draft principle 25 above. See further S. Hanamoto, “Mitigation and remediation of environmental damage”, in Y. Aguila and J. Vinuales (eds.), *A Global Pact for the Environment – Legal Foundations* (Cambridge, Cambridge University Press, 2019), p. 79: “Mitigation and remediation of environmental damage aim at ‘avoid[ing], reduc[ing] and, if possible, remedy[ing] significant adverse effects’ (Article 5(3)(b), Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment to the environment). More precisely, ‘[m]itigation is the use of practice, procedure or technology to minimise or to prevent impacts associated with proposed activities’ and ‘[r]emediation consists of the steps taken after impacts have occurred to promote, as much as possible, the return of the environment to its original condition’ (Antarctic Treaty Consultative Meeting, Revised Guidelines for Environmental Impact Assessment in Antarctica, 3.5, 2016).”

if they remain where they are after the conflict is over.¹⁴²⁴ In other words, removing the remnants of war may in some situations pose a higher environmental risk than leaving them where they are. It is for this reason that the draft principle contains the words “or render harmless”, to illustrate that in some circumstances it may be appropriate to do nothing, or to take measures other than removal.

(3) The obligation to “seek to” is one of conduct and relates to “toxic and hazardous remnants of war” that “are causing or risk causing damage to the environment”. The terms “toxic” and “hazardous” are often used when referring to remnants of war which pose a danger to humans or the environment, and it was considered appropriate to use the terms here.¹⁴²⁵ The term “hazardous” is somewhat wider than the term “toxic”, in that all remnants of war that pose a threat to humans or the environment may be considered hazardous, but not all are toxic. The term “toxic remnants of war” does not have a definition under international law, but has been used to describe “any toxic or radiological substance resulting from military activities that forms a hazard to humans and ecosystems”.¹⁴²⁶

(4) The reference to “jurisdiction or control” is intended to cover areas within *de jure* and *de facto* control even beyond that established by a territorial link. The term “jurisdiction” is intended to cover, in addition to the territory of a State, activities over which, under international law, a State is authorized to exercise its competence and authority extraterritorially.¹⁴²⁷ The term “control” is intended to cover situations in which a State (or party to an armed conflict) is exercising *de facto* control, even though it may lack *de jure* jurisdiction.¹⁴²⁸ It therefore “refers to the factual capacity of effective control over activities outside the jurisdiction of a State”.¹⁴²⁹

(5) The present draft principle is intended to apply to international as well as non-international armed conflicts. For this reason, paragraph 1 addresses “parties to a conflict”. The phrase “party to a conflict” has been used in various provisions of law of armed

¹⁴²⁴ For example, this is often the case with chemical weapons that have been dumped at sea. See T.A. Mensah, “Environmental damages under the Law of the Sea Convention”, *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, J.E. Austin and C.E. Bruch (eds.) (Cambridge, Cambridge University Press, 2000), pp. 226–249. The Chemical Munitions Search and Assessment (CHEMSEA) is an example of a project of cooperation among the Baltic States, which is partly financed by the European Union. Information on the CHEMSEA project can be found at http://ec.europa.eu/regional_policy/en/projects/finland/chemsea-tackles-problem-of-chemical-munitions-in-the-baltic-sea (accessed on 8 July 2019). See also the Baltic Marine Environment Protection Commission (Helsinki Commission) website at www.helcom.fi/baltic-sea-trends/hazardous-substances/sea-dumped-chemical-munitions (accessed on 8 July 2019).

¹⁴²⁵ See, for more information, ICRC, “Strengthening legal protection for victims of armed conflicts”, report prepared for the Thirty-first International Conference of the Red Cross and Red Crescent in 2011, No. 31IC/11/5.1.1 3, p. 18.

¹⁴²⁶ See M. Ghalaieny, “Toxic harm: humanitarian and environmental concerns from military-origin contamination”, discussion paper (Toxic Remnants of War project, 2013), p. 2. See also www.toxicremnantsofwar.info/new-trw-publication-toxic-harm-humanitarian-and-environmental-concerns-from-military-origin-contamination/ (accessed on 8 July 2019). For more information on toxic remnants of war, see also the Geneva Academy, *Weapons Law Encyclopedia*, available at www.weaponslaw.org under “Glossary”, which cites ICRC, “Strengthening legal protection for victims of armed conflicts”, p. 18. See the statements delivered by Austria, Costa Rica, Ireland and South Africa to the First Committee of the General Assembly as its sixty-eighth session, which are available from the paper-smart portal at <http://papersmart.unmeetings.org>.

¹⁴²⁷ See para. (9) of the commentary to art. 1 of the articles on prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 97–98, at p. 151. See also General Assembly resolution 62/68 of 6 December 2007, annex.

¹⁴²⁸ Para. (12) of the commentary to art. 1, *ibid.*

¹⁴²⁹ *A/CN.4/692*, para. 33. Concerning the concept of “control”, see *Namibia, Advisory Opinion* (footnote 1322 above), at p. 54, para. 118, where it states that: “The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.”

conflict treaties in the context of remnants of war.¹⁴³⁰ It was considered appropriate to use the term in the present draft principle as it is foreseeable that there may be situations where there are toxic or hazardous remnants of war in an area where a State does not have full control. For example, a non-State actor may have control over territory where toxic and hazardous remnants of war are present.

(6) Paragraph 2 should be read together with paragraph 1. It aims to encourage cooperation and technical assistance amongst parties to render harmless the remnants of war referred to in paragraph 1. It should be noted that paragraph 2 does not aim to place any new international law obligations on parties to cooperate. However, it is foreseeable that there may be situations where an armed conflict has taken place and a party is not in a position to ensure that toxic and hazardous remnants of war are rendered harmless. It was thus considered valuable to encourage parties to cooperate in this regard.

(7) Paragraph 3 contains a without prejudice clause that aims to ensure that there would be no uncertainty that existing treaty or customary international law obligations prevail. There are various laws of armed conflict treaties that regulate remnants of war, and different States thus have varying obligations relating to remnants of war.¹⁴³¹

(8) The words “clear, remove, destroy or maintain”, as well as the specific remnants of war listed, namely “minefields, mined areas, mines, booby-traps, explosive ordnance and other devices”, were specifically chosen and are derived from existing law of armed conflict treaties to ensure that the paragraph is based on the law of armed conflict as it exists at present.¹⁴³²

(9) It should be noted that the draft principle does not directly deal with the issue of responsibility or reparation for victims on purpose. This is because responsibility to clear, remove, destroy or maintain remnants of war is already regulated to some extent under the existing law of armed conflict, at least in the sense that certain treaties identify who should take action.¹⁴³³ The draft principle is without prejudice to the allocation of responsibility and questions of compensation.

¹⁴³⁰ See, for example, Protocol II to the Convention on Certain Conventional Weapons, as well as the Protocol on Explosive Remnants of War, 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 (Protocol V) (hereinafter, “Protocol V to the Convention on Certain Conventional Weapons”) (Geneva, 3 May 1996), United Nations, *Treaty Series*, vol. 2399, No. 22495, p. 100.

¹⁴³¹ See, for example, amended Protocol II to the Convention on Certain Conventional Weapons; Protocol V to the Convention on Certain Conventional Weapons; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Oslo, 18 September 1997), United Nations, *Treaty Series*, vol. 2056, No. 35597, p. 211; Convention on Cluster Munitions (Dublin, 30 May 2008), *ibid.*, vol. 2688, No. 47713, p. 39; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Geneva, 3 September 1992), *ibid.*, vol. 1974, No. 33757, p. 45.

¹⁴³² See the wording of the amended Protocol II to the Convention on Certain Conventional Weapons; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction; Convention on Cluster Munitions.

¹⁴³³ See, e.g., art. 3, para. 2, of the amended Protocol II Convention on Certain Conventional Weapons: “Each High Contracting Party or party to a conflict is, in accordance with the provisions of this Protocol, responsible for all mines, booby-traps, and other devices employed by it and undertakes to clear, remove, destroy or maintain them as specified in Article 10 of this Protocol.” Art. 10, para. 2, in turn provides that: “High Contracting Parties and parties to a conflict bear such responsibility with respect to minefields, mined areas, mines, booby-traps and other devices in areas under their control.” In addition, art. 3, para. 2, of Protocol V to the Convention on Certain Conventional Weapons provides that: “After the cessation of active hostilities and as soon as feasible, each High Contracting Party and party to an armed conflict shall mark and clear, remove or destroy explosive remnants of war in affected territories under its control”; Convention on Cluster Munitions, art. 4, para. 1: “Each State Party undertakes to clear and destroy, or ensure the clearance and destruction of, cluster munition remnants located in cluster munition contaminated areas under its jurisdiction or control”; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, art. 5, para. 1: “Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in mined areas under its jurisdiction or control”.

Principle 28

Remnants of war at sea

States and relevant international organizations should cooperate to ensure that remnants of war at sea do not constitute a danger to the environment.

Commentary

(1) Unlike the broader draft principle 27, which deals with remnants of war more generally, draft principle 28 deals with the specific situation of remnants of war at sea including the long-lasting effects on the marine environment. Draft principle 28 has added value as draft principle 27 only covers remnants of war under the jurisdiction or control of a former party to an armed conflict, which means that it is not wide enough to cover all remnants of war at sea. This draft principle expressly encourages international cooperation to ensure that remnants of war at sea do not constitute a danger to the environment.¹⁴³⁴

(2) Owing to the multifaceted nature of the law of the sea, a particular State could have sovereignty, jurisdiction, both sovereignty and jurisdiction, or neither sovereignty nor jurisdiction, depending on where the remnants are located.¹⁴³⁵ It is therefore not surprising that remnants of war at sea pose significant legal challenges.¹⁴³⁶ For example, the parties to the armed conflict may have ceased to exist; the coastal State may not have the resources to ensure that the remnants of war at sea do not constitute a danger to the environment; or the coastal State may not have been a party to the conflict, but the cooperation of that State may still be needed in efforts to get rid of remnants. Another foreseeable challenge is that the party that left the remnants may not have been in violation of its international law obligations at the time when that happened but these remnants now pose environmental risk.

(3) Accordingly, draft principle 28 addresses States generally, not only those which have been involved in an armed conflict. It aims to encourage all States, as well as relevant international organizations,¹⁴³⁷ to cooperate to ensure that remnants of war at sea do not constitute a danger to the environment. The reference to “international organizations” is qualified with the word “relevant”, in the light of the fact that the issues involved tend to be specialized.

(4) The words “should cooperate” rather than the more prescriptive “shall cooperate” were considered appropriate, given that this is an area where practice is still developing. Cooperation is an important element concerning remnants of war at sea, as the coastal States negatively affected by remnants of war at sea may not have the resources and thus not be capable of ensuring that remnants of war at sea do not pose environmental risks.

¹⁴³⁴ The need to take cooperative measures to assess and increase awareness of environmental effects related to waste originating from chemical munitions dumped at sea has been explicitly recognized by the General Assembly since 2010, including in General Assembly resolution 71/220. The resolution reaffirms the 2030 Agenda for Sustainable Development and recalls a number of relevant international and regional instruments. It furthermore notes the importance of raising awareness of the environmental effects related to waste originating from chemical weapons dumped at sea and invites the Secretary-General to seek the views of Member States and relevant regional and international organizations on the cooperative measures envisaged in the resolution and identifying the appropriate intergovernmental bodies within the United Nations for further consideration and implementation, as appropriate, of those measures.

¹⁴³⁵ See the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3. The remnants of war could be located in the territorial waters, the continental shelf, the exclusive economic zone or on the high seas, and this will have an impact on the rights and obligations of States.

¹⁴³⁶ See A. Lott, “Pollution of the marine environment by dumping: legal framework applicable to dumped chemical weapons and nuclear waste in the Arctic Ocean”, *Nordic Environmental Law Journal*, vol. 1 (2015), pp. 57–69, and W. Searle and D. Moody, “Explosive Remnants of War at Sea: Technical Aspects of Disposal”, in *Explosive Remnants of War: Mitigating the Environmental Effects*, A. Westing (ed.) (Taylor & Francis 1985).

¹⁴³⁷ For example, the CHEMSEA project, which was initiated in 2011 as a project of cooperation among the Baltic States and partly financed by the European Union (see footnote 1424 above).

(5) There are various ways in which States and relevant international organizations can cooperate to ensure that remnants of war at sea do not pose environmental risks. For example, they could survey maritime areas and make the information freely available to the affected States, they could provide maps with markers, and they could provide technological and scientific information and information concerning whether the remnants pose risks or may pose risks in the future.

(6) There is increasing awareness concerning the environmental effects of remnants of war at sea.¹⁴³⁸ Dangers posed to the environment by remnants of war at sea could have significant collateral damage to human health and safety, especially of seafarers and fishermen.¹⁴³⁹ The clear link between danger to the environment and public health and safety has been recognized in several international law instruments, and it was thus considered particularly important to encourage the cooperation amongst States and international organizations to ensure that remnants of war at sea do not pose danger.¹⁴⁴⁰

(7) Draft principle 28 intentionally does not deal with any issues concerning the allocation of responsibility or compensation for damages regarding remnants of war at sea. Determining which party has the primary obligation to ensure that remnants of war at sea do not pose environmental risks is a very complex and delicate issue to define, especially considering the varied legal nature of the law of the sea, ranging from internal waters to the high seas.

¹⁴³⁸ See General Assembly resolutions 65/149 of 20 December 2010 and 68/208 of 20 December 2013 and [A/68/258](#). See also Mensah, “Environmental damages under the Law of the Sea Convention”, p. 233.

¹⁴³⁹ The Baltic Marine Environment Protection Commission (Helsinki Commission), governing body of the Convention on the Protection of the Marine Environment of the Baltic Sea Area, issued guidelines for fishermen that encounter sea-dumped chemical munitions at an early stage. For an easily accessible overview, see the work done by the James Martin Center for Nonproliferation Studies at www.nonproliferation.org/chemical-weapon-munitions-dumped-at-sea/ (accessed on 8 July 2019).

¹⁴⁴⁰ There is a clear link between danger to the environment and public health and safety. See, for example, article 55, paragraph 1, of Additional Protocol I provides for the protection of the natural environment in international armed conflicts and prohibits the use of means and methods of warfare which are intended or may be expected to cause environmental damage and thereby prejudice the health of the population; article 1, paragraph 2, of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes stipulates that adverse effects on the environment include: “effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interactions among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors”.