RE: Comments submitted by the Environmental Law Institute on the Draft Principles on the Protection of the Environment in Relation to Armed Conflict

The Environmental Law Institute has the honor of submitting these comments on the 28 Draft Principles (DPs) on the Protection of the Environment in Relation to Armed Conflict.

Following this brief introduction, this submission is divided into two sections: (1) general comments on the Draft Principles; and (2) specific opportunities for improving the Draft Principles.

General Comments on the Draft Principles

The Draft Principles represent a significant and important step in codifying the developments to date in international law protecting the environment in relation to armed conflict. The International Law Commission and particularly the two Special Rapporteurs on Protection of the Environment in Relation to Armed Conflict are to be commended. This section of our commentary highlights four particular reasons the Draft Principles are significant.

1. **The DPs are notable for taking an integrated approach to international law protecting the environment in relation to armed conflict.**

Historically, the focus of environmental protection in relation to armed conflict has been on international humanitarian law during armed conflict. Moreover, some have asserted that during an armed conflict international humanitarian law applies exclusively as *lex specialis*, implying the suspension of other potentially applicable bodies of law. It is generally accepted that in a case of

conflicting norms, *lex specialis* takes precedence, or at least serves as the lens through which other norms are applied.[1]

In recent years, though, the ILC has observed that treaties continue to apply during armed conflict to the extent that they do not directly conflict with international humanitarian law.[2] Recognizing the evolution of diverse bodies of international law, the ILC has emphasized that international law is to be conceptualized as a system and implemented in a coherent manner.[3] The Draft Principles on Protection of the Environment utilize an integrated view of international law, drawing upon relevant provisions of international humanitarian law, international human rights law, international criminal law, international environmental law, and international trade law, among other bodies of law.

Such concurrent applicability has been recognized by multiple authorities. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons,* the International Court of Justice noted that international human rights law continues to apply during armed conflict alongside international humanitarian law,[4] and that "States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives", since there is a "general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States … [is] part of the corpus of international law relating to the environment."[5] The ILC cited this Advisory Opinion in its 2011 report on the Fragmentation of International Law, further finding that "no regime [of international law] is self-contained" from general international law.[6]

Similarly, Article 3 of the ILC's Draft Articles on the Effects of Armed Conflicts on Treaties states that "[t]he existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties…,"[7] while the "indicative list of treaties the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict"[8] includes treaties on human rights, protection of the environment, international watercourses, and international criminal law.[9]

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[1] ILC, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission," (2006), UN Doc. A/CN.4/L.682, 49.
[2] ILC, "Report of the International Law Commission on the Work of Its Sixty-Third Session," (2011), UN Doc. A/66/10, ch. VI.E (Text of the Draft Articles on the Effects of Armed Conflicts on Treaties).
[3] ILC, "Fragmentation," *supra* n. 1.
[4] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para. 25.
[5] *Ibid.*, para 30.
[6] ILC, "Fragmentation," *supra* n. 1, 100.
[7] ILC, "Draft Articles on the Effects of Armed Conflicts on Treaties, with Commentaries," (2011), UN Doc. A/66/10, art. 3.
[8] *Ibid*., art. 7.
[9] *Ibid*., Annex: Indicative List of Treaties Referred to in Article 7, 119.

By incorporating the various relevant bodies of international law, the DPs recognize these concurrent regimes and their complementary contributions to the protection of the environment. The integration of these diverse bodies of international law protecting the environment in relation to armed conflict provide additional foundations that extend the protections temporally and in other ways.

2. **The DPs are notable for their temporal scope codifying protections before, during, and after armed conflict.**

It is well established that international humanitarian law provides both direct and indirect protections of the environment, especially since the adoption of the 1977 Additional Protocols and the 1976 Environmental Modification Convention (ENMOD).[10] Due to the nature of international humanitarian law, however, these protections apply only during conflict.

In adopting a broader framing of protecting the environment *in relation to* armed conflict (and not only during conflict), the Draft Principles have looked beyond the traditional focus of international humanitarian law. This broader framing reflects the realities of modern warfare, as well as substantial experience and legal developments over the past four decades.

The DPs are innovative for the integration of international legal protections applying across the conflict, with principles applicable pre-conflict (and generally), during armed conflict, and post-conflict. They are also on solid ground from an international legal perspective (as discussed in the first general comment, above).

ELI notes that the principles of general applicability and those applicable in a pre-conflict context have been combined into a single section may generate some confusion. At the same time, we also recognize that the preventive measures in the principles of general applicability may also be taken during or after a conflict, in addition to the pre-conflict stage. For example, while States may take measures to minimize the threat of environmental damage prior to the onset of an armed conflict through planning and legislation— e.g., by incorporating environmental standards into their manuals on military activities and agreements to address and mitigate the risk of environmental degradation due to the presence of armed forces—these steps can also be taken during a conflict or afterward.

3. **The DPs are notable for their application to a wide range of armed conflicts, including international and non-international, as well as emerging hybrid forms of conflict that do not clearly fit within the scope of Additional Protocols I or II.**

[10] *See, e.g.*, Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd ed., Cambridge University Press, 2016), ch. 7; UN Environment Programme, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law* (2009), 10-28.

Traditionally, international humanitarian law has largely separated the applicable law for international armed conflict (IAC) vs. non-international armed conflict (NIAC). In the increasingly common contexts of conflicts that begin as non-international but which grow to involve other states,[11] however, this dichotomy has made it challenging to know what law applies.[12]

Even where there is clarity on the nature of the conflict, armed conflicts are overwhelmingly non-international[13] and the relevant international humanitarian law provisions under Additional Protocol II (applicable in NIAC) recognizes far fewer restrictions on belligerent conduct, including with respect to the environment. As such, in NIACs, there are fewer international humanitarian law protections of the environment.

This is not to say that other bodies of law do not protect the environment in NIACs.

Indeed, the DPs are significant for their broad applicability to international armed conflict, non-international armed conflicts, and a range of hybrid armed conflicts (including internationalized non-international armed conflicts).

The DPs' broader framing of the relevant conflict contexts follows from DP's consideration of the concurrent application of relevant international law beyond IHL, as many of these other regimes—e.g., international human rights law, international environmental law, international criminal law, and international trade law—contain environmental provisions or principles that continue to apply during conflict (and indeed throughout the conflict life cycle) and they apply regardless of whether conflict international, non-international, or hybrid. The DPs thus unite in a single, comprehensive legal framework the obligations and recommendations that parties to an armed conflict must observe across the range of conflict contexts.

It is worth noting that in this context, the DPs do not seek to apply the provisions of Additional Protocol I to NIACs, nor do they seek to bind States that have not ratified Additional Protocol II. Rather, they acknowledge that by looking at the corpus of international law coherently and comprehensively, these obligations are found in various other international legal regimes that do not distinguish between NIAC and IAC. And barring a direct conflict with relevant international humanitarian law, these other legal norms apply.

4. **The DPs are notable for their inclusion of natural resource exploitation in relation to armed conflict.**

[11] *E.g.*, Hans-Peter Gasser, "Internationalized Non-International Armed Conflicts: Case Studies from Afghanistan, Kampuchea, and Lebanon," 33 *American University Law Review* 145 (1983); Kubo Macak, *Internationalized Armed Conflicts in International Law* (Oxford University Press 2018).
[12] *E.g.*, *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1-AR72 (2 Oct 1995), para. 97; ILC, Effects of Armed Conflicts on Treaties, *supra* n. 7, 110.
[13] Therése Pettersson and Magnus Öberg, "Organized Violence, 1989-2019," *Journal of Peace Research* 57: 597 (2020).

Historically, legal analysis of the protection of the environment in armed conflict has focused almost exclusively on pollution and damage to the environment from military activities (whether direct or indirect), largely omitting the role of natural resources as drivers of conflict and the increased opportunity for illegal exploitation in conflict-related contexts.

Inclusion of natural resources in the DPs is important from a practical standpoint. Since 1989, at least 35 major armed conflicts (conflicts with more than 1,000 battle deaths) have been financed by revenues from natural resources, ranging from diamonds and timber to narcotics, fisheries, and bananas.[14] In the last 20 years, natural resources have become a standard element of peace agreements, providing incentives to resolve the conflict while also providing a foundation for post-conflict recovery.[15]

In addition to the practical considerations, inclusion of natural resources in the DPs is justified by international law. International law has long recognized an absolute prohibition on pillage,[16] and this prohibition has more recently been applied to illegal natural resource exploitation.[17] In this context, the ICJ has also emphasized the international legal principle of permanent sovereignty over natural resources.[18] The Law of Occupation also addresses natural resources. The many property rights protections found in international humanitarian law and international criminal law,[19] reinforce the importance of the DPs in addressing natural resources.

We also welcome the inclusion of corporate due diligence and liability in the DPs. While the principles related to due diligence and liability are recommendatory in nature, they provide important normative guidance as international law and State practice continue to evolve in this space. As the Commentaries note, the role of natural resources in driving or financing armed

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[14] Carl Bruch, David Jensen, Mikiyasu Nakayama, and Jon Unruh, "The Changing Nature of Conflict, Peacebuilding, and Environmental Cooperation," 49(2) *Environmental Law Reporter* 10134-10154 (2019).
[15] UN Department of Political Affairs and UN Environment Programme, *Natural Resources and Conflict: A Guide for Mediation Practitioners* (2015).
[16] Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910), arts. 28, 47; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 287, art. 33; 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) (Adopted 08 June 1977, entered into force 07 December 1978), 1125 UNTS 609, art. 4(2)(g); Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 3, arts. 8(2)(b)(xvi), 8(2)(e)(v).
[17] *E.g*., *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda*) (Judgment) [2005] ICJ Rep 168 ("*Armed Activities*"), paras. 245-246, 248.
[18] UNGA, *Permanent Sovereignty over Natural Resources in the Occupied Palestinian and Other Arab Territories: Report of the Secretary General* (23 June 1983), UN Doc A/38/282; for application, see the separate declaration of Judge Koroma in *Armed Activities,* in which he asserts that the principle of permanent sovereignty remains in effect "*during armed conflict and during occupation"* (emphasis in original) Case *Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda*) (Judgment) (Separate Declaration of Judge Koroma) [2005] ICJ Rep 168, 289-290.
[19] *E.g*., ICRC Customary IHL Database, accessed June 09, 2021 < https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>, Rules 50 ("Destruction and Seizure of Property of an Adversary"), 51 ("Public and Private Property in Occupied Territory"); Rome Statute, *supra* n. 16, arts. 8(2)(a)(iv), 8(2)(b)(xiii), 8(2)(e)(xii).

conflict and human rights violations have been acknowledged at both the domestic and international levels.[20] Inclusion of these provisions is thus notable in supporting progressive development of international law and State practice in this area.

Opportunities for Improvement

Even as we acknowledge the substantial contributions of the Draft Principles on Protection of the Environment in Relation to Armed Conflict, ELI also notes four ways that the Draft Principles should be strengthened to reflect current international law.

1. **The Draft Principles should include a provision protecting water infrastructure before, during, and after armed conflict.**

Recent conflicts have seen a rapid rise in the targeting of water infrastructure upon which civilian populations depend.[21]

There is a substantial body of existing international law protecting water infrastructure during armed conflict, as well as before and after. Under Additional Protocol I, States are prohibited from attacking, destroying, or rendering useless objects which are indispensable to the survival of the civilian population, including drinking water installations.[22] The only exception to this prohibition is infrastructure that is "solely for the members of [the state's] armed forces" or "in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement."[23] Additional Protocol II reiterates this prohibition in practically identical terms.[24] As such, International humanitarian law protects water infrastructure during both international armed conflicts and non-international armed conflicts.

[20] *E.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub L No 111-203 (2010), which includes regulations on conflict minerals from the Democratic Republic of the Congo and neighboring countries; Regulation (EU) 2017/821 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; [2017] OJ L130/60, on supply chain due diligence for certain conflict minerals; UNHCR, "Guiding Principles on Business and Human Rights" UN Doc. HR/PUB/11/04 (2011).
[21] *E.g.*, Jeannie L. Sowers, Erika Weinthal, and Neda Zawahri, "Targeting Environmental Infrastructures, International Law, and Civilians in the New Middle Eastern Wars," *Security Dialogue* 48(5): 410-430; Erika Weinthal and Jeannie L. Sowers, "The Water-Energy Nexus in the Middle East: Infrastructure, Development, and Conflict," *WIREs Water* 7(4):e1437 (2020); Juliane Schillinger, Gül Özerol, Şermin Güven-Griemert, and Michael Heldeweg, "Water in War: Understanding the Impacts of Armed Conflict on Water Resources and on their Management," *WIREs Water* 7(7):e1480 (2020).
[22] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3 (Additional Protocol I), art. 54(2).
[23] Ibid., art. 54(3).
[24] Additional Protocol II, *supra* n. 10, art. 14.

In addition to international humanitarian law, international human rights law offers protections before, during, and after conflict (extending beyond the temporal application of IHL during armed conflict). For example, General Comment 15 by the UN Commission on Economic, Social, and Cultural Rights clarifies that Article 11 of the International Covenant on Economic, Social, and Cultural Rights, which provides protection for a basic standard of living, includes a human right to water.[25]

Following are a few potential options for a new Draft Principle that reflects existing international law protecting water infrastructure:

> "To the extent that it supplies water to civilian populations, water infrastructure shall not be targeted during armed conflict."
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> "Water infrastructure shall be protected from the effects of armed conflict, with the exception of water infrastructure that exclusively provides water to military forces."
>
> "Attacks on or pollution of water infrastructure by combatants are prohibited if such attacks or pollution would render civilian drinking water installations unsafe for use."

This language is only a starting point. The Geneva List of Principles on the Protection of Water Infrastructure highlights the key principles of international law protecting water infrastructure during conflict, as well as before and after.[26] As such, the Geneva List provides additional options and dimensions that may be considered.

2. The Draft Principles could better articulate how they apply to non-state actors.

Non-state armed groups are widespread in contemporary armed conflicts, and often exploit, target, and otherwise harm the environment. While the DPs do a good job of addressing conduct by States and agents of States, they are less clear when it comes to non-state armed groups.

International law protecting the environment in relation to armed conflict already governs behavior by non-state armed groups. It is well-established that non-state actors engaged in armed conflict are bound by international humanitarian law. For example, they bear responsibility under international humanitarian law in Common Article 3 to the four 1949 Geneva Conventions, under various rules of the Hague laws, and under customary rules of international humanitarian

[25] United Nations Committee on Economic, Social and Cultural Rights 'General Comment No. 15: The Right to Water' (20 January 2003) UN Doc E/C.12/2002/11.
[26] The Geneva Water Hub, *The Geneva List of Principles on the Protection of Water Infrastructure* (2019).

law.[27] International criminal law also applies to non-state armed groups, but it is less clear to what extend international human rights law binds non-state armed groups.[28]

Many of the DPs do apply to non-state armed groups, although this application could be more explicit.

While many of the initial DPs explicitly apply to States, and only to States, a number of the later DPs are drafted more broadly so that they could apply to non-state armed groups, as well as other non-state actors including individuals. Indeed, the ILC Commentary on the DPs confirms that specific DPs apply to non-state actors. For example, DP 18 on pillage states that "Pillage of natural resources is prohibited." This broad language is not limited to States, and thus arguably applies to non-state armed groups and other non-state actors (and indeed paragraph 7 of the ILC commentary on DP 18 confirms this).

That said, the lack of mention of non-state armed groups risks obscuring the fact that it applies to them.

Indeed, DP 13 (providing general protections of the natural environment, including prohibiting attacks that cause widespread, long-term, and severe damage to the environment) does not clarify to whom it applies. Does the fact that the commentary for DP 18 confirms that it applies to non-state actors and the absence of similar commentary for DP 13 mean that there is no international law preventing non-state armed groups from causing long-term, widespread, and severe damage to the environment? Can non-state armed groups attack the natural environment even where it is not a military objective?

The current DPs vary widely in terms of whom they apply to due to variations in wording and there are some key gaps that could be addressed. DP 3, 4, 5, 6, 7, 8, and 9 refer only to "States" or "States and International Organizations". For example, in DP 5, it would be helpful to use a broader term when discussing the protection of the environment of indigenous peoples as they may often live in areas under occupation or de facto governments (provided by non-state actors). For example, in Section 5[6] the clause "States should take appropriate measures, in the event of an armed conflict, to protect the environment of the territories that indigenous peoples inhabit." could be rephrased to read "Appropriate measures should be taken, in the event of armed conflict to protect the environment of the territories that indigenous peoples inhabit."

[27] *E.g*. ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict: Rules and Recommendations Relating to the Protection of the Natural Environment under International Humanitarian Law, with Commentary* (2020); *see also* CEOBS, "Non-state Armed Groups Continue to Cause Environmental Damage in Conflicts, Yet States are Reluctant to Meaningfully Address Their Conduct for Fear of Granting Them Legitimacy" (2015).
[28] ICRC *Guidelines*, *supra* n. 27, 28, fn. 90.

In contrast to the many places where non-state actors are not mentioned, DP 8 refers to "States, international organizations and other relevant actors" (in the context of who should prevent damage to the environment in areas where displaced persons are situated).

One option, then, would be to amend the relevant language of the various DPs to expressly incorporate non-state armed groups and other non-state actors. This might be politically difficult, as the language has been so extensively discussed and debated. Moreover, the brevity and clarity of DP 18 (and similar DPs) give it strength.

As such, it may be preferable to adopt a new, stand-alone DP that explicitly addresses non-state armed groups and other non-state actors, indicating which DPs apply to them.

3. **While the inclusion of DP 5 represents an important step forward in the recognition of the environmental rights of indigenous peoples, the International Law Commission should consider the growing weight of evidence that DP 5(2) represents an existing legal obligation.**

DP 5 ("Protection of the environment of indigenous peoples") reflects the growing international consensus that indigenous peoples have a special connection to the lands they have traditionally occupied. This growing consensus is reflected in a variety of global and regional conventions, declarations of international organizations, and the decisions of international courts. Particular attention focuses on both the substantive right of indigenous peoples to the land, resources, and environment on which they have traditionally relied, as well as the procedural rights of free, prior and informed consent (and more broadly consultation).

The 1989 Indigenous and Tribal Peoples Convention (ILO 169), a treaty organized by the International Labour Organization, recognized the "special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories . . . which they occupy or otherwise use …."[29] In 2007, an overwhelming majority of the United Nations General Assembly approved the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP), which affirmed a right of indigenous peoples to "redress … for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been … damaged without their free, prior and informed consent," as well as forbid the military use of indigenous lands without the same free, prior, and informed consent.[30] Nine years later, the Organization of American States released a declaration recognizing the same rights that UNDRIP had, in addition to an explicit obligation on the part of States to protect indigenous peoples "in situations or periods of internal or international armed conflict," as well

[29] Convention (No. 169) Concerning Indigenous and Tribal People in Independent Countries (ILO 169) (opened for signature 27 June 1989, entered into force 5 September 1991), 1650 UNTS 383, art. 13(1).
[30] Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA Res 61/295 (UNDRIP) arts 28(1), 30(1). The UN General Assembly approved UNDRIP 144 in favor and 4 opposed, with Australia, Canada, New Zealand, and the United States voting in opposition.

as an obligation for States to "adopt effective reparation measures and provide adequate resources for said reparation, in conjunction with the indigenous peoples concerned, for the damages or harm caused by an armed conflict."[31]

Regional courts and tribunals have likewise affirmed both the special relationship of indigenous people to their lands and State obligations with respect to that special relationship. In 2007, the same year that the General Assembly adopted UNDRIP, the Inter-American Court of Human Rights recognized the State obligation to seek and receive the "free, prior, and informed consent" of indigenous peoples with regard to use or damage of their lands.[32] In 2012, the Court again found that indigenous peoples inherently have a "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."[33] And in 2017, the African Court on Human and Peoples' Rights applied the principles of the UN Declaration on the Rights of Indigenous Peoples in its decision recognizing the land rights of the Ogiek indigenous community.[34]

Given the surge in treaties, declarations, and judgments of multiple regional courts, it is worth questioning whether the principles laid out in DP 5, particularly section 2, ought to be regarded as binding.

4. **DPs 10 and 11 on corporate due diligence and liability should be extended in scope to apply in pre-conflict, high-risk scenarios.**

While the scope of the Draft Principles as a whole rightly encompasses the before, during, and after stages of the conflict cycle, DPs 10 and 11 on corporate due diligence and liability are notable for applying only "in an area of armed conflict or in a post-armed conflict situation." Including the phrase "in a high-risk situation" or similar language would not only better align DPs 10 and 11 with the overall scope of the Draft Principles, but it would also better reflect the guidance from the United Nations (UN), the Organization for Economic Co-operation and Development (OECD), and the European Union (EU).

Under section 13 of the UN's *Guiding Principles on Business and Human Rights*, businesses have a responsibility to "avoid causing or contributing" to adverse human rights impacts and to "seek to prevent" adverse human rights impacts linked to their businesses.[35] This language

[31] Organization of American States, American Declaration on the Rights of Indigenous Peoples' General Assembly, Res. 2888 (XLVI-O/16) (Washington, DC; 15 June 2016), art. XXX(3), (4)(b).
[32] *Case of the Saramaka People v Suriname* (Judgment), Inter-American Court of Human Rights, Series C, No. 185 (12 August 2008), 134.
[33] *Río Negro Massacres v Guatemala* (Judgment), Inter-American Court of Human Rights, Series C, No. 250 (4 September 2012), 177, fn 266.
[34] *African Commission on Human and Peoples' Rights v Republic of Kenya* (Judgment), African Court on Human and Peoples' Rights, Case No. 006/2012 (25 May 2017), 122-131.
[35] UNHRC, "Guiding Principles on Business and Human Rights: Implementing the United Nations

comprehends corporate due diligence and potential liability even in situations that do not involve conflict, but could be particularly susceptible to conflict. The OECD *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* applies to high-risk areas, although they may not yet have experienced conflict.[36] The OECD Guidance's "Recommendation of the Council" section notes that "due diligence for responsible supply chains of minerals from conflict-affected and high-risk areas is an ongoing, proactive, and reactive process."[37] Again, such language as "high-risk," "ongoing," and "proactive" suggests due diligence applies even before a conflict has happened. EU regulations similarly incorporate pre-conflict due diligence by defining conflict minerals as originating in conflict-affected and post-conflict areas "as well as areas witnessing weak or non-existent governance and security."[38]

The way DPs 10 and 11 are currently framed, all of the guidance for proactive due diligence in high-risk areas is lost. Moreover, DPs 10 and 11 are advisory ("should"), so the non-binding nature of the UN Guiding Principles and OECD Guidance (not to mention the binding EU regulations) are relevant. By extending the scope of DPs 10 and 11 to address high-risk situations more broadly, and thereby include pre-conflict settings, the ILC can both reflect existing normative guidance and support the progressive development of international law in this area.

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'Protect, Respect and Remedy' Framework," in Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc A/HRC/17/31 (21 March 2011), sec. 13.

[36] Organization for Economic Co-operation and Development (OECD), "Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Second Edition" (2013).

[37] *Ibid.*

[38] 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 [2017] OJ L 130/1, art. 2(f).