

United Nations Environment Programme (UNEP) Comments on International Law Commission (ILC) Draft Principles on
Protection of the Environment in Relation to Armed Conflicts
23 November 2020

| Draft Principle / Section | UNEP Comment | Additional Sources |
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| <p>Principle 1 Scope</p> <p>The present draft principles apply to the protection of the environment before, during or after an armed conflict.</p> | <p>It should be noted that within the ILC process, the former Special Rapporteur has suggested working definitions of both “armed conflict” and “environment,” and the inclusion of definitions for these terms would be useful in promoting coherence among legal frameworks on this topic.</p> <p>The draft principles should consider the distinction between internal and international armed conflicts more specifically, although the principles are generally understood to address both. It should be noted that when considering “armed conflict,” over 40 percent of <i>internal</i> armed conflicts over the last 60 years are linked to natural resource issues, and “maintaining a peaceful society depends on vindication of environment-related rights.” Given that most armed conflicts today are non-international or civil wars, much of the existing legal framework does not necessarily apply and thus requires special consideration in extending the application of existing obligations and norms.</p> | <p>UN Doc. A/70/10, para 153.</p> <p>While some members of the Drafting Committee were reluctant to include the definitions, others considered that “such a provision would assist in properly determining the scope of the text and clarify the subject matter at hand.”</p> <p>UNEP, <i>Environmental Rule of Law: First Global Report</i>, p. 19.</p> <p>UNEP, <i>Protecting the Environment During Armed Conflict: an Inventory and Analysis of International Law</i>, at 6. “Clarification is urgently needed, for example, for extending applicable rules to non-international armed conflicts.”</p> |

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| <p>Principle 2 Purpose</p> <p>The present draft principles are aimed at enhancing the protection of the environment in relation to armed conflict, including through preventive measures for minimizing damage to the environment during armed conflict and through remedial measures.</p> | <p>It should be added that “preventative measures” include <i>[avoiding]</i> and minimizing damage to the environment.</p> | <p>UNEP, <i>Protecting the Environment During Armed Conflict: an Inventory and Analysis of International Law</i>, a 20.</p> <p>ICRC, Customary International Humanitarian Law, Vol. 1: Rules, at 147. “Rule 44. Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken <i>to avoid</i>, and in any event to minimize, incidental damage to the environment....” (emphasis added).</p> |
| <p>Part Two [One] Principles of general application</p> | <p>Principles of general application should include the gender dimension with respect to armed conflicts, the environment, and peacebuilding.</p> | <p>UNEP/EA.2/15 (27 May 2016), “Recognizing further the specific negative effects of environmental degradation on women and the need to apply a gender perspective with respect to the environment and armed conflicts.”</p> |
| <p>Part Two [One] Principles of general application</p> <p>Principle 3 [4] Measures to enhance the protection of the environment</p> <p>1. States shall, pursuant to their obligations under international law, take</p> | <p>The principle should include reference to “strengthening environmental rule of law.”</p> <p>The principles should clarify to what extent and by what means of determining the international obligations of states includes the ongoing obligations of</p> | <p>UNEP/GC.27/9 (2013).</p> <p>UNEP, <i>Environmental Rule of Law: First Global Report</i>, p. 231-232: “Before, during, and after conflict, conditions of weak environmental rule of law enable illicit, and often harmful, exploitation of natural resources...”</p> |

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| <p>effective legislative, administrative, judicial and other measures to enhance the protection of the environment in relation to armed conflict.</p> <p>2. In addition, States should take further measures, as appropriate, to enhance the protection of the environment in relation to armed conflict.</p> | <p>multilateral environmental agreements (MEAs)..</p> | <p>Strengthening environmental rule of law – including a sound legal framework, institutional capacity, and functional mechanisms for peacefully resolving disputes – is an important means to prevent or mitigate the effects of the resource curse and address grievances that could escalate to violence, and thus a priority for conflict prevention.”</p> <p>UNEP, <i>Protecting the Environment During Armed Conflict: an Inventory and Analysis of International Law</i>, at 5, 43-58, noting that “the provisions of multilateral environment agreements (MEAs) should be regarded as continuing to apply during both international and non-international armed conflict, unless they specifically stipulate otherwise.... MEAs deal with various areas and subjects of protection.”</p> |
| <p>Part Two [One] Principles of general application</p> <p>Principle 4 [I-(x), 5] Designation of protected zones</p> <p>States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones.</p> | <p>It may be noted that damage to certain components of a natural environment, including endangered species or particularly delicate or sensitive ecosystems, will <i>later result in a greater level of damage</i>, including direct and indirect effects on the natural environment and the population.</p> | <p>UNEP, <i>Integrating Environment in Post-Conflict Needs Assessments: UNEP Guidance Note</i> (March 2009).</p> <p>“Warfare in Biodiversity Hotspots,” <i>Conservation Biology</i>, Vol. 23, No. 3, 578-587, finding that over 90 percent of major armed conflicts between 1950 – 2000 occurred in countries containing biodiversity hotspots, “with more than</p> |

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| | <p>While some MEAs are referenced in the commentary as guidelines to determine areas of “major environmental and cultural importance,” clarification of the ongoing obligations of MEAs during armed conflict could also be useful here.</p> | <p>80% of these conflicts taking place directly in the biodiversity hotspot areas.”</p> <p>IISD, <i>MEAs, conservation and conflict – A case study of Virunga National Park, DRC</i> (2008).</p> |
| <p>Part Two [One] Principles of general application</p> <p>Principle 5 [6] Protection of the environment of indigenous peoples</p> <p>1. States should take appropriate measures, in the event of an armed conflict, to protect the environment of the territories that indigenous peoples inhabit.</p> <p>2. After an armed conflict that has adversely affected the environment of the territories that indigenous peoples inhabit, States should undertake effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and in particular through their own representative institutions, for the purpose of taking remedial measures.</p> | <p>Principle 5(1), in accordance with 5(2), should include the importance of the protection of the environment of indigenous peoples through effective consultation with indigenous peoples.</p> | <p>A/CN.4/720, where the Special Rapporteur noted some arguments for the inclusion of addressing “the obligations of belligerents to take into consideration the traditional knowledge and practices of indigenous peoples in relation to their natural environment,” seeking consultation of affected indigenous peoples not only following an armed conflict, but before, during, and after conflict.</p> <p>UNEP, <i>Environmental Rule of Law: First Global Report</i>, p. 162, recognizing that indigenous communities are often accorded additional protections given their close economic and cultural association with the environment and their traditional disempowerment from legal and governmental systems.</p> |

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| <p>Part Two [One] Principles of general application</p> <p>Principle 6 [7] Agreements concerning the presence of military forces in relation to armed conflict</p> <p>States and international organizations should, as appropriate, include provisions on environmental protection in agreements concerning the presence of military forces in relation to armed conflict. Such provisions may include preventive measures, impact assessments, restoration and clean-up measures.</p> | | |
| <p>Part Two [One] Principles of general application</p> <p>Principle 7 [8] Peace operations</p> <p>States and international organizations involved in peace operations in relation to armed conflict shall consider the impact of such operations on the environment and take appropriate measures to prevent, mitigate and remediate the negative environmental consequences thereof.</p> | | |

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| <p>Part Two [One] Principles of general application</p> <p>Principle 8 Human displacement</p> <p>States, international organizations and other relevant actors should take appropriate measures to prevent and mitigate environmental degradation in areas where persons displaced by armed conflict are located, while providing relief and assistance for such persons and local communities.</p> | <p>Noting that the commentary of the principle includes consideration of both international and internal displacement, and that oftentimes the movement of displaced persons contributes heavily both directly and indirectly to the damage of the environment, the text may include “<i>areas relating to both the movement and relocation of displaced persons</i>” rather than “where persons displaced by armed conflict are located.”</p> | <p>D. Jensen and S. Lonergan, “Natural resources and post-conflict assessment, remediation, restoration and reconstruction: lessons and emerging issues,” <i>Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding</i>, pp. 411–450, finding that “Human displacement is one of the six principal pathways for direct environmental damage in conflict.”</p> |
| <p>Part Two [One] Principles of general application</p> <p>Principle 9 State responsibility</p> <p>1. An internationally wrongful act of a State, in relation to an armed conflict, that causes damage to the environment entails the international responsibility of that State, which is under an obligation to make full reparation for such damage, including damage to the environment in and of itself.</p> | | <p>The commentary here could include reference to the 2016 ICC Office of the Prosecutor Policy Paper on Case Selection and Prioritization, at 41: “The impact of the crimes may be assessed in light of, inter alia, the increased vulnerability of victims, the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities. In this context, the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation</p> |

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| <p>2. The present draft principles are without prejudice to the rules on the responsibility of States for internationally wrongful acts.</p> | | <p>of natural resources or the illegal dispossession of land.”</p> |
| <p>Part Two [One] Principles of general application</p> <p>Principle 10 Corporate due diligence</p> <p>States should take appropriate legislative and other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories exercise due diligence with respect to the protection of the environment, including in relation to human health, when acting in an area of armed conflict or in a post-armed conflict situation. Such measures include those aimed at ensuring that natural resources are purchased or obtained in an environmentally sustainable manner.</p> | | |
| <p>Part Two [One] Principles of general application</p> <p>Principle 11 Corporate liability</p> <p>States should take appropriate legislative and other measures aimed at ensuring that</p> | <p>This principle should be broadened to reference not only the relevant <i>de facto</i> test for subsidiaries of corporations, but also the oftentimes occurrence of corporations aiding and abetting parties in causing environmental damage or looting</p> | <p>UNEP, <i>Protecting the Environment During Armed Conflict: an Inventory and Analysis of International Law</i>, at 51: Given that most armed conflicts today are non-international or civil wars, much of the existing legal framework does not</p> |

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| <p>corporations and other business enterprises operating in or from their territories can be held liable for harm caused by them to the environment, including in relation to human health, in an area of armed conflict or in a post-armed conflict situation. Such measures should, as appropriate, include those aimed at ensuring that a corporation or other business enterprise can be held liable to the extent that such harm is caused by its subsidiary acting under its <i>de facto</i> control. To this end, as appropriate, States should provide adequate and effective procedures and remedies, in particular for the victims of such harm.</p> | <p>natural resources, particularly in internal armed conflicts to support civil war parties.</p> | <p>necessarily apply. This legal vacuum is a major obstacle for preventing the often serious environmental damage inflicted during internal conflicts. There are also no institutionalized mechanisms to prevent the looting of natural resources during armed conflict or to restrict the granting of concessions by combatants that may lack legitimacy or legal authority. In addition, there are no systematic mechanisms to prevent States or corporations from aiding and abetting civil war parties in causing environmental damage or looting natural resources.</p> |
| <p>Part Three [Two] Principles applicable during armed conflict</p> <p>Principle 12 Martens Clause with respect to the protection of the environment in relation to armed conflict</p> <p>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</p> | | |

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| <p>principles of humanity and from the dictates of public conscience.</p> | | |
| <p>Part Three [Two] Principles applicable during armed conflict</p> <p>Principle 13 [II-1, 9] General protection of the natural environment during armed conflict</p> <ol style="list-style-type: none"> 1. The natural environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict. 2. Care shall be taken to protect the natural environment against widespread, long-term and severe damage. 3. No part of the natural environment may be attacked, unless it has become a military objective. | <p>Here, too, the principle and commentary should clarify determining the ongoing obligations of MEAs.</p> <p>Part 3 omits the complete formulation of ICRC Customary International Humanitarian Law Rule 43, which 1) allows the natural environment to be attacked as a military objective. The two other components of Rule 43 should be included: 2) that destruction of any part of the natural environment is prohibited, unless required by imperative military necessity; and 3) that launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.</p> | <p>UNEP, <i>Protecting the Environment During Armed Conflict: an Inventory and Analysis of International Law</i>, at 5, 43-58, noting that “the provisions of multilateral environment agreements (MEAs) should be regarded as continuing to apply during both international and non-international armed conflict, unless they specifically stipulate otherwise.... MEAs deal with various areas and subjects of protection.”</p> <p>Additional sources on the threshold definition of “widespread, long-term and severe damage” to a natural environment include Dieter Fleck, “Legal Protections of the Environment: the Double Challenge of Non-International Armed Conflict and Post-Conflict Rebuilding,” p. 203-218, and <i>Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices</i>, p. 203-204 (2017).</p> <p>ICRC, Customary International Humanitarian Law, Vol. 1: Rules; <i>see also</i> UNEP, <i>Protecting the Environment During Armed Conflict: an Inventory and Analysis of International Law</i>, at 21.</p> |

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| <p>Part Three [Two] Principles applicable during armed conflict</p> <p>Principle 14 [II-2, 10] Application of the law of armed conflict to the natural environment</p> <p>The law of armed conflict, including the principles and rules on distinction, proportionality, military necessity and precautions in attack, shall be applied to the natural environment, with a view to its protection.</p> | <p>Noting that the draft principle is of general character and does not elaborate on how to interpret the well-established principles of law contained in Principle 14, it may include precautions [<i>in the absence of scientific certainty about the likely effects of a weapon</i>] on the environment.</p> | <p>UNEP, <i>Protecting the Environment During Armed Conflict: an Inventory and Analysis of International Law</i>, at 5, 18, emphasizes the importance of taking a precautionary approach in the absence of scientific certainty about the likely effects of a particular weapon on the environment.</p> |
| <p>Part Three [Two] Principles applicable during armed conflict</p> <p>Principle 15 [II-3, 11] Environmental considerations</p> <p>Environmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity.</p> | | |
| <p>Part Three [Two] Principles applicable during armed conflict</p> | | |

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| <p>Principle 16 [II-4, 12] Prohibition of reprisals</p> <p>Attacks against the natural environment by way of reprisals are prohibited.</p> | | |
| <p>Part Three [Two] Principles applicable during armed conflict</p> <p>Principle 17 [II-5, 13] Protected zones</p> <p>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.</p> | <p>Here, too, the commentary should explicitly contemplate the ongoing obligations of MEAs, and whether the commentary’s definition of “agreement,” 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, also includes MEAs which do not explicitly suspend provisions during times of armed conflict.</p> | <p>IISD, <i>MEAs, conservation and conflict – A case study of Virunga National Park, DRC</i> (2008).</p> <p>UNEP, <i>Protecting the Environment During Armed Conflict: an Inventory and Analysis of International Law</i>, at 5, 43-58, noting that “the provisions of multilateral environment agreements (MEAs) should be regarded as continuing to apply during both international and non-international armed conflict, unless they specifically stipulate otherwise.”</p> <p>Sjostedt, B., <i>Protecting the Environment in Relation to Armed Conflict: The Role of Multilateral Environmental Agreements</i>, Dissertation, Faculty of Law, Lund University (2016).</p> |
| <p>Part Three [Two] Principles applicable during armed conflict</p> | | |

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| <p>Principle 18 Prohibition of pillage</p> <p>Pillage of natural resources is prohibited.</p> | | |
| <p>Part Three [Two] Principles applicable during armed conflict</p> <p>Principle 19 Environmental modification techniques</p> <p>In accordance with their international obligations, States shall not engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State.</p> | <p>Although the principles are generally understood to address both internal and international armed conflicts, this provision relates only to State actors and should include [<i>non-state actors</i>].</p> | |
| <p>Part Four Principles applicable in situations of occupation</p> <p>Principle 20 [19] General obligations of an Occupying Power</p> <p>1. An Occupying Power shall respect and protect the environment of the occupied territory in accordance with applicable international law and take environmental</p> | | |

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| <p>considerations into account in the administration of such territory.</p> <p>2. An Occupying Power shall take appropriate measures to prevent significant harm to the environment of the occupied territory that is likely to prejudice the health and well-being of the population of the occupied territory.</p> <p>3. An Occupying Power shall respect the law and institutions of the occupied territory concerning the protection of the environment and may only introduce changes within the limits provided by the law of armed conflict.</p> | | |
| <p>Part Four Principles applicable in situations of occupation</p> <p>Principle 21 [20] Sustainable use of natural resources</p> <p>To the extent that an Occupying Power is permitted to administer and use the natural resources in an occupied territory, for the benefit of the population of the occupied territory and for other lawful purposes under the law of armed conflict, it shall do so in a way that ensures their</p> | | |

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| <p>sustainable use and minimizes environmental harm.</p> | | |
| <p>Part Four Principles applicable in situations of occupation</p> <p>Principle 22 [21] Due diligence</p> <p>An Occupying Power shall exercise due diligence to ensure that activities in the occupied territory do not cause significant harm to the environment of areas beyond the occupied territory.</p> | | |
| <p>Part Five [Three] Principles applicable after armed conflict</p> <p>Principle 23 [14] Peace processes</p> <p>1. Parties to an armed conflict should, as part of the peace process, including where appropriate in peace agreements, address matters relating to the restoration and protection of the environment damaged by the conflict.</p> | | |

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| <p>2. Relevant international organizations should, where appropriate, play a facilitating role in this regard.</p> | | |
| <p>Part Five [Three] Principles applicable after armed conflict</p> <p>Principle 24 [18] Sharing and granting access to information</p> <p>1. To facilitate remedial measures after an armed conflict, States and relevant international organizations shall share and grant access to relevant information in accordance with their obligations under international law.</p> <p>2. Nothing in the present draft principle obliges a State or international organization to share or grant access to information vital to its national defense or security. Nevertheless, that State or international organization shall cooperate in good faith with a view to providing as much information as possible under the circumstances.</p> | <p>Noting the commentary’s references to international and regional environmental obligations on granting access to information, here, too, it should be noted that vulnerable groups, including women, children, and indigenous communities are accorded additional protections relating to the environment.</p> | <p>UNEP, <i>Environmental Rule of Law: First Global Report</i>, p. 162, recognizing that indigenous communities are often accorded additional protections given their close economic and cultural association with the environment and their traditional disempowerment from legal and governmental systems.</p> <p>UNEP/EA.2/15 (27 May 2016), “Recognizing further the specific negative effects of environmental degradation on women and the need to apply a gender perspective with respect to the environment and armed conflicts.”</p> |

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| <p>Part Five [Three] Principles applicable after armed conflict</p> <p>Principle 25 [15] Post-armed conflict environmental assessments and remedial measures</p> <p>Cooperation among relevant actors, including international organizations, is encouraged with respect to post-armed conflict environmental assessments and remedial measures.</p> | <p>Principle should highlight the importance of public participation and access to information.</p> <p>Should add [<i>and other follow-up measures</i>], to increase systematic attention to remedial measures following assessment.</p> | <p>UNEP, <i>Integrating Environment in Post-Conflict Needs Assessments: UNEP Guidance Note</i> (March 2009). Recognizing that, often, “natural resource allocation and management is done in an ad-hoc, decentralized, or informal manner” in post-conflict contexts.</p> |
| <p>Part Five [Three] Principles applicable after armed conflict</p> <p>Principle 26 Relief and assistance</p> <p>When, in relation to an armed conflict, the source of environmental damage is unidentified, or reparation is unavailable, States are encouraged to take appropriate measures so that the damage does not remain unrepaired or uncompensated, and may consider establishing special compensation funds or providing other forms of relief or assistance.</p> | <p>This principle should include States [<i>and international organizations</i>] to take appropriate measures.</p> | |

Part Five [Three]

Principles applicable after armed conflict

Principle 27 [16] Remnants of war

1. After an armed conflict, parties to the conflict shall seek to remove or render harmless toxic and hazardous remnants of war under their jurisdiction or control that are causing or risk causing damage to the environment. Such measures shall be taken subject to the applicable rules of international law.
2. The parties shall also endeavour to reach agreement, among themselves and, where appropriate, with other States and with international organizations, on technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations to remove or render harmless such toxic and hazardous remnants of war.
3. Paragraphs 1 and 2 are without prejudice to any rights or obligations under international law to clear, remove, destroy or maintain minefields, mined areas, mines, booby-traps, explosive ordnance and other devices.

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| <p>Part Five [Three] Principles applicable after armed conflict</p> <p>Principle 28 [17] Remnants of war at sea</p> <p>States and relevant international organizations should cooperate to ensure that remnants of war at sea do not constitute a danger to the environment.</p> | | |
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