1. The Kingdom of the Netherlands has requested and received a report of the Advisory Committee on Issues of Public International Law (CAVV) on the draft Principles. The Kingdom of the Netherlands would like to invite the Secretary-General and the ILC to take note of this report, which is annexed to this letter.

2. The Kingdom of the Netherlands understands that the stated objective of the draft Principles is to include both provisions to set forth principles of international law with a customary international law status, and to include non-binding declarations intended to contribute to the progressive development of international law. The draft Principles should provide appropriate guidance to States. The Kingdom of the Netherlands endorses this general approach of the topic. However, as it has expressed on earlier occasions, the Kingdom of the Netherlands is of the view that the distinction between binding rules of international law ('shall') and principles of a more recommendatory nature ('should') is not always clear or in line with what the Kingdom of the Netherlands sees as the generally accepted status of a specific draft Principle in international law. Furthermore, the customary international law status of articles included in the Geneva Conventions of 1949 or the First Additional Protocol thereto could be further clarified where they are considered to be applicable both in international armed conflict (IAC) and in non-international armed conflict (NIAC). Specific considerations per draft Principle will be noted below.

3. With respect to draft Principle 5, upon further reflection, the Kingdom of the Netherlands considers that the intention is to highlight the special relationship between indigenous peoples and their living environment. This relationship fits well with the dynamic integrated approach taken by the ILC which recognizes that the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties.

4. On draft Principle 7 concerning peace operations, the Kingdom of the Netherlands does not believe that this reflects customary international law. The draft Principle is based on non-binding policy documents adopted by the EU, the UN and NATO. Although such documents make an important contribution to the development of customary international law and often reflect customary international law, there is no conclusive proof that this is already the case in this particular instance. Therefore, the Kingdom of the Netherlands proposes to amend 'shall' into 'should' in draft Principle 7.

5. Concerning draft Principle 12, the Kingdom of the Netherlands is of the view that expanding the Martens Clause warrants great caution. The Kingdom of the Netherlands does not oppose the text of this draft Principle. However, it should not be given the title 'Martens Clause' which, understandably, has been considered controversial by some members of United Nations in the Sixth Committee of the General Assembly.

6. The Kingdom of the Netherlands supports the temporal approach to the draft Principles. One inconsistency, however, should be noted in this regard. Draft Principle 13 is relevant for all temporal phases, but it is included only in part II ('during armed conflict').

7. Considering draft Principle 13(2), the Kingdom of the Netherlands notes that, in 2009, the United Nations Environment Programme requested the development of a more specific definition of the phrase 'widespread, long-term and severe'. The commentaries to the draft Principles merely refer to the First Additional Protocol to the Geneva Conventions of 1949 (API). The Kingdom of the

Netherlands would like to suggest to interpret the standard of 'widespread, long-term and severe' in light of the most recent academic discourse with regard to the different functions of ecosystems, taking into account recent case law. For example, the commentary could refer to the need to interpret this phrase in accordance with the latest scientific insights into the various functions of ecosystems, as the ICJ did in *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua, Compensation Judgment).

8. On the decision not to make a distinction between IAC and NIAC, the Kingdom of the Netherlands has expressed its support on earlier occasions. As noted above, it would have been useful if the ILC had included arguments in the commentaries as to the status of certain elements in the draft Principles that thus far have been considered to apply solely to IAC, including in the view of the International Committee of the Red Cross. The status of draft Principle 13(2), which is derived from Article 55 API, is simply referred to as applicable in a situation of NIAC. The Kingdom of the Netherlands is of the view that a substantiated argument is missing to support this notion.

9. Some of the draft Principles focus on environmental damage external to hostilities. The Kingdom of the Netherlands welcomes the focus on two forms of environmental damage during armed conflicts, being damage to vulnerable nature areas resulting from the reception of displaced persons (draft Principle 8) and damage resulting from the illegal exploitation of natural resources (draft Principles 10, 11, 18 and, indirectly, 21). These draft Principles play an important role in the development of law in this area. The Kingdom of the Netherlands has consistently supported the inclusion of a reference to due diligence in draft Principle 11.

10. With regard to draft Principle 17, the question arises as to how this draft Principle relates to areas that are protected under multilateral environmental treaties. The interaction with relevant treaties merits further consideration and could possibly be clarified by the ILC.

11. On draft Principle 24 concerning information sharing and draft Principle 27 on poisonous and explosive remnants of war, the Kingdom of the Netherlands has previously shared its concerns on the ILC's conclusion that they have the status of customary international law. With regard to draft Principle 27, however, the Kingdom of the Netherlands sees merit in noting that certain developments in international environmental law, including in respect of the 'polluter pays' principle and the principle of due diligence, may point to certain obligations for states that could possibly considered to be of a customary international law nature.

30 December 2020

Advisory Committee on Public International Law

Advisory Report on the ILC's Draft Principles on Protection of the Environment in Relation to Armed Conflicts

Advisory report no. 36, 9 July 2020

Members of the Advisory Committee on Issues of Public International Law

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Temporary member	Dr Daniëlla Dam-de Jong
Executive secretaries	Ms Fatima Arichi Vincent de Graaf LLM

Postbus 20061
2500 EB The Hague
Tel.: +31 (0)70 348 5011
Email: djz-ir@minbuza.nl

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I. Introduction

On 8 July 2019, the International Law Commission (ILC) adopted 28 draft principles on the protection of the environment in relation to armed conflicts on first reading and, in August 2019, its commentaries thereon.[1] These draft principles are the result of a six-year study, encompassing five reports, that was conducted by Special Rapporteurs Marie Jacobsson (Sweden, 2013-2016) and Marja Lehto (Finland, 2017-2019). In his letter of 30 November 2019, the Minister of Foreign Affairs requested the Advisory Committee on Issues of Public International Law (CAVV) to prepare an advisory report on the draft principles.

For the purpose of preparing this report, the CAVV assembled a writing group consisting of Professor Cedric Ryngaert, who acted as coordinator, Dr Daniëlla Dam-de Jong (who agreed to join the CAVV as a temporary member), Dr Catherine Brölmann and Professor Johan Lammers.

The present report examines the political context of the draft principles, the ILC's interpretation of its mandate, its chosen approach and its specific decisions. One of the main themes of the report is the Netherlands' position on the ILC study and the individual draft principles.

II. Political context

The development of international law on the protection of the environment during armed conflicts has been an extremely laborious process. The most important legal developments in this area, which date from the 1970s, were a response to the severe environmental damage caused in Vietnam by US aerial attacks involving highly toxic chemical substances. In the light of these events, states were able to reach agreement on a convention prohibiting military or any other hostile use of environmental modification techniques having 'widespread, long-lasting or severe' effects (the ENMOD Convention of 1976)[2] and two specific provisions in Additional Protocol I to the Geneva Conventions. These provisions prohibit the parties to an international armed conflict from employing weapons that cause 'widespread, long-term and severe' damage to the natural environment (article 35 (3)) and formulate a duty of care to prevent such damage (article 55 (1)). However, states were unable to reach agreement on the inclusion of similar provisions in Additional Protocol II to the Geneva Conventions, which relates to non-international armed conflicts. Moreover, articles 35 (3) and 55 (1) stand accused

[1] Report of the International Law Commission on the Work of its Seventy-first Session, UN General Assembly, 74th session, suppl. 10, ch. VI, UN doc. A/74/10 (2019) ('ILC Report 2019').
[2] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention), United Nations, *Treaty Series*, vol. 1108, p. 151.

of lacking any practical utility on the grounds that it is almost impossible for environmental damage to meet the cumulative requirements of having 'widespread, long-term and severe' effects.[3]

In 2009, the lack of specific rules and the lack of clarity concerning the interpretation of existing rules prompted the UN Environment Programme (UNEP) to ask the ILC to carry out a study on environmental protection during armed conflicts.[4] In 2011, moreover, the ILC completed a study on the effects of armed conflicts on treaties that raised questions regarding the application of international environmental law and human rights law to the protection of the environment during armed conflicts.[5]

The draft principles should be viewed against this background. In this context, it is also worth noting that the ILC was in a difficult position given the political controversy surrounding the development of the law of armed conflict and the special status of the International Committee of the Red Cross (ICRC) as regards the interpretation and application of such law.[6] These two factors undoubtedly influenced the way in which the ILC decided to approach this issue.[7]

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[3] See, for example, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 14 June 2000, http://www.icty.org/x/file/Press/nato061300.pdf, paras. 14-25, in which a committee established by the prosecutor of the International Criminal Tribunal for the former Yugoslavia appraises the NATO bombing campaign against Serbia in 1999 in the light of articles 33 and 55 of Additional Protocol I. In paragraph 15 of its report, the committee states that 'it would appear extremely difficult to develop a prima facie case upon the basis of these provisions', while referring to the very high threshold established by the provisions. Cf. *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-77), vol. VI, pp. 113-118 and 208-209, in which various states explicitly declare that the standard should not be interpreted in the light of other instruments. A key example of such an instrument is the ENMOD Convention, which occasioned the proposal of an informal definition of the terms 'widespread', 'long-term' and 'severe'. See Report of the Working Group on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, UN doc. A/31/27 (1976), vol. I, Annex, p. 91.

[4] UNEP, Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law (2009).

[5] Draft articles on the effects of armed conflicts on treaties, Report of the International Law Commission on the Work of its Sixty-third Session, *Yearbook of the International Law Commission* (2011), vol. II, Part Two.

[6] See, in particular, Report of the Secretary-General on the Protection of the Environment in Times of Armed Conflict, UN doc. A/48/269, 29 July 1993, para. 10. This report contains the ICRC-formulated Guidelines for military manuals and instructions on the protection of the environment in times of armed conflict, which are currently being revised. In addition, the ICRC has identified which customary rules of armed conflict help protect the environment, albeit not without encountering a certain amount of criticism. See Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law* (ICRC and Cambridge University Press, 2005), rules 43-45.

[7] See Report of the International Law Commission, Sixty-third session, UN doc. A/66/10, Annex E for the proposal relating to this study.

III. Mandate and status of the draft principles

The goal of the draft principles is to 'enhanc[e] the protection of the environment in relation to armed conflict'. Although this aim may be interpreted as relating primarily to the progressive development of international law, the Special Rapporteur decided to interpret the ILC's mandate (i.e. the codification and progressive development of international law) in a more restrained manner in the context of the ILC study.[8] First, she clearly states that it is not the ILC's task to develop the law of armed conflict, thus profoundly limiting its ability to develop law in this area. This decision is directly related to the aforementioned background.[9] Second, she argues that the study should focus on identifying rules of customary international law and clarifying the relationship between those rules and the relevant areas of law.[10] The primary goal of the study is thus not to develop new rules.

However, this certainly does not rule out the possibility to progressively develop international law, which may occur as a result of (re)interpretation of existing rules or through the expansion of the applicability of their scope. One example of this is draft principle 16 concerning the prohibition of reprisals against the environment, which is based on a treaty provision. The commentary on this principle notes that there is insufficient agreement as to whether it reflects customary international law and that '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'.[11] Finally, the study formulates various 'best practices' or recommendations to promote the further development of customary international law.

The purpose of the study conducted by the Special Rapporteurs is thus to codify and – to a certain extent – further develop customary international law in this area. The choice to adopt 'principles' is consistent with this approach, since it implies that the ILC does not intend to draft a new treaty, whereas that is precisely the impression that would have been created if it had focused on developing 'articles'. 'Principles' also appear to offer more flexibility than 'conclusions' when it comes to the further development of international law. The Netherlands has explicitly endorsed the ILC's decision to adopt 'principles'.[12]

[8] Preliminary Report on the Protection of the Environment in Relation to Armed Conflicts, submitted by Marie G. Jacobsson, Special Rapporteur, International Law Commission, Sixty-sixth session, UN doc. A/CN.4/674, 30 May 2014 ('preliminary report'), p. 18, para. 62.
[9] Ibid.
[10] Ibid.
[11] See ILC Report 2019, p. 260.
[12] Dutch contribution to the 70th session, chapter IX, para. 2.

It should be clear from the wording of a draft principle whether it constitutes an obligation or a recommendation. This is, first and foremost achieved by using 'shall' for obligations and 'should' for recommendations. However, the precise formulation of the principle is also important, since it can indicate, for example, whether the obligation contained therein is considered to reflect universal customary international law or whether it is only regarded as applying to a limited number of states, on the basis of certain treaty principles or as a rule of regional customary international law.

The Netherlands has criticised the use of 'shall' in various draft principles. In particular, it disputes that draft principles 7 (formerly 8), 24 (formerly 18) and 27 (formerly 16) reflect existing obligations under international law.[13]

Draft principle 7 provides that states and international organisations involved in peace operations 'shall consider the impact of such operations on the environment and take appropriate measures to prevent, mitigate and remediate the negative environmental consequences thereof'. This principle is based on non-binding policy documents adopted by the EU, the UN and NATO.[14] Although such documents make an important contribution to the development of customary international law and often reflect customary international law, the CAVV sees no indication that this is already the case in this particular instance and accordingly shares the Netherlands' view that principle has not attained the status of customary international law. At the same time, it attaches great value to this principle, and is particularly pleased that a consistent practice on this issue is emerging within organisations of which the Netherlands is a member.[15] Moreover, the draft principle appears to be sufficiently

[13] See Statement by Prof. Liesbeth Lijnzaad, legal adviser, Ministry of Foreign Affairs, Kingdom of the Netherlands, United Nations General Assembly, 71st session, Sixth Committee, agenda item 78, Report of the International Law Commission, cluster 3, chapter X, paras. 4-6. It should be noted that the United States also opposes the customary status of draft principles 7 and 27. See Statement of the United States of America, Sixth Committee Debate, agenda item 79: Report of the International Law Commission on the Work of its Seventy-first Session (A/74/10), 5 November 2019.

[14] The ILC's commentary refers to the following documents: European Union, 'Military Concept on Environmental Protection and Energy Efficiency for EU-led Military Operations', 14 September 2012, doc. EEAS 01574/12; NATO, 'Joint NATO Doctrine for Environmental Protection during NATO-led Military Activities', 8 March 2018, doc. NSO(Joint)0335(2018)EP/7141; and '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, UN doc. A/70/357-S/2015/682, para. 129. See ILC Report 2019, pp. 230-232. In addition, reference can be made to the strategy launched by the UN Department of Field Support in 2017.

[15] Besides the above-mentioned policy documents, it is worth mentioning the relevant practice of the UN Security Council in this regard. Five of the UN's current peace operations have been explicitly directed to monitor their ecological footprint: MINUSMA, UNSOS, UNAMID, MONUSCO and MINUSCA. See, for example, UN Security Council resolution 2387 (2017), para. 48, which requests MINUSCA 'to consider the environmental impacts of its operations when fulfilling its mandated tasks and, in this context, to manage them as appropriate and in accordance with applicable and relevant General Assembly resolutions and United Nations rules and regulations'.

flexible owing to the use of the words 'consider' and 'appropriate'. The CAVV therefore advises the Netherlands to support it.

Draft principles 24 and 27 both apply to post-conflict situations. Draft principle 24 formulates an obligation for states and international organisations to share information with each other and grant citizens access to information 'in accordance with their obligations under international law' with a view to facilitating remedial measures after armed conflicts.[16] The scope of this principle is unclear. It can be interpreted in two ways. The first is that the ILC seeks to indicate that the obligation of states and international organisations to share information with each other and grant citizens access to information is sufficiently grounded in international law. In this context, the reference to obligations under international law may be understood in the light of the treaties mentioned in the accompanying commentary, which determine the modalities and potential limitations of such an obligation.[17] The second way in which the draft principle can be interpreted is that the obligation to share and grant access to information only applies to the extent that it arises from existing obligations under international law. This interpretation is based on the following passage from the commentary: '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.'[18] The wording of this passage ('may have') suggests that the obligation does not apply to all states. More generally, the CAVV does not see sufficient evidence for the existence of such an obligation. International environmental law contains an obligation for states to share information,[19] but it is not general in scope. The CAVV therefore shares the Netherlands' view that this obligation is not sufficiently grounded in customary international law.[20]

Draft principle 27 formulates a best efforts obligation ('shall seek to') for parties to an armed conflict, including non-state armed groups, to remove or render harmless toxic and explosive remnants of

[16] Draft principle 24 (1) provides as follows: '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.'
[17] ILC Report 2019, p. 284, paras. 4 and 5.
[18] Ibid., para. 3.
[19] Under the principle of prevention, states must share information in cases involving a significant risk of cross-border environmental damage. See *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 14, paras. 101 and 102; *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, ICJ Reports 2015, 665, para. 107. Reference can also be made to reporting requirements under environmental treaties.
[20] See Statement by Prof. Liesbeth Lijnzaad, legal adviser, Ministry of Foreign Affairs, Kingdom of the Netherlands, United Nations General Assembly, 71st session, Sixth Committee, agenda item 78, Report of the International Law Commission, cluster 3, chapter X, paras. 4-6.

war. It also provides that '[s]uch measures shall be taken subject to the applicable rules of international law'.[21] This reference to international law appears to relate first and foremost to modalities and potential limitations. Moreover, the commentary and the 'without prejudice' clause in the third paragraph of the draft principle indicate that it is meant to complement existing treaty obligations.[22] The Netherlands has challenged both the customary status and the scope of this principle. It argues, firstly, that the principle is founded primarily on treaty provisions and, secondly, that those provisions do not cover every type of remnant listed in the draft principle.[23] The CAVV only partially agrees with the Netherlands' position. In this regard, it refers to developments in the field of international environmental law that may be relevant to the clearance of remnants of war, at least in so far as the obligations of states are concerned, such as the principle of prevention and the 'polluter pays' principle.

IV. Temporal approach to armed conflict

The title of the ILC study ('Protection of the environment in relation to armed conflicts') clearly indicates that the draft principles are intended to apply not only during armed conflicts but also to peacetime measures that are designed to prevent environmental damage during armed conflicts as much as possible. In addition, various draft principles provide guidelines for measures aimed at remediating environmental damage after armed conflicts. This temporal approach ('before, during or after an armed conflict') can count on strong support in the Sixth Committee (Legal) of the UN General Assembly.[24]

The Netherlands has endorsed the temporal approach, while reminding the ILC not to lose sight of the fact that the draft principles focus primarily on conflict situations and that any principles relating to the periods before or after an armed conflict should therefore be sufficiently specific in this regard.[25] The CAVV feels that the ILC has taken the Netherlands' position on board.

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[21] Draft principle 27 (1) states: '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.'

[22] Draft principle 27 (3) provides as follows: '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.'

[23] See Statement by Prof. Liesbeth Lijnzaad, legal adviser, Ministry of Foreign Affairs, Kingdom of the Netherlands, United Nations General Assembly, 71st session, Sixth Committee, agenda item 78, Report of the International Law Commission, cluster 3, chapter X, para. 5.

[24] See statements made during the 68th session of the Sixth Committee and the summary of the debate in the preliminary report of the special rapporteur, pp. 5-6.

[25] Statement by Prof. Liesbeth Lijnzaad, legal adviser, Ministry of Foreign Affairs, Kingdom of the Netherlands, United Nations General Assembly, 71st session, Sixth Committee, agenda item 78, Report of the International Law Commission, cluster 3, chapter X, paras. 2 and 3.

It proved difficult for the ILC to classify the draft principles based solely on the temporal approach.[26] The principles have been divided into five sections that broadly reflect the different phases of an armed conflict. Part One defines the scope and purpose of the draft principles. Part Two contains a number of general principles that apply to all phases of an armed conflict and a few that focus on measures that should be taken before an armed conflict. Part Three contains principles that apply during armed conflicts, while Part Four formulates principles that apply specifically to occupation situations. Part Five, finally, focuses exclusively on the situation after armed conflicts.

It is noteworthy that the principles that apply to occupation situations appear in a separate section, thus seemingly deviating from the temporal approach. The commentary explains this by pointing to the great variety of circumstances that characterise such situations, which may sometimes resemble active conflict situations and sometimes (relatively peaceful) post-conflict situations.[27] The exceptional status of occupation situations can also be explained by the fact that the occupying power exercises effective authority over the occupied territory and its population, which means that it may be expected to perform certain government functions. The Netherlands has endorsed the decision to include occupation situations in a separate section. In doing so, it has stated that it would like to see the inclusion of a draft principle declaring that Parts One, Two and Three also apply to occupations.[28] The CAVV notes that the ILC has not implemented this recommendation as such. However, an introduction containing a statement to this effect has been added to the commentary on Part Four.[29]

Finally, the temporal approach can sometimes lead to ambiguity. An example of this can be found in draft principle 13 ('General protection of the natural environment during armed conflict'), which forms the foundation of the principles that apply to environmental protection *during* armed conflicts. However, the commentary notes that the first paragraph of this principle, which states in a general fashion that '[t]he natural environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict', is relevant during all three

[26] Marja Lehto, 'Armed conflicts and the environment: The International Law Commission's new draft principles', *Review of European, Comparative and International Environmental Law*, vol. 29 (2020), pp. 67-75.
[27] ILC Report 2019, pp. 264-265.
[28] Statement on behalf of the Kingdom of the Netherlands by Liselot Egmond, legal adviser of the Permanent Mission of the Kingdom of the Netherlands to the United Nations, on agenda item 82, Report of the International Law Commission, cluster 3, chapter IX.
[29] ILC Report 2019, p. 268, para. 7.

phases (before, during and after an armed conflict).[30] There does not appear to be an easy way to resolve this ambiguity.

V. Dynamic integrated approach to the law of armed conflict

A key premise of the draft principles is that, although the law of armed conflict serves as *lex specialis* for protecting the environment during armed conflicts, international human rights law and international environmental law play a complementary role in this regard. By employing this integrated approach, the draft principles aim to follow the example set by the aforementioned ILC study on the effects of armed conflict on treaties. One of the main conclusions of this study was that the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties. In many cases, the employment of an integrated approach also gives rise to a dynamic interpretation of the rules of armed conflict, given that most of the relevant developments in the field of international environmental law and human rights law have occurred since the adoption of the applicable provisions of the law of armed conflict.

This approach has been taken furthest in the three draft principles that apply to occupation situations. Draft principle 20, which formulates the general obligations of an occupying power with regard to protecting the environment of the occupied territory, is based on existing state obligations under international humanitarian law (in particular article 43 of the 1907 Hague Convention on Land Warfare and article 55 of Additional Protocol I to the Geneva Conventions), human rights (in particular the rights to life, health and food) and environmental law (in particular the customary principle of prevention, or 'no harm' rule). The principle of prevention also forms the basis of draft principle 22, which formulates an obligation for occupying powers to exercise due diligence in respect of economic and other activities that could cause significant harm to the environment outside the occupied territory. Finally, draft principle 21, which concerns the sustainable use of natural resources in occupied territory, reformulates the principle of usufruct under article 55 of the 1907 Hague Convention on Land Warfare in the light of obligations arising under the customary principles concerning permanent sovereignty over natural resources and their sustainable use. An established doctrine such as the human right to water also provides relevant interpretive context here. In order to justify its decision to directly apply obligations under international human rights conventions and international environmental law to occupation situations, the ILC relies on judgments and decisions of international courts and tribunals, including the case law of the International Court of Justice concerning the application of human rights and environmental law to

[30] Ibid., p. 251, para. 5.

occupation situations, and on the aforementioned ILC provisions on the effects of armed conflict on the operation of treaties.[31]

In the past, the Netherlands has responded to the dynamic integrated approach with constructive criticism.[32] Thus, although it has endorsed the approach, it has also interpreted it in a narrow manner. More specifically, the Netherlands has indicated that it sees the clarification of the application of environmental law to armed conflicts as the main purpose of the ILC study.[33] The CAVV assumes that this does not mean that the Netherlands sees no role for other areas of law in providing environmental protection in conflict situations. This applies in particular to the role of human rights, given that severe environmental damage impedes the observance of various rights, including the right to life and the right to health.[34] This view also appears to be consistent with the general approach of the Netherlands, which, for example, has expressed explicit support for broadening the analysis of applicable human rights in the framework of draft principle 20.[35]

In addition, the Netherlands has repeatedly urged the ILC to refrain from making changes to the law of armed conflict,[36] in particular as regards the definition of the term 'armed conflict' itself. The Netherlands takes the view that this term is already defined in law and that it therefore does not require further definition in the draft principles.[37] Another example concerns the reformulation of the classic Martens clause, which appears in all treaties relating to the law of armed conflict. This clause aims to provide a safety net for individuals in cases where such treaties do not provide for protection appropriate to the specific situation. Draft principle 12 seeks to expand this safety net to

[31] Ibid., pp. 269-270.
[32] Statement by Marcel van den Bogaard, legal adviser, Permanent Mission of the Kingdom of the Netherlands, United Nations General Assembly, 69th session (2014), Sixth Committee, agenda item 78, Report of the International Law Commission, part 3, chapter XI, para. 3. Statement by Liselot Egmond, legal adviser, Permanent Mission of the Kingdom of the Netherlands to the United Nations, United Nations General Assembly, 72nd session (2017), Sixth Committee, agenda item 82, Report of the International Law Commission, cluster III, para. 14.
[33] Ibid.
[34] See Human Rights Committee, General Comment no. 36 on the right to life, CCPR/C/GC/36, 30 October 2018; International Committee on Economic, Social and Cultural Rights, General Comment no. 14 on the right to the highest attainable standard of health, E/C.12/2000/4, 11 August 2000. The judgment of the Supreme Court of the Netherlands in the *Urgenda* case follows a similar approach. See ECLI:NL:HR:2019:2006.
[35] Statement on behalf of the Kingdom of the Netherlands by Liselot Egmond, legal adviser, Permanent Mission of the Kingdom of the Netherlands to the United Nations, on agenda item 82, Report of the International Law Commission, cluster 3, chapter IX.
[36] Statement by Marcel van den Bogaard, legal adviser, Permanent Mission of the Kingdom of the Netherlands, United Nations General Assembly, 69th session (2014), Sixth Committee, agenda item 78, Report of the International Law Commission, part 3, chapter XI, para. 3; Statement by Marcel van den Bogaard, Legal adviser, Permanent Mission of the Kingdom of the Netherlands, United Nations General Assembly, 70th session (2015), Sixth Committee, agenda item 78, Report of the International Law Commission, part 3, chapter XI, para. 3.
[37] Ibid.

the environment by applying the Martens clause to the environment. It states: '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.' One of the aims of this clause is to protect the integrity of the environment itself.[38] This led to some discussion, both within the ILC and within the Sixth Committee of the UN General Assembly, not least on whether, and if so to what extent, the Martens clause – and more specifically the principles of humanity – constituted an appropriate tool for protecting the environment.[39] The CAVV observes that recent developments in the field of human rights protection have established a direct link between the quality of human life and health, on the one hand, and the existence of healthy ecosystems, on the other.[40] More generally, too, there appears to be a growing awareness that protecting the environment is of vital importance. The CAVV is of the opinion that these developments justify the proposed expansion of the Martens clause.

The CAVV is also of the opinion that a careful distinction should be made between 'redefinition' (giving a new meaning to an existing term) and 'reinterpretation' (giving a new interpretation to an existing rule). In general, the CAVV believes that redefinition is inappropriate. In contrast, reinterpretation of the law of armed conflict, as in the case of draft principle 21, may be necessary in order to ensure the continued relevance and unity of international law. This appears to be consistent with the position of the Netherlands, which has explicitly endorsed the reinterpretation of draft principle 21.[41]

The CAVV is further of the opinion that there is a need for greater guidance from the ILC as regards the interpretation and implications of certain rules. One example concerns draft principle 13 (2), which is based on the aforementioned duty of care of states as enshrined in article 55 (1) of Additional Protocol I to the Geneva Conventions (see section II above). This principle states that '[c]are shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage'. In the light of UNEP's specific request to the ILC to analyse the precise meaning

[38] International Law Commission, Second Report on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto, Special Rapporteur, UN doc. A/CN.4/728, 27 March 2019, pp. 80-81.
[39] See, *inter alia*, International Law Commission, seventy-first session, Provisional Summary Record of the 3465th Meeting, UN doc. A/CN.4/SR.3465 (2019), p. 15 (Sean Murphy) and Provisional Summary Record of the 3467th Meeting, UN doc. A/CN.4/SR.3467 (2019), p. 13 (Georg Nolte). See also the statements of Germany (https://papersmart.unmeetings.org/media2/23329141/-e-germany-statement-1-.pdf, para. 7) and Russia (https://papersmart.unmeetings.org/media2/23329111/-r-russian-federation-statement.pdf).
[40] See, *inter alia*, Human Rights Council, Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox, UN doc. A/HRC/25/53, 30 December 2013.
[41] Statement of the Netherlands, 73rd session.

of 'widespread, long-term and severe',[42] it is surprising that the commentary on draft principle 13 confines itself to noting that these terms are not defined in Additional Protocol I.[43] The CAVV believes that it would be desirable to include some guidance in the commentary on draft principle 13 (2). For example, the commentary could refer to the need to interpret this norm in accordance with the latest scientific insights into the various functions of ecosystems, as the International Court of Justice did in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*.[44]

A second example concerns draft principle 17 on protected zones, which reads as follows: '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.' The commentary clarifies that 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'.[45] At the same time, it states that '[t]here has to be an express agreement on the designation'.[46] The question arises as to how this principle relates to areas that are protected under major environmental treaties, such as the UNESCO World Heritage Convention, the Convention on Biological Diversity and the Ramsar Convention on the conservation of wetlands. Do such areas automatically count as 'protected zones' or do the parties to an armed conflict nevertheless have to conclude an agreement designating them as such? It would be helpful if the ILC could clarify the relationship between the various areas of law pertaining to this principle.

Finally, the ILC could clarify the relationship between draft principles 13, 14 and 15. Draft principle 13 seeks to lay down general rules for the protection of the environment deriving from different areas of law. Draft principle 14 provides that the law of armed conflict, in particular the fundamental principles of distinction, proportionality, military necessity and precaution, should be applied to the natural environment with a view to its protection. Draft principle 15 states that '[e]nvironmental considerations shall be taken into account when applying the principle of proportionality and the

[42] UNEP, Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law (2009), p. 53, para. 3.
[43] ILC Report 2019, p. 252, para. 8.
[44] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment, ICJ Reports 2018, p. 15, paras. 78-83. Draft principle 15 can serve as an example in this regard. It provides that '[e]nvironmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity', while the accompanying commentary explicitly refers to the need to interpret the term 'environmental considerations' in a dynamic manner. See ILC Report 2019, p. 257.
[45] ILC Report 2019, p. 260, para. 1.
[46] Ibid.

rules on military necessity'. The resulting framework is unclear on two points. First, there is a need to clarify the relationship between the duty of care to prevent 'widespread, long-term and severe damage' under draft principle 13 (2), on the one hand, and the application of the principles of the law of armed conflict under draft principle 14, on the other. The commentary states that the two principles should be read in conjunction but offers no further guidance regarding the relationship between them.[47] The second source of ambiguity concerns the relationship between draft principles 14 and 15. The commentary states that the two principles complement each other and that draft principle 15 seeks to elucidate the principles of military necessity and proportionality from an operational perspective, which would imply that it 'aims to address military conduct and does not deal with the process of determining what constitutes a military objective as such'.[48] This seems strange given that it may be assumed that the evaluation of the necessity and proportionality of military action already takes place under draft principle 14. The ILC also appears to rely on a fluid notion of military necessity, which the Netherlands has previously criticised.[49] The CAVV feels that draft principle 15 does not add anything significant to draft principle 14 and that it could be dropped.

VI. Lack of distinction between international and non-international armed conflicts

The draft principles do not distinguish between international and non-international armed conflicts. Any differences in the application of the principles to these two types of armed conflict are explained in the accompanying commentaries. This approach is based on the ILC's Draft Articles on the Effects of Armed Conflicts on Treaties (2011) and the approach adopted by the ICRC in its Customary International Humanitarian Law Study (2005). The Netherlands expressed its support for this approach during the 74th session of the Sixth Committee of the UN General Assembly.

In spite of this, the customary status of a few draft principles is open to question in so far as their application to non-international armed conflicts is concerned. This applies in particular to draft principle 13 (2), which has already been mentioned several times in this report. It contains a duty of care in respect of the environment during armed conflict, based on article 55 of Additional Protocol I to the Geneva Conventions, which applies to international armed conflicts. There is considerable support for the customary status of this principle,[50] but it is unclear whether it also applies to non-

[47] Ibid., p. 252, para. 9.
[48] Ibid., p. 257, para. 4.
[49] Statement by Marcel van den Bogaard, legal adviser, Permanent Mission of the Kingdom of the Netherlands, United Nations General Assembly, 70th Session (2015), Sixth Committee, agenda item 78, Report of the International Law Commission, part 3, chapter XI, paras. 4-6.
[50] See rule 45 of the ICRC Customary International Law Study. The United States can be classified as a 'persistent objector' in this regard.

international armed conflicts. In 2005, the ICRC was unable to find sufficient evidence to this effect.[51] The ILC's commentary confines itself to stating that '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'.[52] It accordingly makes no attempt to justify the application of the aforementioned rule to non-international armed conflicts. Perhaps this is best understood as an instance of the ILC exercising its mandate to promote the progressive development of international law.

Finally, the CAVV would like to express its appreciation for Special Rapporteur Marja Lehto's exceptionally thorough analysis of the international responsibility of organised armed groups in her second report.[53] Although the draft principles only touch on this issue indirectly, Lehto's analysis provides a clear theoretical basis for the future development of applicable law outside the framework of the present ILC study.

VII. Scope of the term 'environment'

An issue that has been discussed repeatedly, both within the ILC and within the Sixth Committee, is the definition of the term 'environment'.[54] An initial focus of this discussion is whether the draft principles should use the term 'natural environment', as employed in the law of armed conflict, or the more general term 'environment'. A final choice has yet to be made, despite the fact that it will definitely have implications for the scope of the protection. This is because protection of the 'natural environment' does not cover protection of the human environment, which includes artificial objects such as man-made water treatment plants.[55] The CAVV favours a broad approach that takes account of changes in our scientific understanding of the environment. From this perspective, it recommends using the term 'environment' and cautions against defining it in greater detail.[56]

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[51] Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law* (ICRC and Cambridge University Press, 2005), rule 45.
[52] ILC Report 2019, p. 252, para. 7.
[53] International Law Commission, Second Report on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto, Special Rapporteur, UN doc. A/CN.4/728, 27 March 2019, paras. 51-58.
[54] During the 74th session of the Sixth Committee, for example, this issue was raised by various countries, including Lebanon and Morocco. See https://papersmart.unmeetings.org/media2/23329103/-f-lebanon-statement.pdf for the Lebanon's statement and https://papersmart.unmeetings.org/media2/23329104/-f-morocco-statement.pdf for Morocco's statement.
[55] However, it can be inferred from the commentary on article 55 of Additional Protocol I that the term 'natural environment' is already fairly broad, since it may be understood to include agricultural areas. See Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC and Martinus Nijhoff Publishers, 1987), para. 2126: 'The concept of the natural environment should be understood in the widest sense to cover the biological environment in which a population is living.'
[56] The Special Rapporteur proposed a similar approach. See UN doc. A/CN.4/SR.3464.

The above-mentioned terminological issues are connected to more fundamental questions concerning the scope of the draft principles, especially as to whether they should cover the cultural aspects of environmental protection. This concerns draft principles 4 and 17, which focus in part on the protection of areas of cultural importance, and draft principle 5, which proposes special measures to protect the living environment of indigenous peoples. These principles have been criticised in so far as they appear to go beyond the objectives of the ILC study.[57] With regard to draft principle 5, the Netherlands has explicitly stated its position that 'the fact that [indigenous peoples] have a special relationship with their land and the living environment in itself seems insufficient reason to include this matter in draft principles on protection of the environment in armed conflicts'. The CAVV does not support this position. Draft principle 5 merely seeks to highlight the fact that the special relationship between indigenous peoples and their living environment has specific implications in the context of armed conflicts and with regard to remedial measures after armed conflicts. Draft principle 5 is thus very much compatible with the dynamic integrated approach that characterises the draft principles. Moreover, it is only a recommendation ('should').

VIII. Environmental damage external to hostilities

The draft principles also focus on two other prevalent forms of environmental damage during armed conflicts, especially non-international armed conflicts.[58] These are damage to vulnerable nature areas resulting from the reception of displaced persons (draft principle 8) and damage resulting from the illegal exploitation of natural resources (draft principles 10, 11, 18 and, indirectly, 21). The CAVV believes that these draft principles play an important role in the development of law in this area.

This is especially true of draft principles 10 and 11, which focus on the responsibility of states for corporations and other business enterprises that operate or purchase natural resources in conflict areas. It goes without saying that the Netherlands, which is home to a large number of international companies, attaches great importance to these draft principles. In keeping with the objectives of the ILC study, these principles specifically apply to situations that are linked to armed conflicts. This does not mean that draft principles 10 and 11 cannot apply to other types of situations. In fact, both principles are grounded in wider processes of legal development that seek to promote corporate social responsibility, especially in the field of human rights. Key initiatives in this area include the UN

[57] For opinions on draft principle 5, see First Report on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto, Special Rapporteur, UN doc. A/CN.4/720, 30 April 2018, p. 6, para. 9.
[58] D. Jensen and S. Lonergan, 'Natural Resources and Post-conflict Assessment, Remediation, Restoration and Reconstruction: Lessons and Emerging Issues', in D. Jensen and S. Lonergan (eds.), *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding* (Earthscan, 2012), p. 414.

Guiding Principles on Business and Human Rights, the revised OECD Guidelines for Multinational Enterprises and the development of a dedicated treaty at the initiative of the Human Rights Council.[59]

Draft principle 10 advises states to take 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 […] when acting in an area of armed conflict or in a post-armed conflict situation'. This recommendation is based, *inter alia*, on UN and OECD guidelines that apply to companies operating in states where an armed conflict is taking or has recently taken place or in other high-risk areas.[60] Draft principle 10 translates relevant developments in the field of human rights protection to the area of environmental protection. This is justified on the basis of the increasing integration of international human rights and environmental law.[61] Remarkably, the last sentence of draft principle 10 states that 'such measures include those aimed at ensuring that natural resources are purchased or obtained in an environmentally sustainable manner'. Although this 'supply chain due diligence' is based mainly on guidelines and legislation developed to counter the trade in conflict minerals, these rules also indirectly protect the environment.[62] In fact, the reason that the current ILC study includes principles concerning the illegal exploitation of natural resources is directly related to the environmental damage such exploitation causes. In addition, there are initiatives that already provide a basis for expanding such principles to the field of environmental protection. This applies, in particular, to the Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains,[63] which are based on the above-mentioned OECD guidelines. The OECD

[59] UNHRC, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN doc. A/HRC/17/31, 21 March 2011, Annex; OECD Guidelines for Multinational Enterprises (OECD Publishing, 2011); and Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, 16 July 2019.

[60] See, *inter alia*, Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: A Resource for Companies and Investors (UN Global Compact/PRI, 2010), p. 7; OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, 3rd ed. (2016), p. 13.

[61] See, *inter alia*, UNHRC, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN doc. A/HRC/37/59, 24 January 2018.

[62] OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, 3rd ed. (2016); 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, OJ 2017 L 130.

[63] China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters, Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains (2015), http://mneguidelines.oecd.org/chinese-due-diligence-guidelines-for-responsible-mineral-supply-chains.htm. For a comparison of these instruments, see Daniëlla Dam-de Jong, 'Internationale instellingen en de aanpak van conflictgrondstoffen', in H. de Coninck, M. Hurenkamp, L. Melsen and H. Opschoor (eds.), *Rood-groene Politiek voor de 21e Eeuw: Een Pact tussen Generaties* (Van Gennep, 2017), pp. 167-184.

Guidelines for Multinational Enterprises and the Equator Principles for the financial sector are also worth mentioning in this context, although they were not specifically designed to be applied in the context of armed conflicts.[64]

Draft principle 11 advises states to take appropriate legislative and other measures to ensure that companies operating in or from their territories can be held liable for causing harm to the environment in conflict or post-conflict situations. This principle is explicitly limited to damage that is caused by companies themselves and therefore does not apply to damage caused by business partners in the context of due diligence obligations. On the other hand, it explicitly refers to the liability of subsidiaries. Draft principle 11 stems directly from the UN Guiding Principles for Business and Human Rights. In addition, it is based on an emerging state practice concerning corporate liability for human rights violations and environmental damage.[65]

The CAVV takes the view that the ILC's broader approach to the connection between environmental damage and armed conflict is extremely valuable. Under this approach, the link to armed conflict remains sufficiently clear, given that the damage concerned can be attributed to armed conflict in both of the above-mentioned cases (i.e. the reception of persons displaced by an armed conflict and the exploitation of natural resources as a means of funding the conflict). In addition, the principles that aim to increase state responsibility for environmental damage caused by corporate actors are key to preventing companies from causing serious harm to the environment in conflict areas precisely because they place an additional responsibility on states that are generally in a stronger economic and political position than states where an armed conflict is taking place. This additional responsibility is in keeping with a broader legal development relating to the exercise of jurisdiction by strong states in connection with the activities of multinational enterprises in weaker states. While this practice is somewhat controversial on the grounds that it potentially violates the sovereignty of weaker states, such objections are far less persuasive in the context of situations of armed conflict, where national institutions often function poorly, if at all. Moreover, reconstruction is a long-term process.

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[64] OECD Guidelines for Multinational Enterprises (OECD Publishing, 2011); The Equator Principles: A Financial Industry Benchmark for Determining, Assessing and Managing Environmental and Social Risk in Projects (July 2020), https://equator-principles.com.

[65] The commentary and the underlying report refer to a rich body of case law, including the judgment of The Hague District Court in *Akpan v. Royal Dutch Shell PLC*, ECLI:NL:RBDHA:2013:BY9854. See ILC Report 2019, pp. 243-247; International Law Commission, Second Report on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto, Special Rapporteur, UN doc. A/CN.4/728, 27 March 2019. In addition to this case law, there is a growing practice among states to adopt relevant legislation. See, for example, the French 'Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre', *Journal Officiel de la République Française,* no. 74, 28 March 2017.

IX. Evaluation

In general, the CAVV welcomes the draft principles on the protection of the environment in relation to armed conflicts and the exceptionally thorough study that preceded their adoption. In particular, it attaches great importance to the ILC's temporal approach, which gives the principles added value compared to other initiatives. Moreover, the dynamic integrated approach demonstrates the relevance of areas of law other than the law of armed conflict to the protection of the environment during such conflicts. The present advisory report also identifies some areas for improvement, such as the need to clarify the applicable law during an armed conflict in the case of certain principles. This recommendation pertains, in particular, to the applicability of environmental treaties (draft principle 17) and the standard for impermissible environmental damage (draft principle 13 (2)) during armed conflicts. In addition, the ILC could further clarify the normative status of draft principles 24 and 27 and the relationship between draft principles 13, 14 and 15.

The CAVV believes that the ILC study provides a valuable contribution to the consolidation and development of international law and accordingly advises the Minister of Foreign Affairs to endorse these principles.