

INTERNATIONAL LAW COMMISSION  
Seventieth session  
New York, 30 April – 1 June, and Geneva, 2 July – 10 August 2018

**PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED  
CONFLICTS**

**Statement of the Chairperson of the Drafting Committee**

**Mr. Charles Chernor Jalloh**

**26 July 2018**

Mr. Chair,

It is my pleasure to introduce the sixth report of the Drafting Committee for the seventieth session of the International Law Commission, which concerns the topic “Protection of the environment in relation to armed conflicts”. The report, which is to be found in document A/CN.4/L.911, contains the texts and titles of the draft principles provisionally adopted by the Drafting Committee at the present session.

Before commencing, allow me to pay tribute to the Special Rapporteur, Ms Marja Lehto, whose mastery of the subject, guidance and cooperation greatly facilitated the work of the Drafting Committee. I also thank the other members of the Committee for their active participation and significant contributions. Furthermore, I wish to thank the Secretariat for its invaluable assistance. As always, and on behalf of the Drafting Committee, I am pleased to extend my appreciation to the interpreters.

The Drafting Committee devoted three meetings, from 17 to 19 July, to its consideration of this topic. It examined the three draft principles initially proposed by the Special Rapporteur in her first report (A/CN.4/720), together with a number of reformulations that were proposed by the Special Rapporteur to the Drafting Committee in order to respond to suggestions made, or concerns raised, during the debate in Plenary and in the Drafting Committee. The Drafting Committee provisionally adopted, at the present session, a total of three draft principles on this topic.

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Mr. Chair,

Before addressing the three draft principles provisionally adopted by the Drafting Committee, I would like to recall that a number of suggestions for additional draft principles were made during the plenary debate. Those were carefully considered by the Drafting Committee.

First, members of the Drafting Committee discussed whether it would be appropriate to adopt a separate draft principle on the applicability of the law of occupation to international organizations. After a thorough debate, members considered that the issue would be best addressed in the commentary, given that although international organizations may exercise functions similar to occupying States in certain circumstances, the international administration of a territory could not easily be equated to a military occupation, and there was little practice to build on. The Drafting Committee agreed with the proposal by the Special Rapporteur to use the term “Occupying Power” in the draft principles, thus leaving the door open to possible future developments.

Second, in light of a proposal that had been made in plenary and that obtained the support of many other members, a debate also took place regarding whether to include a provision indicating that draft principles already adopted applied *mutatis mutandis* to situations of occupation. Members of the Drafting Committee ultimately considered that the interrelationship with other draft principles should be explained in a general commentary to Part Four.

Mr. Chair,

I shall now introduce the three draft principles provisionally adopted by the Drafting Committee. These draft principles are placed in Part Four of the draft principles entitled “Principles applicable in situations of occupation”.

Let me turn first to draft principle 19.

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## **Draft principle 19 - General obligations of an Occupying Power**

Draft principle 19 is entitled “General obligations of an Occupying Power”. It comprises three paragraphs.

Paragraph 1 reads as follows:

“An Occupying Power shall respect and protect the environment of the occupied territory in accordance with applicable international law and take environmental considerations into account in the administration of such territory.”

As indicated by the Special Rapporteur in her report, the law of occupation is based primarily on the Hague Regulations of 18 October 1907 complemented by Article 47 of the Fourth Geneva Convention, which refers only indirectly to the protection of the environment, as well as certain provisions of Additional Protocol I and customary international humanitarian law. The obligations of an Occupying Power must nevertheless be interpreted within the current legal context, which includes rules pertaining to environmental concerns as an essential interest of all States. The purpose of paragraph 1 is to set forth this general obligation of an Occupying Power. Furthermore, this draft principle derives from the general thrust of Article 43 of the Hague Regulations of 1907, which imposes the obligation of an Occupying Power to take care of the welfare of the population of an occupied territory.

In her introduction of the report to the plenary, the Special Rapporteur had proposed a reformulation of paragraph 1, as proposed in the first report, to align it with paragraph 50 of her report. The Drafting Committee proceeded on that basis.

The Drafting Committee considered appropriate to use the term “Occupying Power” rather than the term “occupying State”, which was referred to in the report, since the former was a term of art used in the Fourth Geneva Convention and Additional Protocol I. In view of the debate I just mentioned regarding the role of international organizations, it also has the advantage of leaving the door open for any further development in this regard and to provide some elements in the commentary.

The law of occupation is a subset of the law of armed conflict and draft principle 19 shall be read in the context of draft principle 9, which provides that “[t]he natural environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.” In this regard, both draft principles refer

to the obligation to “respect and protect” the environment in accordance with applicable international law, although draft principle 19 does so in the more specific context of occupation. Applicable international law refers, in particular, to the law of armed conflict, but also to international environmental law and international human rights law.

Members of the Drafting Committee also discussed the meaning of the terms “environmental considerations” in paragraph 1 of Draft Principle 19. They generally agreed with the Special Rapporteur that such expression was context-dependent and evolving and would need to be clarified in the commentary.

Finally, further to the concerns expressed by some members during the Plenary debate, the Drafting Committee accepted the proposal of the Special Rapporteur to omit the reference to “adjacent maritime areas over which the territorial State is entitled to exercise sovereign rights”, since this element was not necessary in the text of the provision itself and could be explained in the commentary.

Mr. Chair,

Let me turn to paragraph 2, which reads as follows:

“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.”

During our Plenary debate, a number of members suggested the adoption of an additional provision to address human rights relevant to environmental protection and specific proposals were made in this respect. Paragraph 2 is an additional paragraph that was adopted to address these comments.

The purpose of paragraph 2 is to indicate that significant harm to the environment of an occupied territory may have adverse consequences on the population of the occupied territory, in particular with respect to the enjoyment of certain human rights.

A debate took place among members of the Drafting Committee on the necessity of adopting a paragraph on this specific matter, since paragraph 1 already provided that an Occupying Power shall respect and protect the environment of the occupied territory in accordance with applicable international law. Since international human rights law was covered under applicable international law, some members considered redundant an additional paragraph on this specific issue. After an extensive debate, the Drafting

Committee considered that an additional paragraph was appropriate in light of the importance of the matter. Members of the Drafting Committee agreed that the commentary would clarify that paragraph 2 must be read in the context of paragraph 1, and would explain that while paragraph 1 covers in general terms the obligation of an Occupying Power regarding the protection of the environment in situations of occupation, paragraph 2 addresses a subset of this obligation.

Another discussion took place in the Drafting Committee on the advantages of referring in general to international human rights or to point to specific rights, such as the right to health. Since international human rights law in general was covered under the reference to “applicable international law” in paragraph 1, members of the Drafting Committee decided to refer specifically to the health and well-being of the population of the occupied territory. It could be explained in the commentary that a number of other human rights, such as the right to life or the right to food, would also be covered by this provision. It was felt that some type of basic link was needed, hence the language “that is likely to prejudice” the health and well-being of the population of the occupied territory. The concept of “health and well-being of the population” will also be clarified therein.

Finally, paragraph 2, the term “shall take appropriate measures to prevent significant harm” were deemed appropriate in view of the wording used in previous work of the Commission, and in particular, the draft articles on Prevention of Transboundary Harm from Hazardous Activities. It was understood, however, that the term “significant” was not an additional threshold, since the “harm” in question was already qualified by the end of the sentence.

Mr. Chair,

Let me now turn to paragraph 3.

Paragraph 3 reads as follows:

“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.”

The purpose of paragraph 3 is to set forth the limits bearing on an Occupying Power with respect to the modification of the law and institutions concerning the law of the

environment of the occupied territory. It corresponds to draft principle 19, paragraph 2, as proposed by the Special Rapporteur in her first report.

During our plenary debate, some members suggested that the obligation of an Occupying Power to respect national laws of the occupied territory “unless absolutely prevented”, despite being based on the language of article 43 of the Hague Regulations of 1907, did not reflect the latitude afforded by the law of armed conflict for Occupying Powers to legislate when necessary for the maintenance of public order and civil life and for the benefit of the local population. Taking those concerns into consideration, the Special Rapporteur made a new proposal to members of the Drafting Committee that would not refer to this stringent exception.

A number of members of the Drafting Committee pointed out that the term “legislation”, used in the original proposal, could have different meanings in different legal systems and could be understood in a restrictive way. The Drafting Committee therefore preferred referring to the more generic term of “law” to indicate clearly that this obligation was not limited to certain categories of domestic legislation. A discussion also took place as to the necessity of referring specifically to institutions, which could be covered under the term “law”. Further to the explanations provided by the Special Rapporteur, members of the Drafting Committee considered it appropriate to retain this explicit reference since the Geneva Conventions contained, provisions specifically addressing the maintenance of the institutions of the occupied territory, and institutional collapse was a common feature of conflict situations.

Finally, the Drafting Committee agreed with the Special Rapporteur to also mention limitations imposed by international law on the ability of an Occupying Power to modify laws and institutions of the occupied territory concerning protection of the environment. Such limitation is indicated by the term “within the limits provided by the law of armed conflict”.

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## **Draft principle 20 – Sustainable use of natural resources**

Mr. Chair,

Let me now turn to draft principle 20 entitled “Sustainable use of natural resources”.

This draft principle reads as follows:

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

The purpose of this draft principle is to set forth the obligations of an Occupying Power, as administrator and usufructuary with respect to the sustainable use of natural resources. As indicated in the first part of the sentence, this draft principle applies “to the extent that an Occupying Power is permitted to administer and use the natural resources in an occupied territory”. This refers to the various limits on an Occupying Power and members of the Drafting Committee suggested that such wording would allow for an explanation in the commentary of the various types of limitations on the Occupying Power, as well as the law from which they derive. This is also reflected by the use of the verb “permitted”. The Drafting Committee decided to use terms “administer and use” in light of the terminology of Article 55 of the Hague Regulations of 1907.

A debate took place among members of the Drafting Committee as to the inclusion in the text of the provision that such administration and use has to be for the benefit of the population of the occupied territory. While a number of members considered this mention to be necessary, other members pointed out that the law of armed conflict allowed for other possibilities of their use, in particular for occupation forces and administration personnel. The Drafting Committee therefore decided to cover all possible situations by indicating that such administration and use of natural resources in the occupied territory could be “for the benefit of the population of the occupied territory and for other lawful purposes under the law of armed conflict.” The Drafting Committee also discussed the need to take into account, in their formulation and application, principles of self-determination and the

permanent sovereignty over natural resources in the context of decolonisation and foreign occupation.

As indicated by the Special Rapporteur during the debate, the right of usufruct from which this provision derives has to be interpreted by giving due consideration to the well-established concept of sustainability and in particular in the context of the sustainable use of natural resources. It was understood by the Drafting Committee that the term sustainable use does not preclude the use on non-renewable natural resources and that this clarification would be included in the commentary

In addition, the notion of minimization of the environmental harm follows directly draft principle 2, which states that 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. In view of the language used in this draft principle, the Drafting Committee did not consider it appropriate to replace the term “minimize” by “prevent” as suggested by some members.

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### **Draft principle 21 - Due diligence**

Mr. Chair,

Let me now turn to draft principle 21 entitled “Due diligence”.

This draft principle reads as follows:

“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.”

This provision was generally supported in the Plenary. Its wording was based on the judgment of the International Court of Justice in the Pulp Mills case. The Drafting Committee decided to refine it and to indicate more squarely that an Occupying Power “shall exercise due diligence”. It also changed the word “significant damage” to

“significant harm” for the sake of consistency with other draft principles and previous works of the Commission. Finally, since the occupied territory could extend in some cases to only a part of the territory of a State and not its entirety, several members of the Committee considered that the term “to the environment of another State or to areas beyond national jurisdiction” could be interpreted as excluding the territory of other parts of the same State. It was therefore decided to indicate that the territorial scope of the provision should cover “areas beyond the occupied territory”. A view was expressed, however, that the expression “areas beyond national jurisdiction” should have been retained since it was commonly used in international instruments.

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Mr. Chair,

This concludes my introduction of the sixth report of the Drafting Committee for the seventieth session. Let me note that the Commission is not, at this stage, being requested to act on the draft principles as they have been presented for information purposes only. It is the wish of the Drafting Committee to have the draft principles provisionally adopted by the Commission at a later stage, once commentaries are ready and have been presented to the Commission.

Thank you very much.

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